

Constitutional Questions about Canada's New Political Finance Regime

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Constitutional Questions about Canada's New Political Finance Regime

Abstract

The Supreme Court of Canada has considered the constitutionality of some aspects of the political finance regime that has been in place since 1974. Recent political finance reforms raise new and challenging constitutional questions. This article examines whether the political finance reforms introduced in the 2003 Elections Act and 2006 Accountability Act—limits on political contributions by individuals and an outright prohibition on union and corporate political contributions—are contrary to Charter guarantees of freedom of expression and freedom of association. Parliament's conflict of interest in regulating the democratic process and the implications that this conflict has for Charter analysis of the recent political finance reforms is highlighted.

Keywords

Campaign funds; campaign funds—law and legislation; Canada

CONSTITUTIONAL QUESTIONS ABOUT CANADA'S NEW POLITICAL FINANCE REGIME[©]

COLIN FEASBY*

The Supreme Court of Canada has considered the constitutionality of some aspects of the political finance regime that has been in place since 1974. Recent political finance reforms raise new and challenging constitutional questions. This article examines whether the political finance reforms introduced in the 2003 *Elections Act* and 2006 *Accountability Act*—limits on political contributions by individuals and an outright prohibition on union and corporate political contributions—are contrary to *Charter* guarantees of freedom of expression and freedom of association. Parliament's conflict of interest in regulating the democratic process and the implications that this conflict has for *Charter* analysis of the recent political finance reforms is highlighted.

La Cour suprême du Canada a pris en considération la constitutionnalité de certains aspects du régime de financement politique qui est en place depuis 1974. Les récentes réformes du financement politique ont soulevé de nouvelles questions et enjeux constitutionnels. Le présent article examine si les réformes du financement politique, introduites par la *Loi électorale* de 2003 et la *Loi fédérale sur la responsabilité* de 2006 restreignent les contributions politiques des particuliers, et si ces réformes constituent une interdiction pure et simple à l'égard des contributions politiques des syndicats et des entreprises, et sont contraires à la *Charte* qui garantit la liberté d'expression et d'association. L'article met en lumière le conflit d'intérêts du Parlement quant à la réglementation du processus démocratique et, au moyen de la *Charte*, des répercussions de ce conflit sur les récentes réformes du financement politique.

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I. INTRODUCTION

Political finance regulation came of age in Canada in 1974 with the adoption of the *Election Expenses Act*.¹ The defining features of the political finance regime were public funding of electoral participants and spending limits imposed upon them. A fundamental change to the 1974 political finance regime occurred in 2003. Amendments to the *Canada Elections Act*² in 2003 drastically reduced the ability of corporations and unions to make political contributions and also introduced limits to the size of contributions by individuals to electoral participants. To mitigate the impact on electoral participants' ability to raise private funds, the 2003 *Elections Act* also provided for enhancements to the public funding of

¹S.C. 1974, c. 51.

²S.C. 2000, c. 9, as am. by *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, S.C. 2003, c. 19 [*Elections Act*].

political parties.³ The contribution limits introduced in the *Elections Act* were superseded by even stricter individual contribution limits and a complete ban on corporate and union contributions in the 2006 *Accountability Act*.⁴ The transformative effect of the 2003 and 2006 reforms on electoral participants and tactics cannot be overstated.

The merits of these significant amendments have been debated in public and academic contexts, but scant consideration has been given to the question of the constitutionality of the changed political finance regime. Indeed, given the Supreme Court's recent endorsement of spending limits in *Harper v. Canada (Attorney General)*,⁵ one may wonder why the changes to the political finance regime introduced in the *Elections Act* and the *Accountability Act* raise constitutional concerns at all. The object of this article is to dispel this superficial view and show that the *Elections Act* and the *Accountability Act* do, in fact, raise serious constitutional questions, and to offer some tentative thoughts on how such questions might be resolved.

The new contribution limits infringe the *Canadian Charter of Rights and Freedoms*,⁶ specifically the section 2(b) guarantee of freedom of expression and the section 2(d) guarantee of freedom of association, and are not easily justified under section 1. Contribution limits directly inhibit the ability of individuals to express the intensity of their political sentiment and may indirectly hamper the ability of the recipients of contributions—electoral participants—to disseminate their political views. The prohibition on corporate and union contributions not only constrains expression, but targets expression by certain groups and, as such, contravenes freedom of association. That freedom of expression and freedom of association are infringed is not surprising. The Supreme Court in *Libman v. Quebec (Attorney General)*⁷ ruled that spending limits in the context of a provincial referendum infringed both freedom of expression and freedom of association, and that

³ This article principally focuses on the impact of recent changes to the political finance regime on political parties and the resulting constitutional issues. There is much to be said about the impact of these same changes on candidates and constituency associations. Indeed, readers should be cognizant of the fact that a significant portion of the total political funds (private and public) are controlled by candidates and constituency associations, not national political parties.

⁴ *Federal Accountability Act*, S.C. 2006, c. 9 [*Accountability Act*].

⁵ [2004] 1 S.C.R. 827 [*Harper*].

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11., s. 7 [*Charter*].

⁷ [1997] 3 S.C.R. 569 [*Libman*].

spending limits in *Harper* violated freedom of expression. The real question is whether the new contribution limits can be justified under section 1 of the *Charter*, as spending limits on individuals and interest groups were in *Harper*.

Section 1 analysis in political finance cases has largely focussed on the balance between egalitarian or fairness objectives and the importance of unfettered political expression. The new political finance regime, though born out of an impulse to stem corruption, addresses the same egalitarian and fairness objectives as the spending limit system previously upheld by the Supreme Court in *Harper*. If the constitutional analysis of contribution limits were this simple, there would be no reason to expect a different result. The profound changes to the political finance system, however, require consideration of the constitutionality of the new political finance regime to go several steps farther than the Court went in *Harper*.

There are three section 1 issues raised by the new political finance regime. First, the new political finance regime, particularly the elements introduced in the *Accountability Act*, has a distinct partisan bias that tilts the electoral playing field in favour of the governing political party. I have previously argued that partisan bias in legislation governing the electoral domain is constitutionally objectionable.⁸ Simply put, the problem with rules governing elections is that members of Parliament are in a fundamental conflict of interest: they are both the rule-makers and the subjects of the rules. If, as the data presented in this article suggests, the strict contribution limits in the *Accountability Act* have a partisan bias, that may be a sound reason to find that certain parts of the legislation are not justifiable under section 1. Second, the new political finance regime targets expression by certain groups—corporations and unions—that have played an important and largely uncontrolled role in political financing since at least as early as the beginning of the twentieth century. The strong link between Canada's large trade unions and the New Democratic Party (NDP) is well known and was favourably commented upon by the Supreme Court in dismissing a challenge to a law permitting the conscription of union dues for political use against the wishes of a union member.⁹ Third, the main instrument of the new political finance regime—contribution limits—is a

⁸ Colin Feasby, "Freedom of Expression and the Law of the Democratic Process" (2005) Sup. Ct. L. Rev. (2d) 237 [Feasby, "Freedom of Expression"].

⁹ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 [*Lavigne*].

more direct and effective tool for achieving the egalitarian objectives that justify the existence of spending limits. It is not a normative or ideological argument against spending limits; it is merely functional. If equality of political influence between citizens is the main objective of political finance legislation, direct limits on political contributions are more effective than spending limits on electoral participants that are, at best, indirect constraints on the political influence and expressive capacity of individuals. This article also considers whether there are alternative justifications for spending limits that may override the functional advantages of contribution limits.

Part II of this article is divided into two sections. The first section briefly traces the origins of Canada's political finance regime from 1874 through to the adoption of the modern political finance regime featuring expenditure limits a century later in 1974. It also discusses Canada's abortive experience with a corporate and union contribution prohibition in the progressive era. The second section discusses pre-2004 patterns of political contributions for the major political parties. Generally, the Liberal Party was disproportionately dependent on corporate and large individual contributions, the NDP was dependent on large union contributions, and, in relative terms, the Bloc Québécois (Bloc) and the Conservative Party (including its most significant progenitors) enjoyed more populist fundraising bases. This background is necessary to understand the impact of the 2003 *Elections Act* and 2006 *Accountability Act* changes, to assess the question of partisan bias, and to understand the union-NDP and corporate-Liberal linkages.

Part III reviews the political context that provided the impetus for reform (specifically the Sponsorship Scandal and the Gomery Commission), and the Liberal government's pre-emptive attempt to diffuse the public desire for reform, the *Elections Act*. It analyzes pre-2003 political contribution data and post-2003 political funding data and suggests that the *Elections Act* reforms have partisan impacts. It discusses the context for further reform, including anecdotal accounts of legal avoidance behaviours, and outlines the relevant provisions of the 2006 *Accountability Act*. It concludes with an analysis of contribution data from 2004-2006 which show that the *Accountability Act* reforms can be expected to only have a significant negative impact on the Liberal Party. In other words, the *Accountability Act* tilts the electoral playing field against the government's main rival for power.

Part IV outlines my suggested approach to constitutional analysis of democratic process problems. It identifies and briefly

discusses democratic norms evident from prior cases and suggests that the interaction between these norms and the priority given to each norm in any given instance is a matter on which the courts should defer to Parliament. In practical terms, this means that Parliament should, in most cases, be found to have asserted a pressing and substantial objective in the first part of the section 1 analysis. This Part argues that at the second stage of the section 1 analysis, a critical posture should be adopted and courts should be vigilant in policing partisan and self-interested legislation touching on the democratic process. While there should be deference in the first part of section 1 analysis to Parliament's stated values and objectives, because of the risk of manipulating the political playing field, little deference should be given to the means employed by Parliament to achieve those values and objectives.

Part V considers the US campaign finance legislation and jurisprudence, which has long favoured contribution limits over expenditure limits. Two cases, in particular, are considered: the seminal 1976 decision in *Buckley v. Valeo*,¹⁰ where the US Supreme Court determined that contribution limits were less problematic than spending limits from a First Amendment perspective; and the US Court's 2006 reconsideration of contribution and expenditure limits in *Randall v. Sorrell*.¹¹ In addition, this Part considers US cases concerning corporate and union contribution limits. These decisions consider some of the issues that may come before Canadian courts if the new contribution limits are challenged.

The final Part of this article analyzes three constitutional questions: (1) Are individual contribution limits unconstitutional?; (2) Are bans on union and corporate contributions unconstitutional?; and (3) Are political party spending limits now unconstitutional? The discussion arising from the first question concerns partisan bias and its importance to constitutional analysis in the electoral context. The second question also touches on the issue of partisan bias, but focuses more on the normative issues associated with limiting freedom of association and freedom of expression of corporations and unions. The last question involves consideration of whether the US preference for contribution limits over spending limits on functional grounds has merit in the Canadian context.

¹⁰ 424 U.S. 1 (1976) [*Buckley*].

¹¹ 74 U.S.L.W. 4435 (US 27 June 2006) [*Randall*].

II. THE OLD POLITICAL FINANCE REGIME

A. *The Political Finance Regime before the 2003 Elections Act*

The history of Canadian political finance regulation is a familiar story.¹² However, a brief review of some salient developments helps to put the reforms of 2003 and 2006 in context and provides a background for understanding the practical impact of the new regime on political parties. As will be explained in detail below, the 2003 and 2006 reforms introduced political contribution limits for individuals and prohibited political contributions by corporations and unions. The prohibition on corporate and union contributions marked a return to an unsuccessful progressive era restriction, whereas contribution limits on individuals have no precedent in Canada at the federal level.¹³

The regulation of Canadian political finance effectively began seven years after Confederation, when Alexander MacKenzie's Liberal Party enacted the *Dominion Elections Act*¹⁴ in 1874. The act was modelled after the British *Corrupt Practices Act* of 1854,¹⁵ and it applied to candidates, not to political parties. The focus was also entirely on expenditures, not contributions. The principal innovations in the *Dominion Elections Act* were the requirements that candidates incur expenditures through an agent and that the agent and candidate together were responsible for producing a financial report concerning expenditures.

Following some minor scandals in 1906 and 1907, and roughly coincident with the enactment of the US *Tillman Act* restricting corporate political activities, the *Dominion Elections Act* was amended¹⁶ to prohibit contributions to candidates by corporations other than those incorporated

¹² For good accounts of the history of Canada's political finance regulation see W.T. Stanbury, *Money in Politics: Financing Federal Parties and Candidates in Canada* (Toronto: Dundurn Press, 1991) [Stanbury, *Money in Politics*]; K.D. Ewing, *Money, Politics, and Law: A Study of Electoral Campaign Finance Reform in Canada* (Oxford: Clarendon Press, 1992).

¹³ Contribution limits of varying levels are found in many of the provinces. See e.g. *Election Finances and Contributions Disclosure Act*, R.S.A. 2000, c. E-2; *The Election Finances Act*, R.S.M. 1987, c. E32; *Political Process Financing Act*, S.N.B. 1978, c. P-9.3; *Elections Act*, R.S.N.W.T. 1988, c. E-2; *Nunavut Elections Act*, S.Nu. 2002, c. 17; *Election Finances Act*, R.S.O. 1990, c. E.7; and *Election Act*, R.S.Q., c. E-3.

¹⁴ S.C. 1874, c. 9.

¹⁵ See Stanbury, *Money in Politics*, *supra* note 12 at 28. For a discussion of the history of the comparable British legislative regime, see K.D. Ewing, *The Funding of Political Parties in Britain* (New York: Cambridge University Press, 1987) [Ewing, *Funding of Political Parties*].

¹⁶ *An Act to amend the Dominion Elections Act*, S.C. 1908, c. 26.

solely for political purposes. Further amendments were made to the *Dominion Elections Act* in 1920, requiring disclosure of contributions and expanding the prohibition on contributions to include all corporations as well as unincorporated associations, including trade unions.¹⁷ However, the prohibition on corporate and union contributions to candidates proved unenforceable.¹⁸ The Barbeau Committee studying political finance regulation in 1966 noted a variety of ways in which the law was circumvented, such as through employee bonuses that were then given to a political party. The Barbeau Committee concluded that “[t]he law was ... only a legal platitude, this time made even more empty by virtue of its pretension.”¹⁹ The weaknesses of the early twentieth century corporate and union contribution ban noted by the Barbeau Committee in 1966 are echoed in some of the commentaries on the 2003 and 2006 restrictions on corporations and unions and in some of the post-2003 experiences.²⁰ The prohibition on corporate and union contributions was repealed in 1930.²¹

The recommendations of the Barbeau Committee in 1966 and the Chappell Committee in 1970-1971 resulted in a half-hearted attempt to introduce political finance reform before the 1972 election.²² The Barbeau Committee and Chappell Committee recommendations eventually resulted in comprehensive reforms in the 1974 *Election Expenses Act*.²³ The main features were: (1) regulation of political parties; (2) candidate and political party expenditure restrictions; (3) disclosure of contributions to political parties and contributor identities; (4) public funding in the form of partial tax deductions for political contributions and partial reimbursement of candidate expenditures; and (5) a prohibition on expenditures by third parties. The feature that was notably absent from the 1974 *Election Expenses Act* was contribution limits. Each of the basic elements of the 1974 regime remains in place today, though specific spending limits and levels of funding have been changed over time as a result of court challenges and legislative amendments.

¹⁷ *An Act respecting the Election of Members of the House of Commons and the Electoral Franchise*, S.C. 1920, c. 46.

¹⁸ *Report of the Committee on Election Expenses* (Ottawa: Queen's Printer, 1996) [Barbeau Committee]; Ewing, *Funding of Political Parties*, *supra* note 15 at 9.

¹⁹ Ewing, *Funding of Political Parties*, *ibid.* at 20.

²⁰ See Part III below.

²¹ *An Act to amend the Dominion Elections Act*, S.C. 1930, c. 16; Stanbury, *Money in Politics*, *supra* note 12 at 29.

