Issue Advocacy and Third Parties in the United Kingdom and Canada

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Mitigating the effect on the electoral process of uneven financing in election campaigns has been accepted in both Europe and Canada as a valid and pressing objective of election regulations. The means undertaken by the U.K. and Canada to achieve this objective, however, which include the regulation of third party issue advocacy, are constitutionally problematic. Issue advocacy, which refers to election-time advertising that is ostensibly non-partisan, is a common feature of the electoral landscape in the U.K. and Canada. The problem for election financing arises with respect to so-called sham issue advocacy. Sham issue advocacy is issue advocacy that is but a thinly disguised attack on, or promotion of, a candidate or political party. As such, sham issue advocacy threatens the integrity of political finance regulations because it destabilizes the equilibrium created by expenditure limits on candidates and political parties. The legislatures of the U.K. and Canada have attempted to deal with this problem through the extension of political finance legislation to third party issue advocacy *simpliciter*, as evidenced in the *Political Parties, Elections and Referendums Act 2000* of the U.K. and in the *Canada Elections Act*.

This article begins by reviewing the egalitarian justification for limiting the election expenditures of third parties that was accepted by the European Court of Human Rights in *Bowman v. United Kingdom* and by the Supreme Court of Canada in *Libman v. Quebec*. The author then moves on to the more difficult problem of regulating issue advocacy, which was dealt with by the Alberta Queen's Bench in *Harper v. Canada*. The author draws on this case to argue that the extension of political finauce legislation to third party issue advocacy is problematic in constitutional regimes that place a high value on political expression. Indeed, third party issue advocacy restrictions in the U.K. and Canada arguably contravene both the *Human Rights Act 1998* and the *Canadian Charter of Rights and Freedoms* and cannot be remedied by judicial interpretation. The atthor concludes by suggesting viable issue advocacy regulations that are both effective and consistent with the legal protections of political expressiou in the U.K. and Canada.

L'atténuation des effets du financement inégal des campagnes électorales sur le processus électoral est vu comme un objectif valide et urgent de réglementation tant en Europe qu'au Canada. Cependant, les moyens utilisés au Royaume-Uni et au Canada pour atteindre cet objectif, tels que le contrôle législatif des campagnes faites par des tiers sur des enjeux politiques et sociaux particuliers (*third party issue advocacy*), sont problématiques sur le plan constitutionnel. Ces «campagnes d'enjeux», qui réfèrent à la publicité électorale d'apparence non partisane, sont un aspect commun du paysage électoral du Royaume-Uni et du Canada. Le problème se pose cependant en situation de «fausse» campagne d'enjeux (*sham issue advocacy*). La fausse campagne d'enjeux constitue une manière subtile et déguisée d'attaquer ou de promouvoir, selon le cas, un candidat ou un parti politique. À ce titre, la fausse campagne d'enjeux menace l'intégrité du contrôle des finances politiques car elle destabilise l'équilibre créé par les limites de dépenses admises pour les candidats et les partis politiques en période électorale. Les législatures du Royaume-Uni et du Canada ont tenté de traiter ce problème en étendant le contrôle législatif des finances politiques aux tiers impliqués dans les campagnes d'enjeux, comme en font foi le *Political Parties, Elections and Referendum Act 2000* (R.-U.) et la *Loi électorale du Canada*.

Cet article examine d'abord la justification égalitaire élaborée par la Cour européenne des droits de l'homme dans la décision *Bowman c. Royaume-Uni*, puis par la Cour suprême du Canada dans la décision *Libman c. Québec*, pour limiter les dépenses des tiers en cours de campagne électorale. L'auteur aborde ensuite le problème plns difficile de la réglementation des campagnes d'enjeux telle que soulevée par la Cour du Banc de la Reine de l'Alberta dans l'arrêt *Harper v. Canada*. L'auteur s'attarde sur cet arrêt pour démontrer que l'extension du contrôle législatif des finances politiques aux tiers impliqués dans les campagnes d'enjeux est problématique pour les régimes eonstitutionnels accordant une grande importance à l'expression politique. En effet, l'auteur affirme que ces restrictions législatives violent à la fois le *Human Rights Act 1998* (R.-U.) et la *Charte canadienne des droits et libertés*, et ne peuvent être tempérées par une interprétation juridiciaire. L'auteur conclut en suggérant certains moyens de réglementer les campagnes d'enjeux d'une manière qui serait à la fois efficace et consistante avec les protections légales de l'expression politique au Royaume-Uni et au Canada.

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Introduction

Opponents of the wholesale importation of U.S. political finance jurisprudence into the U.K. and Canada welcomed the recent decisions of the European Court of Human Rights ("European Court") and the Supreme Court of Canada in *Bowman v. United Kingdom* and *Libman v. Quebec*, respectively.[1] *Bowman* and *Libman* signalled that, unlike what was determined under the First Amendment of the U.S. Constitution,[2] mitigation of the effect of uneven financing is a constitutionally valid objective of election regulations in Europe and Canada. The resolution of this fundamental question is clearly important. Just as important, however, are the constitutional questions regarding the regulation of political finance raised by amendments to U.K. and Canadian electoral law following *Bowman* and *Libman*. Both the U.K. and Canadian Parliaments interpreted *Bowman* and *Libman*, respectively, as broad mandates to regulate political finances, including the finances of third parties—individuals and independent groups—who participate in political debate. The *Political Parties, Elections, and Referendums Act 2000*[3] of the U.K. and the *Canada Elections Act*[4] extend the application of political finance controls from third party election communications to third party issue advocacy. Third party issue advocacy can be described as ostensibly non-partisan, paid communication concerning issues important to the third party during an election campaign. The regulation of third party issue advocacy marks a significant departure from previous approaches to political finance regulation in the U.K. and Canada.

The problem of issue advocacy has not grabbed public attention in the U.K. and Canada the way that it has in the U.S. Issue advocacy is best known as one of the great bugbears of U.S. political finance legislation. Pure issue advocacy—paid communication concerned with public issues and bearing no connection to an election—has not been the problem. Rather, the problem is sham issue advocacy, which, as the name suggests, is thinly veiled election advertising.[5] During the 1990s,

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[1] *Bowman v. United Kingdom*, [1998] 1 E.C.H.R. 175, 26 E.H.R.R. 1 [*Bowman* cited to E.C.H.R.]; *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385 [*Libman*]. See *e.g.* Navraj Singh Ghaleigh, "Election Spending and Freedom of Expression" (1998) 57 Cambridge L.J. 431 (noting the similarities between *Bowman* and *Libman* and commenting that "[s]uch reasoning is welcome in that it balances Article 10 [freedom of expression] against Parliament's aim of imposing expenditure ceilings to promote electoral fairness" at 432-33). See also 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.

[2] See *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976) [*Buckley*].

[3] (U.K.), 2000, c. 41 [*PPERA*].

[4] S.C. 2000, c. 9.

