Chronology of the Federal Campaign Finance System of Third Parties in Canada

Chronology of the US Campaign Finance System

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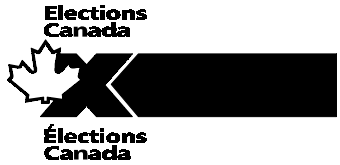

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1966

- The Barbeau Committee on Election Expenses, established by the federal government on October 27, 1964, recommends that "no group or bodies other than registered parties and nominated candidates be permitted to purchase radio and television time, or to use paid advertising in newspapers, periodicals, or direct mailing, posters or billboards in support of, or opposition to, any party or candidate, from the date of the issuance of the election writ until the day after polling day" (Canada, Committee on Election Expenses [Barbeau Committee], 1966, page 50). The Committee does not advocate the prohibition of indirect expenditures (issue advocacy), mostly because of the belief that this prohibition would "stifle the actions of such groups in their day-to-day activities" (page 50). With respect to direct opposition or endorsement of parties or candidates, the Committee "recognizes that restrictions on all such organizations during election periods may encroach to some extent on their freedom of action, but without such restrictions any efforts to limit and control election expenditure would come to nothing" (page 50).

1971

- A Special House of Commons Committee on Election Expenses (the Chappell Committee) recommends, like the Barbeau Committee of 1966, that third parties be prohibited from electoral participation to ensure the effectiveness of limits on candidates and parties. However, the Chappell Committee advocates a prohibition on both direct and indirect expenditures, contrary to the Barbeau Committee recommendations which only called for a prohibition against direct expenditures (Canada, House of Commons, 1971, 13:19).

1974

- The Canadian Parliament adopts legislation which includes provisions to prohibit third parties from spending money to promote or oppose candidates or parties (*Canada Elections Act*, subsection 70.1(3)). The legislation provides for a "good faith" defence to prosecution, to limit negative impacts on freedom of expression, as follows:

  > "Notwithstanding anything in this section, it is a defence to any prosecution of a person for an offence against this Act… if that person establishes that he incurred election expenses…

(a) for the purpose of gaining support for views held by him on an issue of public policy, or for the purpose of advancing the aims of any organization or association, other than a political party or an organization or association of a partisan political character, of which he was a member and on whose behalf the expenses were incurred; and,
(b) in good faith and not for the purpose related to the provisions of this Act limiting the amount of election expenses that may be incurred by any other person on account of or in respect of the conduct or management of an election" (*Canada Elections Act*, subsection 70.1(4)).

1976 - 1978

- During a by-election in Ottawa-Carleton, Donald Roach, the president of the Ontario Housing Corporation Employee's Union, hires an airplane to tow a banner stating: *"OHC Employees 767 CUPE vote but not Liberal"*. The banner makes no reference to any policy issue and Roach is charged with violating the third-party spending restrictions. On appeal in 1978, the judge acquits Roach, stating that the airplane banner "was a legitimate attempt to oppose the government's anti-inflation program" (*R. v. Roach* (1978), 101 D.L.R. (3rd) 736 (Ont. Co. Ct.)). The Court further states that, if Parliament wants to prevent this type of expression, it must use more express language.

1979, 1980, 1983

- In his 1979 Report to Parliament, the Chief Electoral Officer of Canada reports on several occasions where individuals claimed the good faith defence. The Chief Electoral Officer argues that the good faith defence undermines the regime of restrictions of expenditures for candidates and parties (Canada, Elections Canada, 1979, page 26).

- The Chief Electoral Officer reiterates his concerns with respect to the good faith defence in his 1980 Report to Parliament. He states that it is "practically impossible to prove lack of good faith or collusion on the part of individuals or groups who have incurred such expenses" (Canada, Elections Canada, 1980, page 22).

- In 1983, the Chief Electoral Officer again notes the impossibility of enforcing the prohibition against direct expenditures where this prohibition is accompanied by a good faith defence (Canada, Elections Canada, 1983, page 74).

1983

- All parties in the House of Commons unanimously approve Bill C-169 (S.C., 1983, c. 164), which removes the good faith defence from the *Canada Elections Act*. The amendment prohibits third parties from spending money to directly endorse or oppose

a candidate or party. However, the provision does not prohibit expenditures on issue advocacy.

1983-1984

- In *National Citizens' Coalition Inc. (Somerville) v. Canada (A.G.)* (1984), 11 D.L.R. (4th) 481, the National Citizens' Coalition challenges the third-party spending restrictions in Alberta Court of Queen's Bench, on the basis that the legislation violates the freedom of expression guaranteed by the new *Canadian Charter of Rights and Freedoms*. The Court strikes down the provision of the *Canada Elections Act*, concluding that the government has failed to demonstrate any harm or likelihood of harm, caused by third-party election spending. Further, the Court holds that the prohibition cannot be saved under section 1 of the *Charter*.