²² Stanbury, *Money in Politics*, *ibid.* at 34.

²³ *Supra* note 1.

Reimbursement of political party election expenses was introduced in 1979 in the form of a reimbursement for broadcasting expenses and was modified to apply to election expenses generally in 1983.²⁴ In 1989-1991, the Lortie Commission undertook a review of many aspects of the electoral system.²⁵ This included an extensive review of political finance issues, despite which no significant changes were introduced in the next major amendment to the *Elections Act* in 1993.²⁶ Neither the 1993 amendments nor other amendments before 2003 fundamentally altered the 1974 political finance regime.²⁷

B. *Pre-2004 Political Contribution Patterns*

There was a stable political party system from before the adoption of the 1974 political finance regime through to 1993.²⁸ During this period there were three major parties: the Liberal Party, the NDP, and the Progressive Conservative (PC) Party. The data in Appendix II shows that the Liberals and the PCs, the two dominant parties, raised comparable amounts of money and were dependent in significant measure on corporate contributions. Neither of the parties raised any meaningful funds from trade unions. By contrast, the NDP relied significantly on labour union contributions, largely to the exclusion of corporate contributions. The NDP typically raised less than the Liberals and PCs.

Everything changed in the 1993 election with the emergence of the Bloc and the Reform Party. Each of these parties was populist in its own way. The Reform Party was the latest in a line of insurgent populist movements in Western Canada motivated by both a conservative ideology and a dislike

²⁴ Stanbury, *Money in Politics*, *supra* note 12 at 66-67.

²⁵ *Royal Commission on Electoral Reform and Party Financing: Final Report*, 3 vols. (Ottawa: Minister of Supply and Services Canada, 1991) [Lortie Commission].

²⁶ *An Act to amend the Canada Elections Act*, S.C. 1993, c. 19.

²⁷ The most notable feature of the 1993 and 2000 amendments was the attempt to restore parts of the 1974 apparatus by responding to court decisions striking down third party expenditure limits by re-enacting those limits in slightly changed forms. *National Citizens' Coalition Inc. v. Canada (A.G.)* (1984), 11 D.L.R. (4th) 481 (Alta. Q.B.) [*National Citizens' Coalition*] struck down third party spending limits under the *Charter*. The 1993 amendments to the *Canada Elections Act* reintroduced these limits, which were struck down again in *Somerville v. Canada (A.G.)* (1996), 136 D.L.R. (4th) 205 (Alta. C.A.) [*Somerville*]. Third party limits were again introduced in the *Canada Elections Act*, S.C. 2000, c. 9, and were subsequently upheld by the Supreme Court in *Harper*, *supra* note 5.

²⁸ For a discussion of Canadian political party systems and the emergence of a new system at the 1993 election, see R. Kenneth Carty, William Cross & Lisa Young, "A New Canadian Party System" in William Cross, ed., *Political Parties, Representation, and Electoral Democracy in Canada* (Toronto: Oxford University Press, 2002) 15.

for government dominated by central Canada. The Bloc is a party of Quebec nationalists who seek to remove Quebec from Canada. The emergence of these two parties was accompanied by the near-collapse of the PC Party as a parliamentary presence. The PC Party obtained a share of the popular vote comparable to the Bloc, NDP, and Reform Party, but because of the distribution of votes the PCs were reduced to two seats in a 295-seat Parliament. The Liberal Party was left as the only party with strong national representation and organization. The fracturing of the opposition parties in the election of 1993 paved the way for a decade of comfortable Liberal rule, unchallenged by an opponent able to mount a convincing national campaign.

Appendix II shows that the contribution patterns for the three major parties that had predominated prior to the 1993 election changed in subtle ways. The Liberal high point for number of contributors was in 1993, and in most years after that the Liberals raised more money from a dwindling number of contributors. The Liberal Party remained dependent on corporate donations and contributions that were, on average, significantly larger than those received by its main competitors. The inescapable conclusion is that following the 1993 election, the Liberal Party attracted a disproportionate amount of funds from corporations and wealthy individuals because it was the only plausible governing party. The PC Party's electoral debacle in 1993 led to a decline in the number of donors and amounts raised. Meanwhile, the NDP became increasingly dependent on union contributions. The NDP's dependence on corporate and (principally) union contributions in the five years before the 2003 *Elections Act* came into force ranged between 21.2% and 52.6% of its total funds raised. Perhaps equally telling, Appendix I shows that in each of the same five years, the NDP had between six and eight of the largest ten donations made to any one political party.²⁹

The Bloc and the Reform Party (called the Canadian Alliance from 2000 onward) differed from the three established political parties in that neither had long-standing corporate donor relationships or union affiliations. Both parties were fundamentally populist in their approach to politics and fundraising. The Bloc initially did not accept donations from corporations or unions. Even in the period immediately prior to the 2003 *Elections Act* raised only a modest proportion of its funds from corporations

²⁹ Elections Canada does not aggregate contributions by affiliated entities such as national unions and union locals or corporations and their subsidiaries. For example, in the case of the Liberal Party, if the contributions of the major banks are aggregated with separate contributions made by their investment banking divisions, the total amount for some banks in some years would be equal to or greater than some of the top ten contributions.

and unions. The Reform Party did not have any principled objection to receiving such funds, but received comparatively few donations because of its novelty and the limited appeal of its policies to large corporations and unions. From 1996 onward, the Reform Party/Canadian Alliance consistently received more contributions by number, though not value, than any other party including the governing Liberals. As the Reform Party/Canadian Alliance came to be seen as a plausible alternative to the governing Liberals, its success in attracting corporate donations improved, though it never came close to equalling the success enjoyed by the Liberal Party.

III. A NEW POLITICAL FINANCE REGIME

A. *The Sponsorship Scandal and the Context for Reform*

The 1995 Quebec referendum was a near-death experience for Canada. Quebec voters rejected a vague sovereigntist resolution by only a small fraction of a percentage point. The federal government of the day, formed by the Liberal Party under the leadership of Jean Chrétien, resolved not to repeat the experience. The Chrétien government adopted a two-pronged, post-referendum strategy to blunt the separatist movement. First, the government sought to define the legal terms for future referenda on sovereignty or secession. The key elements of this effort were the *Secession Reference*³⁰ to the Supreme Court of Canada and the subsequent adoption of the *Clarity Act*.³¹ This prong of the strategy showed strength and firmness. Second, the government attempted to woo disaffected Quebec voters with a co-ordinated effort to raise its profile in Quebec. One of the main aspects of this prong of the government's strategy was the so-called "Sponsorship Program," which gave money, at the direction of the Prime Minister's Office, to cultural and sporting events in Quebec. From 1996 to the end of the Sponsorship Program in 2002, Canada's name and logo were ubiquitous at events from the Montreal Grand Prix to the smallest country fair.

In 2002, a report by the Auditor General revealed irregularities in the way some Sponsorship Program funds were spent and accounted for.³² This report was followed by a more comprehensive report in early 2004, in

³⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

³¹ S.C. 2000, c. 26.

³² *Report to the Minister of Public Works and Government Services on Three Contracts Awarded to Groupaction* (8 May 2002), online: <<http://www.oag-bvg.gc.ca/domino/reports.nsf/a1b15d892a1f761a852565c40068a492/852ef3f9ee85d6b985256c5a00629d7f>>.

which the Auditor General documented problems with contracts given to some Montreal-based advertising agencies.³³ The agencies were ostensibly hired to place advertisements at events and to distribute funds to events in Quebec. However, in some instances it appeared that the government received little or nothing in exchange for its payments to the advertising agencies. The Auditor General found that during the four year period commencing in 1997, “the Sponsorship Program consumed \$250 million of taxpayers’ money, and more than \$100 million of that amount went to communications agencies in fees and commissions.”³⁴ This was not a usual case of government waste; some of the implicated advertising agencies had worked on Liberal Party campaign advertising and were also donors to the Liberal Party. This hint of corruption resulted in a public outcry for a more comprehensive public investigation and reform.

B. *The 2003 Elections Act: Contribution Limits and Increased Transparency*

The Chrétien government declined to appoint a commission of inquiry. Instead it sought to deflate public antipathy through pre-emptive reforms to the political finance regime. While at that time there was no known trail to connect Sponsorship Program funds back to the Liberal Party, diversion of government funds to political parties seemed to be an obvious risk. Even if political finance reform did not address the real problems of the Sponsorship Program revealed by the Auditor General, it did tackle the broader public concern about corruption. Prime Minister Chrétien, introducing Bill C-24 for second reading, announced it as “a bill that will change the way politics is done in this country, a bill that will address the perception that money talks, that big companies and big unions have too much influence on politics, a bill that will reduce cynicism about politics and politicians...”³⁵ Prime Minister Chrétien’s remarks are noteworthy for emphasizing the promotion of accountability and remedying the perceptions of improper influence and not for promoting

³³ *November 2003 Report of the Auditor General of Canada* (10 February 2004), online: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/03menu_e.html>. Note that the delivery of the report was delayed until February 2004 because the House of Commons was prorogued in November 2003.

³⁴ Office of the Auditor General of Canada, News Release, “Mismanagement of Sponsorship Program extended to five major Crown corporations and agencies” (10 February 2004), online: OAG <http://www.oag-bvg.gc.ca/domino/media.nsf/html/20031103pr_e.html>.

³⁵ *House of Commons Debates*, No. 057 (11 February 2003) at 1535 (Right Hon. Jean Chrétien).

the more customary egalitarian justification for political finance controls.

The *Elections Act* introduced a number of fundamental changes to the political finance regime,³⁶ including the first contribution limits at the federal level: contributions by individuals to each political party, its candidates, and its constituency associations were limited to \$5,000 in the aggregate.³⁷ Corporate and union contributions to national political party organizations were prohibited, but corporations and unions were still permitted to contribute up to \$1,000 to each candidates and constituency associations.³⁸ The contribution limits were complemented by enhanced disclosure of donations to local political party organs, and by transfers to national political parties and increased public funding for political parties.³⁹

The limits on the size of donations by individuals and the limits on both the size and destinations of corporate and union donations created the risk that such money would flow through alternative channels.⁴⁰ The remedy to this problem was to make contribution limits apply to political parties and affiliated candidates and organizations in the aggregate and to impose increased transparency on political parties, including candidates and local organizations. Even with these safeguards, political scientist William Cross and Liberal Party President Stephen LeDrew expressed concerns about circumvention in their testimony before the Standing Committee on Procedure and House Affairs.⁴¹

The limits on contributions by individuals and the prohibition on corporate and union contributions created the potential for a funding shortfall. This, in turn, justified the introduction of enhanced public funding.⁴² The post-election reimbursement for political parties increased

³⁶ For a detailed description of the political finance regime after the adoption of the *Elections Act 2003*, see Colin Feasby, "Canada" in Thomas D. Grant, ed., *Lobbying, Government Relations and Campaign Finance Worldwide: Navigating the Laws, Regulations and Practices of National Regimes* (New York: Oceana, 2005) 57.

³⁷ *Elections Act*, *supra* note 2, s. 25 amending s. 405(1). The \$5,000 limit was indexed to inflation.

³⁸ *Ibid.*, s. 24 amending s. 404.1(1). Corporations and unions were permitted to donate up to \$1,000 (indexed to inflation) to constituency associations and candidates of a political party.

³⁹ *Ibid.*, ss. 23, 30.

⁴⁰ This is the so-called "hydraulic effect" that is seen in US campaign finance. See Samuel Issacharoff & Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform" (1999) 77 *Texas L. Rev.* 1705 [Issacharoff & Karlan, "Campaign Finance Reform"].

⁴¹ Canada, House of Commons, *Standing Committee on Procedure and House Affairs*, 37th Parl. 2nd sess. Evidence of William Cross (6 May 2003) at 1120 and of Stephen LeDrew (29 May 2003) at 1610.

⁴² Liberal House Leader Don Boudria: "The aim of these measures is essentially to compensate for the shortfall of parties and candidates subject to prohibitions relating to corporations and unions, and the ceilings on contributions by individuals." See Canada, Senate, *Proceedings of the Standing Senate*

from 22.5% of election expenses to 50%.⁴³ Inter-election funding was also introduced, entitling each political party to funding based on its share of the popular vote in the previous general election.⁴⁴ The amount was set in 2004 at \$1.75 per year for each vote received in the previous election, and was to increase in accordance with inflation thereafter. The enhanced public funding has been criticized by conservatives as welfare for politicians and by Canadian nationalists as funding for the Bloc's secessionist agenda.⁴⁵

One of the most notable sources of opposition to the 2003 *Elections Act* was the Liberal Party's executive. Liberal Party President Stephen LeDrew proclaimed the contribution limits to be "dumber than a bag of hammers."⁴⁶ LeDrew's view seemed to be that the then-current regime worked to the Liberal Party's advantage and that limits on corporate contributions could only hurt the party. The level of public funding was increased from \$1.50 in the original draft of Bill C-24 to \$1.75 in the version that was passed into law as the *Elections Act*, partly in response to LeDrew's criticisms.⁴⁷ The figures presented in Appendix II indicate that LeDrew's concerns were well founded. In the decade prior to the adoption of Bill C-24, annual donations to the Liberal Party by corporations ranged from 39% to 64% of the total funds raised. By contrast, the figures in Appendix II show that its principal rival, the Canadian Alliance, was more effective at raising money through small donations from individuals. Corporate contributions made up less than 20% of the contributions to the Canadian Alliance in the three years preceding the adoption of Bill C-24. The disparity of the two parties' funding bases was noted frequently in the Parliamentary debates in 2003, before the passage of the *Elections Act*.

Committee on Legal and Constitutional Affairs, 37th Parl. 2nd sess. No. 13—Evidence (17 June 2003) ["Boudria Testimony"]. See also Canada, House of Commons, *Standing Committee on Procedure and House Affairs*, 37th Parl. 2nd sess. Evidence of Don Boudria (3 April 2003) at 1125.

⁴³ *Elections Act*, *supra* note 2, s. 39 amending s. 435.

⁴⁴ *Ibid.*, s. 40 adding s. 435.01(1). Funding between elections was subject to a requirement that the political party receive 2% of the national popular vote or 5% of the popular vote in districts where it endorsed a candidate. These thresholds were struck down as contrary to s. 3 of the *Charter* in *Longley v. Canada (Attorney General)* (2006) 277 D.L.R. (4th) 327 (Ont. Sup. Ct. J.) [Longley].

⁴⁵ "Let political parties raise their own money" *The [Montreal] Gazette* (25 August 2006) A18.

⁴⁶ John Gray, "Reality Check" *CBC News Online* (13 June 2006), online: <<http://www.cbc.ca/news/background/realitycheck/gray/20060613.html>>.

⁴⁷ House of Commons, *Standing Committee on Procedure and House Affairs: Thirty-Sixth Report*. See also the evidence of Benjamin Hutzel, Chief Financial Officer of the Liberal Party of Canada: House of Commons, *Standing Committee on Procedure and House Affairs* (29 May 2003) at 1620.

Bill C-24, which was to become the 2003 *Elections Act*, provoked a range of reactions from political parties during the Parliamentary debates that preceded its adoption. The Bloc welcomed Bill C-24, asserting that it was the fulfillment of a long-standing party objective, and proudly noting that the new law followed the example of Quebec's provincial political finance legislation which was instituted by the provincial separatist party, the Parti Québécois.⁴⁸ The PC Party and the NDP supported Bill C-24 but expressed concern about its details. The NDP was most concerned that affiliated and subsidiary corporations were treated differently than union locals.⁴⁹ The PC Party expressed concern about the advantages that the public funding formula conferred on the governing Liberals.⁵⁰ The Canadian Alliance supported some aspects of Bill C-24 in principle but objected to the bill as a whole, and especially to enhanced public funding, on the grounds that political parties should be supported by voluntary donors and not by funds conscripted from the public treasury. During the debates in the House of Commons, Canadian Alliance speakers also noted that the enhanced public funding system would make it more difficult for new parties to achieve electoral success.⁵¹ The Parliamentary debate ended and Bill C-24 passed the third and final reading on 11 June 2003, with the Liberals, NDP, and Bloc voting in favour and the Canadian Alliance and PCs voting against.⁵² The new limits became effective on 1 January 2004.

