He Hath a Heart For Harping: Stephen Harper and Election Spending in a Spendthrift Age

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Richard Haigh

Prior to the actual decision by the Supreme Court of Canada in Harper v. Canada, the plaintiff, Mr. Stephen Harper, had every reason to feel confident that he would be victorious. He had a good track record, after all. Previous attempts by him and his organization, the National Citizen’s Coalition (NCC), challenging earlier federal gag laws on election spending, had proven successful. In the case itself, both lower court levels had ruled in his favour. And to top it all off, he had recently been crowned leader of a newly united Conservative Party of Canada.

The Supreme Court of Canada’s (SCC) finding, therefore, must have struck a big blow to Mr. Harper. In a split decision, the Court held that the latest version of an ever-refined series of spending limits enacted by Parliament were acceptable. The timing could not have been more propitious: the decision was rendered on May 18, 2004, mere weeks prior to the June 28 federal election in which Harper challenged Paul Martin for the position of Prime Minister of Canada.

This short paper examines the recent history of election financing laws in Canada, and then looks briefly at three distinct aspects of the Harper decision: the irony of Stephen Harper’s position in the case, evidential and conceptual problems associated with equating commercial

*Associate Director, Graduate Program, Osgoode Hall Law School Professional Development. Thanks to Chaim Sapirman for initial research assistance and help with this paper, Sara Wharton for performing most of the reference checks, Tiffany Coelho for assistance with the commercial advertising section and Michael Sobkin for reviewing and commenting on an earlier draft. Apologies to Ezra Pound, whose poem The Seafarer contains the line: “He hath not heart for harping.”

4 Harper was elected leader on March 20, 2004 at the Conservative Party of Canada Convention in Toronto, Ontario.
speech with political speech, and an examination of whether financial restraints are of declining importance in an era where political influence is more subtly obtained.

I. A BRIEF HISTORY OF ELECTION FINANCE REFORM AND THE HARPER DECISION

Election finance regulation became a serious concern in Canada in the mid-1960s. The Barbeau Committee report in 1966 recommended to Parliament that candidates and their political parties should be subjected to spending limits during an election campaign.\(^5\) Some of these recommendations were adopted, resulting in amendments to the Elections Act in 1974 banning anyone other than parties or candidates from incurring any election expenses during a campaign. The crucial exception to this rigid rule allowed expenses to be incurred by third parties only for the purpose of advancing an issue of public policy — the so-called “good faith” exception.\(^6\)

This exception was short-lived. In 1983, the Chief Election Officer Jean-Marc Hamel agreed with critics who argued that the good faith exception was full of loopholes. Evidence showed that third parties were spending large sums of unaccounted for money during election campaigns. New regulations were adopted prohibiting anyone but a registered agent of a party or a candidate from spending any money on the promotion of a candidate or a party.\(^7\)

At this point, the NCC entered the fray. It began systematically challenging the federal position through strategic use of the courts and

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\(^5\) Canada, Report of the Committee on Election Expenses (Ottawa: Queen’s Printer, 1966) (Chair: Alphonse Barbeau).

\(^6\) Election Expenses Act, S.C. 1973-74, c. 51, s. 12. This amendment created a new s. 70.1 to be inserted after s. 70 of the Canada Elections Act. The relevant s. 70.1(4) is as follows:

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

(a) for the purpose of gaining support for views held by him on an issue of public policy, or for the purpose of advancing the aims of any organization or association, other than a political party or an organization or association of a partisan political character, of which he was a member and on whose behalf the expenses were incurred; and

(b) in good faith and not for any purpose related to the provisions of this Act limiting the amount of election expenses that may be incurred by any person on account of or in respect of the conduct or management of an election.

\(^7\) An Act to Amend the Canada Elections Act (No. 3), S.C. 1983, c. 164, s. 14.
the Charter of Rights and Freedoms. It took the position that the very idea of spending limits is anathema to a free and liberal society, gaining the backing of the Alberta courts in a number of separate judgments.

