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POLITICAL FINANCING

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POLITICAL FINANCING

BACKGROUND

The financing of political campaigns has been an important electoral reform issue since at least the early 1970s. It has been the subject of much debate and examination, and prompted a number of studies and reviews by various bodies, including the Royal Commission on Electoral Reform and Party Financing (Lortie Commission). The issue has been driven largely by a growing concern over the cost of election campaigns, campaign spending by political parties and candidates, and the fundraising activities of political parties and candidates. Underlying the push for reform has also been a desire to introduce some degree of financial fairness among candidates and parties.

The 1974 *Election Expenses Act* introduced significant changes to the way election financing is regulated and effectively established a new regime for the financing of federal elections. Greater controls were imposed on election spending, notably in the areas of spending limits; the disclosure of campaign expenses; partial public financing of election campaigns; regulated political broadcasting;(1) and the tax deductibility of electoral contributions to encourage individuals to contribute to parties and candidates.

The work of the Lortie Commission and the various House of Commons committees that were established to study electoral reform laid the foundation for further legislative reforms. A number of important changes to election financing were implemented with the major overhaul of the *Canada Elections Act* brought about by Bill C-2, introduced in the House of Commons on 14 October 1999. The most significant changes to political financing and campaign regulation, however, came about with Bill C-24, An Act to amend the Canada Elections Act and the Income Tax Act (political financing), which took effect on 1 January 2004.(2)

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(1) J.R. Robertson, *The Canadian Electoral System*, BP-437E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, May 2004, p. 9.

(2) J.R. Robertson, *Bill C-24: An Act to amend the Canada Elections Act and the Income Tax Act (Political Financing)*, LS-448E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 June 2003.

Bill C-2, An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability (the Federal Accountability Act, or FAA), introduced in the 1st session of the 39th Parliament, has introduced further reforms to the political financing regime under the *Canada Elections Act*.(3)

SOURCES OF POLITICAL FINANCING

A. Contributions

Only individuals who are Canadian citizens or permanent residents may make financial contributions to registered parties, candidates, constituency associations, and leadership and nomination contestants (*Canada Elections Act*, section 404). A contribution is defined as a "monetary" or "non-monetary" contribution (section 2(1)). As a result of the FAA, the maximum amount these individuals may contribute is (section 405):

- $1,000 in total in any calendar year to each registered party;
- $1,000 in total in any calendar year to the electoral district associations (EDAs), nomination contestants and candidates of each registered party;
- $1,000 to the contestants in a leadership contest; and
- $1,000 in total to independent candidates in an election.(4)

For the sake of clarity, the FAA amended the *Canada Elections Act* so that fees paid by participants at conventions held by political parties are considered contributions to the political party (subsection 404.2(7)). Party membership fees, however, are not considered contributions.

Anonymous contributions of $20 or less need not be reported to the Chief Electoral Officer if they were collected at a meeting or fundraising event. (This kind of collection is sometimes referred to as "passing the hat.") Details of the event will still need to be reported to the Chief Electoral Officer. The Act requires that receipts be issued for any contribution greater than $20 (section 404.4(1)). Cash contributions greater than $20, the source

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(3) The amendments to the political financing provisions of the *Canada Elections Act* brought about by the bill took effect on 1 June 2007.

(4) Previously, individuals could contribute $5,000 collectively to a party, a candidate, a riding association and a nomination contestant within the same political family in a calendar year; $5,000 to an independent candidate in an election; and $5,000 to leadership contestants within a particular leadership contest.

of which is unknown, are prohibited (section 405.31) and, as with any unauthorized contribution, the recipient is required to return the money to the contributor or remit the amount to the Chief Electoral Officer (section 405.4).

Electoral candidates and nomination contestants of a registered party, as well as party leadership candidates, may contribute an additional $1,000 of their own funds to their own campaigns or nomination contests. The $1,000 limit also applies to contributions by candidates who are not candidates of a registered political party to their own campaigns. These amounts are deemed not to be contributions.

The maximum contribution is adjusted annually for inflation (section 405). As a result of the latest inflation adjustment, the maximum contribution in each category of contribution is $1,100.(5) The new maximum in respect of contributions to a registered party, an electoral district association, a nomination contestant, or a candidate is applicable during the calendar year 1 January 2008 to 31 December 2008.(6)

Effective 1 June 2007, unions and corporations are no longer permitted to make political contributions. Prior to the FAA, unions could make modest contributions of $1,000 collectively to candidates, nomination contestants and riding associations, and $1,000 to independent candidates.

The Act contains express anti-circumvention and anti-collusion provisions with respect to political contributions. Section 405.2 prohibits any individual from colluding with another person or engaging in other acts to circumvent the contribution limits in the Act or to circumvent the prohibition against non-citizens and non-permanent residents making a political contribution. Violating section 405.2 is a strict liability offence under paragraphs 497(1)(*i.4*) and (*i.5*) of the Act punishable on summary conviction.

B. Gifts and Advantages

The *Federal Accountability Act* introduced new rules for the receipt of gifts or advantages by a candidate. These are expressly prohibited where they would appear to a reasonable person to have been given for the purpose of influencing the candidate in his duties as

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(5) Elections Canada, *Limit on Contributions*, 28 March 2007, http://www.elections.ca/content.asp?section=fin&document=limit&dir=lim&lang=e&textonly=false.

(6) For leadership contestants the new maximums are applicable in a contest between 1 April 2007 and 31 March 2008. For non-affiliated or independent candidates the new maximums apply to an election for which writ is issued during that period.

a Member of Parliament should the candidate be elected. Candidates must provide a statement to the Chief Electoral Officer of all gifts or advantages whose value to the candidate exceeds $500 and that were received during a period beginning from the time the candidate becomes a candidate and ending on the day he or she becomes a member of Parliament, or on polling day if he or she is not elected.(7)

C. Loans

Loans are seen as increasingly important sources of campaign financing, particularly in light of the reduced contribution limits and the ban on corporate and union contributions resulting from the FAA. Loans to parties, candidates, riding associations, nomination contestants and leadership contestants are permitted under the Act, subject to a number of reporting obligations and approvals by the Chief Electoral Officer, and are not treated as contributions to the political entity that receives them.