C. *Partisan Bias of the New Regime?*

1. Contribution Limits

The 2003 *Elections Act* was imposed on a political finance environment where certain contribution patterns were well established and perhaps, in some cases, becoming more pronounced. The impact of contribution limits and the extent to which those impacts were

⁴⁸ *House of Commons Debates*, No. 114 (9 June 2003) at 1635 (Hon. Jean-Yves Roy).

⁴⁹ *Ibid.* at 1320 (Hon. Alexa McDonough).

⁵⁰ *Ibid.* at 1230 (Hon. Gerald Keddy).

⁵¹ *Ibid.* at 1250 (Hon. Ken Epp). The bias of Bill C-24 against small parties is discussed in Daniel Mol, "Thanks to Bill C-24, Do We Have a Canadian Political Cartel?" *Canadian Student Review* 13:1 (March/April 2004) 1. Some small parties have also suggested that the limit on the size of donations is also an obstacle. See Jennifer Ditchburn, "Party loan writeoff sparks funding debate" *The Globe and Mail* (10 July 2006) A8.

⁵² *House of Commons Debates* No. 116 (11 June 2003) at 1800.

ameliorated by the enhanced public funding is germane to the constitutional questions considered in Part VI of this article.

Before the *Elections Act* went into effect, LeDrew's view that the new law would hurt the Liberal Party's ability to raise private funds was reasonable based on pre-2004 contribution patterns, and is in fact supported by the 2004-2005 data (see Appendix II and Table 2, below). In 2004, the first year under the new regime, the Liberal Party raised less than 20% of the amount it raised in 2003 and less than it raised in any year since 1989. The Liberal Party's fundraising efforts improved in 2005, but the total raised still lagged behind the amounts raised in the years prior to 2004. As will be discussed in the next section, the Liberals' funding woes were mitigated by the new public funding.

There is some difficulty in assessing the impact of the new political finance regime on the Canadian Alliance and PC Party because it coincided with a merger of those parties. Nevertheless, the Conservative Party that resulted from the merger was by far the most successful at raising funds under the new rules. During the first year of the new regime, the Conservative Party raised more money than the Canadian Alliance did during the last year under the old rules and over twice as much as any other political party. In 2005, the second year under the new regime, the Conservative Party increased its total funds raised by approximately 70% and raised more money than the other three major political parties combined. The data for 2006 and early 2007 indicate that the Conservative Party continues to be markedly more successful than the other parties in fundraising.⁵³ The Conservative Party's great fundraising success in the face of the restrictive rules in the *Elections Act* is attributable to the large base of individual donors inherited from the Canadian Alliance and the swift adoption of grassroots fundraising techniques.⁵⁴

⁵³ See Bruce Cheadle, "Conservatives continue to dominate fundraising" *Canadian Press* (2 November 2006) online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061102/Conservatives_fundraising_061102>. Kate Lunau (quoting former Liberal strategist Warren Kinsella) reported:

The Conservatives and New Democrats have "been able to adjust to the new reality," Kinsella said. "It's a lot of blue-haired old ladies and folks sending in their \$100, their \$500. Going back to their Reform roots, [the Conservatives] always had a ... cultural tradition of fundraising. And the NDP, through its prairie, agrarian roots has also had that tradition. The one party that did not—and as I say, had been way too dependent on corporate money—was the Liberal party, and now it's paying the price quite literally."

See "Empty pockets: Liberal fundraising falls woefully short in first quarter of 2007" *Macleans*, online: <http://www.macleans.ca/article.jsp?content=20070502_103657_1072>.

⁵⁴ Bea Vongdouangchanh, "Conservatives out-fundraise governing Liberals, again" *Hill Times* (7 November 2005).

The NDP was not nearly as adversely affected by the limits on union and corporate contributions as the Liberal Party. Contributions to the NDP in 2004 and 2005 were significantly less than in 2003; however, it is clear that the NDP's main union contributors deliberately increased their contributions in 2003 in anticipation of the pending contribution limits.⁵⁵ The total value of NDP contributions in 2004 and 2005 is almost the same as the value of contributions received in 2001 and 2002. The NDP's ability to weather the imposition of the ban on union contributions is not a reflection on the importance of union donations prior to 2004; rather, it speaks to the party's success in adapting to the new environment by increasing funds raised from individual contributions.

The NDP's ability to maintain revenues under the new political finance regime belied other more fundamental changes resulting from the new contribution limits. Harold Jansen and Lisa Young posit that an economic or utilitarian understanding of party and union motives suggests that the new limits on contributions should break the union-party link.⁵⁶ In addition to the contribution limits, they note that the new rules prevent the NDP from obtaining loan guarantees from unions in advance of election campaigns, as was common practice under the old political finance regime, and also prevent the seconding of union staff to the NDP campaign organization.⁵⁷ Despite the obstacles to union financing of the NDP, Jansen and Young conclude that the relationship was restructured as a result of the *Elections Act* rather than severed. In their view, the relationship persisted because of ideological affinities and the involvement of union personnel in the NDP party organization.

The short-term restructuring of the NDP-union partnership faces challenges in the longer term.⁵⁸ The historic NDP coalition of unionized workers, prairie populists, urban intellectuals, and, more recently, environmentalists has inherent tensions and may come apart without the

⁵⁵ H. Jansen & L. Young, "Solidarity Forever? The NDP, Organized Labour and the Changing Face of Party Finance in Canada" (Paper presented to the Annual Meeting of the Canadian Political Science Association, 2005) [unpublished] [Jansen & Young, "Solidarity Forever"].

⁵⁶ *Ibid.* at 3.

⁵⁷ *Ibid.* at 16, 19.

⁵⁸ The negative impact of Bill C-24 on the union-NDP relationship is one reason why Professor Ewing has recommended that the United Kingdom not follow Canada's lead and adopt contribution limits. He also notes that in Britain the Conservative Party enjoys a significant advantage in number of individual donors, just like in Canada. See K.D. Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Oxford: Hart, 2006) at 48, 221-22.

glue of union money. An early sign of the possible breakdown of the NDP-union alliance is the demise of the NDP's relationship with the Canadian Autoworkers (CAW). During the 2005-2006 election campaign the President of the CAW, Buzz Hargrove, publicly endorsed strategic voting for Liberal candidates and made campaign appearances with Liberal Prime Minister Paul Martin. The Ontario wing of the NDP reacted by stripping Hargrove of his membership in the party. At the CAW's annual meeting in the summer of 2006, the CAW officially ended its relationship with the NDP.⁵⁹ Despite this example, it is too early to know whether other unions will follow. Indeed, some other unions have criticized the CAW's move.⁶⁰ Nevertheless, if the CAW can secure advantages by being a political free agent, other unions may follow the CAW's example. Whether or not others follow, the CAW's defection from the NDP divides Canadian unions and weakens the NDP's traditional claim to being the only political party that can speak for unionized workers.

2. Public Funding

According to Don Boudria, the Minister responsible for shepherding the 2003 *Elections Act* through Parliament, the increased public funding of political parties was designed to compensate the parties for the loss of funds that would otherwise be raised from the private sector.⁶¹ This "compensation" was to be based on performance in the last election. However, prior to the *Elections Act*, private funding did not always mirror the popular vote of the previous election. Certain parties consistently outperformed their electoral standing in fundraising and others consistently underachieved in relation to their electoral performance.

Figure 1 shows each party's share of fundraising in relation to its share of the popular vote in the previous election. It shows that three political parties—Liberal, PC, and Reform/Alliance—have raised funds at a rate slightly less than or roughly equal to their share of popular vote. Two other parties diverge significantly from this pattern. The NDP's fundraising has traditionally been far more successful than its performance in federal general elections. By contrast, the Bloc has been

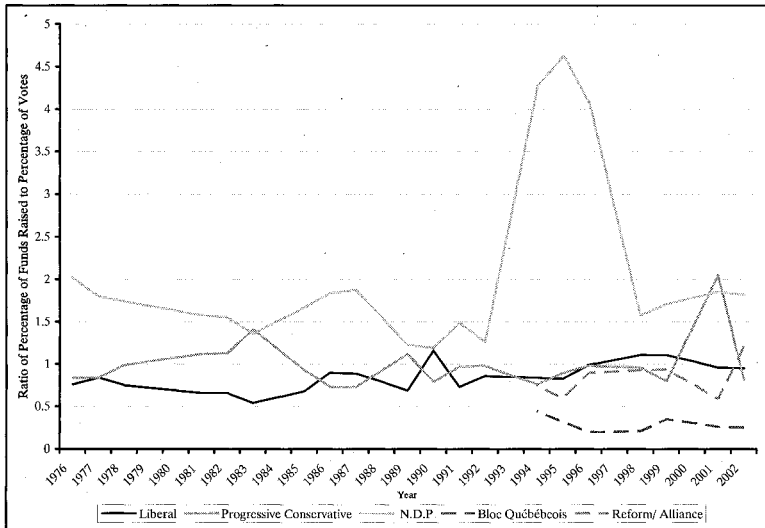
⁵⁹ "CAW, NDP splitsville after long marriage: A new reality for New Democrats" *The Toronto Star* (19 August 2006) F02.

⁶⁰ See e.g. Wayne Fraser, Director, United Steel Workers 6, "CAW decision to drop NDP support full of ironies" online: <<http://www.usw.ca/program/content/3327.php>>.

⁶¹ "Boudria Testimony," *supra* note 42.

less successful at raising funds than it has been at securing votes. Figure 1 suggests that if contributions were banned and the state was the only source of funding, the only clear winner would be the Bloc and the only obvious loser would be the NDP.

Figure 1. Ratio of Annual Revenue Share to Vote Share in Preceding Election⁶²



Minister Boudria's idea of public funding replacing lost private funding would only have worked (save for the effects on the NDP and Bloc noted above) if the public funding fully supplanted the market for private funds. The contribution limits in the *Elections Act* preserved the market for contributions of \$5,000 or less per year from individuals. Accordingly, the parties that were not as dependent on corporate, union, and large individual donations were disproportionately rewarded by the public funding scheme.⁶³ For example, Appendix II shows that Bloc fundraising did not experience a material decline in revenues as a result of the introduction of contribution limits. At the same time, Table 1, below, shows that under the new public funding system, the Bloc has received approximately \$3 million per year in new funds. With the new public

⁶² Based on data from Ian Stewart, "Bill C-24: Replacing the Market with the State?" *Electoral Insight* 7:1 (January 2005) 32 at 33. Note that data for election years is not available and is not representative. The lines plotted connect data points in non-election years.

⁶³ Indeed, some observers questioned whether the new funding system provided political parties with too much money. See e.g. W.T. Stanbury, "Parties will be rolling in the dough" *Hill Times* (17 February 2003).

funding and its largely unaffected level of private funding, the Bloc is much better financed than it ever was under the former regime. To a less dramatic extent, the Conservative Party has also disproportionately benefited from public funding because of its relative lack of dependence on corporate contributions and its large number of small individual donations as compared to its principal national rival, the Liberal Party. In essence, the Bloc and the Conservatives are being compensated by the new public funding scheme as if they had been as dependent on corporate contributions and large individual donations as the Liberals were prior to 2004.

Table 1. Public Funding of Political Parties 2004-2006⁶⁴

	2004	2005	2006
Bloc	2,733,868	3,064,864	2,950,984
Conservative	7,913,512	7,331,172	9,388,357
Liberal	9,141,408	9,087,333	8,572,965
NDP	2,883,919	3,879,817	4,611,140

D. *Anecdotal Evidence of Avoidance of Contribution Limits*

The effectiveness of the limit on corporate and union contributions is difficult to assess as there have been no enforcement actions against political parties. Circumvention activities are also difficult to identify based on fundraising statistics, especially given that there are only three years of data. Accordingly, what follows is speculative and anecdotal.

The funds raised by political parties in 2004, an election year, were significantly less than 2003, a non-election year. Without a change in the law, the opposite result would be expected. The impact of the law, however, may be exaggerated by unusually high donations in 2003 by corporations and unions resulting from the efforts of political parties to raise as much money as possible from these donors before the new rules came into effect at the beginning of 2004.⁶⁵ If it may be assumed that for at least some political parties the flow of funds from historical sources was stemmed and some funding shortfall was experienced, there was some incentive to circumvent the contribution limits. Continued complaints about the impact of the limits even two years after the law was adopted suggest that at least

⁶⁴ Data obtained from Elections Canada, online: <www.elections.ca>.

⁶⁵ Jansen & Young, "Solidarity Forever," *supra* note 55 at 16. A casual review of the largest corporate and union donations in 2003 (Appendix I) and the total value of contributions to all political parties (Appendix II) suggests that both political parties and their corporate and union contributors were acting in anticipation of the pending contribution limits.

some individuals within some political parties chafe under the restrictions and have the motive, if nothing else, to develop avoidance strategies.⁶⁶

Avoidance as a response to campaign finance regulation is a well established phenomenon in the United States.⁶⁷ The so-called “hydraulic effect” likens the flow of money to the flow of water in a river. A dyke or levee does not stop the flow of water, it simply creates pressure downstream that will force the water around or over the river’s banks. William Cross predicted evasion of the *Elections Act* contribution limits using the more colourful analogy of the “whack-a-mole” game often found at the midways of country fairs.⁶⁸ While limiting contributions created an incentive to avoid the law, any legal avoidance would be small in scale compared to that seen in the United States, because of the limited alternative ways in which funds may be spent legally. For example, the limit on third party spending, including spending on issue advocacy, which was held to be constitutional by the Supreme Court in 2004, is a substantial impediment to the flow of political funds into alternative channels.⁶⁹

Information obtained in a survey of leading Canadian corporations concerning attitudes toward political contributions completed shortly before the adoption of the *Elections Act* also provides some insight into the risk of evasion of a ban on political contributions.⁷⁰ Although only 12% of corporations supported the ban on corporate contributions, a further 37% supported some limit on corporate contributions, and there was “solid majority support” for enhanced disclosure. Of the corporations that made political contributions, 60% reported having a written policy concerning these contributions. Even with broad support for some form of increased regulation of corporate donations and a majority of corporations internally regulating donations through written policies prior to the

⁶⁶ See Graham Fox, “Rethinking Political Parties: Discussion Paper” (November 2005), online: Public Policy Forum <http://www.ppforum.com/common/assets/publications/en/rethinking_political_parties.pdf>. Fox notes (at 12-14) complaints about administrative burdens and the difficulty of fundraising. See also Kady O’Malley, “Political financing bill remains ‘fundamentally controversial’ after two years: political insiders” *Hill Times* (20 March 2006).

⁶⁷ See Issacharoff & Karlan, “Campaign Finance Reform,” *supra* note 40. See also *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) at 224, where Justices Stevens and O’Connor, writing for the Court, picked up the hydraulic theme, noting that “[m]oney, like water, will always find an outlet” [*McConnell*].

⁶⁸ William Cross, *Political Parties* (Vancouver: UBC Press, 2004) at 154.

⁶⁹ *Harper*, *supra* note 5.

⁷⁰ Nancy Averill & Bill Neville, “Corporate Political Contributions in Canada: Practices and Perspectives” (February 2003), online: Public Policy Forum <<http://www.ppforum.ca/common/assets/publications/en/corporate%20political%20contributions%20in%20canada.pdf>>.

Elections Act, a minority of leading corporations could pose an avoidance problem. If an effective avoidance strategy were developed, it could put pressure on even those corporations that support the enhanced regulation.