The first in this line of decisions was National Citizens’ Coalition Inc. v. Canada (Attorney General) handed down by the Alberta Queen’s Bench. The Court held that the prohibition was an unjustifiable violation to the right to freedom of expression under section 2(b) of the Charter. Unexpectedly, the decision was never appealed; as a result the next two federal elections, in 1984 and 1988, took place without any third party spending limits.

Following the 1988 election, the Lortie Commission on Electoral Reform and Party Financing recommended to Parliament a new strategy for controlling third party spending. The Commission maintained that broad-based spending limits represented the best way to ensure that all voters received an equal amount of information; this would allow the election process itself to be conducted on as level a playing field as possible. As a result, Parliament amended the Elections Act in 1993 to include third party spending limits of $1,000, a prohibition on pooling resources (as a measure to prevent circumventing this limit), and advertising blackout periods during a start-up period after a writ is issued and again in the final two days of an election campaign. The NCC also successfully challenged these provisions in Alberta in Somerville v. Canada. An appeal by the Crown was dismissed.

Up to this stage, the Supreme Court of Canada had not participated meaningfully in the debate. Its chance came in the case of Libman v. Quebec (Attorney General), a case involving campaign financing rules, albeit in the context of a referendum, not an election. In the decision, however, the Court expressed its disapproval of the Somerville decision. A unanimous SCC stated in obiter that

In Somerville v. Canada (Attorney General)...the Alberta Court of Appeal declared [election spending] provisions to be unconstitutional.
With respect, we have already mentioned that we cannot accept the Alberta Court of Appeal’s point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions.\textsuperscript{13} as it had noted in an earlier passage that:

\begin{quote}
the objective of Quebec’s referendum legislation is highly laudable, as is that of the Canada Elections Act. We agree in this respect with the analysis of the Lortie Commission and of the expert witness P. Aucoin regarding the need to limit spending both by the principal parties (the national committees in the case of a referendum) and by independent individuals and groups in order to preserve the fairness of elections.\textsuperscript{14}
\end{quote}

As a result, and with the implicit support of the Court, Parliament revised its strategy yet again by enacting Bill C-2.\textsuperscript{15} This latest reform initiative received royal assent on May 31, 2000 and reflects an evolving trend towards further tightening of the purse strings. It is wide-ranging, covering a number of grounds related to election and campaign financing.

Not surprisingly, the NCC did not retreat. It again felt that Parliament had gone too far in restricting spending. This time, it was Stephen Harper, by now the President of the NCC, who launched another challenge to the provisions — in his personal capacity, but it was no secret that he represented the view of the NCC.\textsuperscript{16} Again, the case was brought to trial in Alberta.

Harper took issue with three main parts of Bill C-2: (1) the ban on all election advertising by any individual including a registered party on polling day,\textsuperscript{17} (2) the restriction of third party spending during an election

\textsuperscript{13} Id., at para. 79.
\textsuperscript{14} Id., at para. 56.
\textsuperscript{15} Bill C-2, An Act respecting the election of members to the House of Commons, repealing other Acts relating to elections and making consequential amendments to other Acts, 2nd Sess., 36th Parl., S.C. 2000, c. 9.
\textsuperscript{16} It is an interesting question as to why Harper himself and not the NCC launched the lawsuit. There were no doubt strategic matters in issue, discussion of which could form the subject of another paper, as David Somerville did the same in the earlier case of Somerville v. Canada, supra, note 2. On other occasions, it is the NCC who initiates the action.
\textsuperscript{17} Supra, note 15, at cl. 323(1):
\begin{quote}
323.(1) No person shall knowingly transmit election advertising to the public in an electoral district on polling day before the close of all of the polling stations in the electoral district.
\end{quote}
campaign to $3,000 per riding to a maximum of $150,000 nationally (prohibiting parties from splitting into smaller groups to circumvent and exceed the maximum allowable limit); and (3) the attribution, registration, and disclosure sections which require a third party to register itself with Elections Canada once it has incurred expenses of $500, at which time it must appoint a financial agent and may be required to appoint an auditor. The third party must also file an election advertising report within four months after the polling day.