[5] The terms "pure issue advocacy" and "sham issue advocacy" are taken from Richard L. Hasen, "The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy" (2000) 48 UCLA L. Rev. 265 [Hasen, "Disclosure of Contributions and Expenditures"]; Richard L. Hasen, "Measuring Overbreadth: Using Empirical Evidence to Determine

massive amounts of unregulated money were channelled into issue advocacy, making a mockery of U.S. political finance controls. The issue advocacy loophole permitted political parties and independent groups to communicate with the electorate without being subject to political finance disclosure obligations so long as they stopped short of explicitly advocating the election or defeat of a clearly identified candidate. To fit within the issue advocacy loophole, political advertisements used techniques that included oblique references to candidates, implicit or coded criticism of candidates, and exhortations to act for or against candidates by means other than voting. The recently adopted *Bipartisan Campaign Reform Act of 2002*[6] closed the issue advocacy loophole; a constitutional challenge, however, is already underway.[7]

While sham issue advocacy is more pervasive in the U.S. than in the U.K. or Canada, it is not just an American phenomenon. Rather, sham issue advocacy is endemic to countries that have political finance legislation that draws distinctions between political communications and election communications. Sham issue advocacy is the response of determined political actors to the regulation of election communications. Indeed, such ambiguous, coded, and implicit election advertisements are also used in the U.K. and Canada to circumvent political finance controls. Consider the following example, sponsored by the Grand Council of the Crees and published in *The Globe and Mail* two days before the 2000 federal election. While it undoubtedly solicits support for the Liberal Party, it is cloaked in terms that try to suggest that its aim is simply to increase the electoral participation of aboriginal citizens:

> I Encourage Aboriginal Citizens to Vote in the Federal Election
>
> Jean Chrétien's Liberal Platform
> 1. continue to work with aboriginal peoples to address the economic and social problems they face;
> 2. promote aboriginal languages;
> 3. build and strengthen relations with aboriginal peoples;
> 4. promote aboriginal economic skills development and prosperous aboriginal economies.
>
> Stockwell Day's plans for us we all now know.
>
> Gilles Duceppe's agenda for aboriginals in Canada is also well known.
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> ...

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the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy" (2001) 85 Minn. L. Rev. 1773 [Hasen, "Measuring Overbreadth"].

[6] Pub. L. No. 107-155, 116 Stat. 81, amending the *Federal Election Campaign Act of 1971*, 92 Pub. L. No. 225, 86 Stat. 3, and codified in scattered sections of 2 U.S.C. § 431ff. (2003) [*Bipartisan Campaign Reform Act*].

[7] *McConnell v. Federal Election Commission* (heard 5 December 2002), Washington 02-CV-582 (D.C. Cir.), online: Stanford Law School, Robert Crown Library <http://www.law.stanford.edu/library/campaignfinance>.

> By voting we may determine decisions that will impact the future of our peoples. Voting is one expression of our right of self-determination.[8]

Under constitutional regimes where political expression is highly valued and, at the same time, the state's interest in the regulation of political finance is recognized, the line between express advocacy and issue advocacy is of particular importance. The problem, understood simply, is one of boundaries.[9] Where should the line be drawn between election-related paid political communications and other paid political communications? How clear must the distinction between the two forms of paid political communications be? The Alberta Court of Queen's Bench recently confronted this boundary problem in *Harper v. Canada (A.G.)*,[10] where it considered the limits on third party advocacy found in the *Canada Elections Act*. The court in *Harper* struck down spending limits predicated on the definition of "election advertising expenses" on the ground that the definition was, *inter alia*, vague and overbroad. Given the similarities between the *Canadian Charter of Rights and Freedoms*[11] and the *European Convention on Human Rights*,[12] if robust protection for political expression emerges under the *Human Rights Act 1998*,[13] the stage may be set for contest over the boundary between express advocacy and issue advocacy in the domestic courts of the U.K.

This article advances the argument that genuine issue advocacy falls outside the bounds of the most cogent justifications that can be advanced for the regulation of political finance. At the same time, it is recognized that election advertisements that masquerade as issue advocacy are legitimate subjects of political finance regulations. When viewed in light of these two propositions, the new U.K. and Canadian

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[8] Grand Council of the Crees, "A Message from Grand Chief Ted Moses" *The Globe and Mail* (25 November 2000) A10. The elided part of the advertisement contains a coy discussion of the impact of not voting that implies that the reader should not only vote, but vote Liberal. It is also interesting to note that according to the third party returns published by Elections Canada, the Grand Council of the Crees did not register as a third party or report the money spent on publishing this advertisement. Online: Elections Canada <http://www.elections.ca> [Elections Canada].

[9] On issue advocacy as a boundary problem, see Richard Briffault, "Issue Advocacy: Redrawing the Elections/Politics Line" (1999) 77 Tex. L. Rev. 1751 [Briffault, "Redrawing the Elections/Politics Line"].

[10] (2001), 295 A.R. 1, [2001] 9 W.W.R. 650, 2001 ABQB 558 [*Harper*].

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

[12] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*ECHR*].

[13] (U.K.), 1998, c. 42 [*HRA*]. Prior to its adoption, there was speculation that the *HRA* might form the basis of *Bowman*-type attacks on political finance regulation. See *e.g.* Keith Ewing, "Legal Control of Party Political Finance" in Ian Loveland, ed., *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995) 233 (observing that "[t]hose with an interest in campaign finance reform are ... quite properly concerned by the spectre of a domestic Bill of Rights which is currently haunting Britain" at 252). In the same vein, see Howard Davis, "*Bowman v. United Kingdom*—a case for the Human Rights Act?" [1998] P.L. 592.

restrictions on third party issue advocacy are problematic because they provide little guidance as to what kinds of third party paid political communications are regulated. Moreover, to the extent that they are not vague, U.K. and Canadian third party political finance controls must be read to extend to pure issue advocacy. The regulation of pure issue advocacy in this way cannot be justified under either the *HRA* or the *Charter*. The question that follows from this realization is whether there can be a judicial solution to the failings of U.K. and Canadian limits on issue advocacy or whether legislative revision is required.

I. Regulating Third Party Issue Advocacy

A. The Argument for Regulating Third Party Election Spending

Political finance legislation is customarily justified as either an anticorruption measure or as a means to promote political equality. Anticorruption is a simple notion. Essentially, it holds that it is improper for wealthy citizens to purchase favours from representatives because it is the government's role to administer the state in the interest of the common good. This is how the U.S. Supreme Court understands political finance legislation.[14] The U.S. experience shows that in the face of a strong constitutional tradition of freedom of expression, anticorruption is an insufficient justification for the limitation of political spending by candidates, political parties, and third parties.[15] The existence of political spending does not, in itself, pose a risk of corruption. Contributions to candidates, by contrast, do pose a direct risk of corruption and may be limited. The primacy of the anticorruption rationale in the U.S. has resulted in considerable litigation and academic discussion over whether corruption means something akin to bribery or whether it can mean distortions of the political process such as preferential access for donors to elected officials.[16] More often than not, arguments for the expansion of the anticorruption rationale are thinly disguised equality arguments.[17]

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[14] See generally *Buckley*, *supra* note 2. For a good discussion of the U.S. Supreme Court's treatment of equality and corruption rationales, see David A. Strauss, "Corruption, Equality, and Campaign Finance Reform" (1994) 94 Colum. L. Rev. 1369.

[15] Two categories of third parties can, however, be regulated: (1) for profit corporations and (2) unions. These anomalies, however, are inconsistent with the broader U.S. doctrine. The leading case concerning the regulation of election spending by for profit corporations, *Austin v. Michigan Chamber of Commerce* (494 U.S. 652, 110 S. Ct. 1391 (1990)), is difficult to reconcile with *Buckley*. For a discussion of this point, see Richard Briffault, "Campaign Finance, the Parties and the Court: A Comment on *Colorado Republican Federal Campaign Committee v. Federal Elections Commission*" (1997) 14 Const. Commentary 91 at 100-102.

[16] See *e.g. Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 121 S. Ct. 2351 (2001) [*Colorado Republican*]. This is the most recent case to expand the scope of the corruption rationale.