Anecdotal examples indicate some legal circumvention of limits on corporate contributions between the 2003 *Elections Act* and the 2006 *Accountability Act*. In June 2006, ten executives of the Toronto Dominion (TD) Bank announced that they were each making \$5,000 donations to the Liberal Party and the Conservative Party. The executives explained that the donations were made on a non-partisan basis to support the political process. However, the business purpose and partisan nature of the donations was evident in the Chief Executive Officer's comments; when asked why contributions were not being made to the NDP, he explained that the NDP "doesn't like anything to do with the financial services business."⁷¹ Also in the summer of 2006, in the midst of the Liberal leadership campaign, donations by executives of Apotex (a leading generic drug manufacturer), their spouses, and their minor children became an issue. Each of the executives and their family members donated the maximum individual amount of \$5,400 with the total donation amounting to \$54,000.⁷² Although the donations complied with the law, critics rightly questioned whether the children were used by their parents, and implicitly by Apotex, to avoid the contribution limits. The children's donations were returned as a result of the public pressure.⁷³

The contributions by TD Bank and Apotex executives in 2006 may be isolated examples, or they may be indicative of a larger trend. These examples are reminiscent of the phenomena that Louis Massicotte has described as arising in response to the long-standing ban on corporate political contributions at the provincial level in Quebec.⁷⁴ Massicotte notes that in Quebec, individual donations are often "camouflaged corporation donation[s]."⁷⁵ In some instances, he suggests,

⁷¹ Sinclair Stewart & Paul Waldie, "On political donations, TD Bank breaks ranks" *The Globe and Mail* (12 June 2006) B1.

⁷² Campbell Clark, "Twins, 11, donated \$10,800 to Volpe's campaign; Liberal MP received \$5,400 from 14-year-old boy" *The Globe and Mail* (1 June 2006) A1.

⁷³ "Volpe returns controversial campaign donations" *CTV News* (2 June 2006), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060601/volpe_update_060601/20060602>.

⁷⁴ Louis Massicotte, "Financing Parties at the Grass-Roots Level: The Quebec Experience" in K.D. Ewing & Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart, 2006) 153 at 175-76 [Ewing & Issacharoff, *Party Funding*].

⁷⁵ *Ibid.* at 175.

the individual donations may be reimbursed by corporations through bonuses.⁷⁶ Massicotte's speculation recalls the Barbeau Committee's remarks concerning the 1908-1930 corporate political contribution ban.

The Conservative Party also tested the boundaries of individual contribution limits by not reporting fees paid by delegates to attend its 2004 leadership convention as contributions, and not counting these fees toward the individual contribution limits. After a public dispute with the Chief Electoral Officer, and with a ruling on the issue pending, the Conservative Party amended its annual filings with Elections Canada and made refunds to contributors who exceeded their limit as a result of convention fees.⁷⁷

Another type of legal avoidance that could arise from the contribution limits is the flow of corporate and union funds into third party advertising campaigns. However, as noted above, spending limits on third parties reduce the advantage that can be gained through this type of redeployment of funds. The third party limit, however, only applies to the campaign period that immediately precedes the election (*i.e.*, from issuance of the writ to the election day). The Canadian Labour Congress, formerly a significant donor to the NDP, ran a pre-writ public advertising campaign in anticipation of the 2004 election.⁷⁸ Pre-writ advertising campaigns may become more common if corporations and unions seek to find legal alternatives to contributions to political parties.

One informed observer noted in 2005 that the *Elections Act* reforms were working well.⁷⁹ For the most part, this observation held true through to the end of 2006 when the *Accountability Act* came into effect. However, the examples of avoidance noted above suggest that some legal circumvention of contribution limits and other political finance rules was taking place. If the law had not changed, these strategies might have become refined and entrenched. On this basis, then, it might be argued that further reform was justified.

E. *The 2006 Accountability Act*

Regardless of whether or not the reforms were effective, the public's hunger for reform was not sated by the *Elections Act*. In 2004,

⁷⁶ *Ibid.* at 176.

⁷⁷ "Conservatives admit to undisclosed donations" *CTV News* (26 December 2006), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061226/conservatives_donations_061226/>.

⁷⁸ Jansen & Young, "Solidarity Forever," *supra* note 55 at 20.

⁷⁹ Heather MacIvor, "Shining a Harsh Light on Political Financing" *Policy Options* 26:6 (June 2005) 34 at 37.

Paul Martin replaced Jean Chrétien as Liberal leader and Prime Minister. Eager to distance himself from the Sponsorship Scandal and his predecessor, Martin appointed Justice John Gomery of the Quebec Superior Court to head a commission of inquiry into the scandal (the Gomery Commission). The appointment of the commission muted the issue in the 2004 federal general election. The Martin Liberals emerged from the election with a minority government.

The evidence before the Gomery Commission unfolded on television through the second half of 2004 and into 2005. Public revulsion grew as the story of advertising executives receiving money in brown envelopes in a Montreal restaurant and other similar tales were told. Most did not realize that the acts uncovered by the Gomery Commission all took place before the *Elections Act* reforms. The opposition parties took advantage of popular sentiment and attempted to bring down the Martin government in a confidence vote in the spring of 2005. The government earned a short reprieve when an opposition member crossed the floor and the Prime Minister promised to call an election immediately after the Gomery Commission issued its initial fact finding report.⁸⁰

The Gomery Commission issued its fact finding report on 1 November 2005,⁸¹ and a federal general election was called shortly afterward for 23 January 2006. The campaign debate over government accountability and political finance was conducted with the knowledge that the Gomery Commission would make recommendations for reform shortly after the election. The Conservative Party campaigned on a platform that identified a limited number of priorities. High among them was an “Accountability Act” that would deal with a range of issues, including conflicts of interests, government contracting, protection for whistleblowers, lobbying, and political finance.⁸² The Conservative Party formed a minority government following the 2006 federal general election, and the Gomery Commission’s second report was released on 1 February 2006. The Commission’s recommendations notably did not include any changes to the political finance regime. Despite that omission, the new government pressed forward with the reforms that it

⁸⁰ “Conservative Stronach joins Liberals” *CBC News* (18 May 2005), online: <<http://www.cbc.ca/canada/story/2005/05/17/stonach-liberals050517.html>>.

⁸¹ Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible?: Fact Finding Report* (Ottawa: Public Works and Government Services, 2005).

⁸² “Stand Up for Canada”: Conservative Party of Canada Federal Election Platform, 2006.

had proposed during the election campaign. Bill C-2, the Conservative government's *Accountability Act*, was introduced in the House of Commons for First Reading on 11 April 2006.

The *Accountability Act* proposed a number of changes relating to political finance, including increased transparency for money donated from trust funds and enhancement of enforcement provisions. The individual contribution limit was reduced from \$5,000 to \$1,000 and corporate and union contributions were banned.⁸³ Unlike the 2003 *Elections Act*, the reduction in the capacity of political parties to raise funds was not offset by increased public funding. This reduction in the supply of money, without a corresponding reduction in demand, may result in illegal evasion of the contribution limits.⁸⁴ The contribution data set out in Appendix II suggest that this risk does not apply equally to all political parties, as some parties can be expected to operate much more effectively than others under the new rules.

Leading newspapers took opposite positions on whether the \$1,000 limit was reasonable.⁸⁵ The *Globe and Mail*, noting the struggles of some Liberal leadership candidates to raise funds, opined that “[p]olitics should not be a game of begging.”⁸⁶ The lead Liberal spokesman on the second reading of Bill C-2 suggested that the contribution limits were too strict and had partisan effects.⁸⁷ Accordingly, the Liberal-dominated Senate amended the contribution limits from \$1,000 to \$2,000, but those amendments were rejected by the House of Commons.⁸⁸

Liberal Senators were quite correct that the proposed *Accountability Act* had a partisan effect. Table 2 below shows the importance of large individual contributions to the Liberal Party during the period prior to the *Accountability Act*. The Liberal Party was significantly more dependent on contributions over \$1,000 than the other three main

⁸³ The \$1,000 is indexed to inflation and was \$1,100 in 2007. See online: <www.elections.ca>. Note that the \$1,000 contribution limit does not apply in the aggregate as the previous *Elections Act 2003* limit did. An individual can effectively make three \$1,000 contributions to a political party and its constituent parts: one to each of the national party organization, a candidate endorsed by the political party or local district party organization, and a leadership contestant of the political party.

⁸⁴ Heather MacIvor, “Limiting Donations and Eliminating Cash—Problem Solved? Not Exactly” *Policy Options* 27:6 (June 2006) 34 at 36.

⁸⁵ See e.g. *supra* note 45.

⁸⁶ “Those fundraising blues” *The Globe and Mail* (4 August 2006) A14.

⁸⁷ *House of Commons Debates*, No. 009 (25 April 2006) at 1040 (Hon. Stephen Owen).

⁸⁸ Canada, Library of Parliament, Legislative Summary LS-522E, “Bill C-2: The Federal Accountability Act” (Revised 23 November 2006) at 22.

political parties. For example, in 2005 the Liberal Party obtained 44.5% of its income from donors who contributed in excess of \$1,000, and 28% of its income from the portion of those donations that exceeded \$1,000. Based on the contribution patterns observed in the 2004-2006 period, the imposition of a \$1,000 contribution limit will likely have a negligible impact on political parties other than the Liberal Party. Accordingly, the great irony of the *Accountability Act* is that it harms the Liberal Party, the party most likely to replace the governing Conservatives, thereby making the Conservative Party less accountable to the electorate.

Table 2. Impact of Large Individual Contributions, 2004-2005⁸⁹

	Political Party	2004 (\$)	2005 (\$)
Contributors >\$1,000 ⁹⁰	Bloc	19	21
	Conservative	731	930
	Liberal	585	1368
	NDP	339	350
Total Contributions (\$)	Bloc	858,746	734,729
	Conservative	10,910,320	17,847,451
	Liberal	4,719,388	8,344,162
	NDP	5,194,170	5,120,827
Value of Contributions >\$1,000	Bloc	37,736 (4.4%)	32,289 (4.4%)
	Conservative	1,554,955 (14.3%)	1,968,882 (11%)
	Liberal	1,499,743 (31.8%)	3,715,972 (44.5%)
	NDP	600,522 (11.6%)	597,928 (11.7%)
Impact of Notional \$1,000 Contribution Limit ⁹¹	Bloc	(18,736) (-2.1%)	(11,289) (-1.5%)
	Conservative	(823,955) (-7.6%)	(1,038,882) (-5.8%)
	Liberal	(914,743) (-19.4%)	(2,347,972) (-28.1%)
	NDP	(261,522) (-5%)	(247,928) (-4.8%)

⁸⁹ All figures taken from Part 2(a), Statement of Contributions Received—Details of Contributions from Individuals, Registered Party Financial Transactions Returns, Elections Canada, online: <www.elections.ca>.

⁹⁰ The raw data in the Registered Party Transactions Returns lists individual contributions, not total contributions by individual contributors. Accordingly, the number of contributors contributing in excess of \$1,000 and the value of contributions in excess of \$1,000 were identified using the following procedure: (1) identify individuals recorded to have made multiple contributions; (2) aggregate contributions by individuals making multiple contributions; and (3) identify those individuals making annual contributions that in aggregate are in excess of \$1,000, and total the value of those contributions. The author thanks Claire Pater for her database assistance.

⁹¹ The notional impact of the \$1000 cap is calculated by taking the number of contributors over \$1000 and multiplying by \$1000 to get their maximum permitted contribution under a \$1000 cap. That number is then subtracted from the sum actually contributed by individuals who contributed over \$1000 to come up with an amount exceeding the notional cap that would have been lost if the cap had existed. The percentage indicated in parentheses is the percentage of total dollars contributed that would be lost under a cap.

The *Accountability Act* was passed with the unanimous support of all political parties.⁹² The political finance provisions of the *Accountability Act* came into force on 1 January 2007.

IV. THE PROBLEM WITH PARTISAN RULE-MAKING

A. *Democratic Norms in Charter Jurisprudence*

The *Secession Reference* proclaimed that “[t]he principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day.”⁹³ The problem with this pronouncement is that democracy is a contested concept.⁹⁴ The Supreme Court of Canada seemed to recognize this in *Figueroa v. Canada* when it stated, albeit in *obiter*, that the *Charter* does not favour one political system over another.⁹⁵ This begs the question, what kind of democracy informs *Charter* analysis? And, for that matter, where is it found? In the second part of this section, I outline an approach to *Charter* review which suggests that the Court defer to Parliament’s assessment of democratic norms and focus instead on procedural fairness. In the meantime, certain democratic norms provide clues as to how the *Elections Act* and *Accountability Act* provisions might be viewed.

Elsewhere I have argued that cases arising under sections 2(b) and (d), section 3, and section 15 of the *Charter*, and cases touching upon rules governing the democratic process, comprise a *Charter* jurisprudence of the democratic process.⁹⁶ Bringing these cases together reveals common themes that are not apparent when the issues are relegated to separate doctrinal silos. Viewed in this way, Canada’s democratic process jurisprudence identifies a number of norms that guide analysis of any provision governing this process. Given that most of these cases are decided under section 1,⁹⁷ which explicitly refers to limits that are justifiable in a “democratic

⁹² *House of Commons Debates*, No. 094 (8 December 2006) at 1005-35.

⁹³ *Secession Reference*, *supra* note 30 at para. 62.

⁹⁴ W.B. Gallie, “Essentially Contested Concepts” (1956) 56 *Proceedings of the Aristotelian Society* 167 at 183ff.

⁹⁵ *Figueroa v. Canada (A.G.)*, [2003] 1 S.C.R. 912 at para. 81 [*Figueroa*].

⁹⁶ Feasby, “Freedom of Expression,” *supra* note 8.

⁹⁷ A notable exception is *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, where the Court imported a balancing analysis into its definition of the scope of the right protected by s. 3 of the *Charter*.

society,” a unified approach makes sense. The democratic principles that are of most concern in the context of this article are as follows:

1. *Majoritarianism*—The *Secession Reference* makes clear that at its most abstract level, Canadian democracy is majoritarian in nature.⁹⁸ At the local constituency level, this means that the candidate with the most votes is elected to Parliament. At the national level, subject to the geographical distribution of support, the majoritarian principle means that the political party with the most support should form the government. Certain other democratic principles are derivative of the majoritarian principle—egalitarianism, legitimacy, and accountability.

(a) *Egalitarianism*—For the most part, the Court has pursued democracy’s majoritarian goals under the rubric of the “egalitarian model.” If majoritarian preferences are to prevail, there must be relative parity between each citizen’s vote.⁹⁹ “Deliberative equality,” as I have labelled it elsewhere, not only requires roughly equally weighted votes, but also controls that prevent economic advantage from being readily converted to political advantage through, for example, the domination of democratic debate.¹⁰⁰ The Court in *R. v. Bryan*¹⁰¹ went farther to indicate that Parliament may act to promote some measure of informational equality between citizens.

(b) *Legitimacy*—Belief in the legitimacy of the outcome of the democratic process is integral to the rule of law, as it leads citizens to obey the laws enacted by the government. The most important quality of a government in a majoritarian system is to be seen by citizens to represent the majority preference. The problem with legitimacy as a consideration for courts is that there may be considerations other than majoritarianism that affect the public’s concept of legitimacy. As such, giving weight to legitimacy risks introducing irrational considerations into constitutional analysis and should be done with great caution.

(c) *Accountability*—This democratic value has not been judicially considered, but it is a motivating factor behind the new political finance regime and is implicit in the *Charter’s* section 4(1) provision for the maximum term of Parliament. Majoritarianism is of no

⁹⁸ These democratic principles must be viewed within the larger context of principles set out in the *Secession Reference*, *supra* note 30.