Harper’s argument centred on a number of Charter grounds: Freedom of Expression (section 2(b)), Freedom of Association (section 2(a)), and the right to vote (section 3). The Court, in a 6:3 decision, upheld the constitutionality of the Act. The majority determined that all

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18 Id., at cls. 350 and 351.

350. (1) A third party shall not incur election advertising expenses of a total amount of more than $150,000 during an election period in relation to a general election.

(2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by

(a) naming them;
(b) showing their likeness;
(c) identifying them by their respective political affiliations; or
(d) taking a position on an issue with which they are particularly associated.

(3) The limit set out in subsection (2) only applies to an amount incurred with respect to a leader of a registered party or eligible party to the extent that it is incurred to promote or oppose his or her election in a given electoral district.

(4) A third party shall not incur election advertising expenses of a total amount of more than $3,000 in a given electoral district during the election period of a by-election.

(5) The amounts referred to in subsections (1), (2) and (4) shall be multiplied by the inflation adjustment factor referred to in section 414 that is in effect on the issue of the writ or writs.

351. A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

19 Id., at cls. 353(1), 344(1), 355(1) and 359(1).

353. (1) A third party shall register immediately after having incurred election advertising expenses of a total amount of $500 and may not register before the issue of the writ.

354. (1) A third party that is required to register under subsection 353(1) shall appoint a financial agent who may be a person who is authorized to sign an application for registration made under that subsection.

355. (1) A third party that incurs election advertising expenses in an aggregate amount of $5,000 or more must appoint an auditor without delay.

359. (1) Every third party shall file an election advertising report in the prescribed form with the Chief Electoral Officer within four months after polling day.

20 See paras. 66, 125-27, and 67-74, respectively. The bulk of the Court’s analysis, both majority and dissent, was on the issue of s. 2(b) and corresponding s. 1 limits.
of the parts of Bill C-2 under scrutiny were reasonable limits allowable under section 1 of the Charter.

II. IRONY OR SCHADENFREUDE?

Harper has made it one of his key platform issues that the time has come to curb rampant “judicial activism” emanating from the judges appointed to the Supreme Court of Canada. On a number of occasions he has insisted that the judiciary must exercise an appropriate degree of Parliamentary deference. Judges should not meddle with Parliament’s policy decisions. During last year’s election campaign he vowed that, if he were elected, he would scale back the degree to which courts play a role in defining and interpreting legislation. He also advocated appointing only those who agree that courts must defer to Parliament and the legislatures.21 In reality, by ruling as it did, the Court did little more than follow one of the many campaign platform promises of Mr. Harper.

Ironically, by pursuing this litigation, Harper was faced with a situation in which, regardless of the decision, he would be seen simultaneously to win and lose. If the Court accepted his arguments and struck down the provisions of Bill C-2, he faced the unwelcome prospect of having an “activist” judiciary meddling with Parliament’s decisions, but giving him cause to celebrate the fact that businesses, unions, and individuals could contribute unlimited amounts of money to his campaign. If the Court rejected his arguments, as it ultimately did, he and the NCC would have to accept that their ability to fund the political party of their choosing could lawfully be curtailed.

Stephen Harper is the leader of the only party to oppose the idea of reforming election finance laws to limit donations in some way. As vice-president and then president of the NCC during the 1990s, he was instrumental in launching legal campaigns against these limits. The NCC makes no secret of its politics — it is a vehemently pro-business, right-wing think tank, supporting a “big business” agenda. Its home page states, “it is a non-partisan organization that promotes free enterprise, individual freedom, strong defence and better government.”22 It

22 National Citizens Coalition Home Page online at: <www.morefreedom.org> (last accessed 22 June 2005).
has publicly advocated and supported the eradication of medicare, tax cuts and privatization.

In the end it is not clear why Harper chose to fight this battle. Strategically, why would he want to make an argument that would require the dreaded “activism” for him to win? As we shall see in the section below, the effects of advertising are not always apparent, so it is quite conceivable that Harper and the NCC, whose views are forms of “advertisements” distributed to the wider world, unintentionally sent the judges a subliminal message that they should not be activist in this case — they should defer to Parliament. Ultimately, those who do not subscribe to the views of the NCC or Stephen Harper probably felt some smug satisfaction in seeing Harper squirm after this decision. In this case, irony becomes the handmaiden to a little bit of schadenfreude.