[17] The definition of "corruption" in U.S. jurisprudence has become very elastic. Initially, it was limited to quid pro quo corruption. Arguably, the definition now includes undue influence or even

The concept of political equality is both broader than anticorruption and more complicated. Equality, in the sense of "one person, one vote", is a value that is central to many theories of democracy.[18] Political equality, in the sense that it is used to justify political finance regulation, however, means something different and not as widely accepted. The concept of political equality that informs political finance legislation is most frequently associated with the more robust theories of democracy.[19] Indeed, the political equality norm relevant to political finance regulation is concerned with the equal ability of citizens to affect political deliberation. The two species of political equality have been labelled "equality of impact" and "equality of influence", though I prefer to call the latter "deliberative equality".[20] Influence (i.e., one's ability to affect collective deliberation) is determined by a range of factors that include not only wealth but also education, social status, charisma, and more. Private wealth, however, poses a much greater concern than innate advantages like charisma or more ephemeral advantages like social status. The effect of private wealth on public debate is of particular concern because, as John Rawls explains,

> eventually these inequalities [of financial resources] will enable those better situated to exercise a larger influence over the development of legislation. In due time [the wealthy] are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favored circumstances.[21]

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preferred access for some. See Richard Briffault, "Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?" (2001) 85 Minn. L. Rev. 1729 (noting that "[t]he Court's decisions after *Buckley* reflect the intermittent tendency of 'corruption' to morph into 'in equality'" at 1742).

[18] See *e.g.* Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971) at 2 (describing "one person, one vote" as a necessary precondition for democratic government).

[19] Andrew C. Geddis, "Democratic Visions and Third-Party Independent Expenditures: A Comparative View" (2001) 9 Tul. J. Int'l & Comp. L. 5 at 102-107 (concluding that a choice to limit election expenses necessarily indicates a commitment to a "conditional" conception of democracy). Deliberative democracy takes a conditional view of elections because it considers the legitimacy of electoral results to depend on the circumstances of deliberation. For a discussion of deliberative democracy, civic republicanism, and political finance regulation, see Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Toronto: Maxwell Macmillan, 1993) at 94-101, 241-52. See also Ronald Dworkin, "Free Speech and the Dimensions of Democracy" in E. Joshua Rosenkranz, ed., *If* Buckley *Fell: A First Amendment Blueprint for Regulating Money in Politics* (New York: Century Foundation Press, 1999) 63 (arguing that political finance legislation is consistent with his theory of "partnership democracy" at 77).

[20] "Equality of impact" and "equality of influence" are terms coined in Ronald Dworkin, "What is Equality? Part 4: Political Equality" (1987) 22 U.S.F. L. Rev. 1 at 9. On equality and deliberation, see generally Jack Knight & James Johnson, "What Sort of Political Equality Does Deliberative Democracy Require?" in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1997) 279.

[21] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973) at 225.

Political finance regulation is a necessary but insufficient step toward ensuring that "citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."[22]

The European Court in *Bowman* and the Supreme Court of Canada in *Libman* endorsed the promotion of deliberative equality as a valid justification for political finance regulation. The Supreme Court of Canada in *Libman* approvingly stated the objective of the Quebec referendum finance regulation in the following terms:

> [T]he objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.[23]

The European Court's concept of equality was not expressed as clearly in *Bowman*. Nevertheless, the European Court's endorsement of candidate resource equalization as a policy and its acceptance of the proposition that wealth can improperly influence or distort public deliberation is consistent with *Libman*.[24]

Deliberative equality as accepted by the Supreme Court of Canada and the European Court supports financial controls on candidates and political parties. Deliberative equality can also be argued to support the regulation of third parties on the grounds that over time, it stands to reason that third party involvement in elections will be biased towards the interests of private wealth. The bias of third party activities in favour of the interests of private wealth is, however, a less obvious threat to deliberative equality than contributions to, and expenditures of, candidates and political parties. Understanding the danger posed by third party election spending purely from the deliberative equality perspective leaves third party limits open to challenge on empirical grounds.

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[22] John Rawls, "The Basic Liberties and Their Priority" in Stephen Darwall, ed., *Equal Freedom: Selected Tanner Lectures on Human Values* (Ann Arbor, Mich.: University of Michigan Press, 1995) 105 at 175.

[23] *Libman*, *supra* note 1 at para. 41.

[24] "First, it promoted fairness between competing candidates for election by preventing wealthy third parties from campaigning for or against a particular candidate or issuing material which necessitated the devotion of part of a candidate's election budget, which was limited by law, to a response. Secondly, the restriction on third-party expenditure helped to ensure that candidates remained independent of the influence of powerful interest groups. Thirdly, it prevented the political debate at election times from being distorted by having the discussion shifted away from matters of general concern to centre on single issues" (*Bowman*, *supra* note 1 at 187 [footnotes omitted]).

Indeed, a leading objection to the deliberative equality justification of third party election spending limits is that it is impossible to prove that the activities of wealthy third parties actually affect electoral outcomes.[25] If this is the ground on which the battle over third party regulation is to be fought, defenders of spending limits are destined to fail. Often, proponents and opponents of expenditure limits alike make the mistake of accepting that the validity of expenditure limits is dependent upon the assumed or proved effect of wealth on election outcomes. This debate cannot be resolved because of the present inability of social science to divine from the entrails of an election the impact of third party activities with any certainty.[26] What is needed is an understanding that the potential effects of third party activities go beyond simply affecting election results in a conventional sense.

Unrestrained third party election activities have the potential to threaten the place of political parties as the primary political organizations. That political parties occupy such a primary position is necessary for the proper functioning of responsible government in the Anglo-Canadian tradition.[27] The threat to the primacy of political

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[25] See *e.g. Harper*, *supra* note 10; *Somerville v. Canada (A.G.)* (1996), 184 A.R. 241 at paras. 63-66, 136 D.L.R. (4th) 205 (Alta. C.A.) [*Somerville*]. In both *Harper* and *Somerville* the fact that there was no evidence that third party expenditures affected election results determined the Court's decision; the Court was interested in the proven impact of third party expenditures on election outcomes, not in other conceptions of harm to the electoral process. The same estimation of the importance of the effect of third party expenditures underlies *Libman* (*supra* note 1 at para. 47), where "impact on the outcome of the vote" is the focus of the Court. The misconception that evidence of impact on election results is the only relevant measure of harm is also evident in the political science literature. See *e.g.* A. Brian Tanguay & Barry J. Kay, "Third-Party Advertising and the Threat to Electoral Democracy in Canada: The Mouse that Roared" (1998) 17 International Journal of Canadian Studies 57. The error in viewing the harm of third party expenditures solely in terms of the effects of third party expenditures on election results is pointed out by Janet L. Hiebert ("Money and Elections: Can Citizens Participate on Fair Terms Amidst Unrestricted Spending?" (1998) 31:1 Canadian Journal of Political Science 91 at 105-106): "What is objectionable about the claim that money is a problem only if it has a causal effect on a particular outcome is that this provides an incomplete measure of the significance of money in elections."

[26] U.K., H.C., "Fifth Report of the Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom", Cm 4057 in *Sessional Papers*, vol. 1 (1997-98) 1 (Chair: Lord Neill of Bladen) [U.K., "Neill Committee Report"]. "[I]t is hard to know what evidence could be adduced to prove [or disprove the supposed effects of election spending]" (*ibid.* at 120). There is, however, a recent U.S. study that suggests that third parties can have a very real impact on election results. See Gary C. Jacobsen, "The Effect of the AFL-CIO's 'Voter Education' Campaigns on the 1996 House Elections" (1991) 61 Journal of Politics 185.