- The decision is not appealed by the government. Although only binding in the province of Alberta, the prohibition on third-party spending is not enforced anywhere in Canada during the 1984 and 1988 federal elections.

1988

- The 34th general election is fought mainly on the issue of free trade with the United States. The event is characterized by unprecedented spending by third parties on both sides of the issue. Total pro-free trade expenditures on advertising by third parties is $3.6 million, including $2.3 million by Canadian Alliance for Trade and Job Opportunities and $150,000 by National Citizens' Coalition. Anti-free trade expenditure on advertising by third parties totals $878,000, of which $752,000 is spent by the Pro-Canada Network.

1992

- The Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) recommends

  "that:

  (a) election expenses incurred by any group or individual independently from registered parties and candidates not exceed $1,000;
  (b) the sponsor be identified on all advertising or distributed promotional material; and,
  (c) there be no pooling of funds" (rec. 1.6.6).

- According to the Lortie Commission (Report, Volume 1, p. 353), "A spending limit of $1,000 for independent expenditures would also permit individuals and groups to engage in meaningful freedom of expression, denied by the 1983 legislation, by allowing them to promote or oppose candidates and parties either directly or indirectly when advocating election positions, as long as their election expenses did not exceed $1,000."

1993

- On April 2, 1993, Bill C-114 is adopted by Parliament (the Bill receives Royal Assent in May). The Act contains a new attempt to regulate third-party spending, pursuant to the Lortie Commission Report. Bill C-114's $1,000 limit on third-party spending applies to direct (or partisan) spending only. Interest groups are free to spend as much as they like to promote their positions on public policy issues. As recommended by the Lortie Commission, Bill C-114 prohibits the pooling of resources by multiple third parties.

- On May 4, 1993, building on the framework found in Bill C-114 for the regulation of third-party spending, a Special Committee of the House of Commons (the Hawkes Committee) recommends that the Act be amended to require third parties to register if they incur or intend to incur expenses in excess of $1,000 in advertising on public policy issues during a federal election. This recommendation is found in the fifth report of the Committee, but is not acted upon as Parliament is prorogued on September 8, 1993.

1993 - 1996

- The National Citizens' Coalition challenges the new provisions imposing spending limits on third parties. In 1996, the Alberta Court of Appeal upholds the decision of the Alberta Court of Queen's Bench striking down the restrictions on third-party spending (*Somerville v. Canada (A.G.)* (1996), 136 D.L.R. (4th) 205 (Alta C.A.)). The government does not appeal the decision of the Alberta Court of Appeal.

1997

- In his Report to Parliament on the 36th general election, the Chief Electoral Officer recommends the establishment of a level playing field regarding third party participation. He recommends a requirement for registration of third parties, and requirements for disclosure to increase accountability. He further recommends that the federal *Referendum Act*, with its registration requirements and spending limits for 'third parties', be used as a template.

- The Supreme Court of Canada states, while striking down the restrictions on third-party spending in Quebec's *Referendum Act* (*Libman* v. *Quebec (A.G.)*, [1997] 3 S.C.R. 569), that it cannot accept the point of view of the Alberta Court of Appeal in the 1996 *Somerville* decision. The Supreme Court states that it disagrees with the Alberta Court of Appeal's conclusion on the legitimacy of the objective of the restrictions, and recognizes that the regulation of third-party spending is a valid objective.

1999

- In June, the government introduces Bill C-83, which proposes, *inter alia*, to introduce a requirement for the registration of third parties during electoral events. The Bill further proposes to impose limits on the ability of third parties to spend money to oppose or endorse a candidate or party. Pursuant to the Bill, third parties would have a spending limit of $3,000 per electoral district, with a $150,000 limit for national campaigns. Bill C-83 dies on the Order Paper when the first session of the 36th Parliament is prorogued in October.

- At the beginning of the second session of the 36th Parliament, in October, 1999, the government reintroduces an electoral reform bill, Bill C-2. Bill C-2 contains the same provisions relating to third parties as those previously found in Bill C-83.

2000

- On February 28, 2000, the House of Commons votes to adopt Bill C-2, including the provisions concerning the regulation of third parties during electoral events.

Sources: *Third-Party Advertising and the Threat to Electoral Democracy in Canada: The Mouse that Roared*, Tanguay and Kay

Interest Groups and Elections in Canada (Seidle), Royal Commission on Electoral Reform and Party Financing, 1991.

