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

January 26, 2007

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1. Introduction

At the conclusion of its June 2006 report, *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*, the House of Commons Standing Committee on Procedure and House Affairs indicated that, in the context of a review of overall political financing issues, it intended to address seven specific topics noted in the report:

- Membership Fees and Tax Credits
- Tax Receipts for Pre-Election Contributions
- Minimum Age for Making Political Contributions
- Exclusion of Certain Services as Contributions
- Limits on Leadership Campaign Spending
- Transfer of Candidates' Debts
- Elimination of Threshold for Quarterly Allowances for Parties

I am pleased to provide the Committee with my recommendations respecting those seven issues in accordance with the undertaking that I provided to the Committee at my appearance before it on October 26, 2006.

2. Membership Fees and Tax Credits

Summary of Section

This section:

- notes the status of membership fees in a registered party or registered electoral district association as contributions under the *Canada Elections Act*;
- discusses the existing exemption for nominal fees paid by an individual for his or her own membership in a registered party; and
- discusses when one person may pay the membership fees of another in a registered party or registered electoral district association.

It recommends:

- that the Act be amended to expressly prohibit one person from paying the membership fees of another in a registered party or registered association.

Current Law

Membership Fees as Contributions Under the *Canada Elections Act*

As set out in Elections Canada Information Sheets 20 and 21, fees for membership in a registered party or a registered association currently constitute "contributions" for the purpose of the *Canada Elections Act.*

Payment of Membership Fees Must Comply With Statutory Requirements Respecting Contributions

Because the payment of membership fees, other than those minimal fees referred to in subsection 404.2(6), constitute making a contribution those payments must comply with the requirements of the Act respecting contributions – eligibility, caps and disclosure.

Operation of a Limited Exemption for Certain Memberships

As noted above, membership fees that meet the criteria specified in subsection 404.2(6) of the Act will not constitute contributions if they meet the criteria specified in that provision.

> **404.2** (6) The payment by an individual during a year of fees of not more than $25 per year in relation to a period of not more than 5 years for membership in a registered party is not a contribution.

In order to fall within the exception set out in subsection 404.2(6), the following criteria must be met:

- The membership must be paid by an individual.
- The fee must be related to that individual's own membership.[1]
- The individual must otherwise be eligible to make a contribution.[2]
- The fee must not amount to more than $25 for a single year's membership.
- Memberships for a period of years can be purchased within a single year provided that the individual is not at any time a paid-up member for more than five years.
- The membership fee must be paid out of the individual's own resources.[3]

The payment of any fee for membership in a registered party that does not meet these criteria constitutes a contribution. It must comply with the requirements of the Act respecting contributions, including those respecting eligibility, caps and disclosure.

Restricting the existing membership fees exemption in this way to only nominal amounts paid by an individual for his or her own membership ensures that membership fees cannot be used to avoid contribution caps or the eligibility rules.

Paying the Fee for the Membership of Another

Because the payment of membership fees constitutes making a contribution, the payment of one person's membership fee by another, including the payment of membership fees in bulk, is subject to the provisions of the *Canada Elections Act* respecting the making of contributions.

If the payment of the fee for membership in a registered party breaches any of the rules respecting contributions, that payment is prohibited under the Act.

[1] The English version of subsection 404.2(6) refers to "The payment by an individual … for membership in a registered party". The French version is clearer and refers to "le droit d'adhésion … qu'un particulier paye … pour être membre d'un parti enregistré."

[2] This is implicit in subsection 404.2(6). The purpose of subsection 404.2(6) was to permit an individual to buy a membership in a registered party without having that contribution count toward the person's contribution cap. It was not intended to provide the means to avoid the rules respecting eligibility rules relating to contributions.

[3] This is also implicit in subsection 404.2(6). Absent such an implication, the exception in subsection 404.2(6) would provide a simple means whereby ineligible entities could avoid the eligibility restrictions by funding memberships. The contribution caps could be avoided through similar funding arrangements. Parliament expressly provided in section 405.3 that contributions cannot be made using money, property or resources of another given to one for that purpose. It would not have intended subsection 404.2(6) to operate as a broad exception to that principle.

Prohibition Against Indirect Contributions

Section 405.3 of the Act prohibits the making of indirect contributions. It provides that:

> "No person or entity shall make a contribution to a registered party, a registered association, a candidate or a leadership contestant or a nomination contestant that comes from money, property or the services of any person or entity that was provided to that person or entity for that purpose."

Section 405.3 prohibits a person from making a contribution using another's money that was given to the person for that purpose. As a consequence, section 405.3 operates to prohibit an individual from either:

- purchasing a party membership directly using money that was given to the individual by another for that purpose; or
- permitting another person or entity to purchase a membership in the individual's name using the other person's or entity's money where the person in whose name the membership is purchased is reported as the contributor.

Any person or entity who contrives to provide the money for the purpose of paying for the memberships of others in the registered party without being reported as the actual contributor can also be included as a party in any prosecution of the person who permitted his or her membership to be paid by another contrary to section 405.3 (s. 21 *Criminal Code*).

Where any person or entity uses his, her or its own funds to pay the fee for the membership of another in a registered party, the person or entity paying the fee is the contributor. That person must be eligible to make contributions to the registered party, he or she must be reported as the contributor, and the payment will count toward that person's contribution cap.

Statutory Anti-Avoidance Prohibitions

Payment of the fee for the membership of another in a registered party without disclosing oneself as the contributor of the money can also amount to a breach of the anti-avoidance provisions of the Act found in section 405.2 both by the person providing the money and the person for whom the membership fee is being paid. For more information respecting anti-avoidance, see Elections Canada Information Sheet 9, *Anti-avoidance Provisions in Relation to Contributions.*

Eligibility

The person who provides the money for the payment of the fee for someone's membership in a registered party (who must be reported as the contributor) must be eligible to make contributions to a registered party. Thus, the fees for membership in a registered party can be paid only by individuals who are citizens or permanent residents as defined in subsection 2(1) of the *Immigration and Refugee Protection Act*.

Treatment Afforded the Legal Payment of Membership Fees by Persons Other Than the Member

If the Payment Is Made by Some Other Person

Where a person other than the member legally pays the fees for the membership of another in a registered party, the payment will be a contribution by the person who pays and will be subject to his or her contribution caps and the other rules respecting contributions, including those relating to eligibility and disclosure.

If the Payment Is Made Through a Leadership or Nomination Campaign Account

Because the payment of a membership fee is a contribution, the payment of those fees by a nomination contestant or a leadership contestant through a nomination campaign account or leadership campaign account will not constitute a nomination or leadership campaign expense. Rather, as paragraphs 404.2(3)(*a*) and (*b*) of the Act provide that the provision of funds from a nomination contestant or a leadership contestant to a registered party is not a contribution but a transfer, the payment of those membership fees in the registered party through the relevant campaign account will be treated as a transfer from the contestant to the registered party and will not be subject to any monetary limits. The transfer must be reported as such in the relevant returns of the nomination contestant (s. 478.23(2)(*h*)) or the leadership contestant (s. 435.3(2)(*g*)) and the registered party (s. 424(2)(*h*.2)) or registered association (s. 403.35(2)(*g*)).

Recommendations

No Extension of Existing Exemption

There should be no extension of the current limited exemption of membership fees from the concept of contribution. Creating an extended exemption for membership fees in excess of the current nominal amount would potentially create a funding mechanism for registered parties and a means to purchase influence outside of the controls of the *Canada Elections Act*. Such an extension of the existing limited exemption for nominal membership fees from the rules respecting contributions could, depending on the extent of the extension, provide the means for corporate or other ineligible money to flow to registered parties or registered electoral district associations, provide the means whereby money and other resources could flow outside of the contribution caps, and exempt such flows of political donations from the disclosure rules.

Also, to the extent that such fees constitute contributions they are eligible for income tax credits. This complements the overall purpose of the political tax credit of encouraging individuals to participate in the political process. Excluding membership fees generally from the concept of contributions would disqualify them from the income tax credit available respecting contributions to political parties and electoral district associations.

Remove Ability for One Eligible Entity to Pay the Membership Fees of Another

As noted above, the *Canada Elections Act* does not currently prohibit one person, who is otherwise eligible, from paying the membership fees of another in a registered party or a registered association provided that the person who actually pays the fee is reported as the source of the payment.[4] Such payments would constitute contributions by the person actually paying the fees and would be subject to that person's contribution caps.

However, while such payments do not offend the strict letter of the *Canada Elections Act* they offend the spirit of that law. This legal ability can be exploited by nomination and leadership contestants to purchase memberships for others as part of their nomination or leadership contests. Canadians have a right to assume that all new political recruits actually want to join a registered party or registered electoral district association and that they paid their own way.

Despite the legality of the current ability that opens the door to the purchase of bulk memberships as part of nomination or leadership campaigns, this is a practice that Canadians do not condone.

For that reason, the *Canada Elections Act* should be amended to prohibit the payment of one person's membership fees in a registered party or registered electoral district association by another.