III. THE EFFICACY OF ELECTORAL ADVERTISING

The Supreme Court determined that the object of campaign finance laws is to ensure that the process of an election is fair. How is this object accomplished? It is obvious that election finance laws control the amount of fundraising that political parties can engage in — the legislation aims at restricting the amount that third parties can contribute to a campaign for reasons of fairness. But how does one go about measuring unfairness in an election?

Unfairness might arguably occur where money is not shared equally between parties and the money is ultimately used in an attempt to persuade voters. Bill C-2 assumes that third party political donations will be used to persuade voters of the merits of a particular political party. Advertising is the mode of delivery of this message. As Bastarache J., speaking for the majority, notes: “[t]he limits preclude the voices of the wealthy from dominating the political discourse, thereby allowing more voices to be heard.”

The campaign finance regime is the primary mechanism by which the state promotes equality in electoral discourse. As such, the Court held that Bill C-2 reflects an egalitarian model of election process. It therefore meets the basic principles for spending limits set out in Libman: to preserve equality of democratic rights by preventing the most affluent from monopolizing political discourse; to

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23 Harper, supra, note 1, at para. 118.
guarantee electors adequacy of information; and to apply universally to all individuals and groups, particularly to third-parties because of their ubiquity. There is, however, no easy way to establish whether this is happening under Bill C-2. The majority adverted to this problem in a single paragraph, first noting that “the nature of the harm and the efficaciousness of Parliament’s remedy in this case is difficult, if not impossible, to measure scientifically,” then citing a number of Lortie Report references to harm caused by unlimited third party spending and then concluding that

the absence of limits on third party advertising expenses can erode the confidence of the Canadian electorate who perceive the electoral process as being dominated by the wealthy. This harm is difficult, if not impossible to measure because of the subtle ways in which advertising influences human behaviour…

In the end, the Court deferred to Parliament’s choice by relying almost exclusively on evidence tendered in the Lortie Commission report and the fact that it is nearly impossible to measure the harm that may be caused without restrictions.

As Christopher Bredt points out, controlling third party spending during campaigns is a strange way of attempting to achieve a goal of political parity. The law does not deal with other methods of influencing voter behaviour which might persuade the average citizen: solicitation by email, use of other internet resources and creation of “dummy” charities asking for money to pay for badges or pins, to name just three. It does not deal with other time periods, outside the formal campaign. It says nothing about editorial and media coverage, which tends to bias incumbent and established parties at the expense of alternative voices. Ironically, the Court found that the availability of some of these alternative methods in fact levels the playing field because they are not included within the definition of “election advertising” in the Act. If the primary objective was to create a level playing field, rather than curbing spending, would it not be more effective to ensure parties

24 Cited in Harper, id., at para. 61.
25 Id., at para. 79.
are equally funded as Bredt suggests? Or regulate by capping the amount of exposure \textit{per se} — by limiting TV time, regulating the number of emails each party could send, restricting column inches of print and seconds of radio time — rather than the revenue received? Of course, no one seriously suggests such a scheme, as it would be completely unmanageable. It does, however, frame things in a slightly different way: it is not really an issue of freedom of expression, but more accurately one of access to the media.

Moreover, a problem that remains underanalyzed in the debate surrounding election finance laws is what effects paid political advertising has on voter behaviour. In a companion piece in this issue, Colin Feasby notes that there is a need to distinguish between partisan advertising, and communication that is non-partisan, or pure issue advocacy. His point is that spending limits would be much more effective if they focused specifically on partisan advertising, leaving out educational advertising as it provides a social good for all voters.\footnote{C. Feasby, "Freedom of Expression and the Law of the Democratic Process", at p. 237.} Both Feasby and Bredt argue that in cases such as political process cases, courts should be wary of showing deference to Parliament, due to the inherent self-interest Parliament has in regulating its own processes. Bredt takes this a bit further, arguing that third party election spending laws are fundamentally suspect because they concentrate on such a small piece of what influences voters, ignoring more troubling areas such as the inequality of wealth between political parties (which is not regulated).\footnote{See Feasby, \textit{id.}, at 34-40. See also C. Bredt, "Comments on Colin Feasby’s Paper", at 291.}