1. The Repayment of Loans

Loans are referred to in the Act as "unpaid claims." The reference is found in various sections of the Act. There is an expectation that loans, like all unpaid claims, will be repaid by the borrowing entity. To this end, the Act prescribes specified periods of time within which unpaid claims must be repaid:

- in the case of a *registered EDA*, within six months after the due date of the claim (section 403.3);
- in the case of a *political party*, within six months after the due date of the claim (section 418);
- in the case of *leadership contestants*, within 18 months of a leadership contest (section 435.24(1));
- in the case of a *candidate*, within four months after polling day (section 445(1)); and
- in the case of a *nomination contestant*, within four months after polling day (section 478.17(1)).

(7) *Canada Elections Act*, sections 92.1 to 92.6.

2. Extension of the Time-period Within Which to Repay Loans

These periods may be extended, however, by the Chief Electoral Officer on the written application of the political entity or a financial agent of that entity, if in the opinion of the Chief Electoral Officer there are reasonable grounds for extending the repayment period. The Chief Electoral Officer may authorize the repayment over a longer period of time and may impose any terms and conditions such as a fixed schedule for repayment.(8) A judge who is competent to conduct a recount may also extend the repayment period if an extension was refused by the Chief Electoral Officer or the unpaid claim was not paid in accordance with the terms established by the Chief Electoral Officer when granting the extension.(9)

Failure by a *candidate*, a *nomination contestant* or a *leadership contestant* to repay a loan within the legislatively-mandated period is an offence, unless an authorization to extend the repayment period has been granted by the Chief Electoral Officer or a judge. No offence is prescribed in the Act for the failure of an EDA or a political party to repay a loan within the periods prescribed in the Act.

3. The Reporting of Loans

Loans are to be included in the financial returns of all political entities as a "contribution," but only for reporting purposes. They are not otherwise subject to the contribution limits in the Act. In the case of a *candidate* and a *nomination contestant*, a financial agent must provide a financial statement to the Chief Electoral Officer with a statement of contributions, including loans, within four months following an election (sections 451(4) and 478.23(6), respectively). In the case of a *leadership contestant*, the financial return must be provided within six months of a leadership contest (section 435.3(6)). *Political parties* and *EDAs* must provide their returns within six months and five months, respectively, following the end of the fiscal period for those entities (sections 424(4) and 403.35(4), respectively).(10)

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(8) See section 403.31 for electoral district associations, section 419 for registered political parties, section 435.26 for leadership contestants, section 447 for candidates, and section 478.19 for nomination contestants.

(9) See section 403.32 for electoral district associations, section 420 for registered political parties, section 435.27 for leadership contestants, section 448 for candidates, and section 478.2 for nomination contestants.

(10) These periods may be extended by the Chief Electoral Officer where there are extenuating circumstances such as illness of the financial agent or an honest mistake of fact. See section 403.41 for EDAs, section 433 in respect of a registered political party, section 435.38 for leadership contestants, section 458 in respect of candidates, and section 478.33 for nomination contestants.

A further report is required where there are unpaid claims and an authorization has been granted by the Chief Electoral Officer approving a repayment schedule on unpaid claims.(11)

4. When Unpaid Loans Are Deemed to Be Campaign Contributions

The Act states that claims against a political entity that remain unpaid are deemed to be campaign contributions:

- 18 months after polling day, in the case of a *candidate* (section 450(1));
- 18 months after the selection date (or after polling day in some circumstances) in the case of a *leadership contestant* (435.29(1));
- 18 months after the selection date in the case of a *nomination contestant* (section 478.22(1)); and
- 18 months after the end of the fiscal period in the case of a *political party* and a *registered EDA* (sections 423.1(1) and 403.34(1), respectively).

The Act, however, exempts unpaid claims from the deeming provision if the claim:

- is the subject of a binding agreement to pay;
- is the subject of a legal proceeding to secure payment;
- is subject to a dispute as to the amount to be repaid; or
- has been written off by the creditor as uncollectible in accordance with the creditor's usual accounting practices.

5. Legislative Reforms Respecting Loans – Bill C-29

The Chief Electoral Officer, in a recent report to the House of Commons Standing Committee on Procedure and House Affairs, commented that unlike the extensive controls imposed by the *Canada Elections Act* on the sources and extent of contributions, there are

(11) See for example, 435.35 in respect of leadership contestants, section 455 in respect of candidates, 478.3 for nomination contestants. There is no similar provision applicable to registered political parties or EDAs. Presumably, such a provision would be unnecessary since these entities have an ongoing existence and an ongoing obligation to provide financial reports to the Chief Electoral Officer.

relatively few controls on the use of loans and no limits on the amount that may be loaned.(12) He recommended that a distinct regime be established in the Act for the regulation of loans. He recommended, among other things, that limits be imposed on the amount that individuals may loan to a political entity and that loans in excess of the contribution limits should only be obtained from financial institutions.

The government responded by introducing Bill C-54, An Act to amend the Canada Elections Act (accountability with respect to loans) in the 1st Session, 39th Parliament on 8 May 2007.(13) The bill was reported back to the House of Commons with amendments on 19 June 2007. It was reinstated in the second session of the 39th Parliament as Bill C-29. The bill proposed a number of changes to the *Canada Elections Act* that would affect loans and loan guarantees, including:

- a ban on loans and loan guarantees by unions and corporations, except banks as defined in the *Bank Act*;
- the amount that an individual may loan or guarantee, combined with any contribution, cannot exceed $1,100;
- more stringent rules for the treatment of unpaid loans;
- limits on the amount that financial institutions and political entities may loan; and
- a requirement that financial institutions provide loans at market rates.