[4] Payment of a membership fee for one person without reporting the true source of financing would amount to the making of a contribution that comes from the money of another that was provided for that purpose contrary to section 405.3 of the *Canada Elections Act.*

3. Tax Receipts for Pre-Election Contributions

Summary of Section

This section:

- discusses the current rules respecting the income tax receipting of political contributions, including:
  - the interaction of the *Canada Elections Act* and the *Income Tax Act*;
  - the specific rules, and limitations thereof, respecting the income tax receipting of contributions to registered parties, registered associations, candidates and leadership contestants.

It recommends:

- that the ability of newly registered parties and candidates to issue tax receipts for contributions be expanded to permit tax receipts to be issued for contributions made to the registered party or the candidate from the period from the drop of the writ in the election in which the party achieved registered status or the candidate was confirmed.

It will further:

- make an observation that the current income tax rules respecting contributions to leadership contestants may have the unexpected effect of delaying the reporting of leadership contributions, and suggests that if that observation is proven correct consideration be given to two alternative amendments which might address that fact.

Current Law

Interaction Between the *Income Tax Act* and the *Canada Elections Act*

The income tax credit for political contributions was introduced in 1974 with amendments to both the *Canada Elections Act* and the *Income Tax Act* (S.C. 1973–74, c. 51). The ability to claim income tax credits for political contributions and the amount that can be claimed therefore was instituted through (what is now) section 127 of the *Income Tax Act*. That statute, however, uses the *Canada Elections Act* as the source of the definitions of the types of political contribution for which the income tax credit can be claimed.

127(3) There may be deducted from the tax otherwise payable by a taxpayer under this Part for a taxation year in respect of the total of all amounts each of which is a monetary contribution referred to in the *Canada Elections Act* made by a taxpayer in the year to a registered party, a provincial division of a registered party, a registered association or a candidate, as those terms are defined in the Act,

(*a*) when that total does not exceed $400, 75% of that total,

(*b*) when that total exceeds $400 and does not exceed $750, $300 plus 50% of the amount by which that total exceeds $400, and

(*c*) when that total exceeds $750, the lesser of
(i) $650, and
(ii) $475 plus 33⅓% of the amount by which the total exceeds $750,

if payment of each monetary contribution that is included in that total is evidenced by filing with the Minister a receipt, signed by the agent authorized under that Act to accept that monetary contribution, that contains prescribed information.[5]

Thus, while the *Income Tax Act* provides for the income tax credit, it is the *Canada Elections Act* which is determinative of the meaning of the component elements necessary to determine the application of that credit – what constitutes a monetary contribution, a registered party, a registered association, a candidate, and who is permitted to accept contributions.[6]

[5] For a maximum deduction of $650 respecting total contributions of $1,275 or more.

[6] Subsection 404.4(1) of the *Canada Elections Act* requires that all forms of contributions in excess of $20 must be receipted. This is a separate and distinct receipting requirement from that required for tax credits under the *Income Tax Act*. The obligation to receipt contributions under subsection 404.4(1) applies only to contributions in excess of $20 but applies to all forms of such contributions to all political entities regulated by the Act (other than for third parties).

The income tax credit is available only with respect to contributions of money (cash or negotiable instrument[7]).[8] Non-monetary contributions of goods or services are not eligible for income tax credits. And as currently provided under the *Income Tax Act*, and with one exception respecting leadership contestants, income tax credits are available only for monetary contributions given to registered parties, registered associations and candidates. In each case, tax credits are available only for contributions after the particular entity in question attains registered status (in the case of parties and electoral district associations[9]) or the status of a candidate.[10]

A taxpayer, of course, retains the discretion to actually claim a credit on his or her income tax return for an otherwise eligible political contribution.

As a general principle, the *Canada Elections Act* does not control the uses to which a registered party or registered association may put its funds. And, as a corollary to that principle, there is no restriction on the types of things to which registered parties and registered associations may put contributions that are eligible for an income tax credit. (Nor is there any way that a party or a registered association can know whether any particular eligible contribution has actually been claimed by a taxpayer on his or her tax return.)

With respect to tax-receipted contributions to candidates, the requirements of the *Canada Elections Act* respecting the disposal of a candidate's surplus will operate to ensure that tax-credited contributions, as is the case with all contributions, must be either expended on the election campaign or transferred to the candidate's registered party, registered association or, in the case of candidates without political affiliation, the Receiver General.

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[7] Subsection 127(4.1) of the *Income Tax Act*.

[8] In addition, section 477 of the *Canada Elections Act* directs that candidates and their official agents shall use the forms prescribed by Elections Canada for official receipts to contributions for the purpose of subsection 127(3) of the *Income Tax Act.* (Registered parties and registered associations may use any form of receipt provided that it contains the information prescribed under the *Income Tax Act*.)

Reference should also be made to the full section 127 of the *Income Tax Act* for a complete canvass of the rules respecting contributions to political entities. The discussion in this report only canvasses those aspects of the scheme particularly relevant to the points in the report.

[9] Registered associations are subject to an additional limitation, which will be discussed below.

[10] Where a contribution is both required to be receipted under section 404.1 of the *Canada Elections Act* and eligible for income tax credit under the *Income Tax Act*, the responsible financial agent may issue either two separate receipts – one for each purpose, each meeting the requirements of the relevant elections or tax Act whose purpose they are to serve, or the agent may issue a single receipt that meets the requirements of both.

Registered Parties

In the case of parties, only contributions to registered parties are eligible for the income tax credit. As registered party status can only be obtained by running at least one candidate in a general or by-election, contributions given to that party prior to that time are not eligible for income tax credits.[11] In other words, contributions given to eligible parties (i.e. parties which have applied for registered status and which have been found to meet all of the administrative requirements under the Act) are not eligible for the income tax credit. However, as a party, once registered, retains that status between general elections, contributions made to a registered party between elections remain eligible for income tax credit as long as the party does not voluntarily deregister itself or is involuntarily deregistered by the Chief Electoral Officer or a judge for some failing as specified in the statute.[12]

Registered Electoral District Associations

As in the case of a registered party, contributions to a registered electoral district association, whether given during or outside of an election period, are also tax receiptable. However, unlike a registered party, the association's authority to issue tax receipts respecting its contributions does not start automatically on its securing registered status.

Before a registered association is authorized to give tax receipts, the leader of its registered party must first notify the registered association in writing that its agents are authorized to issue receipts. For this reason, a registered party retains the discretion to determine which of its registered associations will be able to issue tax receipts.[13]

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[11] At the same time, such contributions are not subject to the contributions rules of the *Canada Elections Act* respecting eligibility, caps and disclosure as those rules do not apply to contributions to parties that are not registered parties.

[12] Registered parties can be deregistered under the Act as a result of failing to run at least one candidate in a general election (s. 385), or as a result of either its own voluntary request for deregistration or of its involuntary deregistration by the Chief Electoral Officer under sections 385.1, 386, 387 or 388 for failing to meet one of the administrative requirements of the Act.

In addition, an organization, which is registered as a political party but which ceases to meet the criteria for political party status under the Act, can also be the subject of an application by the Commissioner of Canada Elections to a judge for deregistration under section 521.1.

[13] The party leader cannot pick which of the association's individual agents are authorized to issue tax receipts. An authorization once given is for all of the agents of the association. Subsection 127(3) of the *Income Tax Act* grants the authority to issue tax receipts to the agents who are authorized under the *Canada Elections Act* to accept contributions – which in the case of a registered electoral district associations are the association's financial agent and any other electoral district agents appointed by the association under subsection 403.09(1). (The association itself can exclude the authority to accept contributions from the appointment of an electoral district agent under s. 403.09(1), which will also indirectly restrict such a limited agent from issuing tax receipts.)

Following the coming into force of S.C. 2003, c. 19 (Bill C-24), it is now clear that a registered association that is not authorized to issue tax receipts cannot pass contributions it has received on its own behalf on to its registered party for tax receipting by the party and ultimate return to the association. The effect of Bill C-24 and the terms of section 127 of the *Income Tax Act* make it clear that tax receipts can be issued by the registered party only for contributions made to the party and that tax receipts for contributions made to a registered association can only be given by the association to which the contribution was given. This clarifies any ambiguity that may have existed prior to Bill C-24. Thus, a decision of a leader of a registered party not to authorize the agents of a registered association to issue tax receipts has the effect of making all contributions to the registered association ineligible for the income tax credit.

Candidates

In the case of candidates, subsection 127(3) provides for income tax credits only for contributions made to a candidate as that term is defined in the *Canada Elections Act.*

The *Canada Elections Act* defines a candidate as:

> "a person whose nomination as a candidate at an election has been confirmed under subsection 71(1) [i.e. by a returning officer during the election period] and who, or whose official agent, has not complied with sections 451 to 463 and 471 to 475 in respect of that election." (s. 2)

Thus, only contributions made to a candidate after his or her confirmation by a returning officer during an election are eligible for the income tax credit. Contributions made before that time are not eligible. This is so notwithstanding the retroactive imposition of "candidate" status upon such confirmed persons by sections 82 and 365 of the Act respecting the various financial obligations of the Act respecting candidates. The reason for this is because both of those sections do not deem the person to be a candidate retroactively for *all* purposes, including the *Income Tax Act*. The retroactive status of candidate deemed by sections 82 and 365 operate only with respect to the financial obligations of Part 18 of the Act and the obligations of a candidate to have an official agent and an auditor as set out in sections 83 to 88 and 90.[14] It is the definition of "candidate" in section 2 of the Act that specifies when a person becomes a candidate for the purposes of the income tax credit.