⁹⁹ *Reference re Provincial Electoral Boundaries (Sask.)*, *supra* note 97 at paras. 48-57.

¹⁰⁰ Colin Feasby, “Issue Advocacy and Third Parties in the United Kingdom and Canada” (2003) McGill L.J. 11 at 17.

¹⁰¹ 2007 SCC 12 [*Bryan*].

value without accountability moments that provide an opportunity to replace a government or defeat its individual members.¹⁰² This requires an electoral system that is not tilted to favour certain kinds of candidates or one political party over another. The greatest risk to accountability is partisan legislation designed to favour the success of incumbents generally and, in particular, the governing political party.¹⁰³

2. *Free debate*—Democracy requires open discussion and debate. This openness fulfills both an abstract civic purpose and an instrumental purpose. From a civic perspective, citizen participation in democratic debate has an intrinsic value. The Court in *Figueroa* endorsed the concept of “meaningful participation,” which, in that case, was found to trump structural interests advanced by the government (*i.e.*, promotion of the formation of majority governments). From an instrumental perspective, the best ideas, best candidates, or best parties should prevail in an open marketplace for expression, thus enhancing the prospect of good government. The view of Parliament and the Supreme Court has been that open debate does not mean deregulation of electoral expression; rather, it is consistent with certain limits during an election period and state-financed expression so long as it is provided on equal terms to all.¹⁰⁴

While the democratic norms above can be identified in the case law, it is much more difficult looking forward to determine which norms should prevail in future cases when they come into conflict. If anything, Canada's democratic process jurisprudence demonstrates a need for a principled approach to determine priority among democratic norms in each case. As will be explained in the next section, this is really a question of the allocation of responsibility between the Court and Parliament in overseeing the functioning of the democratic process and of the deference (or lack thereof) that the Court should accord to Parliament.

B. Charter Review of Rules Governing the Democratic Process

The overly deferential approach favoured by the Supreme Court in two recent democratic process cases, *Harper* and *Bryan*, suggests that

¹⁰² See Rebecca L. Brown, “Accountability, Liberty, and the Constitution” (1998) 98 *Colum. L. Rev.* 531.

¹⁰³ It is important to note that in addition to partisan manipulation of electoral rules, there is the possibility of bipartisan collusion. See *e.g.* Samuel Issacharoff, “Gerrymandering and Political Cartels” (2002) 116 *Harv. L. Rev.* 593.

¹⁰⁴ See generally *Harper*, *supra* note 5 and *Figueroa*, *supra* note 95.

the Court seeks to limit its role in the supervision of the democratic process. This will constrain the Court's ability to rectify abuses and may even invite manipulation of the rules that govern the democratic process. I have previously outlined a preferable approach to judicial review of rules governing the democratic process under the *Charter* that I have dubbed "process theory lite."¹⁰⁵ My approach, unlike the Court's current deferential approach, would require that under section 1 of the Charter, the Court consider Parliament's fundamental conflict of interest, in that the government is both regulating the political process and is the product of that process. Parliament's conflict of interest and the risk of partisan rule-making is of special relevance to the political finance regime brought into existence by the 2003 *Elections Act* and the 2006 *Accountability Act*.

The Court's reasoning in *Harper* and *Bryan* shows a disturbing tendency toward unreflective deference. Justice Fish's admonition in *Bryan* is representative of the majority approach in both cases and is most worrisome; specifically, he states: "[W]e must be particularly careful not to usurp Parliament's role in determining the rules of the electoral game most appropriate for Canada as a whole."¹⁰⁶ Justice Abella, who wrote for the minority in *Bryan*, was chastised by Justice Bastarache for "ignor[ing] yet again the contextual and deferential approach contemplated in the recent jurisprudence of this Court."¹⁰⁷ The extreme deference of the majorities in *Harper* and *Bryan* is a departure from the more measured approach found in *Libman*, *Figueroa*, and other earlier cases.

According to Justice Bastarache in *Thomson Newspapers v. Canada (A.G.)*, the level of deference to be accorded Parliament is determined after considering four contextual factors: (1) the nature of the harm and the inability to measure it; (2) the vulnerability of the group protected; (3) subjective fears and apprehension of harm; and (4) the nature of the infringed activity.¹⁰⁸ The contextual factors identified

¹⁰⁵ The name acknowledges the intellectual debt owed to John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) [Ely, *Democracy and Distrust*], and also to later proponents of process theory in the US context. See e.g. Samuel Issacharoff & Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 *Stan. L. Rev.* 643 [Issacharoff & Pildes, "Politics as Markets"]; Richard H. Pildes, "The Theory of Political Competition" (1999) 85 *Va. L. Rev.* 1605.

¹⁰⁶ *Bryan*, *supra* note 101 at para. 58.

¹⁰⁷ *Ibid.* at para. 50.

¹⁰⁸ [1998] 1 S.C.R. 877 at paras. 90-96 [*Thomson Newspapers*].

by Justice Bastarache are deployed as a rote approach in *Harper* and *Bryan* to determine the appropriate level of deference to Parliament. However, these contextual factors alone are inadequate to determine the applicable standard of review.

The problem with Justice Bastarache's contextual approach is that it is entirely blind to one of the most important contextual factors: Parliament's inherent conflict of interest in regulating the political process.¹⁰⁹ Legislative conflict of interest in regulating the democratic process is not a novel concept. The idea of a gerrymander—the manipulation of electoral boundaries for partisan or other purposes—dates back to at least the early nineteenth century.¹¹⁰ Gerrymanders, however, are hardly the only way to manipulate the democratic process for partisan purposes. Political finance regulations and other controls on political expression provide similar opportunities to obtain partisan advantage.¹¹¹ Political scientists, particularly public choice scholars, and US legal commentators who favour a more process-based approach to judicial review, have long recognized this risk. They argue that the self-interest of legislators justifies close scrutiny of rules governing the political process. John Ely envisioned courts, through constitutional review, exercising something akin to a regulatory role to ensure that democratic process is open and that political competition remains robust.¹¹² Richard Pildes expressed this view and suggested that it has application beyond the US context: “[C]onstitutional law must play a role in constraining partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy. That functional justification for judicial review will be present in all constitutional democracies.”¹¹³

The question in the Canadian context is how to account for Parliament's self-interest in *Charter* review of rules governing the democratic

¹⁰⁹ Note that *Bryan*, *supra* note 101, was a rare democratic process case in that it did not raise any issue of conflict of interest. There is no reasonable argument that can be made that the self-interest of any members of Parliament was served by restricting access to eastern election results in more western parts of the country before voting ended. There are, of course, other good arguments that can and were made against this, but the Supreme Court of Canada deferred to Parliament's judgment in the matter.

¹¹⁰ Our first Prime Minister, Sir John A. MacDonald, was a noted practitioner of the art. See generally R. MacGregor Dawson, “The Gerrymander of 1882” (1935) 1 *Can. J. Econ. & Pol. Sci.* 197.

¹¹¹ Issacharoff & Pildes, “Politics as Markets,” *supra* note 105 at 688-90.

¹¹² Ely, *Democracy and Distrust*, *supra* note 105 at 102-03.

¹¹³ Richard H. Pildes, “The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics” (2004) 118 *Harv. L. Rev.* 29 at 154.

process. I have previously offered as my answer a two-step approach. First, Parliament, being a majoritarian institution, is acknowledged to be better placed than the courts to determine the principles that should inform the regulation of the democratic process; only in the most extreme circumstances would it be appropriate for a court to prefer its conception of democracy over one clearly expressed by Parliament.¹¹⁴ In practical terms, this means that at the first stage of the section 1 analysis, courts should defer to Parliament's assessment of whether or not legislation addresses a pressing and substantial objective. Second, Parliament's conflict of interest in regulating the democratic process requires courts to be vigilant in assessing the means chosen by Parliament to implement its objectives. This means, in practice, that courts should not defer to Parliament in their assessment of proportionality.¹¹⁵ A strict application of the proportionality aspects of the section 1 test, especially minimal impairment, will significantly reduce the risk of partisan and self-interested rule-making.

My approach is generally consistent with the approach favoured by the Supreme Court in democratic process cases prior to *Harper* and with the dissenting reasons in *Harper* and *Bryan*. The best example is *Libman*, where the Supreme Court deferred to the Quebec legislature's assertion that some form of spending limits was necessary to achieve its democratic vision, but rejected the absurdly low limits imposed. This approach is echoed by Justice Breyer of the US Supreme Court in his extra-judicial writing and recent decisions.¹¹⁶

The Supreme Court of Canada might, of course, never adopt my approach. However, it is almost inconceivable that the Court will remain oblivious to the risk of self-interested and partisan rule-making. In analyzing the two statutes that are the focus of this article, I contend

¹¹⁴ The court however, must retain the power and discretion to intervene if Parliament sanctions a clearly anti-democratic norm.

¹¹⁵ This is certainly true of the rational connection and minimal impairment parts of the proportionality analysis. An argument may be made that in balancing the salutary and deleterious effects in the last phase of the proportionality analysis, some credit should be given to Parliament's assessment of the salutary effects of the legislation, as that evaluation often mirrors the analysis undertaken in connection with determining whether an objective is pressing and substantial. Parliament, however, is poorly suited to evaluating the deleterious effects of rules governing the democratic process, as it may be blind (wilfully or otherwise) to the anti-competitive and anti-democratic aspects of such rules.

¹¹⁶ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005) at 49. Cass Sunstein has observed that Breyer's approach to judicial review, at least in so far as it emphasizes democracy as an interpretive principle, resembles Ely's. See Cass Sunstein, "Justice Breyer's Democratic Pragmatism" (2006) 115 Yale L.J. 1719 at 1720.

that, in some form or another, the Court will be more sensitive to the problem of partisan self-interest in its future analysis of rules governing the political process.

V. US CAMPAIGN FINANCE JURISPRUDENCE

A. *The Relevance of the US Experience*

Canada's political finance jurisprudence is peculiar. The battles over the constitutionality of the political finance regime have been fought by third parties (*i.e.*, interest groups) and minor political parties.¹¹⁷ These contests at the margins of the system have been treated by courts as proxies for the constitutionality of the system as a whole.¹¹⁸ Indeed, the Supreme Court of Canada's leading political finance decisions implicitly assume the constitutionality of the system in general and spending limits on political parties in particular. However, the constitutionality of the main device of the 1974 political finance regime—spending limits on political parties and candidates—has never actually been tested. Similarly, neither the contribution limits in the 2003 *Elections Act* nor any provincial contribution limits have been challenged.

In 1976 and again in 2006, the US Supreme Court considered the constitutionality of political finance regimes featuring both spending limits and contribution limits.¹¹⁹ No other democracy has confronted the constitutionality of spending limits and contribution limits in tandem. The differences between Canada and the United States in terms of political culture and constitutional and legal structures give ample reason to be cautious when considering the reasoning of US courts and legal scholars for the Canadian context. Even so, the grafting of contribution limits on to Canada's spending limit-based political finance system makes the American experience with contribution limits and spending limits of special interest. The US Supreme Court decisions

¹¹⁷ See *National Citizens' Coalition*, *supra* note 27; *Somerville*, *supra* note 27; *Libman*, *supra* note 7; *Pacific Press v. British Columbia (A.G.)*, [2000] 5 W.W.R. 219 (B.C.S.C.); *Harper*, *supra* note 5; *Figueroa*, *supra* note 95; and *Longley*, *supra* note 44. On the constitutional status of minor political parties before *Figueroa*, see: Heather MacIvor, "Judicial Review and Electoral Democracy: The Contested Status of Political Parties Under the Charter" (2002) 21 Windsor Y.B. Access Just. 479.

¹¹⁸ Feasby, "Freedom of Expression," *supra* note 8 at 237. See also *Harper*, *supra* note 5 at para. 102, where the Court held that "protecting the integrity of spending limits applicable to candidates and parties is a pressing and substantial objective."

¹¹⁹ *Buckley*, *supra* note 10; *Randall*, *supra* note 11.

identify and debate many of the key issues that would be raised in any constitutional challenge of Canada's new political finance regime. Identifying and understanding these key issues facilitates informed consideration of how they might be resolved in the Canadian context.

The United States' long tradition of regulating corporate and union participation and the constitutional jurisprudence that has resulted may also provide insight into issues surrounding Canada's new limits on corporations and unions. Even recognizing that, in practice, the effectiveness of US limits is questionable given the various loopholes available, the justifications offered for limiting corporate and union political activity in the US jurisprudence are noteworthy. As with spending limits and contribution limits generally, the richness of US jurisprudence in this area stands in stark contrast to the jurisprudence on these issues in other major democracies.

B. *Contribution and Spending Limit Cases*

1. *Buckley v. Valeo* (1976)

In 1974, in the aftermath of the Watergate scandal, a political finance system featuring contribution limits, spending limits, and public financing for presidential campaigns was adopted.¹²⁰ The contribution limits and spending limits were promptly challenged in *Buckley*,¹²¹ a decision which has set the parameters of US legislation, jurisprudence, and debate since 1976.¹²²

The defenders of the new political finance system contended in *Buckley* that contribution limits and spending limits were necessary to prevent corruption. A secondary goal, the promotion of equality, was also asserted. Noting "disturbing examples" from the 1972 election, the US Supreme Court accepted that preventing corruption and the appearance of corruption was an important legislative objective and that contribution limits logically furthered that objective.¹²³ Reasonable limits on contributions were not found to pose a significant risk to First Amendment values such as open and robust political debate. This

¹²⁰ *Federal Election Campaign Act of 1971*, 86 Stat. 3, as am. by *Federal Election Campaign Act Amendments of 1974*, 88 Stat. 1263, 2 U.S.C. § 431ff.

¹²¹ *Buckley*, *supra* note 10.

¹²² See e.g. Richard L. Hasen, "Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of *McConnell v. Federal Election Commission*" (2004) 153 U. Pa. L. Rev. 31.

¹²³ *Buckley*, *supra* note 10 at paras. 17-18.

conclusion depended in significant part on the view that a contribution, which is fundamentally a financial exchange, has limited expressive content beyond the mere fact of being made.¹²⁴ The decision cautioned that contribution limits might pose First Amendment concerns “if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy,”¹²⁵ and observed that contribution limits “impinge on protected associational freedoms.”¹²⁶ Despite those concerns, the cases following *Buckley* subjected contribution limits to “closely drawn” scrutiny rather than the more onerous standard of “strict scrutiny” usually applied to expenditure limits.¹²⁷

By contrast, spending limits were found to directly undermine the First Amendment. The US Supreme Court held that “[t]he expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”¹²⁸ The anti-corruption rationale was inadequate to justify the spending limits: “[T]he independent advocacy restricted by the provision does not presently appear to pose the dangers of real or apparent corruption comparable to those identified with large campaign contributions.”¹²⁹ Though this view appeared to soften in *McConnell*, where spending limits on issue advocacy survived a constitutional challenge, the *Buckley* formula was reaffirmed in *Randall* in 2006.¹³⁰

Having found the anti-corruption rationale sufficient to justify contribution limits but inadequate to support spending limits, the judges in *Buckley* then considered whether the secondary objective, promotion of equality, had any merit. They dismissed that objective in categorical terms, holding that “the concept that government may restrict the speech

¹²⁴ According to the majority opinion, “A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.” See *ibid.* at para. 14.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at para. 22.

¹²⁷ *McConnell*, *supra* note 67 at 137, per Stevens and O’Connor JJ. (writing for the court): “The less rigorous standard of review we have applied to contribution limits (*Buckley*’s “closely drawn” scrutiny) shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”

¹²⁸ *Buckley*, *supra* note 10 at para. 13.

¹²⁹ *Ibid.* at para. 36.