With the dissolution of the 39th Parliament, the bill died on the Order Paper.

D. The Transfer of Money, Goods and Services

The Act permits the various entities that make up a political organization to transfer funds between themselves with few restrictions. With a few exceptions, these transfers are not considered contributions, and thus are not subject to the contribution limits set out in the Act.

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(12) Elections Canada, *Recommendations of the Chief Electoral Officer of Canada to the House of Commons Standing Committee on Procedure and House Affairs Respecting Specific Issues of Political Financing*, [Report on Political Financing], 26 January 2007.

(13) See Michel Bédard, *Bill C-54, An Act to amend the Canada Elections Act (accountability with respect to loans*), LS-562E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 October 2007, http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Session=14&query=4961&List=toc.

1. Transfers of Funds

Subject to several restrictions noted below, the following transfers of funds are permitted and not treated as contributions (section 404.2(2.1)):

- a party may transfer funds to a registered or unregistered EDA, to a candidate (unless the funds come from a trust) and to a leadership contestant (subject to restrictions noted below);
- a registered EDA may transfer funds to the party, another registered EDA or to a candidate (unless the funds come from a trust);
- a candidate may transfer funds to the party, to a registered EDA, or to him or herself in his or her capacity as a nomination contestant;
- a leadership contestant may transfer funds to a party or to a registered EDA; and
- a nomination contestant may transfer funds to the party, to the registered EDA that held the nomination contest or to the candidate endorsed by the party in that nomination contest.

Some important restrictions, however, are imposed by the Act. Funds from a trust may not be transferred by a party or a registered EDA to a candidate endorsed by that party. If a party transfers funds to leadership contestants, it must treat all leadership contestants equally, i.e., they must each receive equal amounts.

Another important limitation is that a registered party or registered association may not transfer funds to a candidate after election day except to pay claims related to the candidate's campaign (section 476).

2. Transfers of Surplus Funds

There are special rules concerning the transfer of surplus funds at the end of election campaigns and leadership and nomination contests. A determination of the amount of surplus funds is made by the Chief Electoral Officer following receipt of the financial returns submitted by candidates, leadership contestants and nomination contestants. Those individuals are notified of the amount of the surplus, if any.

The *Canada Elections Act* requires a candidate to dispose of surplus electoral funds by transferring them either to the registered party that endorsed the candidate or to the registered electoral district association of that party in the candidate's electoral district.[14] The Act also provides that in any other case, surplus funds are to be transferred to the Receiver General of Canada. The effect of this provision is that independent candidates not endorsed by a registered political party or affiliated with a registered electoral district association must forfeit

(14) *Canada Elections Act*, paragraph 473(2)(a).

surplus funds to the Government of Canada.[15] This provision was challenged in 2005 by an independent candidate in the 2004 general election on the basis of section 3 of the *Canadian Charter of Rights and Freedoms*.[16] The candidate argued that the provision denied him the right to meaningful participation in the electoral process, one of the rights encompassed in section 3, the voting rights provision of the Charter. The Ontario Court of Justice granted the candidate's application to strike down the provision, declaring it of no force and effect. The decision was not appealed.

Leadership contestants are required to transfer surplus funds following a leadership contest to the registered party that held the contest or to a registered association of the party.[17]

Nomination contestants must transfer their surplus nomination contest funds either to the candidate ultimately endorsed by the registered party in the electoral district in which the contest was held or to the registered association that held the nomination contest or to the registered party that endorsed the candidate.[18]

3. Transfers of Goods and Services

In the case of goods and services, transfers are permitted and are not treated as contributions in the following situations (section 404.2(2)):

- from a party to a registered or unregistered EDA, to a candidate, to a nomination contestant and to a leadership contestant (subject to restrictions noted below);
- from a registered EDA to another registered EDA, to a candidate, to a nomination contestant and to a leadership contestant (subject to restrictions noted below); and
- from a candidate to a party, a registered EDA or to him or herself in his or her capacity as a nomination contestant.

If a party or an EDA provides funds, goods or services to nomination contestants or leadership contestants, these must be provided equally to all contestants, unless, in the case of a leadership contest, the funds come from a directed contribution where the contributor has

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(15) *Canada Elections Act*, section 473(2)(*b*).

(16) *R.* v. *Nunziata*, 2005 ONCJ 292, 203 C.C.C. (3d) 261, 78 O.R. (3d) 285, http://www.canlii.org/eliisa/highlight.do?language=en&searchTitle=Ontario+-+Ontario+Court+of+Justice&path=/en/on/oncj/doc/2005/2005oncj292/2005oncj292.html.

(17) *Canada Elections Act*, section 435.46(2).

(18) *Canada Elections Act*, section 478.41(2).

expressed a wish to direct the money to a particular leadership contestant (section 404.3(1)). The amount of the directed contribution is deemed to be a contribution made by the contributor. A non-monetary transfer from a party to a candidate is considered an election expense incurred on behalf of the candidate if the property or service that is transferred directly promotes the candidate.(19)

E. Public Funding

Bill C-24, An Act to amend the Canada Elections Act and the Income Tax Act (political financing), also increased and extended the level of public financing of political parties and candidates. The most significant extension was the provision of an annual allowance to political parties that achieve a prescribed vote threshold.

1. Reimbursement of Electoral Expenses

Parties are entitled to reimbursement of 50% of their electoral expenses provided that candidates endorsed by the party received at least 2% of valid votes cast in an election or 5% of valid votes cast in constituencies in which the party endorsed a candidate (section 435).

Individual *candidates* are also entitled to reimbursement of electoral expenses if they receive 10% or more of the valid votes cast. The maximum amount that may be reimbursed is the lesser of 60% of the candidate's paid election and personal expenses, or 60% of the maximum the candidate is allowed to spend in an election under section 441(3) of the *Canada Elections Act* (section 464).