[27] See Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 1 (Toronto: Dundurn Press, 1991) at 11-13 (Chair: Pierre Lortie) [Canada, *Final Report*] (discussing the role of political parties as primary political organizations). See also Herman Bakvis & Jennifer Smith, "Third-Party Advertising and Electoral Democracy: The Political Theory of the Alberta Court of Appeal in *Somerville v. Canada (Attorney General)* [1996]" (1997) 23:2 Can. Pub. Pol'y 164; K.D. Ewing, "Transparency, Accountability and Equality: The Political Parties, Elections and Referendums Act 2000" [2001] P.L. 542 at 544 [Ewing, "Transparency, Accountability and Equality"].

parties is an indirect threat to deliberative equality. The activities of third parties could overwhelm or displace the messages of candidates and political parties who are constrained by spending limits. The voices of candidates and political parties—those who will actually govern—must have the opportunity to be heard clearly above the cacophony of other interests. This concern is not a hypothetical one, as third parties have incurred large expenditures on a national scale in both the U.K. and Canada and have spent as much as major party candidates in selected local contests.[28]

Deliberative equality is improved by a measure of equality of resources among candidates and political parties. Unchecked third party expenditures have the potential to destabilize the relative equality of resources among candidates and political parties established by political finance legislation. In particular, the activities of third parties may threaten to disturb the détente among candidates and political parties imposed by spending limits. Third parties may, by formal agreement, implicit arrangement, or otherwise, undermine expenditure limitations on candidates and parties by pursuing coordinated or complimentary campaigns.[29] For example, a candidate may employ a

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[28] In the U.K. context, businessman Paul Sykes is reported to have spent more than either the Labour or Conservative Party on newspaper advertising during the closing week of the 1997 general election. See Chris Powell, "The Role of Labour's Advertising in the 1997 General Election" in Ivor Crewe, Brian Gosschalk & John Bartle, eds., *Political Communications: Why Labour Won the General Election of 1997* (London: Frank Cass, 1998) 28 at 35. More recently, businessman Brian Souter spent "tens of thousands of pounds" buying up all of the prime billboard space in the constituency of Ayr, purchasing full page advertisements in the local newspaper and printing and distributing 56,000 leaflets attacking the Labour government's policies during a 2000 by-election. See K. Farquarson & J. Robertson, "Souter Takes Fight to Blair on Section 28" *The Sunday Times* (12 March 2000) SN 1.

In the Canadian context, the most famous example of third party election activities is the 1988 federal election, for which the Free Trade Agreement with the U.S. was the defining issue. During that election third parties are estimated to have incurred expenditures of approximately $4.7 million—an amount that exceeded the national advertising expenditures of each of the major political parties. See Janet Hiebert, "Interest Groups and Canadian Federal Elections" in F. Leslie Seidle, ed., *Interest Groups and Elections in Canada*, vol. 2 (Toronto: Dundurn Press, 1991) 3 at 20. In the 1993 federal election, the National Citizen's Coalition spent $50,000—approximately the expense limit of candidates—to attack Calgary M.P. Jim Hawkes. See Nancy Tousley, "Hawkes Goes Down to Defeat" *The Calgary Herald* (26 October 1993) AA3. In the 2000 federal election, there were several third party campaigns both for and against Anne McLellan in the constituency of Edmonton West. The extent of these campaigns, however, is not known, as many of the protagonists did not report their expenditures. See Doug Beazley, "Incumbent Anne is Target of Many Groups: But National Issues Like Gun Control Aren't Local Issues" *The Edmonton Sun* (26 November 2000) 28. Note the absence from the list of registered third parties of the National Firearms Association and others who have stated openly that they were conducting campaigns against McLellan. See Elections Canada, *supra* note 8.

[29] For a discussion of the possible risks of using third parties as negative proxies, see Walter I. Romanow & Walter C. Soderland, "Conclusions" in Walter I. Romanow *et al.*, eds., *Television Advertising in Canadian Elections: The Attack Mode, 1993* (Waterloo: Wilfrid Laurier University Press, 1999) 193 at 203. The classic example of using proxies as negative advertisers was the "Willie Horton" campaign of George Bush Sr., described by Darrell M. West (*Checkbook Democracy: How*

third party as a proxy so that the candidate may circumvent political finance regulations or so that the candidate may maintain a safe distance from unseemly attacks upon opposing candidates.[30] Keith Ewing, writing about the effect of third party limits on trade unions, observed that "electoral and referendum spending limits can be easily justified as being necessary to prevent the political party spending limits from being subverted."[31] In other words, limits on third parties are a necessary incident of limits on candidates and political parties.

Even accepting a broad definition of the harm posed by third party election spending, it is possible to object to limits on third party activities. Third parties play an important role in the process of public deliberation distinct from that of political parties. Third parties help to set the public agenda and to define the parameters of debate in ways that mainstream political parties are often unwilling or unable to do. Political parties, for mutually convenient reasons, may collude to avoid raising certain issues. Accordingly, restricting issue advertising that fails to pose a reasoned threat to the political finance regime that governs political parties and candidates (i.e., restricting pure issue advocacy) cannot easily be justified on the grounds of deliberative equality. It could be argued that limits on pure issue advocacy are justified because better financed third parties logically have an advantage in issue advertising aimed at agenda setting and thereby can secure disproportionate influence. Without the corresponding threat to the integrity of political party and candidate spending limits, however, it is not clear that such an indirect harm would be sufficient to justify the potential adverse impact on the breadth of public deliberation.

B. Issue Advocacy

If deliberative equality and the primacy of political parties are accepted as normative baselines, the case for regulating third party election expenditures is a strong one. The case for the regulation of third parties is less clear, however, when

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Money Corrupts Political Campaigns (Boston: Northeastern University Press, 2000) at 18-19) as follows:

> Caught between their need to place negative information about Dukakis before the people and their desire to avoid a backlash created by going on the attack, Bush operatives decided on a two-track system. The official campaign would attack Dukakis's views on crime and his record as governor. ...
>
> At the same time ... outside groups would run a second political operation that was much tougher. This other track would employ "brass knuckles" tactics that would appeal to the basest instincts of the American public on the subject of race. Unauthorized and uncoordinated, the operation would say things and run advertisements that were off-limits for the official organization.

[30] For a discussion of the problems of collusion and circumvention, see Jennifer Smith & Herman Bakvis, "Changing Dynamics in Election Campaign Finance: Critical Issues in Canada and the United States" (2000) 1:4 Policy Matters 1 at 21-23. Circumvention in a different context has been recognized as a risk to U.S. political finance controls (*Colorado Republican*, *supra* note 16).

[31] K.D. Ewing, "The Political Parties, Elections and Referendums Act 2000—Implications for Trade Unions" (2001) 30:2 Indus. L.J. 199 at 205.

third party activities are not coordinated with or complementary to the campaign of a candidate or political party. Third party advocacy that does not seek to advance the fortunes of a particular candidate or party does not obviously threaten to overwhelm partisan messages or destabilize the relative parity of resources among the candidates and political parties. If freedom of expression, particularly political expression, is highly prized, then it is impossible to justify the extension of third party expenditure limits to communications that are imperfectly aligned with the message of a candidate or political party, or that only indirectly prejudice the campaign of a candidate or political party. The practical problem, then, is distinguishing between third party political activities at large and third party political activities that may reasonably be thought to overwhelm partisan messages or destabilize the relative equality established among candidates and political parties by political finance legislation.

The breadth of an expenditure regulation is determined by its definition of "election expenses". Regardless of the form of the definition, any regulation of election expenses, whether it is expenditure reporting or a spending limit, must define what political expenses qualify as election expenses. Such a definition must provide an articulation of the nexus that is required between an expenditure and an election before the expenditure may be called an "election expense". Apart from expenses for mundane items (such as the maintenance of an office), election expenditures are expenditures on expressive activities. Whether the expenditure of money is considered expressive or merely an essential prerequisite for certain forms of expression, the regulation of election expenditures must be understood to engage guarantees of freedom of expression.[32]

The regulation of election expenses presents a particularly sensitive problem because the expression regulated is arguably the very form of expression—political expression—that constitutional guarantees exist to protect.[33] *Bowman* and *Libman* have settled, for the moment, that third party electoral expression may be regulated in the U.K. and Canada. Nevertheless, it cannot be denied that third party expression incidentally affected or inadvertently captured by regulations of election expenditures will invariably be political expression of the sort vital to a free and democratic society. Separating electoral expression from political expression is a formidable challenge

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[32] There is a robust debate in the U.S. concerning whether money is speech. See *e.g.* J. Skelly Wright, "Politics and the Constitution: Is Money Speech?" (1976) 85 Yale L.J. 1001. The question of whether money is expression or not is not an issue in Canada because the definition of expression is clearly broad enough to encompass monetary expenditures. See *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 967-71, 58 D.L.R. (4th) 577.