¹³⁰ *Ibid.*; *Randall*, *supra* note 11.

of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment... ”¹³¹ The decision noted that the financial ability of individuals to participate in public debate is not a relevant First Amendment concern. This inflexible position eroded in subsequent cases, as the distinction between anti-corruption and the promotion of equality has proved difficult to sustain both in theory and in practice. As will be discussed, the equality rationale partly explains why limits on corporate and union political activity have been sustained in some cases. Indeed, it has been suggested that the equality rationale is at work in many campaign finance cases, even when it is not explicitly acknowledged.¹³²

2. *Randall v. Sorrell* (2006)

Thirty years after *Buckley* the US Supreme Court revisited the constitutionality of contribution and spending limits in *Randall*. The political finance regime in issue was adopted by Vermont in 1997 and shared two main features with the Canadian political finance system after the adoption of the 2003 *Elections Act*—contribution limits and spending limits.¹³³ *Randall* provided the opportunity to assess the constitutionality of spending limits in light of the post-*Buckley* experience.

Two main submissions were made in support of spending limits. First, it was contended that the “[p]ost-*Buckley* experience ... has shown that contribution limits (and disclosure requirements) alone cannot effectively deter corruption or its appearance; hence experience has undermined an assumption underlying that case.”¹³⁴ Second, it was asserted that fundraising has become an all consuming enterprise that distracts elected officeholders from their duties as legislators and representatives.¹³⁵ *Buckley*’s rejection of the equality rationale was not directly attacked.

¹³¹ *Buckley*, *supra* note 10 at para. 38.

¹³² See e.g. David A. Strauss, “Corruption, Equality, and Campaign Finance Reform” (1994) 94 Colum. L. Rev. 1369 at 1369 and at n. 1; Richard Briffault, “The Return of Spending Limits: Campaign Finance Reform After *Landell v. Sorrell*” (2005) 32 Fordham Urb. L.J. 399 at 438.

¹³³ Aside from the differences in amounts, the Vermont law did not consider expenditures of a candidate’s own money to be “contributions,” and the Vermont law sought to correct the advantages of incumbents by limiting incumbents’ expenditures to 85% or 90% of the spending limit depending on the office.

¹³⁴ *Randall*, *supra* note 11 at 4439 (Breyer J., majority opinion).

¹³⁵ *Ibid.* For a more detailed elaboration of this argument, see Vincent Blasi, “Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All” (1994) 94 Colum. L. Rev. 1281.

The plurality decision written by Justice Breyer rejected the first contention. Justice Breyer's reasons indicate that for spending limits to be constitutional it must first be shown that contribution limits are insufficient to prevent corruption. Justice Breyer, writing for himself and the Chief Justice, held that political finance issues had not changed radically since *Buckley* and certainly not enough to undermine the Court's conclusions in that case.¹³⁶ His reasons seem to embody two ideas. First, he suggests that since the problem has not changed in nature or scope, the remedy upheld in *Buckley*—contribution limits—should continue to suffice; meanwhile, the remedy found unconstitutional in *Buckley*—spending limits—should remain unconstitutional. Second, Justice Breyer's finding is in part an application of the preference for the least drastic means. *Buckley* held that contribution limits are less problematic than spending limits; therefore, it stands to reason that contribution limits should be used before spending limits. Justice Souter expressed a similar view in dissent when he remarked that "the *Buckley* court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment."¹³⁷

Justice Breyer also found the alternative justification for spending limits unpersuasive. The amount of time devoted by elected officials to fundraising, despite the conclusion of Justice Souter in dissent, was considered in *Buckley* and rejected as a compelling objective.¹³⁸ Justice Breyer declined to overrule *Buckley* on this point.

Vermont's contribution limits were also unconstitutional. Justice Breyer prescribed a two-stage inquiry to assess the constitutionality of contribution limits. First, following *Buckley*, he asked whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'"¹³⁹ He then asked "whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage."¹⁴⁰ Justice Breyer's conclusion that the Vermont contribution limits were unconstitutional is not surprising, given that the limits were very low compared to limits in other States and were not indexed for inflation.¹⁴¹

¹³⁶ *Randall, ibid.* at 4439-40.

¹³⁷ *Ibid.* at 4451 (Souter J., concurring).

¹³⁸ *Ibid.* at 4440 (Breyer J.) and at 4451 (Souter J.).

¹³⁹ *Ibid.* at 4440 (Breyer J.).

¹⁴⁰ *Ibid.*

¹⁴¹ But see Richard Briffault, "A Changing Supreme Court Considers Major Campaign Finance Questions: *Randall v. Sorrell*, and *Wisconsin Right to Life v. FEC*" (2006) Election L.J. 74

Justice Breyer's concern that contribution limits not be allowed to magnify the natural advantages of incumbency is consistent with the approach that I recommend for adjudicating democratic process issues under the *Charter*. Justice Breyer objects to the use of legislative power to entrench incumbents. Put differently, he objects to partisan rule-making in the context of the democratic process. This view is also reminiscent of the Supreme Court of Canada's approach in *Figueroa* where minor political parties were denied access to certain advantages afforded to major political parties.

C. *Corporations, Unions, and Political Finance Restrictions*

The United States has a long tradition of regulating corporate and union political contributions and expenditures. This impulse for regulation dates back to the progressive movement of the early twentieth century. The *Tillman Act* of 1907 imposed a ban on political contributions by corporations.¹⁴² The traditional view, expressed by Justice Souter in *Federal Election Commission v. Beaumont* in 2002, is that the *Tillman Act* was a legislative response to a popular movement inspired by Theodore Roosevelt to curtail corporate political influence.¹⁴³ Despite Justice Souter's explanation that the *Tillman Act* sought to free elections from corruption by corporate money, other rationales for the regulation of corporate and union contributions and expenditures can be identified. For example, Justice Frankfurter set out a democratizing rationale for the *Tillman Act* in *United States v. UAW-CIO*.¹⁴⁴ He wrote that the "underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a

at 81, noting the Second Circuit's finding that the contribution limits were "sufficiently high to permit effective campaigning."

¹⁴² 2 U.S.C. § 441b(2), 34 Stat. 864, Ch. 420.

¹⁴³ *Federal Elections Commission v. Beaumont*, 539 U.S. 146 (2003) at 152:

The current law grew out of a "popular feeling" in the late 19th century "that aggregated capital unduly influenced politics, an influence not stopping short of corruption." A demand for congressional action gathered force in the campaign of 1904, which made a national issue of the political leverage exerted through corporate contributions, and after the election and new revelations of corporate political overreaching, President Theodore Roosevelt made banning corporate political contributions a legislative priority. ... [T]he momentum was "for elections 'free from the power of money,'" and Congress acted on the President's call for an outright ban, not with half measures, but with the Tillman Act.

Souter J.'s rendition of the history behind the *Tillman Act* represents the conventional wisdom. However, others offer a more nuanced story. See e.g. John R. Bolton, "Constitutional Limitations on Restricting Corporate and Union Political Speech" (1980) 22 Ariz. L. Rev. 373 at 375-81.

¹⁴⁴ 352 U.S. 567 (1957).

democracy for the wise conduct of government.”¹⁴⁵ This reflects the sentiment that the right to make political contributions should be limited to those who have the right to vote or are capable of obtaining the right to vote by achieving the age of majority or seeking naturalization. Another purpose of the *Tillman Act* was to stop corporations from using shareholders' funds for political purposes that they may not support. Adam Winkler contends that this animating purpose can be found in all subsequent restrictions on corporate political activity and that the same rationale informs restrictions on union activity.¹⁴⁶ Winkler provides the most cogent explanation as to why corporations and unions are often subject to the same rules. Absent the shareholder and dues payer protection rationales, the only plausible reason for treating corporations and unions the same way is that they are traditional adversaries and that fairness requires equal treatment.¹⁴⁷

Whatever the purpose of limiting corporate and union political activity may be, there is a general acceptance that the prohibition of direct corporate and union political contributions to candidates is constitutionally permissible. To be sure, many devices have emerged to facilitate the use of corporate and union funds for the indirect support of candidates—most notably funding the overhead for political action committees (PACs). Indeed, much of the recent litigation has concerned independent expenditures of corporations and unions and whether PACs that depend on corporations or unions to fund some of their costs can be limited in their activities.¹⁴⁸ Implicit in these challenges is an acceptance of limits on the direct political involvement of corporations and unions.¹⁴⁹

The US approach to judicial review of expenditure limits is, for the most part, less deferential than that in Canada. *Buckley* and *Randall* both apply a stricter standard of review than leading Canadian expenditure limit cases. One of the early cases concerning corporate expenditure

¹⁴⁵ *Ibid.* at 575.

¹⁴⁶ Adam Winkler, “‘Other People’s Money’: Corporations, Agency Costs, and Campaign Finance Law” (2004) 92 *Geo. L.J.* 871 [Winkler, “Other People’s Money”].

¹⁴⁷ See e.g. David J. Sousa, “‘No Balance in the Equities’: Union Power in Making and Unmaking of the Campaign Finance Regime” (1999) *Stud. Am. Pol. Dev.* 374, discussing the idea of “balance” between business and labour that has informed US campaign finance legislation since the 1940s. Note that *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) at 666 provides some justification for the differential treatment of corporations and unions [*Austin*].

¹⁴⁸ See e.g. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

¹⁴⁹ See *McConnell*, *supra* note 67 at 203.

limits, *First National Bank of Boston v. Bellotti*,¹⁵⁰ involved corporate expenditures in a referendum and adopted a strict approach, partly as a result of the inapplicability of the anti-corruption rationale in the context of referenda.¹⁵¹ Despite favouring a strict standard of review for spending limits generally and for corporations in the specific context of referenda, the US Supreme Court occasionally defers to legislative judgment in the context of spending limits on PACs associated with corporations and unions.¹⁵² A leading example of this is *Austin v. Michigan State Chamber of Commerce*,¹⁵³ where a restriction on the expenditure of corporate funds on campaign advertising was upheld.

The US Supreme Court is less deferential when dealing with limits on non-profit interest groups. In *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*,¹⁵⁴ Justice Brennan wrote that a corporation formed for the sole purpose of engaging in political advocacy did not pose the same threat as a corporation formed for the purpose of amassing capital.¹⁵⁵ Accordingly, the restrictions on expenditures on such companies were held to be unconstitutional. The US Supreme Court reaffirmed its approach to non-profit interest groups in *Federal Election Commission v. Wisconsin Right to Life, Inc.*,¹⁵⁶ which was a challenge to the *Bipartisan Campaign Reform Act* limits on interest group advocacy that were largely upheld in *McConnell*. In this case, the court took an approach that some commentators viewed as being tantamount to overruling the conclusion in *McConnell*.¹⁵⁷ Despite the conflicting signals,

¹⁵⁰ 435 U.S. 765 (1978).

¹⁵¹ *Ibid.* at 789. See also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) at 297-98, where the same approach was taken in the context of contributions in a referendum.

¹⁵² For example, in considering expenditures made by a non-profit corporation in soliciting contributions in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), Chief Justice Rehnquist held at 209: “[C]areful legislative adjustment of the federal electoral laws in a ‘cautious advance, step by step,’ to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference” [*National Right to Work Committee*].

¹⁵³ *Supra* note 147.

¹⁵⁴ 479 U.S. 238 (1986). The reversal of direction from *National Right to Work Committee*, *supra* note 152, may be attributable to the nature of the two organizations, one being a genuine membership organization and the other being a group of donors masquerading as a membership organization.

¹⁵⁵ *Ibid.* at 259.

¹⁵⁶ 127 S. Ct. 2652 (2007).

¹⁵⁷ Richard L. Hasen, “Beyond Incoherence: The Roberts Court’s Deregulatory Turn in *FEC v. Wisconsin Right to Life*” (July 2007) Loyola-LA Legal Studies Paper No. 2007-33, online: <<http://ssrn.com/abstract=1003922>>.

limits on for-profit corporations and unions (or their associated PACs) are more likely to get an easy ride from the US judiciary than limits on individuals or interest groups.

VI. THREE CONSTITUTIONAL QUESTIONS

A. *Are Individual Contribution Limits Unconstitutional?*

1. Expressive Nature of Contributions and Egalitarian Objectives

The idea that political contributions carry less expressive content than political expenditures is not persuasive on the preliminary question of whether freedom of expression has been infringed. The threshold for violating section 2(b) is low; most human acts other than violent acts are considered expressive and most limits accordingly infringe the guarantee.¹⁵⁸ As a result, it is almost trite to observe that contribution limits breach the constitutional guarantee of freedom of expression. The real question is whether contribution limits can be justified under section 1 of the *Charter*. In this part of the *Charter* analysis the question of expressive content is relevant.

The first question to consider in the context of section 1 is the nature of the objective of the impugned law. The Supreme Court of Canada has characterized the overall objective of election laws to be fairness. Central to the objective of fairness is a concept of equality. Indeed, the Court in *Harper* described the Canadian approach to election regulation to be an egalitarian model,¹⁵⁹ which holds that subject to differences in individual talents, citizens should have a roughly equal influence on the outcome of the electoral process. This requires roughly equally weighted votes and constraints on the use of private wealth in the electoral arena.

Contribution limits further egalitarian objectives and are a more direct and effective tool for levelling influence on the political process than spending limits. Even a contribution limit of \$1,000 permits the wealthy to

¹⁵⁸ See *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at para. 43.

¹⁵⁹ *Harper*, *supra* note 5 at para. 62. On the political theory and objectives of Canadian political finance legislation, see Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill L.J. 5; Andrew Geddis, "Liberté, Égalité, Argent: Third Party Election Spending and the *Charter*" (2004) 42 Alta. L. Rev. 429; and Andrew C. Geddis, "Democratic Visions and Third-Party Independent Expenditures: A Comparative View" (2001) 9 Tul. J. Int'l & Comp. L. 5.

obtain more influence than the poor. Nevertheless, when contributions are limited to \$1,000, influence is necessarily spread thinly over a much larger pool of donors than when contributions sizes are unlimited. The contribution limit system in the *Accountability Act* is, then, more democratic and more egalitarian than a system without contribution limits.

Although the contributions limits in the *Elections Act* and *Accountability Act* can be justified in egalitarian terms, they were in actuality a response to the corruption in the Sponsorship Program and the perception that large donors, corporations, and unions enjoyed improper political influence. Anti-corruption has long been a motivating factor for Canadian election regulation, but it has not been the focus of judicial comment in the *Charter* era. However, the US courts have repeatedly found that the prevention of corruption is a worthwhile objective of election laws. Given that contribution limits both promote egalitarian objectives and combat corruption, there can be little doubt that the first branch of the section 1 test—the existence of a pressing and substantial objective—is met.

2. Proportionality and Partisan Bias

The real test for the *Accountability Act* contribution limits is whether they satisfy the proportionality aspects of the section 1 analysis. The Supreme Court has taken an inconsistent approach to the proportionality analysis in recent democratic process cases. As noted in Part IV, I have argued elsewhere that the Supreme Court's democratic process jurisprudence before *Harper* was characterized by deference to the philosophical objectives of Parliament, but critical assessment of the means used to achieve those objectives.¹⁶⁰ Most often, this approach leads to a critical evaluation of the means employed to achieve an objective in the context of the "minimal impairment" test. However, the Court in *Harper* took a deferential approach to the evaluation of third party spending limits even at the minimal impairment stage of the section 1 analysis.¹⁶¹ In the context of contribution limits, such a deferential approach could be rationalized by following the US example in finding that contributions carry less expressive value than expenditures. In the same way that the US courts use closely drawn

¹⁶⁰ Feasby, "Freedom of Expression," *supra* note 8 at 282-86.

¹⁶¹ *Harper*, *supra* note 5 at para. 111.

scrutiny rather than strict scrutiny to evaluate contribution limits, the Supreme Court of Canada could defer to the judgment of Parliament's estimation of the need for, and level of, contribution limits.