2. Annual Allowance for Political Parties

Political parties are entitled to an annual allowance of $1.75 for each vote received by the party in the previous election, provided that candidates endorsed by the party received at least 2% of the valid votes cast in that election or 5% of valid votes cast in the constituencies in which the party endorsed a candidate. The $1.75 allowance for each vote is paid in quarterly instalments of $0.4375 and is adjusted annually for inflation (section 435.01).

A challenge to the threshold vote requirements for the granting of an annual allowance was recently brought by a number of smaller registered political parties. The challenge was based on sections 3 (voting rights), 2(*b*) (freedom of expression),

(19) Elections Canada, *Registered Party Handbook* [Party Handbook], March 2007, p. 40.

2(*d*) (freedom of association) and 15 (equality rights) of the *Canadian Charter of Rights and Freedoms*. In the Superior Court of Justice for Ontario, the applicants succeeded in obtaining an order that section 403.01(1) of the Act breached the voting rights guarantee in section 3 of the Charter. The Court ordered that the parties who brought the application were entitled to the annual allowance retroactive from the date section 403.01 came into force on 1 January 2004.(20)

The Court of Appeal for Ontario reversed the lower court's ruling.(21) It held that while the provision violates the broad-based electoral rights – including voting and electoral participation rights – that make up section 3 of the Charter, as articulated by the Supreme Court of Canada in *Figueroa* v. *Canada (Attorney General)*, [2003] 1 S.C.R. 912, the limits on those rights are reasonable and justifiable in accordance with section 1 of the Charter. The Court described the objective of the thresholds as "preserving the integrity of the Canadian electoral process and its public funding mechanisms by guarding against the misuse of public funds."(22) The Court considered the thresholds to be an integrity measure intended to ensure that public funding for political parties is preserved for legitimate public discourse. The Court accepted that there are legitimate concerns about organizations becoming involved in the political process for purposes unrelated to promoting genuine political discourse, such as promoting a lifestyle or commercial interests, using public funds.

The Court found no violation of sections 2(*b*), 2(*d*) or 15 of the Charter. There was no "substantial interference" with a fundamental freedom protected by sections 2(*b*) and 2(*d*). A reduced ability to convey a political message or to associate would not be sufficient to constitute a breach of the Charter.(23) Leave to appeal the decision to the Supreme Court of Canada was denied on 24 April 2008.

3. Tax Credits for Contributors

The *Income Tax Act* provides incentives for individuals to contribute to registered political parties, registered electoral district associations (EDAs) and candidates in the form of tax credits. Contributions to leadership candidates, nomination contestants, and unregistered

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(20) *Longley* v. *Canada (Attorney General)*, 2006 CanLII 36358 (ON S.C.).

(21) *Longley* v. *Canada (Attorney General)*, 2007 ONCA 852 [*Longley* 2007].

(22) *Longley* (2007), paragraph 49.

(23) *Longley* (2007), paragraph 109. The section 15 challenge was dismissed largely on the basis that there is no differential treatment of the smaller parties on the basis of "personal characteristics." The differential treatment is based on the number of votes received by the parties. See paragraph 96.

parties and unregistered EDAs are not eligible for a tax credit. The amount of the tax credit is scaled to the amount contributed as follows: 75% of the first $400; 50% of the next $350; and 33.3% of an amount over $750.

SPENDING

A. Election Spending

There are generally no restrictions on the amount that a political party or an electoral district association may spend in a non-election period. The body of rules in the *Canada Elections Act* that restrict or limit spending generally only come into play during an election period.

1. The Meaning of Election Period

An election period is defined in the Act as the period "beginning with the issue of the writ and ending on polling day" or on the day the writ is withdrawn or deemed to be withdrawn.(24) In determining whether an expense was incurred during an election period, the Chief Electoral Officer considers the use of the product of the expense, regardless of whether the expense was incurred before or during an election. If the product of the expense was used during an election, the expense may be considered an election expense.(25) This has important implications, since election expenses are subject to limits for political parties and candidates, and an election expense incurred before the issue of the writ, but whose product is used during an election period, may be treated as an election expense and subject to the spending limit of either the party or the candidate incurring the expense.(26)

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(24) *Canada Elections Act*, section 2(1).

(25) Party Handbook, p. 32, http://www.elections.ca/content.asp?section=pol&document=index&dir=pol/ec20229&lang=e&textonly=false.

(26) This issue came to light in the 2008 general election when a number of candidates who held seats in the House of Commons during the 39th Parliament sent out brochures paid for by the House of Commons as part of the package of privileges to which Members of Parliament are entitled (so-called "ten percenters" because they are delivered to 10% of households in a riding). These brochures were prepared and sent out before the issue of the election writ on 7 September 2008. Many of these brochures, however, did not reach households until after the election period began. A number of candidates complained about this practice to Peter Milliken, the Speaker of the House. Whether these brochures are treated as election advertising remains to be seen. It is not known whether complaints were also made to Elections Canada. See: T. McCharles, "Last Minute Mailings by Tory MPs Draws Election Scrutiny," *Toronto Star*, 13 September 2008, p. A16, and D. Butler, "Baird Sending Out 'Aggressive,' Taxpayer-Funded Flyers, Liberal Pratt says," *Ottawa Citizen*, 13 September 2008, p. A4.

2. Election Expense Defined

An election expense is defined in the Act as "… any cost incurred, or any non-monetary contribution received, by a registered party or a candidate … to directly promote or oppose a registered party, its leader or a candidate during an election."(27) Elections Canada, in a number of its publications, however, has refined the definition depending upon whether the expense is incurred by a candidate or a political party during an election.