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[14]

82. For the purposes of sections 83 to 88 and 90, a candidate is deemed to have been a candidate from the time he or she accepts a contribution or incurs an electoral campaign expense referred to in section 406.

365. For the purposes of this Part [Part 18], a candidate is deemed to have been a candidate from the time he or she accepts a contribution or incurs an electoral campaign expense referred to in section 406.

Some candidates may elect to have pre-election contributions intended for the candidate's campaign run through the candidate's registered electoral district association (or even registered party) in order that they be eligible for the income tax credit respecting contributions to registered associations. A number of factors may make this a less than perfect alternative to being able to directly credit contributions to the candidate. First, not all candidates have a registered electoral district association (or registered party). Second, once contributed to the association the funds become the property of the association or party, which retains the discretion as to when and if those contributions may be transferred to the candidate. Third, registered electoral district associations and registered parties cannot transfer funds to a candidate prior to the candidate being confirmed as such by a returning officer during an election (s. 404.2(2.1)(*b*)).

Notwithstanding that a person remains a candidate under section 2 of the *Canada Elections Act* until such time as the administrative obligations under sections 451 to 463 and 471 to 475 have been met, the Canada Revenue Agency (CRA) has determined that a candidate's official agent can only issue income tax receipts for those contributions which were already in the process of being delivered on or before polling day and which were received no later than 30 days after polling day. As outlined in CRA's Information Circular IC-75-2R7 (para. 8):

> "Official agents can only issue such receipts for monetary contributions received in a certain period. This is the period that starts with the day on which the candidate's nomination has been confirmed by the returning officer, and ends on the day that is 30 days after polling day. Contributions received after polling day must have been in transit on polling day."[15]

Contributions to nomination contestants are not eligible for income tax credit.

Leadership Contestants

Contributions made directly to a leadership contestant are not tax receiptable. However, a contributor may make a contribution to the contestant's registered party (which would be receiptable as a contribution to the party) and direct that the contribution be transferred to the leadership contestant. The party is not required to comply with that request and retains the discretion to transfer all or part of the contribution to the identified contestant as it deems appropriate. In any event, regardless of whether any or all of the contribution is actually transferred to the contestant, the entire contribution is deemed by subsection 404.3(4) of the Act to be treated as a contribution to the leadership contestant and as such will count toward that contributor's contribution caps respecting leadership contestants (rather than the contributor's cap respecting contributions to the party).

[15] This interpretation appears to be related to the obligation in subsection 478(2) on candidates and their official agents to return their unused income tax receipt forms within a month after polling day.

> 478(2) A candidate and his or her official agent shall return any unused forms referred to in section 477 within a month after polling day.

Recommendations

The issue of tax receipts for pre-election contributions either by candidates or registered parties was touched on in three earlier reports made to the Speaker of the House: the 1996 *Strengthening the Foundation*, the 2001 *Modernizing the Electoral Process* and the 2005 *Completing the Cycle of Electoral Reform.*

As noted above, a party cannot issue income tax receipts for contributions made to it prior to its securing registered party status in an election. Similarly, a candidate cannot issue income tax receipts respecting contributions given to the candidate prior to the candidate having been confirmed in that status during an election by the returning officer. The 1996 report *Strengthening the Foundation* recommended that a slight extension to this authority to authorize a party or a candidate to issue income tax receipts for contributions received by the party or the candidate from the time of the drop of the writ in which the party achieved registered party status or the candidate was confirmed as such by a returning officer.[16]

The 1996 recommendation respecting the availability of income tax credits for parties and candidates was revised in the 2001 report (respecting parties) and the 2005 report (respecting candidates).

The 2001 report *Modernizing the Electoral Process* noted, in the discussion respecting recommendation 3.1.2, that the continuing status of a party as a registered party between elections creates advantages in the context of the income tax credit for parties that were registered in earlier elections over those eligible parties that are later registered in a current election. As a party, once registered, maintains that status between general elections, registered parties may continue to receive, and tax receipt, contributions received between those elections. This gives them an advantage over a party which complies with the administrative requirements of the *Canada Elections Act* and secures eligible party status but is unable to secure registered party status until the next general election is called. This advantage is discussed in more detail in recommendation 3.1.2 of the earlier *Modernizing the Electoral Process.* In view of this inequality, that report recommended that a party that achieves registered party status should be allowed to issue

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[16] The report noted that:

> "The *Income Tax Act* allows registered political parties to issue official tax receipts only for contributions received after their registration according to the *Canada Elections Act* takes effect, which is the day after they have sponsored candidates in at least 50 electoral districts. [Now reduced to at least one electoral district – S.C. 2004, c. 24.] Similarly, candidates can only issue official receipts for contributions received after their nomination papers have been accepted by the returning officer. Thus, the current legal framework restricts the ability of both candidates and parties to raise sufficient campaign funds in the first weeks of a campaign."

It then recommended (recommendation 103) that:

"provision be made for the retroactive issuance of receipts for contributions to a registered party, local association, or candidate during the election period prior to the official registration or nomination, as the case may be."

tax receipts for contributions received by that party either from the time that its application for registration was accepted by the Chief Electoral Officer, or from the time of the last general election, whichever is later.

The inequality noted in the 2001 report was alleviated to some degree by the reforms to the *Canada Elections Act* (S.C. 2004, c. 24) that permit an eligible party to achieve registered status by running at least one candidate in a general or by-election. However, the inequity remains where no by-elections are called between general elections to permit an eligible party to seek registered party status or where the by-election is called in a district where the eligible party has no true intention of running a candidate and would be required to do so only for the purposes of securing registered status.

Again, any extension of the income tax credit respecting contributions to parties should be accompanied by a corollary obligation to report the contributions receipted.

The income tax receipting of pre-election contributions by candidates was addressed in the 2005 report *Completing the Cycle of Reform*. That report recommended that this be addressed by providing for a pre-writ confirmation process through the Chief Electoral Officer for candidates under which a person would be able to register as a candidate in advance of the calling of an election for an electoral district. Confirmation as a candidate prior to the drop of a writ would automatically make all contributions to the confirmed candidate eligible for the income tax credit.

In its subsequent 2006 report *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*, the Committee endorsed the concept of allowing advance registration of candidates but rejected the corollary recommendation that that confirmation be carried out through the office of the Chief Electoral Officer. Advance registration is only feasible if carried out through the Chief Electoral Officer as returning officers do not operate continuing offices between elections.

In light of the increased ability of parties to seek registered party status, and in the interest of relative ease of record keeping and application, in the case of newly registered parties and candidates the Committee may wish to consider expanding the ability of these entities to provide income tax receipts to include contributions given to the party or the candidate from the period of the drop of the writ in the election in which the party secured registered party status or the candidate was confirmed.

Observation of Potential Effect of Indirect Tax Credit for Leadership Contestants

There have been only a few leadership contests regulated under the *Canada Elections Act* since the introduction of the current leadership contest controls on January 1, 2004.[17] Of those contests, only the current ongoing contest of the Liberal Party of Canada concerned a parliamentary party. For that reason, analysis of the operation of the indirect income tax credit system respecting leadership contests is problematic at this time. However, as a preliminary observation based primarily on the current experience with the Liberal Party leadership contest, it may be that one effect of the funding of leadership contestants primarily through the medium of the registered party in order to secure the tax credit is to delay the availability of contribution information such that it is not available at the time of the statement of contributions that accompanies the registration of a contestant under section 435.06. (This may be principally due to the fact that the party has not yet processed and passed directed contributions on to the contestant at the time of the registration report.) Where directed contributions are not transferred by the party to a contestant until after the contestant's registration with Elections Canada, these contributions are not required to be reported until the first report on contributions four weeks before the selection date of the contest.

If future events confirm this observation is correct, and the current scheme for the interim reporting of contributions is retained, then consideration may be given at that time to amending section 435.31 to require an additional report on contributions to come at some earlier time following the filing of the contestant's registration with the Chief Electoral Officer.

Alternatively, consideration could be given to making contributions made to leadership contestants after they are registered as such with the Chief Electoral Officer tax receiptable. This would reduce the need for such contributions to pass through the registered party, ensure that the full amount of the contribution is provided to the leadership contestant for whom the contributions are intended, reduce the potential influence of a registered party respecting leadership contestants which results from its control over directed contributions received by the party, and potentially lead to faster and more accurate returns by contestants. Such an amendment would be consistent with the general prohibition in section 404.3 (which is aimed at ensuring neutrality) against a registered party or registered electoral district association from providing money to a leadership or nomination contestant. (As noted above, the current section 404.3 contains an exception for directed contributions to a leadership contestant.)

[17] Two contests for the Green Party of Canada (2004 and 2006), one for the Libertarian Party of Canada (2005) and the current contest for the leadership of the Liberal Party of Canada.

4. Minimum Age for Making Political Contributions

Summary of Section

This section:

- explains that age is not currently a factor affecting the eligibility of contributions under the *Canada Elections Act*;
- sets out the existing controls in the Act that ensure that minors cannot be exploited as a means to avoid the eligibility, caps and disclosure rules of the Act; and
- discusses the value of permitting youth to participate in the electoral process prior to reaching voting age through such means as the making of contributions.