[33] The most celebrated articulation of the argument that links the protection of free speech to the instrumental needs of government is that of Alexander Meiklejohn. See *e.g.* Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948). American, British, and Canadian courts all accept that one of the most important instrumental purposes of the constitutional protection of freedom of expression is to facilitate democratic deliberation and government. See *R. v. Secretary of State for the Home Department, ex parte Simms*, [2000] 2 A.C. 115 at 126, [1999] 3 All E.R. 400 (H.L.); *Re Alberta Legislation*, [1938] S.C.R. 100 at 133, [1938] 2 D.L.R. 81, aff'd without comment on this point [1939] A.C. 117, [1938] 4 D.L.R. 433 (P.C.).

because elections are inherently political, and conversely, most political expression can be seen to have electoral ramifications to one degree or another. Inflexible definitions of election expenses are, as a result, doomed to be overinclusive or underinclusive. Therein lies the constitutional significance of the delicate problem of defining the electoral sphere. The project of defining election expenses assumes that election-related expressive activity may be intelligently separated from the larger realm of political expression. Embedded in this assumption is the idea that the larger domain of public political discourse continues to exist during the course of an election.[34]

The problem of separating electoral expression from general political expression can be illustrated by reference to two recent advertisements, portions of which are excerpted below. The first, "Canada's Health Care", by the Canadian Medical Association, ran as a quarter page advertisement in *The Globe and Mail* eighteen days before the 2000 Canadian federal election:

> Canada's Health Care: Planning a Full Recovery
>
> Join with Canada's physicians to help make [the Canadian Medical Association's ideas for a better health care system] a reality, by letting your voice be heard during this election. [Here are] some things you can do:
>
> 1. *Send your idea of an ideal health system to us. We'll post them on our web-site, and send them all to Canada's political leaders.*
> 2. *Tell your local candidates about the health system you want, and ask what they'll do to make it happen.*
> 3. *Write, email, phone hot line shows, go to meetings, and then make your vote count.*[35]

The second, "European Union?", sponsored by the British Democracy Campaign,[36] was a full page advertisement in *The Times* approximately one month prior to the 2001 U.K. general election:

> European Union?
>
> You are the electorate. They are the elected. The overwhelming majority of you say you want a referendum. The vast majority of MPs say nothing. On everything from the price of petrol to public spending, you can't keep them quiet. But on this, the most vital issue affecting the future of every man, woman

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[34] This idea is central to any defence of the constitutionality of spending limits. See C. Edwin Baker, "Campaign Expenditures and Free Speech" (1998) 33 Harv. C.R.-C.L.L. Rev. 1; Frederick Schauer & Richard H. Pildes, "Electoral Exceptionalism and the First Amendment" (1999) 77 Tex. L. Rev. 1803; Briffault, "Redrawing the Election/Politics Line", *supra* note 9; Feasby, *supra* note 1.

[35] Canadian Medical Association, "Canada's Health Care: Planning a Full Recovery" *The Globe and Mail* (9 November 2000) A9 ["Canada's Health Care"] [emphasis in original].

[36] The British Democracy Campaign (online: British Democracy Campaign <http://www.britishdemocracycampaign.co.uk>) is closely associated with wealthy businessman Paul Sykes, whose activities in past elections are discussed by Powell (*supra* note 28).

> and child in Britain ... silence. We wrote to all 659 MPs, up to and including the Prime Minister, and asked if they would support the majority British view and back the call for a free and fair referendum in the next Parliament. Printed below is the response that we received.
>
> MPs FOR A REFERENDUM: Harold Best ...
> MPs AGAINST A REFERENDUM: David Atkinson ...
> MPs WHO REPLIED BUT REFUSED TO COMMIT: Peter Ainsworth ...
> MPs WHO FAILED TO RESPOND: Diane Abbott ...
>
> These MPs want your vote in the election but will not give you a vote on who should govern Britain after the election.
>
> IS THIS DEMOCRACY?[37]

"Canada's Health Care" is neutral on its face and appears to be primarily engaged in raising awareness about health care as an election issue. The neutrality of the advertisement indicates that it does not threaten to destabilize the balance of resources among candidates and the political parties. Indeed, this is the type of advertisement that may be viewed as agenda-setting and intrinsically valuable to the political process. In contrast, "European Union?" names candidates standing for election and highlights their agreement or disagreement with the position that is advanced by the advertisement. There is no question that "European Union?" favours some electoral participants over others and, thus, poses a reasoned risk to the balance of resources among candidates and political parties. The challenge for drafters of political finance legislation is to craft provisions that distinguish between advertisements like "Canada's Health Care" and "European Union?" and the harder cases that fall in between.

II. Judicial Consideration of Third Party Limits and Legislative Responses

A. Bowman v. United Kingdom

Under the *Representation of the People Act 1983*,[38] constituency campaign restrictions prohibited third parties from incurring expenses in excess of five pounds "with a view to promoting or procuring the election of a candidate ... "[39] Mrs. Bowman, an anti-abortion activist, was charged with violating the prohibition on third party spending for distributing a leaflet that stated: "We are not telling you how to vote, but it is essential for you to check on candidates' voting intentions on abortion and on the use of the human embryo as a guinea pig." Below this statement, the leaflet summarized the positions of the three principal candidates in the constituency on the

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[37] British Democracy Campaign, "Is This Democracy?" *The Times* (16 May 2001) 7 ["European Union?"].

[38] (U.K.), 1983, c. 2.

[39] *Ibid.*, s. 75.

question of abortion access and medical research on human embryos. Mrs. Bowman's criminal charge was dismissed on technical grounds. Mrs. Bowman, however, was not satisfied with her acquittal because it left open the possibility of prosecution in future elections. Mrs. Bowman decided to pursue the matter further by filing a complaint with the European Commission of Human Rights. Mrs. Bowman's complaint stated that her right to freedom of expression, as guaranteed by article 10 of the *ECHR*, was violated by her prosecution for incurring election expenses in excess of five pounds. The European Commission of Human Rights overwhelmingly agreed.[40]

The U.K. appealed the ruling of the European Commission of Human Rights to the European Court of Human Rights. The European Court began by concluding that the restriction served the legitimate aim of attempting to secure "equality between candidates".[41] The third party limit, however, was not found to be justifiable for two reasons. First, the third party limit in "section 75 of the 1983 Act operated, for all practical purposes, as a total barrier to Mrs Bowman's publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate."[42] The European Court's reasons do not make it clear whether it understood section 75 to be a barrier to pure issue advocacy or just sham issue advocacy of the type found in Mrs. Bowman's leaflets. The various concurring and dissenting judgments all point out that activities that may be described as pure issue advocacy are not implicated by the third party limit. Two judges, dissenting in part, noted that the third party limit "does not prevent expenditure on the provision of factual material or comment intended merely to inform the public."[43]

Viewed against the backdrop of the concurring and dissenting judgments, the majority must be understood to have been concerned with a complete restriction on election advocacy (including sham issue advocacy), not issue advocacy simpliciter.[44] Such a prohibition of election advocacy was, in the view of the majority, disproportionate and unnecessary to achieve the objective of equality between candidates. Second, the third party limit was not necessary in the eyes of the majority

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[40] *Bowman*, *supra* note 1. The European Commission decision (reported 12 September 1996 (article 31)) is reprinted in the annex of the European Court's decision (*ibid.* at 202-209).