As explained above, when a partisan impact or incumbent-entrenching effect of a democratic process rule is identified, a court should adopt a critical view and demand compelling justification for the rule.¹⁶² Contribution limits are an interesting test for this approach. The \$5,000 contribution limit in the *Elections Act* disproportionately affected the Liberals, who were the majority government at the time the limit was adopted. What, if anything, is a court to make of the fact that the contribution limit was so obviously contrary to the Liberals' self-interest? The natural normative conclusion is that it must be a good law because the government would not act contrary to its partisan interest without a compelling reason. The question, though interesting, is moot given the passage of even more strict contribution limits under the leadership of the Conservatives in 2006.

The contribution limits in the 2006 *Accountability Act*, as shown above in Table 2, are only to the significant prejudice of the Liberal Party. When the new contribution limits were proposed by the Conservatives, neither they nor the Bloc or NDP could reasonably have expected to suffer any real disadvantage as a result of the changes. As such, the 2006 contribution limits are a classic example of self-serving rule-making. Accepting for the moment that some form of contribution limits is constitutional, the Conservatives' self-interested change to the law should be carefully scrutinized. If my recommended approach or another approach with sensitivity to Parliamentary conflicts of interest were followed, the Liberal Party would be able to make a credible argument that the \$1,000 contribution limit should be struck down as unconstitutional. This argument would be more credible if a challenge was brought by the Liberal Party organization that opposed the introduction of contribution limits rather than by Liberal Members of

¹⁶² Christopher D. Bredt and Laura Pottie argue that the court should be even more exacting than I suggest. See "Liberty, Equality and Deference: A Comment on Colin Feasby's 'Freedom of Expression and the Law of the Democratic Process'" (2005) 29 Sup. Ct. L. Rev. (2d) 291 at 292 [emphasis in original]:

[W]e believe that a healthy dose of judicial scepticism is particularly warranted in respect of regulation of advocacy *within* the electoral context. Experience has demonstrated a clear tendency for Parliament to enact legislation that preserves the *status quo* by giving preferential access to resources to incumbents and/or large established parties. This tendency should be balanced by a requirement for convincing evidence when justifying restrictions on participation in an election.

Parliament that voted in favour of the contribution limits in both the *Elections Act* and the *Accountability Act*.

This approach could be supplemented by arguments that follow *Randall*, specifically that contribution limits preclude political parties from raising sufficient funds to carry on the level of public debate required to engage the electorate. The argument, in other words, is that a political party (or its candidates) has been denied the deliberative equality the political finance regime is otherwise designed to promote.¹⁶³ The contribution limits, it could be argued, impede the ability to raise funds necessary to meaningfully participate in the electoral debate. This reasoning is similar to the argument that prevailed in *Libman*, where third party spending limits were constitutional in concept, but the actual limits were too low to permit a meaningful campaign.¹⁶⁴ Strains of this type of reasoning were heard during the recent Liberal leadership campaign when the editors of the *Globe and Mail*, among others, lamented the impact of contribution limits on the ability of candidates to effectively participate in the leadership contest.¹⁶⁵ This type of challenge could draw upon process theory and would seek to import the rule in *Figueroa*—that political finance laws not exacerbate pre-existing economic disparities—from section 3 of the *Charter* to section 2(b) of the *Charter*.¹⁶⁶ The system of election expense reimbursement for candidates and political parties, together with enhanced inter-election public funding for political parties, detracts from the urgency of any such claim by established political parties and candidates. For such a claim to have maximum resonance it must be brought by an emerging political party that has not yet qualified for public funding.¹⁶⁷

Even though the Liberals are the most adversely affected by the reduction in the level of contribution limits, an emerging political party

¹⁶³ On “deliberative equality,” see Colin Feasby, “The Supreme Court of Canada’s Political Theory and the Constitutionality of the Political Finance Regime” in Ewing & Issacharoff, *Party Funding*, *supra* note 74, 243 at 248-53.

¹⁶⁴ *Libman*, *supra* note 7 at paras. 58-82. The concept of “meaningful participation” also figured prominently in the context of s. 3 in *Figueroa*, *supra* note 95. See also *Bowman v. United Kingdom*, [1998] E.C.H.R. 175, where the European Court of Human Rights struck down a £5 spending limit for third parties on the grounds that it effectively precluded participation in the electoral debate.

¹⁶⁵ “Those fundraising blues,” *supra* note 86.

¹⁶⁶ *Figueroa*, *supra* note 95 at para. 54.

¹⁶⁷ This type of challenge was brought by the emerging Reform Party against the free broadcasting regime in *Reform Party of Canada v. Canada (A.G.)* (1995), 123 D.L.R. (4th) 366 (Alta. C.A.).

could bring a broader challenge that invokes the partisan bias of the *Accountability Act* in support of a larger argument against the constitutionality of contribution limits. Such an argument would emphasize that the introduction of contribution limits was a fundamental change from the historical mode of political finance regulation in Canada and would question whether there was any evidence that spending limits failed to address Parliament's concerns. The broader argument against contribution limits would also necessarily claim that in addition to whatever partisan effects exist amongst the established political parties, the contribution limits entrench the status quo and protect established parties as a group from insurgent ones. Such a claim would require empirical evidence that contribution limits create an entry barrier for new political parties.¹⁶⁸ In this regard, US studies, which demonstrate little consensus on the effect of contribution limits on political competition, are of little use because of the existence of spending limits in Canada.¹⁶⁹ The Court would have to balance all of these arguments against the egalitarian, democratizing, and anti-corruption benefits of contribution limits.

B. *Is the Ban on Union and Corporate Contributions Unconstitutional?*

1. The Union Prohibition

The 2003 *Elections Act* prohibited trade union and corporate contributions to registered political parties but preserved the ability of trade unions and corporations to make small contributions to candidates and electoral district political party organizations. The *Accountability Act* made the ban on trade union and corporate contributions complete by forbidding contributions to candidates and electoral district political party organizations.

As discussed, political finance controls have traditionally been questioned on the grounds that they may violate freedom of expression. Indeed, the ban on union and corporate contributions raises such concerns.

¹⁶⁸ On the contrary, one might argue that an emphasis on lowering entry barriers only assists small political parties that are well financed and question how this can be reconciled with an egalitarian model of election regulation. At the same time, however, it could be asserted that the renewal brought to the political system by new parties—well financed or otherwise—is worth paying some measure of anti-egalitarian price.

¹⁶⁹ Richard L. Hasen, "The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after *Randall v. Sorrell*" (2007) 68 Ohio St. L.J. 849.

Many of the concerns already discussed that attend contribution limits generally also apply in the context of limits on corporations and unions. However, there are certain additional issues raised by the outright ban on political contributions by corporations and unions. These issues arise under both the *Charter's* section 2(b) guarantee of freedom of expression and the section 2(d) guarantee of freedom of association.

Section 2(d) protects the right of individuals to associate with one another to pursue common objects. It does not confer constitutional protection on group activities that are not constitutionally protected if pursued by individuals. In *Dunmore v. Ontario (A.G.)*,¹⁷⁰ the Supreme Court explained that section 2(d) analysis comes down to a single question: “[H]as the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?”¹⁷¹

In *Libman* the Court held that spending limits in the Quebec *Referendum Act*¹⁷² on individuals and groups not affiliated with the officially sanctioned “Yes” or “No” committees violated freedom of expression. The limits were also found to be so low as not to be justifiable under section 1 of the *Charter*. *Libman* is not often thought of as a section 2(d) case; however, the case was brought by both Robert Libman and the Equality Party and the issue of freedom of association was argued. Indeed, the Court found that the spending limits contravened freedom of association as well as freedom of expression.¹⁷³

Unions and, perhaps to a lesser extent, corporations are associations of individuals. As such, corporations and unions stand in relation to elections in the same position that the Equality Party in *Libman* stood in relation to the Quebec referendum. The ban on corporate and union contributions is an obvious breach of freedom of association when it is considered that individual contributions are permitted subject to the \$1,000 limit in the *Accountability Act*. The long tradition of permitting union and corporate political contributions, both before and during the *Charter* era, further supports this conclusion by making clear that the purpose of the ban is to discourage the collective pursuit of common goals. The question, then, is whether or not the ban on corporate and union contributions can be justified under section 1 of the *Charter*.

¹⁷⁰ [2001] 3 S.C.R. 1016.

¹⁷¹ *Ibid.* at para. 16.

¹⁷² R.S.Q. c. C-64.1.

¹⁷³ *Libman*, *supra* note 7 at paras. 36-37.

Reasons for limiting corporate and union contributions in both the *Elections Act* and the *Accountability Act* are broadly reminiscent of those considered in US cases. First, the prohibition on corporate and union contributions addresses the perception that political parties are unduly beholden to corporate and union donors. Second, limiting the right to make political contributions to individuals reinforces the role of the individual in the democratic process. As such, the prohibition of political contributions by corporations and unions broadly aligns the right to make contributions with democratic rights under the *Charter*.¹⁷⁴ Third, the prohibition of political contributions by corporations and unions removes the possibility of shareholder funds and union membership dues being used for purposes that they do not approve of—this is the “other people’s money” problem described by Winkler.¹⁷⁵ While the first two rationales are consistent with the egalitarian model of election regulation endorsed by the Supreme Court of Canada, the last rationale has little resonance in Canadian case law.

The issue of union contributions came before the Supreme Court of Canada in a different context in *Lavigne*.¹⁷⁶ The question in that case was whether or not an individual’s freedoms of association and expression were violated by a union’s use of mandatory dues collected under state authority to support the union’s political activities. The political activities that the individual objected to were, generally speaking, support of the NDP and left-leaning causes. The Supreme Court, though divided, held that the use of union dues collected under statutory authority was subject to the *Charter*. The Court unanimously decided that if the *Charter* applied, then any infringement of the rights to freedom of association and freedom of expression was justified. Justice Wilson, writing for herself and Justice L’Heureux-Dubé, cited US and Privy Council authorities for the proposition that unions are inherently political organizations and that their legitimate objectives extend beyond collective bargaining.¹⁷⁷ Justice Wilson went on to conclude that union political

¹⁷⁴ Minors and permanent residents who do not enjoy democratic rights under the *Charter* are permitted to make political contributions. Accordingly, it is more accurate to say that the right to make political contributions is limited to those who have democratic rights or are capable of obtaining democratic rights by attaining voting age or through naturalization.

¹⁷⁵ Winkler, “Other People’s Money,” *supra* note 146.

¹⁷⁶ *Lavigne*, *supra* note 9.

¹⁷⁷ *International Associations of Machinists v. Street*, 367 U.S. 740 (1961) at 812; *Colleymore v. Attorney-General of Trinidad and Tobago*, [1969] 2 All E.R. 1207 (J.C.P.C.) at 1211.

activity was connected to, and could not be separated from, the achievement of other union objectives. Justice La Forest, writing for himself and Justices Sopinka and Gonthier, also commented favourably on the constructive role played by unions in the Canadian political process and specifically noted traditional union support of the NDP.¹⁷⁸

Plausible arguments can be made that the ban on contributions by unions to political parties cannot be justified under section 1. First, the prohibition on union contributions operates disproportionately to the detriment of the NDP. This obvious partisan impact, together with the Supreme Court's recognition of the positive aspects of union involvement in the political process in *Lavigne*, provides a good basis for arguing that the union contribution ban is not justified under section 1.

Several factors are balanced against the partisan effects of the ban and the positive historic contribution of unions to the political process. Unions would have to show why they differ not only from regular corporations but also from non-profit corporations and interest groups that are captured by the contribution limits. There is also the reality that the contribution ban was supported by Canada's largest unions and the principal beneficiary of union political donations, the NDP. A court would understandably have a difficult time taking seriously arguments about the deleterious effects of the ban when such effects were understood and anticipated at the time of the adoption of the ban and were widely supported by those most affected by it.¹⁷⁹ Furthermore, the continued ability of motivated union members to volunteer in political campaigns and contribute out of their own funds, and for unions to encourage their members to do so, is a mitigating factor. Other factors, such as the third party spending limits upheld in *Harper* that narrowed an alternative outlet for union political money, could affect a court's analysis of the constitutionality of the ban on union political contributions.

All of this discussion may be moot if the \$1,000 individual contribution limit in the *Accountability Act* is constitutional. The practical reality is that for a major national union, a contribution limit of \$1,000 is so low as to effectively be a ban. As a result, any NDP or union strategy to challenge the ban on union political contributions would have to be part

¹⁷⁸ *Lavigne*, *supra* note 9 at para. 270.

¹⁷⁹ Louis Massicotte, "Electoral Legislation Since 1997: Parliament Regains the Initiative" in John H. Pammet & Christopher Dornan, eds., *The Canadian Federal Election of 2006* (Toronto: Dundurn Press, 2006) 196 at 207.

of a larger challenge of contribution limits. Such an argument would inevitably emphasize the inappropriateness of applying a contribution limit designed for individuals to a group of individuals. The positive ideological disposition of the NDP and its union allies toward political finance controls and the benefits that accrue to the NDP from the prohibition on corporate contributions and individual contribution limits make a constitutional challenge by the NDP or its union allies unlikely.

2. The Corporate Prohibition

Much of the discussion of the prohibition on union contributions applies *mutatis mutandis* to corporations. Indeed, the applicable constitutional framework is the same. The difference between the position of corporations and unions is that unions comprise individuals of roughly equal standing, each of whom are citizens or residents of Canada, whereas corporations may have shareholders with widely varying ownership stakes and who are neither residents nor citizens of Canada.¹⁸⁰ In this way, the majoritarian and egalitarian underpinnings of the regulation of political finance weigh heavily against the prospects of any challenge against the ban on corporate contributions. The lack of any positive commentary on corporate participation in the democratic process stands in contrast to the favourable commentary about union political activities in *Lavigne*. The best case scenario for opponents of the ban on corporate contributions is for parallel treatment if the union contribution ban is struck down.

C. *Are Political Party Spending Limits Now Unconstitutional?*

One of the bedrock assumptions of Canadian political finance law has been that spending limits on candidates and political parties are constitutional. While these limits have never been tested by a court, *Harper* upheld third party spending limits on the ground that they buttressed the main pillars of the political finance regime, which are spending limits on candidates and political parties. *Harper* makes it clear that the objective of these pillars is to constrain the influence of money on the political process.

¹⁸⁰ Arguments for identical treatment of corporations and unions would be less persuasive if rules were adopted to allow union members to opt out of support of union political activities with which they disagree. Indeed, the existence of such a rule allowed the US Supreme Court to make a distinction between corporations and unions in *Austin*, *supra* note 147 at 666.

The interaction between contribution limits and spending limits has not been considered in Canada. That is why the US Supreme Court's decisions in *Buckley* and *Randall* are of interest. Perhaps the most important principle that may be drawn from those cases is that while spending limits may theoretically be justifiable, they cannot be justified in practice despite the pervasive influence of money in US politics. The principal reason for this is the existence of contribution limits. Spending limits are difficult to justify when contribution limits are already in place. How do spending limits prevent the corruption of candidates when contributors may only donate specific amounts? If anything, the lack of spending limits creates an imperative to raise ever more funds that inevitably dilutes the influence of individual contributors.¹⁸¹

Is the Canadian context so different that the principle drawn from *Buckley* and *Randall* would not apply? The anti-corruption rationale which is prevalent in the US jurisprudence is complemented and overshadowed by the egalitarian justification in Canada. It is tempting to assume that the egalitarianism in Canada's political finance law makes a difference. Such an assumption, however, does not hold up under scrutiny. Contribution limits are a far superior device for promoting the egalitarian goals of the Canadian political finance regime than are spending limits. Under the spending limit regime that prevailed from 1974 to 2003, it was theoretically possible for a candidate or political party to obtain all necessary funds from a single contributor. While this extreme scenario never happened, political parties did, to differing extents, depend on large donations from wealthy individuals, unions, and corporations. Under the new political finance regime, no individual is able to contribute more than \$1,000, which amounts to only a small fraction of the funds necessary for the operation of a political party in a non-election period, let alone during a campaign. As such, contribution limits are a far more effective levelling device than spending limits.