Chronology of the US Campaign Finance System (Recent)

1971

- Concerns about rising campaign costs and wealthy challenges in the late 1950's and early 1960's led the US Congress to enact the *Federal Election Campaign Act* (FECA) in 1971 [Public Law 92-225 (S. 382, 92nd Congress)]. It retained many of the elements from past attempts to regulate election financing, including sections of the Tillman Act of 1907 [34 Stat. 864 (1907), now a part of 18 U.S.C. Sec. 610] which prohibited corporations, including banks, and unions from contributing to candidates for federal office.

- The first part of the law established contribution limits on the amount a candidate could give to his or her own campaign and set ceilings on the amount a campaign could spend on media in both primaries and general elections. The second part imposed public disclosure procedures on federal candidates and political committees.

1974

- In 1974, Congress thoroughly revised the federal campaign finance system [Public Law 93-443 (S. 3044, 93rd Congress)] in response to the pressure for comprehensive reform in the wake of the Watergate scandal. The *Federal Election Campaign Act* was amended and consolidated. The amended legislation also established the Federal Election Commission (FEC) as the independent agency to regulate election financing.

- This legislation significantly strengthened the disclosure provisions of the 1971 law and enacted strict contribution limits (not indexed to inflation) to federal campaigns and party organizations by individuals and political action committees (PACs), along with new campaign financing rules applying to national party organizations. The media expenditure ceilings of 1971 were replaced with aggregate spending ceilings for presidential, senatorial, and congressional candidates (indexed to inflation). Additionally, spending limits were placed on independent expenditures made on behalf of or in opposition to a federal candidate (by definition, political parties were prohibited from engaging in independent expenditures).

- The 1971 limits on expenditures made by candidates from their personal or family funds was retained, as well as the long-standing prohibition on contributions from corporations (including banks) or labour union treasury funds, in connection with federal elections. The only exception to this latter prohibition applied to contributions received by national party organizations for a special exempt category of funding known as a "building fund", which was an account established to receive contributions to pay for the construction of a party headquarters or office building. Outside of this fund, the law required party organizations to pay for all federal election-related activities with monies raised from limited contributions from individuals and political action committees.

- The 1974 amendments are notable for imposing new rules respecting party organizations. In addition to restricting contributions to party organizations, the statute also provided limits on direct contributions and another direct form of assistance known as coordinated expenditures from party organizations to federal candidates. With respect to direct contributions to candidates, each national, congressional, and state party campaign committee could give $5,000 to a House candidate at each stage of the election process, including a primary, runoff and general election. The parties' national and senatorial campaign committees could give slightly more, with a combined total of $17,500 in an election cycle to a Senate candidate. State party committees could contribute an additional $5,000 to a Senate candidate.

- Coordinated expenditures differ from direct contributions since these funds are controlled by both the party and the candidate. Also, they usually taking the form of campaign services such as polls, television commercials, direct mailings or issue research. The average limit for coordinated expenditures is $31,000 per candidate in a House general election; for the Senate, the limits range from $61,820 in the smallest states to $1.4 million in large states such as California.

- State party committees are allowed to spend the same coordinated amounts as the national party organizations in House and Senate races. Additionally, a state party's spending quota can be transferred to a national party committee via an "agency agreement" if, for example, the state party committee could not earn sufficient funds to meet its limit. These provisions greatly strengthened the role of national party committees.

- Another notable feature of the 1974 reform pertains to the creation of an optional program of full public financing for presidential general election campaigns and a voluntary system of public matching subsidies for presidential primary campaigns. In general election campaigns, the presidential nominees for the major parties could receive an amount equal to the aggregate spending limit if they agreed to refrain from raising any additional private monies. In prenomination campaigns, the candidates could qualify for matching subsidies on small contributions. The scheme was funded by a voluntary checkoff on federal income tax forms.

1976

- Before the new rules could take effect for the federal elections in 1976, the US Supreme Court rendered its decision in *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (USSC). Most notably, the Court ruled against the spending limits established for House and Senate candidates. The only spending ceilings allowed to stand were those for publicly funded presidential campaigns (voluntary).

- The Court found unconstitutional the rationale provided by Congress to limit spending, namely to equalize the relative ability of individuals and groups to affect

the outcome of elections. In its view, the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the *First Amendment*. However, *Buckley* gave Congress a broad scope to limit contributions as long as those limitations were needed to prevent corruption or the appearance of corruption. But, it held that this was not required in the case of independent spending and the use of personal funds by candidates (the limits of which were struck down). All that remained were the contribution ceilings with respect to individuals, party organizations and PACs.