For candidates, an election expense is a cost incurred or a non-monetary contribution received by a candidate to promote or oppose *a candidate*.(28) For political parties, the definition of election expense includes costs incurred or non-monetary contributions received for the purpose of promoting or opposing a *political party or its leader*.(29) This distinction is important, since it could potentially narrow the scope of campaign advertising by a party or a candidate.

Election expenses include the production of advertising or promotional material and its distribution, broadcast or publication by any means, the conduct of election surveys or other research during an election period, and the payment of salaries for financial agents or other official agents.(30)

B. Spending Limits and Other Restrictions

1. Political Parties

Limits on spending by *political parties* during an election are determined by multiplying $0.70 by the number of names on the registered list of electors for constituencies in which the party has endorsed a candidate (*Canada Elections Act*, section 422).

Section 423(2) explicitly forbids collusion between a political party and a third party, as defined in section 349 of the Act, for the purpose of circumventing the political party spending limit during an election.

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(27) *Canada Elections Act*, section 407(1).

(28) Elections Canada, *Election Handbook for Candidates, their Official Agents and Auditors* [Candidates' Handbook], March 2007, p. 27, http://www.elections.ca/content.asp?section=pol&document=index&dir=can/ec20190&lang=e&textonly=false.

(29) Party Handbook, p. 32.

(30) Candidates' Handbook, p. 27, and Party Handbook, p. 33.

2. Electoral District Associations

The Act prescribes no general spending limit for electoral district associations, except for advertising during an election period. An EDA is prohibited from incurring expenses for election advertising (section 403.04) during an election. Election advertising is defined in section 319 of the Act as an advertising message transmitted "by any means" that supports or opposes a registered party or a candidate or a position that is associated with a party or a candidate.

3. Candidates

Limits on spending by a *candidate* in an election are $2.07 for each of the first 15,000 electors in the constituency; $1.04 for each of the next 10,000 electors; and $0.52 for each of the remaining electors. This amount is increased if the number of electors per square kilometre of a constituency is less than 10 (section 441). Candidates and their agents are expressly prohibited from colluding with a third party, as defined in section 349 of the Act, to circumvent the candidate spending limit (section 443(2)).

4. Nomination Contestants

Limits on spending by *nomination contestants* are 20% of the spending limit established for electoral candidates, not including some personal expenses such as travel and living expenses (section 478.14). The Act expressly forbids any person or entity from colluding to circumvent the spending limit for nomination contestants (section 478.15).

5. Leadership Contestants

No spending limits are imposed on *leadership contestants*. They are required, however, to provide the following to Elections Canada: a statement of leadership campaign expenses; disclosure of the terms of all financial loans and the name of the lender; the name and address of each contributor who contributes more than $200; and a declaration of the total amount of contributions (section 435.3). Contestants are also required to register with Elections Canada in order to accept contributions or incur expenses (section 435.05).

6. Proposed Reforms

There have been periodic calls on Parliament to impose limits on leadership campaign spending. The Chief Electoral Officer, in his 2001 report to Parliament, *Modernizing the Electoral Process*, maintained that leadership contests are not private matters of a political party.(31) They are an integral part of the democratic process, and as such, Parliament has an interest in regulating such contests and imposing campaign spending limits.

The Chief Electoral Officer renewed his recommendation to impose spending limits on leadership contests in his recent mini-report to Parliament on political finance.(32) He maintains that limits would help to ensure a level playing field for contestants and prevent contests from becoming exclusionary or prohibitive for contestants who lack access to large sources of funding.

C. Broadcast Advertising

1. Allocation of Paid Time

The *Canada Elections Act* requires every Canadian broadcaster to make prime time broadcasting available to each registered party and eligible party(33) for purchase during the period beginning with the issue of the election writ and ending on midnight on the day before polling day.(34)

The term "prime time" is defined in the Act as follows: for radio, 6:00 a.m. to 9:00 a.m., noon to 2:00 p.m., and 4:00 p.m. to 7:00 p.m.; for television, 6 p.m. to midnight.(35)

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(31) Elections Canada, *Modernizing the Electoral Process – Recommendations from the Chief Electoral Officer of Canada Following the 37th General Election*, Recommendation 8.1.4, November 2001, p. 131.

(32) Report on Political Financing, p. 33.

(33) An eligible party is a party that has applied to Elections Canada to be a registered political party and has received a notice of eligibility from the Chief Electoral Officer. A notice of eligibility is issued if the party meets certain requirements, including these: it has at least 250 electors who are members of the party; that one of the party's fundamental purposes is to participate in public affairs by endorsing one or more candidates in an election; and an auditor, a chief agent and three or more officers in addition to the party's leader are appointed. An eligible party will become a registered party when it has at least one candidate whose nomination has been confirmed for an election and the party's application for registration was made at least 60 days before the issue of an election writ. (See sections 366 to 370 of the Act.)

(34) *Canada Elections Act*, section 335 (registered parties) and section 339 (eligible parties).

(35) *Canada Elections Act*, section 319.

For the 2008 general election, the amount of time that must be made available by each broadcaster for all registered and eligible parties to share is 396 minutes (six hours and 36 minutes). This advertising time is allocated to each registered and eligible party by the Broadcast Arbitrator who is appointed by the Chief Electoral Officer under the authority of the Act.(36) For the 2008 general election the Broadcasting Arbitrator allocated the 396 minutes to a total of 19 political parties. The lion's share of the time was allocated to the larger parties, including the Conservative Party of Canada (95 minutes, 30 seconds) the Liberal Party (82 minutes, 30 seconds) and the New Democratic Party (45 minutes). The Bloc Québécois was allotted 37 minutes, 30 seconds, and the Green Party of Canada, 22 minutes, 30 seconds. Smaller parties received a proportionately smaller share of the allocation. The neorhino.ca Party and the Work Less Party, for example, were each allocated six minutes, with parties such as the Canadian Action Party and the Marijuana Party each receiving nine minutes.(37)

This allocated time is not meant to serve as a cap on the amount of time that a party may purchase and that a broadcaster may make available. Broadcasters are free to sell advertising time in excess of a party's entitlement, though not at the lowest unit rate, and this additional purchased time would not count against a party's allocation under section 335 of the Act. Parties purchasing advertising time, however, would still need to ensure that their total election spending does not exceed the election spending limit (see Part B.1. in this section). If a broadcaster sells additional time to one party, under broadcasting regulations, it cannot refuse to sell additional time to other parties, if asked.