My concern is slightly different. This debate accepts as a basic premise that political advertising influences voters, in a similar vein to the way that commercial advertising influences purchasers. Is there any evidence to support this? The Supreme Court has spent untold pages debating the merits and risks associated with commercial advertising. In \textit{RJR-Macdonald Inc. v. Canada (Attorney General)} the majority and dissent engaged in a heated conversation about the efficacy of cigarette advertising.\footnote{[1995] S.C.J. No. 68, [1995] 3 S.C.R. 199. The majority in \textit{RJR} referred to a number of internal manufacturers’ documents, academic studies on advertising and cigarette consumption (sociological and psychological) taking over six pages of analysis: see paras. 60-94.} In the end, the two sides disagreed on the adequacy of evidence showing a link between advertising and consumption. The majority (unwittingly) painted advertising as a form of religious belief,
where spending untold millions acts as the necessary leap of faith to take advertising from something inexplicable to something harmful. As the Court would have it:

One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of human psychology. Many of the workings of the human mind, and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time which then means that:

The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products.

This leads to:

[It is difficult to believe that Canadian tobacco companies would spend over 75 million dollars every year on advertising if they did not know that advertising increases the consumption of their product.]

In Harper, however, there is much less sustained discussion on whether the same analysis in the commercial realm applies to election advertising. A number of questions remain unanswered: Are political decisions shaped by the same forces as commercial decisions? Do we know whether voter behaviour is swayed by advertising to the same degree that consumer behaviour is affected? During a campaign, what impact does advertising have? What about at the very moment of voting? Is the impact different? If so, in what way?

There are only two instances where the Court in Harper develops its theme about the nature of advertising. In the first, a very short phrase buried in a passage about harms, hearkens back to the mystery described in RJR: “because of the subtle ways in which advertising influences human behaviour.” Later on, the Court relies on Professor Aucoin, the Research Director for the Lortie Commission:

There is no … evidence for the claim that the advertising of third parties can never have its desired effect. It is advertising like all other
advertising: sometimes it works, in the sense that it has its intended effects; sometimes it does not…

Note that there is only minimal recognition of the fact that this case is not about advertising in the commercial sphere; as in *RJR*, the analysis relies much more on assertion than evidence. It is not difficult for the majority in *Harper* to then follow the *RJR* majority’s earlier leap of faith logic: “That political advertising influences voters accords with logic and reason. Surely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective.” As in all of these advertising cases, one wonders why the Court does not pry more deeply into the nature of advertising. Relying almost exclusively on the Lortie Commission and its Research Director is not good enough. And if spending large sums of money is a universal proof of efficacy, then it would surely help us all if Environment Canada simply spent more money on its weather forecasting.

Commercial advertising is ubiquitous. As a result, it is one of the most important cultural factors shaping behaviour in a consumer world. Academic debate about the nature of advertising abounds. One thing that everyone agrees on, however, is that its importance to society is not limited to its ability to sell things to us. In fact, there are more important forces at work. As Judith Williamson notes:

[Advertising] has another function…[i]t creates structures of meaning. …In other words, advertisements have to translate statements from the world of things into a form that means something in terms of people…. Thus a diamond comes to ‘mean’ love and endurance for us. Once the connection has been made, we begin to translate the other way and in fact to skip translating altogether: taking the sign for what it signifies, the thing for the feeling. [People and objects] become interchangeable…[so] objects are made to speak – like people…[c]onversely there are the ads where people become identified with objects.

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32 Id., at para. 106.
33 Id.
This phenomenon is well understood in the field of commercial advertising. The interchangeability between subject and object means that commercial ads sell ideas about people in a glorified or romantic way, as much or more so than they sell products. De Beers, in linking diamonds with love in their ads, thereby runs the risk that all diamonds, from any manufacturer, become associated with love. The advertisement universalizes an emotion or feeling about an object. A consumer does not need to buy a de Beers diamond to get this response.