It recommends:

- that additional eligibility criteria based on age are not desirable at this time as they would serve no purpose not already addressed under the Act.

Current Law

There is currently no minimum age requirement for an individual to be eligible to make contributions under the *Canada Elections Act*. (Nor is there a maximum age.) Age is not a factor that affects the application of the contribution rules of the Act. Contributions made by a person to registered parties, registered associations, candidates, nomination contestants and leadership contestants are subject to the same requirements respecting eligibility, caps and reporting, regardless of the age of the contributor. This is also true respecting contributions to third parties, which do not depend for their eligibility on the age of the contributor.

There is no evidence at this time of any widespread practice of using minors to avoid the contribution rules of the Act. The provisions of the Act that operate ensure that individuals or entities do not use others as tools to avoid the application of the contribution requirements of the Act apply equally to the use of younger people as they do to the use of any person or entity.

Section 405.3 provides that no person or entity shall make a contribution to a registered party, a registered association, a candidate, a nomination or a leadership contestant that comes from money, property or the services of any person or entity that was provided to that person or entity for that purpose. This section precludes one person or entity giving a minor resources for the minor to make political contributions as it does with respect to gifts given to an adult for that purpose. One cannot avoid one's contribution caps, or one's own ineligibility, or the reporting of one's contributions, by attempting to make those contributions through the medium of another, whether that person is a minor or not.

The prohibitions in section 405.2, which preclude any person or entity from circumventing or attempting to circumvent the contribution eligibility, caps or disclosure rules of the Act, apply to schemes involving minors for such circumventions as they do to schemes that do not involve minors.[18]

Thus, there does not at this time appear to be a hole in the contribution eligibility, caps or disclosure requirements of the Act that can be exploited through the use of minors.

Recommendations

The ability to make contributions is an important aspect of inclusion to assist in ensuring that those who reach voting age have a reasonable opportunity to come to it with familiarity and not as strangers.

Furthermore, the political process itself benefits from the participation of new generations of young people, who bring to it not only the additional energy of youth but appreciation of evolving times.

Elections Canada currently encourages youth participation in the electoral process through a number of administrative initiatives listed on the Young Voters section of the Elections Canada Web site (e.g. Student Vote, The Democracy Project and Go Vote). These administrative initiatives complement the current provisions of the *Canada Elections Act* to promote participation by youth in the electoral process without waiting to reach voting age. Young people, like all persons, are free to provide volunteer services, as such volunteer services do not constitute contributions (except where a self-employed

[18] 405.2(1) No person or entity shall

(*a*) circumvent, or attempt to circumvent, the prohibition under subsection 404(1) or a limit set out in subsection 405(1) or section 405.31; or

(*b*) act in collusion with another person or entity for that purpose.

(2) No person or entity shall

(*a*) conceal, or attempt to conceal, the identity of the source of a contribution governed by this Act; or

(*b*) act in collusion with another person or entity for that purpose.

(3) No person who is permitted to accept contributions under this Act shall knowingly accept a contribution that exceeds a limit under this Act.

person provides a type of services for which that person normally charges).[19] They are also free to make monetary contributions, according to the rules of the Act as they feel appropriate, which will be reported and count toward their individual caps.[20] Through such means, young people may feel more included in the electoral process and have a stake in the outcome of political judgments.

Nor are additional administrative measures respecting the reporting of youth contributions recommended at this time – such as the inclusion of the ages of contributors under some specified age. Such additional reporting requirements would single out youth participation and might discourage it. Moreover, insofar as any person could be used to improperly channel secret contributions, the very young are the least likely to be chosen for that purpose because significant contributions made through them raise suspicions.

For these reasons, additional restrictions on the ability to make contributions based on age criteria are not recommended at this time. If such restrictions were to be considered, much effort would have to be expended on determining which types of contributions were to be included under the new restrictions and the appropriate age upon which such restrictions would be predicated.

[19] The following definitions are found in section 2 of the Act:

> "non-monetary contribution" means the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value.
>
> "volunteer labour" means any service provided free of charge by a person outside of their working hours, but does not include such a service provided by a person who is self-employed if the service is one that is normally charged for by that person.

[20] While the *Canada Elections Act* requires that an individual must be at least 18 years of age on election day to be appointed an election officer, the Act also provides, among other things, for the appointment of citizens as young as 16 who reside in the relevant district where a returning officer is unable to identify a person who meets the age requirement (subsection 22(5)).

5. Exclusion of Certain Services as Contributions

Summary of Section

This section:

- discusses the current exceptions to the contribution rules of the *Canada Elections Act* respecting volunteer labour and the provision of personal services with minimal value;
- discusses how the current provisions of the Act take into account the societal value of encouraging individuals to personally participate in their democratic processes and the values served by disclosure and contribution caps.

It recommends:

- that no additional exemptions be created for specific services.

Current Law

Non-Monetary Contribution: Provision of Services Without Charge

A person or entity may sell services to a registered party, a registered association, a candidate, nomination contestant or leadership contestant at the commercial value of those services (or more). That sale will not constitute a contribution. However, subject to a significant exception respecting volunteer labour, the provision of services to those political entities at less than commercial value (or for free) will constitute a non-monetary contribution (valued at the difference between the amount the person actually charges the political entity for the services and the commercial value of those services) and be subject to the contribution rules of the *Canada Elections Act* respecting eligibility, caps and disclosure.[21]

[21] The following definition of "non-monetary contribution" is set out in section 2 of the Act:

> "non-monetary contribution" means the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value.

In general terms, the commercial value of a service is the cost that a person in similar circumstances would have to pay on the open market for similar services in that area without regard for any political consideration. The specific detailed definition of the phrase is set out in section 2 of the Act and provides that:

> "commercial value," in relation to property or a service, means the lowest amount charged at the time that it was provided for the same kind and quantity of property or service or for the same usage of property or money, by
>
> > (*a*) the person who provided it, if the person is in the business of providing that property or service; or

The Act provides two exceptions to the above – one for volunteer labour and one for services of minimal value.[22]

Volunteer Labour

The first exception is for services provided free of charge by volunteers other than services provided by self-employed persons that they normally provide for a fee. Such volunteer labour is not a contribution under the Act.[23] As it is not a contribution, it is not subject to the eligibility[24] and disclosure rules of the Act. Nor is it included in the calculation of a contributor's contribution cap.

The service provided by the volunteer must be provided free of charge. This means that the volunteer cannot be paid for it – either by the recipient or by any other person. Thus, an employer that:

- sends its paid employees to work for a political entity during their regular working hours;
- pays its employees to work outside of working hours for a political entity;

> (*b*) another person who provides that property or service on a commercial basis in the area where it was provided, if the person who provided the property or service is not in that business.

[22] A related exception in the *Canada Elections Act* also permits an employer to grant an employee with a paid leave of absence during an election for that employee to be a nomination contestant or a candidate. Such a leave of absence will not constitute a contribution by the employer under the Act.

> 404.2(5) The provision, by an employer, of a paid leave of absence during an election period to an employee for the purpose of allowing the employee to be a nomination contestant or candidate is not a contribution.

[23] As provided by the definitions of "non-monetary contribution" and "volunteer labour" in section 2 of the Act.

> "non-monetary contribution" means the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value.
>
> "volunteer labour" means any service provided free of charge by a person outside their working hours, but does not include such a service provided by a person who is self-employed if the service is one that is normally charged for by that person.

[24] Corporations, trade unions and unincorporated associations cannot take advantage of the volunteer labour exception as the services in question must be provided by the volunteer himself or herself. As corporations, trade unions and unincorporated associations are incorporeal entities that cannot act themselves, they are incapable of providing volunteer services.

- provides its employees with a paid leave of absence for the purpose of working for a political entity;[25] or
- otherwise provides the remuneration to a worker for that worker's services to a political entity, or pays the worker for his or her meals, lodging or other expenses incurred for that purpose

itself makes a non-monetary contribution to the political entity under the *Canada Elections Act*.[26]

The exception for volunteer labour does not apply to the provision of services by a self-employed person respecting the services for which that person usually charges.[27] Self-employed persons can provide volunteer services – those services simply cannot be services for which the self-employed person usually charges.

Accountants, lawyers and other persons who are employed can take advantage of the volunteer labour exception to provide the type of services they provide in their employment. But this work must continue to meet the general requirement for all volunteer labour in that they are not being paid to provide those specific services by either the recipient political entity or some other person – including their employer.

[25] A worker who takes leave that the worker has earned or to which the worker is otherwise entitled, such as paid vacation, does not make a contribution himself or herself. Nor is the employer considered to have made a contribution as the employer is not providing the leave to provide services to the political entity. The leave is provided because it was previously earned by the employee, who is free to do with it as he or she pleases.

An employer's granting of a leave of absence without pay is not considered to be a contribution as the employer does not pay any salary to an employee during this leave. The commercial value of any payments the employer may make to continue an employee's pension and other benefits during a leave of absence without pay would be considered to be a contribution unless that cost was $200 or less (see deemed value of property or services with a commercial value of less than $200 in subsection 2(2) of the Act).