The rates that a broadcaster may charge a political party for advertising time allocated in accordance with the Act must not exceed the lowest rate charged for equivalent time made available to any other person within the same advertising period.(38)

A broadcaster to whom the obligation applies includes all AM and FM radio stations, TV stations, and specialty television services licensed by the CRTC and carried by cable, satellite and MDS systems. The obligation does not apply to pay television services or to

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(36) *Canada Elections Act*, section 332.

(37) The Broadcasting Arbitrator, *Broadcasting Guidelines, Federal General Election, October 14, 2008* [Broadcasting Guidelines], (Issued 8 September 2008), p. 5, http://www.elections.ca/content.asp?section=med&document=index&dir=bro&lang=e&textonly=false.

(38) *Canada Elections Act*, section 348(*a*).

community channels. If a broadcaster is affiliated with a network, the 396-minute obligation is shared in accordance with any agreement between the broadcaster and its network.(39)

2. Allocation of Free Time

The *Canada Elections Act* imposes an obligation on some networks to provide free advertising time, though not in prime time, in addition to paid prime time advertising during the period prescribed by the Act to all registered parties and eligible parties.(40) In the 2008 general election, the following networks were required to provide the following amounts of free advertising time: CBC Radio One and SRC Première Chaîne, 120 minutes each; Réseau Corus Québec, 62 minutes; CBC TV and SRC-TV, 214 minutes each; TVA and TQS, 62 minutes each.(41)

The value of the free advertising time made available under the Act is not taken into account in calculating a party's election spending.(42)

3. Proposed Reforms

In his report to Parliament following the 38th general election, the Chief Electoral Officer made a number of recommendations aimed at achieving some measure of fairness in the apportionment of paid and free-time political broadcasting.(43) These include the following:

- All registered political parties should be entitled to purchase a maximum of 100 minutes of time from each broadcaster at the lowest unit rate.
- Each broadcaster should place a cap of 300 minutes on all political advertising.
- Each broadcaster (as opposed to network) that accepts advertising would be required to apportion 60 minutes of free time in prime time equally among registered parties.

The House of Commons Standing Committee on Procedure and House Affairs in its 13th Report, supported the Chief Electoral Officer's recommendations for achieving greater

(39) Broadcasting Guidelines, p. 3.

(40) *Canada Elections Act*, section 345.

(41) Broadcasting Guidelines, p. 19.

(42) *Canada Elections Act*, subsection 345(3).

(43) Elections Canada, *Completing the Cycle of Electoral Reforms, Recommendations from the Chief Electoral Officer of Canada on the 38th General Election*, September 2005, Chapter 3.

equity among the political parties in the availability of paid and free political broadcasting.(44) The government endorsed these recommendations in its own report and suggested that the issue be studied in detail. In addition, the government proposed that political parties as well as broadcasters be consulted extensively in order to develop and implement an improved regime.(45)

THIRD PARTY ELECTION ADVERTISING

A third party is defined as an individual or a group that is neither a candidate nor a political party (section 349). Third parties play an increasingly significant role in election campaigns by supporting or opposing, through advertising or other expenditures, individual candidates or parties. A third party is required to register with Elections Canada if it spends $500 or more in election advertising, but it may not register before the issue of an election writ (section 353(1)).

Third parties may not incur more than $150,000 in total election advertising expenses (section 350(1)). Of that amount, no more than $3,000 may be spent on supporting or opposing the election of one or more candidates in an individual constituency (section 350(2)). With respect to a party leader, the $3,000 spending limit applies only to his or her candidacy in a particular constituency (section 350(3)). These amounts are adjusted for inflation. The spending limits that apply to elections whose writ is issued between 1 April 2008 and 31 March 2009 are $183,300 and $3,666, respectively.(46) As noted earlier, third parties are expressly forbidden from colluding with candidates and political parties to circumvent the spending limits in the Act.

These limits were challenged as an infringement of the right to free speech in the *Charter of Rights and Freedoms*. The Supreme Court of Canada in *Harper* v. *Canada (Attorney General)*, however, in a majority judgment, upheld the challenged provisions on the basis that they promoted electoral fairness.(47)

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(44) House of Commons Standing Committee on Procedure and House Affairs, *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*, 13th Report, June 2006.

(45) Government of Canada, *Government Response to the Thirteenth Report of the Standing Committee on Procedure and House Affairs: "Improving the Integrity of the Electoral Process,"* 1st Session, 39th Parliament, 20 October 2006.

(46) Elections Canada, *Limit on Election Advertising Expenses Incurred by Third Parties*, 26 August 2008, http://www.elections.ca/content.asp?section=fin&document=limit_tp&dir=lim&lang=e&textonly=false.

(47) [2004] 1 S.C.R. 827.

Third parties that are required to be registered must file a report with Elections Canada within four months following an election (section 359(1)). The report must contain a statement of contributions received and expenses incurred during an election (section 359(2)). The report must also provide the names and addresses of contributors who contributed more than $200 to the third party, as well as the amount and date of contribution, during the period beginning six months before the issue of an election writ and ending on polling day. If the contribution is from a numbered company, the name of the president or chief executive officer of the company must be reported (section 359(4)).