Unfortunately, the Supreme Court has not addressed whether this translates into the political realm. But surely it is important to know something about the sociology and psychology of election advertising. Political ads may be different from an ad for Coke or Pepsi. Or they may not.

For example, if we apply Williamson’s approach, the content of a political ad — which party is being supported, which candidate is best — may not become as important to the recipient as the basic idea that political advertising during elections reflects one of the cornerstones of democracy. The sign, the thing — an ad for Stephen Harper — may become nothing more than a signifier that we are blessed to have free, open elections. So that any campaign ad, whether it be for a political party, by a particular candidate, or from a third party about an issue such as health care, may act as nothing more than a symbol for the democratic process itself. The ads translate political party speech into ideas about the nature of democracy.  

If this deeper functioning of political advertising takes place, then it makes a big difference how funding restrictions should be treated in the analysis under section 1 of the Charter. In such a case, limits on restricting expression should be much more attenuated because the advertisements do not alter the playing field as much as originally thought. Voters are not manipulated to the same extent. Other parties, including marginal and alternative parties, may benefit from the belief that the democratic process is alive and well and vigorous.

On the other hand, this deeper functioning may not apply at all in the political sphere. The sad fact is that in Harper, as before in RJR,

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35 Another possible answer to “what is the effect of political advertising?” is “almost nil.” People vote for political parties oftentimes simply because they have always done so or for no other reason than that they want change. See Louis Menand, “Permanent Fatal Errors” New Yorker (6 December 2004), at 54 for a good overview.
Libman and other advertising cases, the Supreme Court has only made a half-hearted attempt to probe these “mysteries of human psychology.”

IV. THE INFLUENCE OF AFFluENCE

The Court was asked a relatively simple question: do the provisions of the Elections Act offend certain basic rights as provided for in the Charter? It is not the Court’s fault that the question had to be framed in this way. The NCC had become very adept at turning what is essentially a political question into something that resembles a legal dispute (again, this is the first step in what inevitably leads to issues about judicial activism and the politicization of the judiciary. As judges, it must sometimes be all that they can do not to throw up their hands in dismay, as they are placed in a situation from which they cannot avoid criticism by the very group that wants them to stay out of such a situation!)

There are few, if any, federal laws that are designed to work in such a limited temporal fashion as electoral finance laws. Most of the provisions in question in Harper take effect only during a few days of a federal election campaign. Their goal may be laudable, but as mentioned, they address only a fraction of what makes an election “fair.” A much more intractable problem is the narrowing of political debate due to the more or less permanent influence of politicians by an ever-decreasing segment of society holding an ever-smaller world view. The problem is perhaps more widespread in the U.S. than in Canada, but we are most certainly not far behind.

The reasons are twofold: political power in Canada is becoming more concentrated in the Prime Minister’s Office, and the “star power” of leaders figures more prominently in the public imagination. A concentration of power in the PMO means that the power of the executive derives less influence from outside sources. Add to that the lure of celebrity culture, to which the political arena has not been immune, and

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36 This is part of a much larger topic about how legal disputes act to frame issues in a particular way and whether a particular issue or question is better left for an electoral decision or a judicial one. For an interesting discussion on this basic debate, see, for example: Andrew Geddis, “Three Conceptions of the Electoral Moment” (2003) 28 Aust. J. Legal Philosophy 53.

37 See Donald Savoie, Governing From the Centre (Toronto: University of Toronto Press, 1999).
the consequence is that political leaders become “co-dependent” on other powerful interests.