- The Court also narrowed the statute's coverage by ruling that it only applied to independent expenditures that made mention of explicit words of advocacy of election or defeat. Thus, the FEC's control was restricted to express advocacy financed by "hard" expenditures, the latter referring to monies under the control of the FEC.

1978

- The FEC opened the door to soft money in 1978 in an advisory opinion that permitted large contributions for party-building activities, so long as the funds were not spent directly to aid particular candidates.

1979

- Following *Buckley*, political parties, particularly state and local parties, criticized the financial regime as discouraging grass-roots volunteer efforts. They alleged that parties were forced to concentrate their legally limited resources (hard monies) on media advertising in support of their candidates, leaving little left to dedicate to grass-roots political activities such as voter registration, certain types of campaign activities, material, and voter turnout programs. The 1979 amendments [Public Law 95-187 (H.R. 5010, 96th Congress)] addressed this issue by changing the legal definition of contribution and expenditure applied to political parties to exclude the amounts spent on such activities, and providing that the funds for those activities were raised in compliance with the FECA limits. This meant that in addition to direct contributions and coordinated expenditures, party organizations could spend unlimited amounts on such grass-root programs.

- This change paved the way for the phenomenon known as soft money—that is, the common name given to party funds that are not regulated by federal law (with the exception of the 1991 amendments as noted below) but for which the FEC allows party committees to accept and spend on administrative expenses associated with party building and for certain grass root expenditures. Soft monies held by national party committees could even include funds donated by unions and corporations since such funds could be contributed for party building purposes and national organizations could accept funds through agency agreements with state and local affiliates for grass root purposes, so long as state and local laws permitted such contributions.

- The rise of soft money, which could be dedicated to ongoing party building and voter drives meant that hard monies could be freed-up for massive political campaign advertisements. Moreover, the expenditures supported by soft monies did not fall under the disclosure rules of the FEC.

- By the end of the 1980's soft money funding had become a major component of national election financing. The best estimates suggest that the two major parties spent $19.1 million in soft money during the 1980 election cycle, rising to $21.6 million in 1984, to $83 million in 1992 and $262 million in 1996.

- An explosion in funding occured in the 1990's as parties found a new way to spend soft money, specifically, financing issue advocacy ads. Such ads do not expressly advocate the election or defeat of a federal candidate, although they are clearly designed to influence how electors vote. Issue ads are not subject to federal regulation. As a result, sponsors became free to run an unlimited number of issue advocacy ads paid for in any way they liked, including from sources and in amounts not regulated by federal election law.

1991

- The expansion of soft money did not go unnoticed or unchallenged. In 1991 the FEC, in an effort to allay the criticisms, issued new soft money regulations. The regulations changed the disclosure requirements for soft money and the methods by which party organizations could allocate their expenditures.

- Under these rules, all national party committees raising and spending soft money in conjunction with federal elections must file regular disclosure reports of their contributions and disbursements with the FEC. These reports must identify any contributors who give more than $200 to soft money accounts held by these organizations. Monies raised and spent by state and local committees that are unrelated to federal election activity, however, do not have to be reported to the FEC. These funds remain subject to the reporting requirements, if any, of applicable state disclosure.

- Additionally, the rules state that during a presidential election year, national party committees must charge at least 65 percent of the costs of grass-root activities to their federal or hard money accounts. (This would be reduced to 60 percent in non-presidential election years.) For state and local party organizations, these costs must be allocated on the basis of the composition of the particular state's general election ballot—the percentages reflecting the proportion of federal offices to total office on the general election ballot.

- Thus, the new rules placed some restraints on soft money through the allocation rates. However, they placed no restrictions on soft money fundraising or on the amounts

that could be spent. Moreover, there are incomplete rules governing the disclosure of expenditures financed by soft money (ie. issue advertising).

1996

- In 1996, the case of *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (95-489), 518 U.S. 604 (1996) (USSC), successfully challenged the long standing rule against party organizations engaging in independent expenditures. In response to this ruling the Republican Party established a political operation separate from the National Republican Senatorial Committee to make independent expenditures on behalf of Republican senate committees. The Democrats later followed this lead. This means that there is now yet another avenue for parties to spend even more sums on federal campaigns.

The Continuing Debate

- Critics of the current system argue that:

    - The system (non-regulation of issue ads, the increase in and expanded uses for soft money, the use of independent expenditures by parties and the absence of expenditure limits) has lead to vast sums spent in election campaigns, with the corresponding need to raise ever increasing sums through contributions;

    - The money chase discourages potential candidates with limited means and structures how elected officials spend their time, where they travel and with whom they speak;

    - The system therefore favours incumbents over challengers;

    - The unbalanced law leads to weak enforcement which undermines credibility.