[26] Such payments could also constitute a breach of the anti-avoidance provisions of the Act in section 405.2 if entered into to circumvent the eligibility, caps and disclosure provisions of the Act respecting contributions.

[27] See definition of "volunteer labour." It is also implicit in Parliament's use of the term "volunteer labour" that the service must be provided at the free discretion of the volunteer. Thus, an employer who, while not paying an employee for services rendered to a political party, orders the employee to provide such services or otherwise implies that the employee must provide such services or face negative consequences will be found to be making a contribution to the political entity at the commercial value of those services. Such activities on the part of an employer or other person may also constitute an avoidance contrary to section 405.2 of the Act.

Services of Minimal Value

The Act also provides that in determining the commercial value of property or services, which are provided by a person who is not in the business of providing that property or those services, the commercial value will be deemed to be nil where the lowest amount charged in the open market for similar property or services at that time is $200 or less.[28] The most common operation of this provision is to exclude from the concept of non-monetary contribution gifts of goods with a market value of less than $200 (such as small gifts of refreshments). With respect to services, it would permit workers who are not strictly volunteers, because they are agreeing to work for a minimal amount of money, from being treated as if they were making a non-monetary contribution for the difference between what they are being paid and the market value of those services – provided the value of similar services on the market is $200 or less (and provided the worker is not in the business of providing that service).

Recommendations

It is not recommended that additional exemptions to the contributions rules in the *Canada Elections Act* be created for specific services beyond those that currently exist. The treatment accorded volunteer labour under the *Canada Elections Act* is structured to take into account both the societal value of encouraging individuals to participate in their democratic processes and the values served by disclosure and contribution caps. Expanding the existing exceptions to those disclosure and contribution rules would unduly affect that balance.

Aside from the exercise of the vote itself, the provision of personal services to political entities is likely the most direct and closest involvement that a citizen can enjoy in the democratic process. Through such involvement, the citizen contributes to his or her community by playing a role in the shaping of his or her government; secures the potential to directly influence political policy and direction; and gains a unique insight based on personal experience and appreciation.

Such involvement should be encouraged and should not be restricted by unreasonable barriers.

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[28] Subsection 2(2) of the Act.

> 2(2) For the purposes of this Act, the commercial value of property or a service is deemed to be nil if
>
> (*a*) it is provided by a person who is not in the business of providing that property or those services; and
>
> (*b*) the amount charged for it is $200 or less.

The electorate, however, also has a right to know who contributes significantly to the political resources of the political entities that vie for its support. The disclosure rules of the *Canada Elections Act* are intended to provide such disclosure. Limits on contributions operate to limit the ability of individuals to purchase political influence and ensure that wealth alone does not grant the ability to shape or control political decisions. Creating exceptions to those rules that will allow commercial enterprises to donate their services without limit and without disclosure will undermine those controls, including the restrictions imposed on corporate contributions. This will be particularly so if exceptions are made for those services that command a higher commercial price – such as legal services.

The current exception for volunteer services is a delicate balance of these values. It permits and encourages the direct personal involvement of individuals in their political processes but, by restricting the exemption to personal services by those who are not in the business of providing those services, avoids the undue potential for the secret purchase of influence.

To expand the current statutory exemptions for services to include specialized personal services provided by self-employed lawyers and accountants would create a two-tiered contribution system and permit those persons to provide services with significant commercial value to political entities without limit and without disclosure.

6. Limits on Leadership Campaign Spending

Summary of Section

This section notes the earlier recommendation made in the 2001 recommendations report entitled *Modernizing the Electoral Process* that "There should also be spending limits respecting leadership contests with the specific amount of those limits being set by Parliament."

The section further observes that there is insufficient data available to Elections Canada to make a recommendation to assist Parliament in the setting of such limits.

Current Law

The *Canada Elections Act* does not set any expense limits respecting leadership contests.

Recommendation

As was noted in the 2001 recommendations report of the Chief Electoral Officer entitled *Modernizing the Electoral Process* a leadership contest is not a private matter of a party. Selection of the leader of a party is an extremely important political event. To this end, recommendation 8.1.4, in addition to recommending requiring financial disclosure by leadership contestants, proposed that: "There should also be spending limits respecting leadership contests with the specific amount of those limits being set by Parliament."

Imposition of such a limit would assist in ensuring a level playing field for contestants (and ensure that spending limits do not become prohibitive or exclusionary). Limits set by law would also be enforceable, which is not necessarily the case respecting limits set through internal rules of parties.

That recommendation preceded the political financing reforms, which came into effect on January 1, 2004. Those reforms, among other things, required the reporting of leadership campaign expenses by leadership contestants. Since the implementation of those reforms, there have been four leadership contests either completed or underway:

- Green Party of Canada (end date August 28, 2004)
- Libertarian Party of Canada (end date May 22, 2005)
- Green Party of Canada (end date August 26, 2006)
- Liberal Party of Canada (end date December 3, 2006)

The Libertarian Party contest did not result in the incurring of leadership campaign expenses by its contestants. The final leadership campaign returns relating to the 2004 Green Party contest are published on the Elections Canada Web site at www.elections.ca, under Election Financing. The final campaign returns for the 2006 contests for the Green Party of Canada are only due on February 26, 2007, while those of the Liberal Party of Canada will not be due until June 3, 2007.

The very few available returns do not provide a sufficient basis upon which Elections Canada can make any further recommendations respecting a generic spending limit for leadership contests.

7. Loans and the Transfer of Candidates' Debts

Summary of Section

This section:

- sets out the existing rules contained in the *Canada Elections Act* with respect to loans and the need for a distinct regime for this type of transaction; and
- as requested by the Committee, discusses the ability of a candidate to transfer campaign debts.

It recommends:

- that political entities may borrow money in excess of the contribution limits only from financial institutions, as this expression is defined and used in section 437 of the *Canada Elections Act*;
- the limit on loans made by individuals should be their contribution limit; an exception may be considered for an initial loan by a candidate to his or her campaign;
- that a separate regulatory regime be developed for loans; and
- that no additional changes to the Act are required at this time to address the issue of the transfer of campaign debts.

Current Law

Loans

While Parliament has imposed an extensive regime to control the source and extent of contributions, it has not done so with respect to that other source of funding constituted by loans. However, loans are money, albeit a legitimate means of financing a campaign if there is a reasonable expectation of repayment. The loans granted by lenders – who are not in the business of lending, who lend money at non-commercial rates, with terms that are not available to others, or in cases where there is little prospect of reimbursement – may be perceived as a means to influence the political entity to which the funds are provided. Also, the current provisions of the Act dealing with other unpaid claims are not adequate when applied to loans. For these reasons, consideration should be given to imposing additional controls and making these transactions more transparent and the rules governing disclosure more consistent from one political entity to the other.

Currently, the Act authorizes all political entities it governs to borrow money to meet their expenses. It also assimilates loans to contributions for the purposes of reporting. Thus, registered parties, registered electoral district associations, candidates, leadership contestants and nomination contestants are required to report on the loans they have contracted as part of their election/contest/financial returns.[29] Reporting requirements set out in the Act vary from one entity to another.

The repayment obligations also vary from entity to entity, with more time-constrained rules and consequences being imposed on event-based entities (the candidates, leadership contestants and nomination contestants) than on ongoing entities (the registered parties and EDAs). Candidates, leadership contestants and nomination contestants are expected to repay all claims (including loans) within a varying number of months following the event for which they contracted the loans.[30]

Where the campaign of a candidate, a leadership contestant or a nomination contestant cannot repay a loan within the legislated period, it may apply to the Chief Electoral Officer for authority to repay the loan over a longer period. (A further application to a judge is available.) If the Chief Electoral Officer is satisfied that there are reasonable grounds for so doing, he may authorize the loan to be repaid over a longer period of time and according to specified terms and conditions – such as a requirement to repay the loan according to a precise repayment schedule.

It is an offence for candidates, leadership contestants and nomination contestants to fail to repay a loan within the legislated period after the conclusion of the event (polling day or selection date), unless the loan falls into one of the exceptions set out in the Act – the two most common of which are when the Chief Electoral Officer has authorized the repayment over a longer period of time or when a judge has done so.[31]

The repayment rules applicable to loans contracted by parties and EDAs are defined in relation to the repayment date negotiated between the entity and the lender, presumably a recognition of their ongoing status.[32] There are no offences under the Act for failure by a party or an EDA to repay a loan.

[29] See paragraph 403.35(2)(*i*) and (*i*.1) for EDAs, 424(2)(*j*) for registered parties, 435.3(2)(*d*.1) for leadership contestants, 451(2)(*e*) for candidates and 478.23(2)(*c*) for nomination contestants.

[30] See section 445 for candidates, 478.17 for nomination contestants and 435.24 for leadership contestants.

[31] See subsection 445(2) for candidates, 435.24(2) for leadership contestants and 478.17(2) for nomination contestants.

[32] See section 418 for registered parties and 403.3 for EDAs.