Attempts to regulate the activities of third parties during election periods have continued. Bill C-79, An Act to amend the Canada Elections Act (third party advertising), introduced in the House on 23 November 2006, was one such effort. The bill, however, died on the Order Paper with the dissolution of Parliament on 29 November 2006. The bill sought, generally, to limit a third party's ability to use, for election advertising purposes, contributions received during a period commencing six months before the issuing of an election writ and ending on polling day ("the designated period"). The bill essentially attempted to link the maximum amount a third party could spend for election advertising to the contributions received by the third party from individuals and entities. Another important feature of the bill was its attempt to place limits on contributions to third parties for the purpose of election advertising, though not for other purposes, and only if the contributions were received during the designated period.

The bill proposed that a maximum of $5,000 from the contributions of an individual could be spent by the third party on election advertising if the contribution was received from the individual within the designated period commencing six months before the date an election writ was issued and ending on polling day. A $1,000 spending limit would have been imposed in respect of contributions received from persons other than an individual (organizations) during the same period.

The bill would also have imposed a limit of $150,000 on the amount an individual or an organization could contribute to a third party during the designated period for the purpose of election advertising in a general election. A contribution limit of $3,000 was proposed if the individual or entity intended his or her contribution, made in the corresponding period, to be used for election advertising to oppose or support the election of candidates in a given electoral district in a general election. The $3,000 contribution limit was also proposed for election advertising in a by-election.

Finally, the bill would have required third parties to disclose the names and addresses of individuals who contributed more than $5,000 during the designated period

described above, and the amount that the third party paid out of, or incurred as expenses from, that contribution for election advertising. Similar disclosure requirements were proposed for contributions of $1,000 or more from other persons or entities.

REGULATION OF POLITICAL FINANCING

The *Canada Elections Act* contains rigorous requirements on the management of the finances of a party, an electoral district association, a candidate, a leadership contestant or a nomination contestant. Typically, the Act imposes restrictions on who may accept contributions, incur expenses, enter into contracts, and generally deal with the finances of the political entity.

A. Political Parties

The chief agent of a political party is responsible exclusively for administering the financial transactions of a registered party and reporting on them (section 415). Only the chief agent or one of the party's registered agents may (section 416):

- pay the party's expenses
- incur expenses on behalf of the party
- accept contributions to the party.

The party's chief agent must submit a detailed report to Elections Canada covering the fiscal period (section 424(1)), within six months following the end of a fiscal period (section 424(4)). The fiscal period for a registered party is the calendar year (section 364). The report must contain a financial transactions return, an auditor's report on those transactions, and the chief agent's declaration concerning those transactions (section 424(1)). The financial transactions return must contain, among other things (section 424(2)):

- the total contributions received by the party and the number of contributors;
- the names and addresses or all contributors who contributed more than $200 to the party, the total amount and the amount of each contribution by the contributor;
- a statement of revenues and expenses;
- a statement of loans or security received by the party;
- a statement of the commercial value of goods and services provided and funds transferred by the party to electoral district associations and candidates; and

- a statement of the commercial value of goods and services provided and funds transferred to the party from its registered associations, candidates, leadership contestants and nomination contestants.

B. Electoral District Associations

Only the electoral district associations (EDAs) of a registered party that are registered with Elections Canada may benefit from the various provisions of the Act relating to political financing (section 403.01). These benefits include:

- accepting contributions;
- providing goods or services and transferring funds to a candidate, a party or another registered association; and
- accepting surplus campaign funds from a candidate, a leadership contestant or a nomination contestant.

The financial agent of an EDA is responsible for administering its finances and reporting on them to Elections Canada (section 403.27)). As is the case with the chief agent of a political party and the official agent of a candidate, only the financial agent (as well as an electoral district agent designated by the EDA) of an EDA may accept contributions, pay and incur expenses, and accept and make transfers of goods or funds on behalf of the EDA (section 403.28).

The EDA's financial agent must submit a financial transactions return and an auditor's report to Elections Canada within five months following the end of the EDA's fiscal period (section 403.35(4)). The calendar year is the fiscal period for an EDA (section 403.06). As with the financial transactions return for a political party, an EDA's financial transactions return must include, among other things (section 403.35(2)):

- a statement of contributions received by the EDA and the number of contributors;
- the name and address of each contributor who contributed more than $200 in the fiscal period to the EDA including the total amount contributed and the amount of each contribution;
- a statement of revenues and expenses;
- a statement of the commercial value of all goods, services and funds transferred by the EDA to the party, another EDA or to a candidate;

- a statement of the commercial value of all goods, services and funds transferred to the EDA by the party, another EDA, a candidate, a leadership contestant or a nomination contestant; and
- a statement disclosing the details of all financial loans for the purpose of campaigning, including a repayment schedule.

C. Candidates

In the case of a candidate, the Act requires that an official agent be appointed to handle all the financial transactions of the candidate's campaign (section 436). The official agent must establish a bank account in the agent's name with the title "official agent" shown next to the name (sections 437(1) and (2)). The agent must be appointed and the bank account established before the candidate may accept contributions or incur expenses. All financial transactions involving the receipt or payment of money for the electoral campaign must be deposited into or paid from that account (section 437(3)). The account must be closed following the election once any unpaid claims and surplus funds are dealt with in accordance with the Act (section 437(4)).

The official agent is the only individual authorized by the Act to do the following on behalf of the candidate (section 438):

- accept contributions
- incur expenses
- issue tax receipts
- enter into contracts
- pay the candidate's personal expenses.

The official agent is required, within four months following polling day, to submit to Elections Canada a comprehensive financial report that includes a detailed electoral return and an auditor's report on election expenses (sections 451 and 453). The electoral campaign return must include, among other things (section 451(2)):

- a statement of election expenses
- a statement of unpaid claims
- a statement of contributions received
- the number of contributors
- the name and address of contributors who contributed more than $200 to the candidate's campaign.