[41] *Bowman*, *ibid.* at 187.

[42] *Ibid.* at 189.

[43] *Ibid.* at 199. Eight justices, some concurring and some dissenting in the result, disputed the plurality's finding that the third party limit was effectively a "total ban". Though not in so many words, the eight justices held that the section provided an opportunity for Mrs. Bowman to engage in pure issue advocacy. Three judges who agreed with the plurality in all other respects held that "[s]ection 75 does not prohibit the publication of facts or comment for the information of the general public" and that the leaflet was only "intended to inform the voters of Halifax of the probable intentions of the candidates with regard to the abortion issue" (*ibid.* at 193). Three other judges expressed similar disagreement with the plurality position in a dissenting judgment (*ibid.* at 195-97, Loizou, Baka, and Jambrek JJ.).

[44] For support of this interpretation, see U.K., "Neill Committee Report", *supra* note 26 at 129 (where it is noted that "factual information" [i.e., pure issue advocacy] was exempt from the prohibition considered in *Bowman*).

because there were "no restrictions placed upon ... political parties and their supporters to advertise at national or regional level, provided that such advertisements were not intended to promote or prejudice the electoral prospects of any particular candidate in any particular constituency."[45] Without limits on political party advertising, the argument that the third party limits preserve the equality between candidates that is established by constituency spending limits loses some of its force.

The lesson of *Bowman* is that, in the context of a comprehensive spending limit system, limits on third party election advertising that supports or opposes candidates or political parties will be justifiable if the level of permitted spending is proportionate to the limits on candidates and political parties. Proportionate, in this sense, is understood to be reflective of the relative stakes of third parties and political parties in the electoral process (i.e., the permitted level of spending for political parties will be greater than that for third parties). The unstated corollary of *Bowman*'s conclusion is that limits on third party informational advertising (i.e., pure issue advocacy) are impermissible even if subject to a higher monetary limit. The question that is not answered by *Bowman* is where the line is to be drawn between election advertising and informational political advertising.

B. *The Lortie Commission and* Libman v. Quebec

Concerns about the levels and sources of expenditures in the 1988 federal election in Canada led to the appointment of the Royal Commission on Electoral Reform and Party Financing chaired by Pierre Lortie ("Lortie Commission"). The Lortie Commission engaged in a wholesale analysis of the role of money in the Canadian electoral process. A reconsideration of the definition of "election expenses" in the 1983 *Canada Elections Act*[46] was central to this task. The *Final Report* of the Lortie Commission explained that the definition of "election expenses" was underinclusive because it did not capture issue-driven communications. Issue advocacy, according to the *Final Report*, had the potential to alter the discourse of an election campaign and was, therefore, a subject for regulatory attention.[47]

Instead of confronting the difficult task of crafting a line distinguishing issue advocacy from express advocacy, the Lortie Commission concluded that any distinction between issue advocacy and express election advocacy was logically unsustainable and recommended a sweeping definition of "election expenses". The Lortie Commission recommended that any definition of "election expenses" capture all spending that directly or indirectly promotes or opposes candidates or political parties. The commission also recommended that spending that promotes or opposes a candidate or political party's policies fall within the definition of "election expenses". Further, the Lortie Commission observed that issues may "emerge or be reformulated" during a campaign and that "[i]t is thus essential that the definition of

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[45] *Bowman*, *supra* note 1 at 189.

[46] *An Act to amend the Canada Elections Act (No. 3)*, S.C. 1980-81-82-83, c. 164.

[47] Canada, *Final Report*, *supra* note 27 at 15.

election expenses encompass spending to approve or disapprove the positions taken in response to the events of an election campaign."[48] A majority of the provinces have legislation that defines election expenses, consistent with the Lortie Commission's recommendation, as "all costs incurred to directly or indirectly, promote or oppose a candidate or party."[49] The federal government, however, did not adopt the Lortie Commission's expansive approach to defining election expenses until after *Libman* in the *Canada Elections Act*[50] of 2000.

The Supreme Court of Canada first considered the question of electoral expression in *Libman* in the context of restrictions on third parties in the Quebec *Election Act*.[51] The Quebec *Election Act* serves a dual purpose in that by operation of the *Referendum Act*[52] it applies in modified form to referenda.[53] Indeed, it was the modified form of the Quebec *Election Act* that was considered in *Libman*. Operating in its guise as a referendum law, the *Election Act* sets up a framework where one umbrella committee advocates an affirmative position and another umbrella committee advocates a negative position. Each of these committees is entitled to incur "regulated expenses". The *Special Version of the Election Act*[54] provided that "[t]he cost of any goods or services used during the referendum period to promote or oppose, directly or indirectly, an option submitted to a referendum is a regulated expense."[55] Individuals and groups unaffiliated with either of the umbrella committees were prohibited from incurring regulated expenses except for an amount of six

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[48] *Ibid.* at 341.

[49] *Election Act*, R.S.B.C. 1996, c. 106, s. 183; *Elections Finances Act*, R.S.M. 1987, c. E-32, s. 1; *Election Expenses Act*, R.S.P.E.I. 1988, c. E-2.01, s. 1; *Elections Act*, R.S.N.S. 1989, c. 140, s. 3; *The Election Act, 1996*, S.S. 1996 E-6.01, s. 220(f) [*SEA*]. Despite a common definition, different approaches to regulating third party expenditures are found throughout the provinces.

[50] Parliament, however, adopted the Lortie Commission's recommendation to impose a one thousand dollar ceiling on third party election expenditures and made several minor definitional changes. "Advertising expenses" in *An Act to amend the Canada Elections Act* (S.C. 1993, c. 19, s. 259), just like "election expenses" in prior versions of the *Canada Elections Act*, were defined to include any amounts paid "for the purpose of promoting or opposing, directly and during an election," a registered party or candidate. The limit on third party "advertising expenses" was challenged in *Somerville* (*supra* note 25). At the outset, the court stated that "advertising expenses" did not include amounts spent "advertising on issues" (*ibid.* at para. 6). Having thus narrowed the definition to "direct advertising", the court gave no further consideration as to what exactly "direct advertising" encompassed. The definitional question proved inconsequential in the end when the court ruled that the limitation of third party expression was unjustifiable because it was designed to exclude third parties from the electoral arena and to protect candidates and parties from criticism.

[51] R.S.Q. c. E-3.3.

[52] R.S.Q. c. C-64.1.

[53] The Quebec *Election Act* (*supra* note 51), as it applied to elections, was not at issue in *Libman*. Nevertheless, the approach in that act to defining electoral expression and regulating third party participation is noteworthy for its highly structured nature. The definition of "election expenses" extends to amounts spent to "propagate or oppose" the policies of a candidate or party (*ibid.*, s. 402).

[54] *Elections Act, ibid.*, as am. by *Referendum Act, supra* note 52, appendix 2, in aecordance with *Referendum Act, ibid.*, s. 45 [*Special Version of the Election Act*].