In addition to the obligations above regarding the repayment of loans, the Act provides that the unpaid portion of a loan which remains unpaid on the day that is 18 months after the end of the event to which it relates or, in the case of registered parties and EDAs, 18 months after the end of the fiscal period to which the transaction return relates, is deemed to be a contribution which is subject to the eligibility, disclosure and contribution limits set out in the Act as of the day the loan was incurred. However, the unpaid amount will not be deemed to be a contribution if it falls within certain exceptions, the most common of which is that the amount is the subject of a binding agreement to pay. Another of these exceptions is when the loan has been written off by the creditor as an uncollectable debt in accordance with the creditor's normal accounting practices.[33]

Any arrangement whereby a loan is used as a mechanism to avoid the eligibility, caps or disclosure requirements of the Act respecting contributions would constitute an offence under paragraphs 497(1)(*i*.4) and (*i*.5), and 497(3)(*f*.14) and (*f*.15), as a breach of the anti-avoidance provisions of the Act.

Recommendation

It is recommended that Parliament consider reviewing the rules governing loans to impose additional controls on loans, make these transactions more transparent and the rules more consistent from one type of political entity to another. More particularly, consideration should be given to:

- providing that political entities may borrow money in excess of the contribution limits only from financial institutions, as this expression is defined and used in section 437 of the *Canada Elections Act*;

- the limit on loans made by individuals should be their contribution limit; an exception may be considered for an initial loan by a candidate to his or her campaign;
- providing that all loans (and lines of credit) authorized by lending institutions be at commercial rates; and
- developing a separate regime for the treatment and reporting of loans in the Act, including requiring a more complete and consistent set of information to be provided for loans (as well as lines of credit) contracted by all entities, including interest rates, repayment schedules and the name of the lender.

[33] See paragraph 423.1(2) for parties, 403.34(2) for EDAs, 450(2) for candidates, 478.22(2) for nomination contestants and 435.29(2) for leadership contestants.

Transfer of Debts

The Committee also requested that this report address matters related to the ability of a candidate to transfer his or her campaign debts. The discussion that follows is limited to candidates and does not extend to leadership contestants, although some aspects may be similar.

During or at the end of a campaign, a candidate may find himself or herself with insufficient funds to pay outstanding debts. To pay such outstanding debts, a candidate's campaign has two choices.

It can continue its fundraising efforts to raise the necessary funds.[34] However, where this fundraising is done after polling day, in addition to the difficulties involved in after-event fundraising, the contributions to the candidate do not appear to be tax receiptable pursuant to the current Canada Revenue Agency income tax interpretation.[35]

The registered party or a registered electoral district association of a candidate can also either transfer the necessary funds to the candidate's campaign to pay the debt[36] or assume the liability for the payment of that debt. This latter arrangement will constitute the provision of a service to the candidate and also be reported as a transfer.[37] All candidates, including those who do not have a registered party or registered association can adopt a similar process if the debt is within the contribution cap of an individual or entity eligible to make contributions and is prepared to assume the responsibility for the debt. In that case, the transfer of liability would be treated as a non-monetary contribution by the individual or entity assuming the debt.

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[34] Contributors wishing to donate to these campaigns must still adhere to their contribution caps. In the case of candidates who are not associated with a registered party, for whom the contribution caps run on a "per event" basis, it will be prudent to get an express statement from "after-polling day" contributors that such contributions are for the past election. This is to avoid confusion respecting to which event a contribution is intended.

[35] See CRA's Information Circular IC-75-2R7 (para. 8).

[36] The prohibition on the after-polling day transfer of funds in section 476 does not apply to transfers to pay claims related to the candidate's electoral campaign.

> 476. No registered agent of a registered party, financial agent of a registered association or financial agent of a nomination contestant shall transfer funds to a candidate after polling day except to pay claims related to the candidate's electoral campaign.

[37] The choice of arrangement will depend on the circumstances. Where the campaign bank account is closed, the assumption of the debt by the registered party or registered association will not involve a transfer of funds and will not require the re-opening of the bank account. If funds are transferred to the candidate, those funds must be received in the campaign account and the expense paid by the candidate's official agent. Also, payment of an unpaid claim by a campaign later than four months after election day requires the consent of the Chief Electoral Officer under section 458.

Contributions made to a registered party or to a registered electoral district association are tax receiptable.

All payment of debts, fundraising for such purposes, and transfers must be reported by the candidate's campaign. This may require an update to the return where the payment, fundraising or transfer takes place after the filing of the campaign's electoral campaign return under section 451.[38]

Recommendation

No additional changes to the Act are required at this time to address the issue of the transfer of debts by candidates to their EDA or the party.

[38] See section 455 (updating financial reporting documents respecting unpaid claims) and section 458 (application to correct a return).

8. Elimination of Threshold for Quarterly Allowance for Parties

Summary of Section

This section:

- outlines the current provisions of the *Canada Elections Act* respecting the payment of quarterly allowances to registered parties;
- canvasses the provincial electoral laws providing for such payments to parties; and
- notes the recent constitutional challenges made to the criteria upon which the quarterly allowances are based.

Until the current constitutional challenge to the current vote threshold for the payment of the quarterly allowances is finally resolved, no recommendation will be made respecting that issue.

Current Law

Introduction of Quarterly Allowances

Quarterly allowances for registered parties were first introduced with the political financing reforms that came into effect on January 1, 2004. Although not calculated directly in proportion to estimated reductions in revenue resulting from the ban on corporate and trade union contributions to registered parties that came into effect at the same time, that ban was a major impetus behind the introduction of the allowance.

Eligibility for Allowance Under Current Wording of the Act

Section 435.01 of the Act provides that a registered party that obtains at least 2 percent of all valid votes cast at a general election or at least 5 percent of the valid votes cast in the electoral districts in which it ran a candidate in a general election is eligible for an annual allowance.[39]

[39] The 2 percent figure is calculated on the basis of the cumulative number of valid votes cast nationally. The 5 percent figure is calculated by looking at each of the individual electoral districts in which the registered party ran a candidate and determining the percentage of valid votes cast for the party's candidate in that district. The party's candidates must have secured at least 5 percent of the valid votes in each individual district.

As the Act is currently written, a party that obtains the number of votes required to qualify for the annual allowance will receive the first payment of the allowance in the quarter after the general election in which it became eligible.

The allowance is payable to a party "whose candidates for the most recent general election preceding that quarter received at that election" the necessary threshold percentage of votes (s. 435.01). Thus, where a party is registered and/or secures the necessary percentage of votes as a result of a general election held within a quarter, the entitlement for that quarter is still determined on the basis of the most recent general election preceding that quarter. The party therefore will not actually become entitled to an allowance until the next quarter when the determinative general election will be the general election that was just held.

A party that loses its registered status in a quarter will not be eligible to receive its annual allowance for any part of that quarter.

That is because under subsection 435.02(1), the Chief Electoral Officer is to provide the Receiver General at the end of the quarter with a certificate that sets out the amount of the allowance payable to "the registered party" for that quarter. Thus, a party must be registered at the time of the certificate to receive the allowance.

The constitutionality of the minimum vote threshold for the payment of the quarterly allowance was the subject of a recent decision of the Ontario Superior Court, which is discussed later in this section.

Amount of Payment

The amount of the quarterly allowance is equivalent to 43.75 cents per valid vote the recipient party obtained in the most recent general election preceding the quarter for which the payment is being made (s. 435.01(2)).

On an annual basis, the payment is equivalent to $1.75 per valid vote obtained and is indexed for inflation, as provided for by paragraph 435.01(2)(*b*).[40]

On the above basis, the following allowances were paid out to the registered parties listed below between January 1, 2004 (when the allowance started), and September 2006 (the most recent quarter).[41]

[40] The inflation adjustment figure in effect for the one-year period beginning April 1, 2006, is 127/119.0 or 1.070. The inflation adjustments figures are published by Elections Canada in the *Canada Gazette* before April 1 of each year (as per subsection 405.1(3)). They are also available on the Elections Canada Web site at www.elections.ca.

[41] A record of quarterly allowances paid from 2004 to date is also available on the Elections Canada Web site at www.elections.ca, under Political Parties, Candidates and Others.

2004[42]

Registered political party	**Advance paid in Jan. 2004 (Jan. 1–Dec. 31, 2004)** *(Based on the 37th GE)*	**3rd Quarter (July–Sept. 2004) Payable or (receivable)** *(Based on the 38th GE)*	**4th Quarter (Oct.–Dec. 2004) Payable Jan. 2005** *(Based on the 38th GE)*
Bloc Québécois	$2,411,022	$0	$322,846
New Democratic Party	$1,914,269	$12,958	$956,692
Green Party of Canada	$0	$261,847	$261,847
Liberal Party of Canada	$9,191,054	($49,646)	$0
Conservative Party of Canada	$8,476,872	($563,360)	$0

2005

Registered political party	**1st Quarter (Jan.–Mar. 2005) Payable Apr. 2005** *(With inflation adjustment as of Apr. 1, 2004 – Based on the 38th GE)*	**2nd Quarter (Apr.–June 2005) Payable July 2005** *(With inflation adjustment as of Apr. 1, 2005 – Based on the 38th GE)*	**3rd Quarter (July–Sept. 2005) Payable Oct. 2005** *(With inflation adjustment as of Apr. 1, 2005 – Based on the 38th GE)*	**4th Quarter (Oct.–Dec. 2005) Payable Jan. 2006** *(With inflation adjustment as of Apr. 1, 2005 – Based on the 38th GE)*
Bloc Québécois	$755,740	$769,708	$769,708	$769,708
New Democratic Party	$956,692	$974,375	$974,375	$974,375
Green Party of Canada	$261,847	$266,686	$266,686	$266,686
Liberal Party of Canada	$2,240,772	$2,282,187	$2,282,187	$2,282,187
Conservative Party of Canada	$1,807,734	$1,841,146	$1,841,146	$1,841,146

[42] As a transitional measure, the annual allowance for 2004 was paid out in full at the beginning of the year. That advance payment was taken into account at each subsequent quarterly payment date in the calculation of any additional allowance that was required to be paid at that time. In addition, in calculating the allowances payable for the third and fourth quarters the results of the general election on June 27, 2004, were also taken into account (S.C. 2003, c. 19, s. 71).