The FAA introduced new rules respecting the receipt of gifts or advantages by a candidate.[48] These are now expressly prohibited under the Act where they would appear to a reasonable person to have been given for the purpose of influencing the candidate in his duties as a member of Parliament should the candidate be elected. Candidates must provide a statement to the Chief Electoral Officer of all gifts or advantages whose value to the candidate exceeds $500, received during a prescribed period beginning from the time the candidate becomes a candidate and ending on the day he or she becomes a member of Parliament or polling day, if he or she is not elected. It is an offence for a candidate to accept a prohibited gift or advantage or to fail to provide the required statement within the required period of time (four months after polling day). If the offence is committed knowingly, the Act prescribes more severe punishment than if the failure or omission was inadvertent.

D. Leadership Contestants

Rules for the conduct of leadership campaigns have been in force since 1 January 2004 (Part 18, Division 3.1, of the *Canada Elections Act*). Prior to this date, campaigns were unregulated.

Once a leadership campaign is called by a registered party, the party must notify Elections Canada. Candidates are deemed to be candidates upon acceptance of a contribution or the incurring of a campaign expense, at which time they are required to register with Elections Canada.

The leadership candidate's financial agent is responsible for the financial transactions of a leadership contestant's campaign and for reporting on those transactions (section 435.2). The financial agent must open a bank account for the exclusive purpose of the leadership contestant's campaign and all transactions related to that campaign involving the receipt of money must be paid from or to that account. The account must be closed at the end of the leadership contest after surplus funds and unpaid claims have been dealt with in accordance with the Act (section 435.21).

Only leadership campaign agents and financial agents, (who are considered campaign agents), are permitted to accept contributions and pay expenses in respect of a leadership campaign (section 435.22(1) and (3)). Only the financial agent or the leadership contestant may incur expenses in respect of a leadership contest and pay the personal expenses of the leadership contestant (section 435.22(4) and (5)). A contract involving a leadership

(48) See newly enacted sections 92.1 to 92.6 of the *Canada Elections Act*.

campaign is only enforceable if entered into by the leadership contestant or by his or her campaign agents (section 435.25).

The financial agent must provide Elections Canada with a detailed financial report within six months after the leadership contest (section 435.3(1) and (6)). The report must include a campaign return (section 435.3(1)). The return must include the following:

- a statement of campaign expenses;
- the total contributions received and the number of contributors;
- a disclosure of all financial loans including a repayment schedule and the name of the lender;
- the names and addresses of contributors who contributed more than $200 to the contestant, the total and the individual amount of the contributors' contributions; and
- a statement of the commercial value of the goods and services provided or funds transferred by a leadership contestant to the party or to an EDA.

An auditor's report on the campaign return must be filed if the leadership contestant has accepted contributions totalling $5000 or more or has incurred campaign expenses of $5000 or more (sections 435.3(1)(b) and 435.33(1)).

In addition to the return that is to be filed under section 435.3 within six months following the leadership contest, financial agents are required to file periodic reports on the amounts and sources of donations (section 435.31), including one report covering the period that begins on the first day of the contest and ends four weeks before the conclusion of the contest; and one report for each of the three weeks leading up to the leadership contest.

E. Nomination Contestants

Prior to Bill C-24, nomination contests were unregulated. As of 1 January 2004, nomination contests are subject to special rules provided for in the *Canada Elections Act* (Part 18, Division 5).

Within 30 days after the date on which a nomination contest is held, the constituency association must report the holding of the contest to Elections Canada (section 478.02). A nomination contestant is deemed to be a contestant upon acceptance of a

contribution or the incurring of an expense (section 478.03). Nomination contestants may not accept contributions and incur expenses unless a financial agent has been appointed.

The financial agent is designated by the Act as the principal person responsible for administering the financial transactions relating to the nomination contestant's campaign (section 478.11). The financial agent must establish a bank account in his or her name exclusively for the contestant's campaign (section 478.12). All financial transactions related to the campaign that involve money must be conducted through that bank account.

The financial agent is the only individual permitted to accept contributions to the nomination contestant's campaign or *pay* the contestant's expenses (section 478.13(1) and (3)). The nomination contestant or the financial agent may *incur* expenses associated with the campaign (section 478.13(4)).

The financial agent is required to file a campaign return with Elections Canada in essentially the same form and with the same information as is required for leadership contestants and candidates (section 478.23) if contributions or expenses exceed $1,000 (section 478.23). An auditor must be appointed if the contestant spends or receives contributions in excess of $10,000 (section 478.25).

The reporting obligations arise after the completion of the nomination contest (unlike leadership campaigns, in which the contestants must provide reports during the campaign). Nomination contestants must file a financial return, if required, within four months after the completion of the nomination contest (section 478.23(6)). If the nomination contest occurs during an election period, the return may be filed within four months after election day.

ENFORCEMENT OF POLITICAL FINANCING RULES

The *Canada Elections Act* prescribes a long list of offences for breach of political financing rules, including circumventing or conspiring to circumvent the rules that limit political donations, failing to report a contribution or an expense, and spending in excess of the prescribed limits (section 497).

Prior to the FAA, the limitation period for initiating prosecutions was 18 months from the date on which the offence came to light, with an absolute limit of seven years from the time the offence occurred. Section 514 of the *Canada Elections Act* now provides that a prosecution under the Act may only be initiated within five years from the day on which the

Commissioner of Canada Elections becomes aware of the facts giving rise to the prosecution, with an absolute limit of 10 years from the date the offence was committed.

The FAA has also resulted in the division of responsibility for the investigation and prosecution of offences between the Commissioner of Canada Elections and the newly created Director of Public Prosecutions. The DPP is now responsible for initiating and conducting prosecutions of offences under the Act on behalf of the Crown. The Commissioner of Canada Elections continues to investigate possible offences under the Act, on the recommendation of the Chief Electoral Officer, and can refer the matter to the DPP, who will decide whether to initiate a prosecution.