It is no secret that major political parties of all stripes do not engage in the same diversity of debate that existed a few decades ago. Witness how the Labour Party in the United Kingdom under Tony Blair has been dramatically reformulated under his “Third Way” to look less like a traditional Labour Party and more like a conservative one. Or that John Kerry, Democratic Party nominee, attempted to secure John McCain, stalwart Republican, as his Vice-Presidential running mate. Or that there is not today a single major political party in Canada (or the Western World) that advocates deficit spending as a temporary solution to societies’ ills (in many jurisdictions over the last decade, balanced budgets have become the law). Or that these same parties in the same countries give absolutely no consideration to abandoning free trade or opting out of the WTO. Without passing judgment on these changes, there is little doubt that public discourse has contracted as a result. One of the main reasons for voter complacency and poor voter turnout, especially amongst the younger generation, is that there is very little, if any, difference amongst the major political parties.38

Some of these changes are due to the increasing influence of a small segment of society — the wealthy — over politicians. It is not the fact that the wealthy try to purchase influence through campaign contributions. The approach is much more subtle than that. Politicians now move effortlessly in the circles of the rich and famous. Recall, for example, when Bono, the lead singer of U2, was a headline act at Paul Martin’s leadership convention.39 These kinds of associations, over time, insulate leaders from the rough and tumble of everyday life.

It is all self-reinforcing. Wealthy businesspeople gain the notoriety of being able to associate with prominent politicians and leaders — which is good for business — and the political leaders gain a “networking” circle of influential business leaders, which translate into ever


greater networks, eventually bringing about respect, legitimacy and ultimately, vote-getting. As Robert Reich puts it:

The network is reassured, charmed, seduced…No policy has been altered, no bill or vote willfully changed. But, inevitably as the politician enters into the endless round of coffees, meals and reception among the networks of the wealthy, his view of the world is reframed. The seduction has been mutual….Increasingly, the politician hears the same kinds of suggestions and the same voicing of concerns and priorities. The wealthy do not speak in one voice, to be sure, but they share a basic common perspective in which such things as balancing the budget, opening trade routes, and cutting taxes on capital gains are of central importance.40

And campaign finance laws have nothing to say about this concern. In effect, they tinker around the edges as the playing field tilts ever further towards the affluent.

Where does this leave us? All Canadians cling to the hope (illusion?) that our elections are fair. We do not have UN observers monitoring our elections; our ballots are free of hanging, bulging or pregnant chads; we have not had to rely on our Supreme Court to decide the fate of an election. Our election finance laws do not seem to be widely disparaged, either. It is more than likely that most Canadians believe that elections here are not won or lost by how much money a candidate raises. We do not, however, share the same view about elections south of the border.

Yet, our system of electoral finance regulation is not ideal. Colin Feasby and Christopher Bredt in this Volume have pointed out many of the problems with the current approach. Maybe, in a quintessential Canadian way, these problems are deliberate; that Parliament has built an intentionally inferior system. Given the lack of evidence of any correspondence between advertising quantity and voter preferences, and the deep mystery surrounding advertising that the Court itself acknowledges, one wonders whether ultimately these laws are not meant to be rigorously logical, but to simply give weight to a perception of fairness. Perhaps their sole purpose is to pacify voters, to give them a sense of security, while at the same time, setting our system apart from the American process.

40 R.B. Reich, “Party Favors” New Yorker (13 October 1997), 12.
If this is the objective, our campaign finance laws seem to accomplish what they set out to achieve. While American attempts to control election spending with ever-tighter laws fail (election spending in the U.S. continues to rise by about 35 per cent each election)⁴¹ our electoral campaigns muddle along. None of the candidates or parties seems to spend obscene amounts of money (although, until Bill C-2, which finally allows Elections Canada to track all forms of spending on campaigns, no one knew for sure).

Thus, those stalwart challengers to Canadian election financing policies, the NCC and Stephen Harper, end up only challenging a small aspect of a much bigger puzzle. And with the Court falling clearly on the side of deference, the *Harper* case may be the last chance for some time that Parliament and the Court will collectively engage in this issue. That may be just as Stephen Harper wants it. Now that he has bigger fish to fry, it seems unlikely that he will continue to have the heart for harping on about campaign finance laws.

⁴¹ As an example, the difference between the 1996 and 2000 elections: $2.3 billion in campaign funds raised in 1996 versus $3.1 billion in 2000 — see the Federal Elections Commission website online at: <http://www.fec.gov> (last accessed 22 June 2005).