2006

Registered political party	**1st Quarter (January–March 2006) Payable April 2006** (With inflation adjustment as of April 1, 2005 – Based on the 38th GE)	**2nd Quarter (April–June 2006) Payable July 2006** (With inflation adjustment as of April 1, 2006 – Based on the 39th GE)	**3rd Quarter (July–September 2006) Payable October 2006** (With inflation adjustment as of April 1, 2006 – Based on the 39th GE)
Bloc Québécois	$769,708	$727,092	$727,092
Conservative Party of Canada	$1,841,146	$2,515,737	$2,515,737
Green Party of Canada	$266,686	$310,867	$310,867
Liberal Party of Canada	$2,282,187	$2,096,926	$2,096,926
New Democratic Party	$974,375	$1,212,255	$1,212,255

When Payments Are Made

Payments are made by the Receiver General of Canada following the end of each quarter (after each March 31, June 30, September 30 and December 31), on receipt of a certificate from the Chief Electoral Officer of Canada setting out the amount to be paid, and certifying that the party has complied with certain financial filing obligations (s. 435.02(1)).

The allowance, however, is withheld if one of the following financial statements that a registered party is required to file is overdue:

- an annual financial transactions return
- a quarterly return on contributions and transfers received by the party
- an election expenses return (s. 435.02(2))

A statement that is not *overdue* at the time of the payment of an allowance will not operate to postpone the giving of the certificate. And once an overdue return is filed, any past quarterly allowance that was withheld is paid (s. 435.02(2)).[43]

[43] More information respecting the payment of the quarterly allowance is set out in Elections Canada's Information Sheet 8, *Annual Allowances for Political Parties*, which is available on the Elections Canada Web site at www.elections.ca, under Electoral Law, Policy and Research.

In keeping with the general principle that, subject to the imposition of election expense limits, the *Canada Elections Act* does not direct the spending of registered parties governed by it and there are no restrictions imposed by the Act on the uses to which a registered party may pay the allowance that it receives. However, a registered party that is entitled to the quarterly allowance is also required to provide the Chief Electoral Officer with quarterly reports of the contributions, transfers and contributions returned by the party for each quarter (s. 424.1).

Provincial Comparisons

Currently, three provinces provide some form of allowance to parties – Prince Edward Island, New Brunswick and Quebec. Prince Edward Island's is a direct unfettered allowance. New Brunswick's is an allowance paid in advance, which can be used only for administration costs, to propagate a party's political programs and to coordinate the political activities of its members. Quebec's is a subsidy paid to reimburse a party for operating costs incurred. The calculation of the allowance in each case factors in the number of votes secured by the party's candidates. None has a minimum vote threshold, although the party must hold a seat in the provincial legislative assembly in Prince Edward Island. In New Brunswick, the party must either hold a seat in the assembly or have run at least 10 candidates in the last general election. In Quebec, the party does not have to have a seat in the assembly but needs only be registered (i.e. be "authorized") with the Chief Electoral Officer. Each provincial scheme is outlined broadly below.

Prince Edward Island (*Election Expenses Act,* section 23)

Prince Edward Island's allowance is paid to each registered party holding one or more seats in the Legislative Assembly. The amount payable is the amount obtained by multiplying the number of valid votes cast for official candidates of the party at the immediately preceding general election by a sum not exceeding $2 determined by the Lieutenant Governor in Council after consultation with the Leader of the Opposition.

> **23.**(1) An annual allowance in the prescribed amount shall be payable to each registered party holding one or more seats in the Legislative Assembly.
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> (2) In subsection (1) the "prescribed amount" means an amount obtained by multiplying the number of valid votes cast for official candidates of the party at the immediately preceding general election by a sum not exceeding $2.00 determined by the Lieutenant Governor in Council after consultation with the Leader of the Opposition.
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> (3) The sum determined by the Lieutenant Governor in Council under subsection (2) shall be increased or decreased in accordance with the Consumer Price Index (Charlottetown\Summerside) published by Statistics Canada using the annual 1995 as the base and the latest available index, as determined by the Chief Electoral Officer, as the current index.

New Brunswick (*Political Process Financing Act,* ss. 31–34)

New Brunswick's allowance is payable to every registered party represented in the Legislative Assembly on January 1 of each year, and to every registered party which, although not represented in the Assembly, had at least 10 official candidates in the immediately preceding general election.

The subsidy for each party equals $1.30 multiplied by the total number of valid votes cast for the official candidates of that party at the immediately preceding general election. It is adjusted for inflation.

Unlike Prince Edward Island and the federal statute, the New Brunswick law limits the purposes for which the allowance can be used. The statute directs that the party can only be used to pay the costs of its current administration, to propagate its political programs and to coordinate the political activities of its members, with any surplus remaining at the end of a year being required to be repaid into the Consolidated Revenue Fund (s. 34).

> **31** An annual allowance shall be payable for the year 1979 and each subsequent year
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> > *(a)* to every registered political party represented in the Legislative Assembly on the first day of January of each year, and
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> > *(b)* to every registered political party which, although not represented in the Legislative Assembly, had at least ten official candidates at the immediately preceding general election.
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> **32**(1) The annual allowance of each registered political party entitled thereto shall be an amount equal to the product obtained by multiplying the adjusted amount determined in accordance with section 32.1 by the total number of valid votes cast for the official candidates of that party at the immediately preceding general election.
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> **32**(2) The annual allowance payable to each registered political party in any year shall be published by the Supervisor in *The Royal Gazette* on or before the first day of March in that year or as soon thereafter as is practicable.

32.1(1) For the purposes of section 32, the adjusted amount shall be

(a) for the year 1981, one dollar and thirty cents, and

(b) for each year subsequent to 1981, the product of one dollar and thirty cents multiplied by the ratio that the Consumer Price Index for the twelve month period that ended on the thirtieth day of September next before that year bears to the Consumer Price Index for the twelve month period that ended on the 30th day of September, 1980.

32.1(2) When the adjusted amount as calculated under subsection (1) is not a multiple of one cent, it shall be rounded to the nearest multiple of one cent or, if it is equidistant from two such multiples, to the higher thereof.

32.1(3) For the purpose of this section, the Consumer Price Index for any twelve month period is the result arrived at by

(a) aggregating the Consumer Price Index for Canada, as published by Statistics Canada under the authority of the *Statistics Act*, chapter S-16 of the Revised Statutes of Canada, 1970, for each month of that period;

(b) dividing the aggregate obtained under paragraph (a) by twelve; and

(c) rounding the result obtained under paragraph (b) to the nearest one-thousandth or, if the result is equidistant from two one-thousandths, to the higher thereof.

33 The annual allowance computed in subsection 32(1) shall be payable in equal quarterly instalments on the last day of March, June, September and December of each year.

33.1(1) Notwithstanding sections 32, 32.1 and 33, the annual allowance of each registered political party for the year 1991 shall be the same as its annual allowance for the year 1990, as published that year under subsection 32(2).

33.1(2) The quarterly instalments payable under section 33 in June, September and December 1991 shall each be equal instalments of the amount which, taking into account the instalment paid in March 1991, remains to be paid for the year 1991.

33.2 Notwithstanding sections 32 and 32.1, the annual allowance of each registered political party

(a) for the year 1994, shall be an amount that equals 11.6 per cent less than its annual allowance for the year 1993 as published that year under subsection 32(2),

(b) for the year 1995, shall be an amount that equals 10 per cent less than its annual allowance for the year 1994 as published that year under subsection 32(2),

(c) for the year 1996, shall be an amount that equals 4.65 per cent less than its annual allowance for the year 1995 as published that year under subsection 32(2), and

(d) for the year 1997, shall be an amount that equals 1.57 per cent less than its annual allowance for the year 1996 as published that year under subsection 32(2).

34(1) The annual allowance shall be used by the registered political party to pay the costs of their current administration, to propagate their political programmes and to coordinate the political activities of their members.

34(2) If, in any year, a registered political party entitled to an annual allowance, fails to incur, for the uses set out in subsection (1), costs equal to or greater than the amount of the annual allowance paid to it for that year, the difference between such amount and the costs actually incurred by it for those uses during that year shall be remitted to the Minister of Finance to be paid into the Consolidated Fund.