[55] *Special Version of the Election Act, ibid.*, s. 402.

hundred dollars, which could be spent on holding a meeting.[56] The Supreme Court of Canada observed in *Libman* that "the definition of regulated expenses [was] very broad,"[57] but did not address the question of whether it was overbroad or impermissibly vague. The Court did, however, endorse the Lortie Commision's view that "[i]ndependent spending could very well have the effect of directly or indirectly promoting one candidate or political party to the detriment of others ... "[58] Instead of confronting the definitional question, the Court struck down the challenged provisions of the *Special Version of the Election Act* in the course of its section 1 proportionality analysis under the *Charter* on the basis that the limit of six hundred dollars for a meeting expense was too restrictive to be justifiable in a free and democratic society.[59]

C. U.K. and Canadian Legislation

1. The Neill Committee and the *PPERA*

The U.K. recently underwent a significant revision of its electoral laws.[60] The all-party Committee on Standards in Public Life chaired by Lord Neill ("Neill Committee") reviewed British electoral practices with a view to proposing a modern law to govern party finances, elections, and referenda. One of the subjects that the Neill Committee grappled with was the definition of "election expenses" and the scope of limits on third party spending. The Neill Committee reviewed the *Bowman* decision and concluded that the principal finding of the European Court was that the five pound limit on constituency expenditures was unjustifiably low. Accordingly, the Neill Committee recommended an increase in the constituency expenditure limit to five hundred pounds to permit activities such as the printing and circulation of leaflets or the placement of a local newspaper advertisement. In making the recommendation for the increased limit, the Neill Committee observed that the section under which Mrs. Bowman was prosecuted was "confined to activities which are intended to promote or prejudice the electoral prospects of 'particular candidates in a particular constituency'. Leaflets designed merely to bring factual information to the attention of voters or to assist a national campaign without referring to particular candidates fall outside the section."[61]

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[56] *Ibid.*, s. 404(9).

[57] *Libman*, *supra* note 1 at para. 34.

[58] *Ibid.* at para. 49.

[59] *Ibid.* at paras. 75-82.

[60] This reform process and the work of the Neill Committee is described in Lisa E. Klein, "On the Brink of Reform: Political Party Funding in Britain" (1999) 31 Case W. Res. J. Int'l L. 1. See also K.D. Ewing, "The Funding of Political Parties in Britain: Prospects for Reform" (1998) 7 Griffith L. Rev. 185.

[61] U.K., "Neill Committee Report", *supra* note 26 at 129.

The Neill Committee further considered whether national expenditure limits on third parties were warranted.[62] The committee observed that during the 1940s and 1950s, corporations and industry groups conducted significant campaigns against the nationalization policies favoured by the Labour Party and that during the 1997 election, the U.K.'s largest union, UNISON, spent more than one million pounds on advertisements promoting a national minimum wage.[63] Some of the advertisements by corporations in the 1950s, as well as by the UNISON campaign, avoided direct references to parties or candidates. The Neill Committee concluded that it would be "naive to imagine" that advertisements such as the corporate anti-nationalization and the 1997 UNISON advertisements were "nonpartisan promotional propaganda".[64] Clearly, according to the Neill Committee, advertisements of this sort had as one of their objects to promote or damage the electoral prospects of one or more parties. As a result, it was recommended that the limit on third parties extend to communications that implicitly promoted or opposed the success of a party. The Neill Committee recommended that

> "[e]lection expenses" ... be taken to include expenses that are clearly intended to promote or have the foreseeable effect of promoting some parties or to disparage other parties irrespective of whether such parties are mentioned by name in the individual's or organisation's advertising or other promotional material.[65]

Following the Neill Committee's recommendations, the U.K. Parliament enacted the *PPERA*.[66] Section 85 of the *PPERA* restricts "controlled expenditures", defined as expenses incurred in relation to "election material". Subsection 85(3) defines "election material" as

> material which can reasonably be regarded as intended to –
>
> (a) promote or procure electoral success at any relevant election for –
>
> (i) one or more particular registered parties,
>
> (ii) one or more registered parties who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of such parties, or
>
> (iii) candidates who hold (or do not hold) particular opinions or who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of candidates, or
>
> (b) otherwise enhance the standing –
>
> (i) of any such party or parties, or

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[62] See *R. v. Tronoh Mines Ltd.*, [1952] 1 All E.R. 697, 35 Cr. App. R. 196 (Cen. Crim. Ct.) (holding that an earlier version of the third party limits considered in *Bowman* did not apply to general political advertising or national campaign advertising).

[63] U.K., "Neill Committee Report", *supra* note 26 at 131.

[64] *Ibid.* at 133.

[65] *Ibid.*

[66] *Supra* note 3. For an extensive review of the *PPERA*, see Ewing, "Transparency, Accountability and Equality", *supra* note 27.

> (ii) of any such candidates, with the electorate in connection with future relevant elections (whether imminent or otherwise);
>
> and any such material is election material even though it can reasonably be regarded as intended to achieve any other purpose as well.[67]

The breadth of this definition is increased by subsection 85(4), which provides that "for the purposes of determining whether any material is election material, it is immaterial that it does not expressly mention the name of any party or candidate." The temporal scope of the definition, which seems open-ended on the face of section 85, is narrowed by section 3 of schedule 10, which provides that the "relevant" period for parliamentary general elections is the 365 days prior to the election day. The definition of "election material" seems to be aimed at sweeping into the regulatory net all material that directly or indirectly promotes or opposes a candidate or political party within one year of an election including expression concerning policies associated with a candidate or political party.

2. The *Canada Elections Act*

Following *Libman*, Canada's federal government introduced third party expenditure controls with significantly higher limits to ensure conformity with the dicta of the Supreme Court. The responsible minister indicated that the government's purpose was to restore the comprehensiveness of political finance regulation by subjecting third parties to limits proportional to those of parties and candidates.[68] The amendments were passed by Parliament as the *Canada Elections Act*[69] of 2000. Central to the amendments contained in the *Canada Elections Act* is the definition in section 319 of "election advertising" as communications that promote or oppose a particular candidate or party, including communications that take "a position on an issue with which a registered party or candidate is associated." The idea of regulating expenditures concerning policies "associated" with candidates and parties is consistent with the Lortie Commission recommendations and with the *Election Act* of Quebec. The third party expenditure limit is stated in section 350 of the *Canada Elections Act* in the following terms:

> (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;

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[67] *PPERA*, *ibid.*, s. 85(3).

[68] *Harper*, *supra* note 10 at paras. 228-34.

[69] *Supra* note 4.

(*b*) showing their likenesses;

(*c*) identifying them by their respective political affiliations; or

(*d*) taking a position on an issue with which they are particularly associated.[70]

Together, the definition of "election advertising" in section 319 and the third party expenditure limits in section 350 represent a significant departure from previous attempts to control third party activities during elections.

III. Are the *PPERA* and the *Canada Elections Act* Overbroad?

A. Harper v. Canada

Stephen Harper, leader of Canada's official opposition party and erstwhile president of the National Citizens' Coalition, brought a challenge to the *Canada Elections Act* immediately upon its proclamation.[71] Although many sections of the *Canada Elections Act* were challenged,[72] the heart of Harper's assault—and the primary subject of Cairns J.'s reasons—was the definition of "election expenses" and its application to the restriction on third party advertising. There were both primary

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[70] *Ibid.*, s. 350.

[71] The procedural history of *Harper* is complicated. The trial was heard during the first weeks of October 2000, at which time the trial judge reserved his decision. On 22 October 2000, only days after the end of the hearing, a federal election writ was issued. With the decision expected to be months away, Harper reattended before Cairns J. and moved for an interlocutory injunction prohibiting enforcement of the challenged sections of the *Canada Elections Act* for the duration of the election campaign. Cairns J. granted the requested injunction (*Harper v. Canada (A.G.)* (2000), 6 C.P.C. (5th) 362 (Alta. Q.B.)) and the Alberta Court of Appeal rejected an appeal by the attorney general (*Harper v. Canada* (2000), 266 A.R. 262, 2000 ABCA 288). With the election campaign well underway, the Supreme Court of Canada reversed both the Alberta Court of Appeal and the trial judge, allowing the challenged provisions of the *Canada Elections Act* to stand pending the reserved trial decision (*Harper v. Canada (A.G.)*, [2000] 2 S.C.R. 764, 2000 SCC 57). The balance of the election campaign proceeded with the challenged provisions of the *Canada Elections Act* in place.