The unintended consequence of Canada's new contribution limits may be to render spending limits unconstitutional. As *Harper* made clear, spending limits violate section 2(b) of the *Charter* but may be justified under section 1 on egalitarian grounds. The Court declined to second-guess Parliament in *Harper* as to whether its egalitarian objective could have been accomplished by less intrusive means. Now

¹⁸¹ This is undoubtedly the reason that defenders of the Vermont spending limits in *Randall* turned to the time preservation rationale. Today this rationale has little bearing on the Canadian context.

Parliament has enacted what the US Supreme Court has found to be a less intrusive means of accomplishing anti-corruption objectives—contribution limits. There can be no real debate that contribution limits are also a less intrusive means of accomplishing egalitarian objectives. The presence of a less intrusive means substantially—perhaps completely—undermines the justification for spending limits.

If spending limits are to survive, alternative justifications must be made out. The first possible alternative justification is that spending limits ensure that political parties have a measure of parity of resources. In one respect this is an aesthetic argument—competition is more interesting if the protagonists are evenly matched.¹⁸² This argument is not unlike some of the arguments marshalled in favour of salary caps in professional sports. Parity of resources may, however, be something more than just an aesthetic objective. Measures that ensure some parity of resources might be justifiable on the grounds that democratic debate is more robust when opponents are evenly matched and, in turn, that the electorate becomes more interested, informed, and engaged in the democratic process.¹⁸³ The Supreme Court has, however, been reluctant to uphold limits on expression that might promote a better quality of democratic debate.¹⁸⁴ In addition, it is not clear whether there is any evidence that supports this view or what kind of evidence the Court would require.

The second alternative justification has some foundation in Canadian political finance and constitutional law. In *Figueroa*, the Court held that election laws, and specifically political finance laws, may not exacerbate pre-existing disparities in the resources of political parties. While *Figueroa* does not mandate equality of resources, it does preclude the exaggeration of unequal resources. The main concern in *Figueroa* was for the fate of small or emerging political parties. In much

¹⁸² Another, less persuasive, aesthetic argument is that without spending limits, political discourse may become dominated by large media, mass mailings, and other modern electioneering techniques, to the exclusion of more voluntary grass-roots activities that bind citizens together. However, it is not clear that more expensive campaigns would silence debate or stifle grass-roots activities. Indeed, in one respect, more expensive elections combined with contribution limits require more, not less, engagement with citizens in the form of fundraising activities.

¹⁸³ On deliberative democracy, see Joshua Cohen, "Deliberation and Democratic Legitimacy" in David Estlund, *Democracy* (Malden, Mass.: Blackwell, 2002) 87. In the context of Canadian election law, deliberation-enhancing objectives are discussed in Colin Feasby, "Public Opinion Poll Restrictions, Elections, and the *Charter*" (1997) 55 U.T. Fac. L. Rev. 241.

¹⁸⁴ See e.g. *Thomson Newspapers*, *supra* note 108, where it was argued that limits on publication of opinion polls for a short period before election day enhanced the quality of democratic debate.

the same way, it is arguable that spending limits further the interests of small political parties.¹⁸⁵ Essentially, spending limits ensure that elections remain affordable and accessible for small or emerging political parties. The affordability and accessibility of elections is necessary both for citizens' exercise of the democratic right to run for public office, protected under section 3 of the *Charter*, and for the renewal and health of the democratic process as a whole. This argument, however, would likely require some empirical evidence that small or emerging political parties would be significantly discouraged from participating in the democratic process or that their prospects of success would be materially diminished by the removal of spending limits.¹⁸⁶

A third alternative justification for spending limits might be the promotion of access to the political process for women.¹⁸⁷ The Lortie Commission suggested that women face greater fundraising obstacles than men, and recommended the introduction of contribution limits for nomination contests to mitigate the problem.¹⁸⁸ There are several problems with a gender access justification for spending limits. To begin with, it would only apply to candidate spending limits and not to political party spending limits. There is no reason to believe that party spending limits would have any bearing on the women who do gain access to the political process. Perhaps more importantly, a study of Canadian provinces and territories found that women were marginally better represented in jurisdictions without spending limits than those with spending limits.¹⁸⁹ While this certainly does not prove that spending limits are contrary to women's success in politics, it also does not support the view that spending limits are necessary to assist women.

¹⁸⁵ Alternatively, it is arguable that spending limits hurt small parties that are well financed.

¹⁸⁶ The question of the need for empirical evidence to justify limits of freedom of expression in the electoral context was before the Supreme Court in *Bryan*, *supra* note 101, a case concerning the publication of eastern election results prior to the close of polls in more westerly time zones. For a critical view of the Supreme Court's lax approach to requiring evidence in *Harper*, *supra* note 5 and other cases, see Jamie Cameron, "Governance and anarchy in the s. 2(b) jurisprudence: A comment on *Vancouver Sun* and *Harper v. Canada*" (2005) 17 N.J.C.L. 71.

¹⁸⁷ Similar fundraising impairments might be posited for minority candidates.

¹⁸⁸ "Lortie Commission," *supra* note 25 at 117.

¹⁸⁹ See Lisa Young, "Campaign Finance and Women's Representation in Canada and the United States" in Steven Griner & Daniel Zovatto, eds., *The Delicate Balance Between Political Equality and Freedom of Expression: Political Party and Campaign Financing in Canada and the United States* (Washington, D.C.: Organization of American States, 2005) 47 at 57.

VII. CONCLUSION

This article has raised three questions about the constitutionality of the new political finance regime. However, none of these questions will be taken seriously unless the Court adopts a more critical approach to the regulation of political process under section 1 of the *Charter*. The changes to the political finance regime wrought by the *Elections Act* and *Accountability Act*—particularly the individual contribution limits and attendant changes to public funding and the prohibition of corporate and union contributions—have an obvious partisan impact. If a constitutional challenge to either contribution limits or the restrictions on unions and corporations materializes and the Court fails to scrutinize Parliamentary conflicts of interest, future governments will be free to manipulate the rules of the democratic process for partisan advantage. Though such a challenge might not necessarily succeed, at a minimum the Court must be alert to the risk that self-serving legislation poses to the democratic process.

Perhaps the greatest risk to the integrity of the democratic process is that the constitutional questions outlined in this article will never be heard by a court. Unlike in the past with third party spending limits and funding thresholds, there are no obvious protagonists to bring these questions before a court for a resolution. Just as no major political party challenged spending limits since the *Charter's* adoption in 1982, there is little reason to expect the major political parties to attack this legislation. By the time any challenge materializes, it is likely that the immediate partisan impacts of the reforms will have long since abated and the major political parties will either have adapted to the new rules or ceased to exist. At that time, the features of the legislation—individual contribution limits, the prohibition on corporate and union contributions, and spending limits—will be judged on their merits, divorced from the partisan biases of the *Elections Act* and *Accountability Act*.

A constitutional challenge to contribution limits—the individual limits or the corporate and union ban—would be more likely to succeed in the short term, while the partisan effects are still discernible. However, if contribution limits survive a challenge, or if the immediate partisan context of the legislation passes without a challenge to contribution limits, the most obvious and pressing constitutional question will be the validity of spending limits. The question of whether contribution limits render spending limits redundant is timeless in nature. Indeed, once the limits become entrenched and accepted as part of the Canadian political finance regime, the likelihood that a court will invalidate spending limits on the assumption of the permanence and constitutionality of contribution limits rises.

APPENDIX I

Top 10 Political Contributions 1999¹⁹⁰

	Donor	Type of Donor	Political Party	Amount
1.	Estate of Robert Lauzière	Individual	BLOC	221,906
2.	OFL	Union	NDP	127,120
3.	Bank of Nova Scotia	Corporate	Liberal	119,619
4.	CEP	Union	NDP	117,320
5.	CUPE	Union	NDP	113,345
6.	CanWest Global Communications Corporation	Corporate	Liberal	87,173
7.	UFCW	Union	NDP	83,430
8.	USWA District 6	Union	NDP	71,597
9.	CAW	Union	NDP	69,043
10.	Bombardier Inc.	Corporate	Liberal	63,481

Top 10 Political Contributions 2000

	Donor	Type of Donor	Political Party	Amount
1.	CLC	Union	NDP	683,947.12
2.	CAW	Union	NDP	452,177.25
3.	USWA National	Union	NDP	254,415.98
4.	UFCW	Union	NDP	196,670.45
5.	CUPE	Union	NDP	192,107.69
6.	USWA District 6	Union	NDP	178,945.42
7.	Canadian Imperial Bank of Commerce	Corporate	Liberal	154,636.77
8.	CEP	Union	NDP	139,261.14
9.	Bombardier Inc.	Corporate	Liberal	100,502.68
10.	Canadian Machinists Political League	Union	NDP	97,783.87

¹⁹⁰ Excluding transfers from local and provincial party organizations.

Top 10 Political Contributions 2001

	Donor	Type of Donor	Political Party	Amount
1.	Bracken House Trust	Trust	PC	4,243,584
2.	USWA District 6	Union	NDP	193,362.32
3.	CUPE	Union	NDP	187,859.02
4.	USWA National	Union	NDP	142,893.02
5.	Bombardier Inc.	Corporate	Liberal	142,503.80
6.	CLC	Union	NDP	122,803.75
7.	CEP	Union	NDP	117,529.43
8.	CAW	Union	NDP	87,076.95
9.	UFCW	Union	NDP	85,123.65
10.	Bank of Montreal	Corporate	Liberal	83,800.89

Top 10 Political Contributions 2002

	Donor	Type of Donor	Political Party	Amount
1.	OPSEU-SEFPO	Union	NDP	250,450.00
2.	Bombardier Inc.	Corporate	Liberal	142,359.89
3.	CEP	Union	NDP	123,281.36
4.	USWA District 6	Union	NDP	109,680.10
5.	Robert Mallen	Individual	NDP	100,893.67
6.	UFCW	Union	NDP	97,432.00
7.	USWA National	Union	NDP	83,000.00
8.	Bank of Montreal	Corporate	Liberal	76,184.30
9.	Manalta Investments Inc.	Corporate	Liberal	75,000.00
10.	Power Corporation of Canada	Corporate	Liberal	70,000.00

Top 10 Political Contributions 2003

	Donor	Type of Donor	Political Party	Amount
1.	55555 Inc.	Corporate	Liberal	2,974,341.20
2.	CEP	Union	NDP	761,910.00
3.	UFCW	Union	NDP	740,600.00
4.	CAW	Union	NDP	736,733.20
5.	Magna International	Corporate	Conservative	380,337.43
6.	CUPE	Union	NDP	334,710.00
7.	USWA National	Union	NDP	316,090.00
8.	PM Capital Inc.	Corporate	Conservative	275,000.00
9.	USWA District 6	Union	NDP	259,823.20
10.	OPSEU-SEFPO	Union	NDP	252,619.60

APPENDIX II

Number of Contributions to Major Registered Political Parties, 1989-2005

	BLOC	Conservative	Liberal	NDP	Reform/ Alliance	PC
1989	-	-	23,859	90,771	7,606	49,635
1990	-	-	42,035	118,339	71,722	34,887
1991	-	-	30,256	95,840	45,462	34,799
1992	-	-	32,973	76,589	57,238	34,958
1993	-	-	48,686	66,680	50,927	53,626
1994	29,085	-	43,859	55,511	29,756	16,641
1995	25,848	-	46,681	57,065	33,907	18,101
1996	17,030	-	45,018	50,322	68,047	21,543
1997	18,886	-	42,043	51,965	77,014	26,590
1998	10,541	-	39,385	46,327	56,317	19,794
1999	13,104	-	38,230	43,000	54,518	18,262
2000	20,633	-	42,348	57,934	266,720	14,777
2001	5,980	-	6,536	28,221	49,354	13,392
2002	5,499	-	17,891	35,614	95,531	11,555
2003	5,277	-	21,830	33,265	82,316	17,941
2004	8,775	68,382	17,429	30,097	-	-
2005	7,773	106,818	23,878	27,824	-	-

Value of Contributions to Major Registered Political Parties by Corporations, 1989-2003

	BLOC	Liberal	NDP	Reform	PC
1989	0	3,931,263	54,323	141,184	6,942,728
1990	0	4,567,820	141,509	138,039	6,349,996
1991	0	3,411,803	291,692	490,743	6,660,310
1992	0	3,501,792	129,818	613,102	6,793,081
1993	0	8,307,383	147,332	1,021,634	13,215,683
1994	0	5,980,286	127,920	569,907	2,060,476
1995	0	7,510,127	425,445	815,520	2,859,552
1996	0	7,814,722	188,344	907,769	3,106,031
1997	0	11,229,478	269,847	1,910,961	6,435,732
1998	0	7,734,420	244,919	1,291,094	2,905,154
1999	0	8,624,397	342,459	1,504,736	2,241,201
2000	360,153	11,862,693	198,757	6,753,356	2,777,286
2001	7,000	6,411,391	47,542	873,989	1,457,507
2002	88,350	5,144,528	95,269	1,121,519	1,038,908
2003	67,209	10,816,396	109,958	1,319,144	1,155,746

Corporate Contributions as a Percentage of Total Contributions to Each Political Party, 1989-2003

	BLOC	Liberal	NDP	Reform	PC
1989	0	62.2	0.8	10.5	50.3
1990	0	37.9	1.8	6.2	57.5
1991	0	50.3	3.3	9.4	55.3
1992	0	46.4	1.8	9.8	58.9
1993	0	56.4	1.6	14.4	59.3
1994	0	50.8	1.3	11.9	49.9
1995	0	56.8	3.4	18.8	51.3
1996	0	55.4	1.6	12.6	46.3
1997	0	64.2	1.9	21.7	58.6
1998	0	56.4	4.4	22.4	50.0
1999	0	60.0	5.3	23.9	43.6
2000	15.9	59.1	2.2	34.4	49.4
2001*	7.6	51.4	0.9	18.3	18.3
2002*	9.7	38.8	1.8	15.4	30.9
2003*	6.6	44.8	1.0	15.8	26.7

Value of Contributions to Major Registered Political Parties by Trade Unions, 1989-2003

	BLOC	Liberal	NDP	Reform	PC
1989	0	2,882	1,006,689	0	0
1990	0	3,443	1,170,766	0	0
1991	0	3,659	1,082,960	0	0
1992	0	3,639	1,189,755	0	0
1993	0	39,497	3,182,396	0	0
1994	0	10,731	808,594	0	0
1995	0	24,363	1,214,559	0	0
1996	0	10,658	1,250,079	0	0
1997	0	15,704	2,749,574	0	0
1998	0	19,068	1,021,428	0	0
1999	0	39,904	1,652,684	0	0
2000	36,008	77,331	3,022,480	0	0
2001	7,000	40,481	1,391,652	0	6,061
2002	17,100	51,214	1,021,481	0	0
2003	20,300	111,938	5,198,717	0	0

Trade Union Contributions as a Percentage of Total Contributions to Each Political Party, 1989-2003

	BLOC	Liberal	NDP	Reform	PC
1989	-	0	14	0	0
1990	-	0	14.9	0	0
1991	-	0.1	12.3	0	0
1992	-	0	16.8	0	0
1993	-	0.3	34.8	0	0
1994	0	0.1	8.0	0	0
1995	0	0.1	9.8	0	0
1996	0	0.1	10.4	0	0
1997	0	0.1	19.6	0	0
1998	0	0.1	18.5	0	0
1999	0	0.2	25.7	0	0
2000	1.6	0.4	33.7	0	0
2001	7.1	0.3	27.6	0	0
2002	1.9	0.4	19.4	0	0
2003	2.0	0.5	51.5	0	0