Quebec (*Elections Act*, sections 81–83)

Quebec's allowance is payable to "authorized" parties – which are parties that have applied to the Chief Electoral Officer for "authorized" status, similar to the concept of "registered party" under the federal statute (see sections 47 and following of the *Quebec Act*). Unlike the federal statute, a party does not have to run a candidate in an election to be "authorized." Its application for status, however, must be supported by at least 100 members and it must otherwise comply with the administrative requirements of the Act. The allowance is tied both to a formula and specific expenses incurred by the party. It is computed by dividing between the authorized parties, proportionately to the percentage of valid votes obtained by them in the last general election, a sum equal to the product obtained by multiplying 50 cents by the number of electors entered on the lists of electors used at that election. The subsidy cannot exceed the expenses incurred by the party for its general administration, propagation of political programs and coordination of political activities of members. The expenses must have been actually incurred and paid.

81. The chief electoral officer shall, every year, determine an allowance for each authorized party.

82. The allowance shall be computed by dividing between the authorized parties, proportionately to the percentage of the valid votes obtained by them at the last general election, a sum equal to the product obtained by multiplying the amount of $0.50 by the number of electors entered on the list of electors used at that election.

83. The allowance shall be used to reimburse the expenses incurred by the parties for their current administration, the propagation of their political programs and the coordination of the political activities of their members; it shall be paid only if the expenses are actually incurred and paid.

Constitutional Rulings Affecting Payment of Quarterly Allowance

a. Securing Registered Party Status

As noted earlier, under the Act the quarterly allowance is payable only to registered parties, and even then only to registered parties whose candidates secured the minimum vote threshold in the last general election.

As a result of the earlier decision of the Supreme Court of Canada in *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, the ability of a party to secure registered party status was significantly eased by reforms to the *Canada Elections Act* made by S.C. 2004, c. 24.[44] Under those reforms a party, which otherwise has registered with the Chief Electoral Officer as an eligible party, can secure registered party status by running at least one candidate in a general election or a by-election. Provided that that party continues to be a political party and complies with its administrative obligations under the Act, it will retain that registered party status as long as it continues to run at least one candidate in each subsequent general election. (The party can resign its registered status.) As part of those reforms, and in order to avoid potential abuses of the income tax system by entities hoping to secure registered party status primarily to take advantage of the income tax credit available respecting contributions to registered parties, a definition of "political party" was added to the Act and the administrative requirements that had to be met to secure eligible party status (and to maintain registered party status) were bolstered.

[44] The reforms of the 2004 statute, which came into effect on May 15, 2005, were originally intended to operate only for two years, at which time their operation was to be reviewed by Parliament. However, those reforms were extended indefinitely by S.C. 2006, c.1 which, in substitution for the original sunset clause of the 2004 statute, added a provision calling for the review of those reforms in another two years.

Under the new requirements, a party seeking to be registered must first satisfy the Chief Electoral Officer that it is a political party. It does this by satisfying the Chief Electoral Officer that it meets the statutory definition of a "political party":

> "an organization one of whose fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election."

In determining whether a group meets this definition, the Chief Electoral Officer must be satisfied that the group intends to run candidates in an election. If, however, the Chief Electoral Officer determines that the group will be running candidates primarily for some purpose other than political – such as securing public funding or income tax benefits – he can refuse to register the party. Thus, the Chief Electoral Officer is entitled to assess and approve the reasons *why* one wants to participate in public affairs by candidates as a party. To this end, the party leader is required to file a declaration stating that one of the party's fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election. To supplement that declaration, the Chief Electoral Officer is given the discretionary power, to be used if and when he feels it is necessary, to ask the party's leader for any relevant information to enable him to determine that one of the party's fundamental purposes is to participate in public affairs by endorsing and supporting candidates. This authority will include asking for, among other things:

- the party's constitution, articles of incorporation, or other information indicating its purpose
- the party's political program, annual reports to members, fundraising plans, advertising material and policy statements
- information respecting the nature and extent of the party's activities
- information respecting the funds received by the party, its sources and the uses to which it is put
- information respecting the interactions of the party with other entities

Aside from having to satisfy the Chief Electoral Officer, the applicant party must now, in addition to the administrative information required in the past, also provide the Chief Electoral Officer with the names, addresses and consents of all of its officers (of which it must have a minimum of three in addition to the leader); the names and addresses of 250 members along with their declarations that they are members of the party and support their party's application. (Starting in 2007, the party will have to submit these lists and declarations again every 3 years.) The leader of the party must also provide the Chief Electoral Officer with a fresh declaration as to the party's purposes every year. Once registered, a registered party can be deregistered by the Chief Electoral Officer for failure to comply with one of the administrative requirements of the Act (such as failure to file a required return, to update its administrative information, or to file a required leader or membership declaration).

The 2004 reforms also provided that a registered party can be deregistered by a court on application by the Commissioner of Canada Elections in the event that the Commissioner believes that the party has ceased to be a "political party" as defined under the Act.

As noted, these administrative requirements operate to ensure that only those entities that are true political parties secure registered party status under the Act.

b. Meeting the Minimum Vote Threshold

The 2 and 5 percent eligibility criteria in section 435.01 for the payment of the quarterly allowance was recently challenged on constitutional bases in the Ontario Superior Court of Justice case of *Longley v. Canada (Attorney General).*[45]

In its October 12, 2006, decision, the Court held that the above minimum vote threshold was unconstitutional. Citing the earlier decision of the Supreme Court of Canada in *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, the Court, among other things, declared paragraphs 435.01(1)(*a*) and (*b*) of the *Canada Elections Act* to be null and void because these provisions contravened sections 3 (right to vote) and 15 (equality rights) and were not saved by section 1 of Charter (reasonable limits demonstrably justified). The Court made its declaration "effective retroactively to December 31, 2003."

In the *Longley* decision, the Court basically held that the principles and conclusions of the Supreme Court of Canada in *Figueroa* respecting limiting the income tax credit, the right to have one's party's name on the ballot, and the ability of a party to receive a candidate's election surplus to parties that ran at least 50 candidates in a general election applied equally to the threshold requirements of the quarterly allowance. The Court noted that the democratic rights guaranteed by section 3 of the Charter includes the right of every citizen to play a meaningful role in the electoral process, and that political parties act as a vehicle for the participation of individual citizens in the electoral process. The Court quoted from the earlier Supreme Court of Canada decision:

> "[L]egislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3."

After noting that "it is both self-evident and supported by the evidence that political parties and candidates require substantial sums of money in order to participate in any meaningful way in the electoral process," the Court stated that elimination of the thresholds would "substantially increase the possibilities that [small] parties could make voters aware of their platform and candidates." The Court also noted that the quarterly allowance payable to political parties that meets the threshold is of greater importance now than before because of the statutory elimination of donations from corporations and trade unions and the statutory restrictions placed on the maximum size of donations that can be given to individuals. The threshold set out in paragraphs 435.01(*a*) and (*b*) of the *Canada Elections Act* was accordingly found to infringe section 3 of the Charter by

[45] [2006] O.J. no. 4316, Docket: 05-CV-291729PD.

discouraging individuals who do not support one of the larger parties from participating in the electoral process.

The Court found that under section 15 of the Charter (equality rights), the political party applicants suffer discrimination by being deprived of the right to receive the quarterly allowance because they had failed to meet the threshold.

> "The impugned provisions place smaller and weaker parties at a disadvantage in comparison with the major parties and I can find no rationale that would justify this approach. Small and weaker political parties play a very important role in the Canadian electoral process whether or not they receive large numbers of votes and they should be entitled to receive the quarterly allowance on exactly the same basis as the larger political parties."

The Court also cited the conclusions in *Figueroa* to hold that these breaches of the Charter could not be justified under section 1 of the Charter both because there was no rational connection between the imposition of the threshold and the cited purpose of maintaining the cost-efficiency of the tax credit scheme, and because the threshold requirement failed the minimal impairment test. In addition, the Court also rejected the argument that the threshold was justified "to maintain public confidence in the integrity of the electoral process as fair, accessible and transparent," and that the threshold maintained "Canadians' faith in the integrity of the electoral process' financing regime by endeavouring to ensure that public funds are not used for other than intended public policy purposes." In rejecting this view, the Court stated that:

> "the existence of the threshold diminishes public confidence in the electoral process and encourages a public perception that the threshold exists only to benefit the major political parties who alternate, from time to time, in forming the government and are in a position to maintain it. As well, it is impossible to see any reasonable mechanism by which its existence can help ensure that public funds are not improperly used. At most, one can say, tautologically, that if no public funds are given to smaller and weaker political parties, then they certainly cannot spend any of them on either proper or improper purposes. In any event, there are more effective and less damaging means of achieving this purpose such as required reporting and audits were it genuinely sought."

The Court in *Longley* ordered the payment of specific amounts to the small registered parties that were participants in that action calculated by reference to the payable allowance retroactive to January 1, 2004. With respect to future payments of the quarterly allowance, the Ontario Superior Court of Justice's decision in *Longley* legally applies only in Ontario. However, at the time of the payment of the next quarterly allowance the Chief Electoral Officer will have to determine whether that decision should be applied across the board.

Based on the results of the 2006 general election, the quarterly allowance payable to those small registered parties that did not meet the 2 and 5 percent threshold would be $140,338.

The Crown has appealed the *Longley* decision to the Ontario Court of Appeal.

Recommendation

As the issue of the eligibility threshold for the quarterly allowance is still before the courts, no recommendation is made respecting it.