[72] The sections challenged in *Harper* included: (1) the restriction of third party advertising expenditures during elections to $3,000 per constituency and $150,000 nationally (section 350); (2) the prevention of third parties from dividing or combining to avoid the application of advertising expenditures (section 351); (3) the restriction of third parties from advertising within twenty-four hours of the close of polls (section 323); (4) the compelling of third parties to track and report election-related expenditures (sections 359, 360); (5) the prohibition of third parties from spending contributions from foreign nationals on election advertising (section 358); and (6) obligating third party advertisements to contain a statement identifying the sponsor of the advertisement (section 352) (see *Harper*, *supra* note 10 at para. 1). The last item challenged, identification of the sponsor, raises important questions, but was dismissed without due consideration. While there are arguments in favour of the constitutionality of the identification requirement, the U.S. Supreme Court has found some anonymous campaigning to be protected by the First Amendment. See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 at 367, 115 S. Ct. 1151 (1995) [*McIntyre*]. At the very least, the relevance of the arguments in *McIntyre* should have been canvassed by the trial judge.

and alternative grounds for the decision in *Harper*.[73] Cairns J.'s principal conclusion was that the restrictions on third party advertising were impermissibly vague. The interpretation of the term "associated", according to the government's expert witness, "should be relatively narrow."[74] Cairns J., however, understood the evidence of the chief electoral officer to be that "associated" might have a significantly wider ambit and, in fact, might include all issues touched upon in a party or candidate's election materials. The chief electoral officer submitted that third parties could easily ascertain what issues candidates and parties were associated with by reviewing published election platforms or checking official campaign web sites. Cairns J. found that even if it were possible to gather the information referred to by the chief electoral officer, the indeterminacy of the word "associated" rendered it impossible for a third party to be certain whether a specific issue advertisement was subject to the advertising expenditure limits. Cairns J. feared that since the major parties take positions on almost every issue of public concern, under such a broad interpretation of "associated", issue advocacy would be effectively proscribed during the course of an election campaign. Cairns J. further explained that he was also "concerned about the very broad discretion that is given to the Commissioner of Elections, whose duty it is to ensure that the *Act* is complied with and enforced, in deciding to investigate and prosecute a complaint which [deals] with 'association' issues."[75]

Cairns J. concluded that even if the third party restrictions were not vague, then surely they must be overbroad. Although he was concerned about the expenditure levels imposed, he stated that if there were a pressing and substantial objective (which he did not find), then "some deference should be accorded to Parliament"[76] to determine the precise (monetary) limits within a reasonable range of alternatives. Cairns J., however, was not prepared to accord Parliament any deference with respect to defining electoral expression. Indeed, he concluded that the third party restriction was overbroad "because of the manner in which it captures not only pure partisan advertising, but also a potentially broad range of informational advertising through the workings of the definition of 'election advertising' set out in ss. 319 and 349 which includes issues with which a party or candidate is associated."[77] The problem identified by Cairns J., whether it is labelled vagueness or overbreadth, is the problem inherent in definitions of election expenses.

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[73] Cairns J.'s central alternative ground for invalidating the *Canada Elections Act* restrictions was that there was no evidence that third party advertising expenditures have any impact on elections and, as a consequence, the provisions did not address a "pressing and substantial" objective and, therefore, were not justified in a free and democratic society. This ground is not dealt with in this article because it is simply a rejection of the conclusion of *Libman* and raises no novel questions. The Supreme Court of Canada will, of course, be forced to confront Cairns J.'s conclusion that they erred in *Libman* in concluding that, in the abstract at least, political equality was a sufficient ground for expenditure limits on third parties.

[74] *Harper*, *supra* note 10 at para. 203.

[75] *Ibid.* at para. 209.

[76] *Ibid.* at para. 288.

[77] *Ibid.*

B. Overbreadth in the U.K. and Canada

1. Overbreadth Theory and Doctrine

Overbroad statutes cast a wider net than is necessary to capture the activity about which the legislature is concerned. The Supreme Court of Canada has frequently used the term "overbreadth" to refer to measures that are more strict than necessary. For example, in *Libman* the Court referred to the spending limit as being overbroad. The problem in *Libman*, as understood by the Court, was that the quantum of the permitted expense was inappropriately low. Overbreadth, however, is a term that is better used to denote definitional problems. For example, a law prohibiting individuals with prior convictions for sex-related crimes involving children from loitering in areas where children are likely to congregate might be overbroad in a geographic sense if it forbade such individuals from entering parks.[78] The overbreadth of such a provision is manifest in the definition of "park", which includes parks where children are unlikely to be—such as wilderness parks.

Overbreadth is closely related to the doctrine of vagueness. Often, the most plausible meaning of a vague law is an overbroad meaning.[79] Concomitantly, overbroad laws are often framed in vague terms. Both overbreadth and vagueness impinge upon one of the basic precepts of the rule of law, namely the requirement that a citizen be capable of knowing the law.[80] Implicit in this rule is that the law must be clear enough to permit citizens to govern their conduct accordingly. Vagueness is problematic for two main reasons. First, vagueness denies citizens the ability to govern their actions to avoid the sanction of the law. The risk attendant with an inability to know what conduct is proscribed is that citizens will be discouraged from engaging in constitutionally protected activity. Second, vague laws do not adequately delineate the scope of discretion ceded to administrative officials.[81] In a complex

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[78] *R. v. Heywood*, [1994] 3 S.C.R. 761 at 794-96, 94 C.C.C. (3d) 481 [*Heywood* cited to S.C.R.].

[79] Richard H. Fallon, Jr., "Making Sense of Overbreadth" (1991) 100 Yale L.J. 853 at 905.

[80] This is implicit in A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (New York: St. Martin's Press, 1959) at 248 (where it is argued that citizens should only be punished for a distinct breach of the law). This is made clear by the European Court in discussing the meaning of the term "prescribed by law" in *Sunday Times v. United Kingdom* (1979), 30 E.C.H.R. (Ser. A.) 1 at 31, 2 E.H.R.R. 245 [*Sunday Times*]:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

[81] For a discussion of the connection between vagueness and discretion, see Robert C. Post, "Reconceptualizing Vagueness: Legal Rules and Social Orders" (1994) 82 Cal. L. Rev. 491 at 494-98. See also Lamer J.'s identification of the dangers of a "standardless sweep" by law enforcement as

modern state, laws are necessarily cast in general terms because of the impossibility of conceiving or detailing the application of the law in every imaginable circumstance. The problem, then, is not lack of absolute precision in the law, but the existence of unguided discretion that invites capricious enforcement.[82]

Overbreadth, like vagueness, invites inconsistent and unprincipled enforcement. Laws cast in terms so broad that the administering authority cannot reasonably enforce the limit, are inherently problematic.[83] When faced with a broad provision, an administering authority may adopt informal and unstated guidelines for enforcement. For example, a statute that prohibits loitering might be enforced against teenage males at night and not against parishioners mingling outside church on Sunday mornings.[84] Overbreadth, in this way, can inhibit citizens' ability to govern their conduct and invites inconsistent and arbitrary enforcement.

Evaluation of overbreadth takes place within the justification analysis that is applied under article 10(2) of the *ECHR* and section 1 of the *Charter* once a violation of freedom of expression is found.[85] The inquiry is more formal and rigorous under the *Charter* than under the *ECHR*. The Supreme Court of Canada has held that there is no distinctive freedom of expression overbreadth doctrine in Canada that is directly analogous to the First Amendment doctrine of overbreadth in the U.S.[86] Instead, overbreadth is considered to be a question of proportionality that is considered in the context of the state's justification for infringing constitutional rights.[87] Overbreadth, as already noted, is closely related to the problem of vagueness. As a practical matter, overbreadth and vagueness analyses are often conflated by courts. For example, while *Charter* doctrine permits courts to consider vagueness as a preliminary matter before weighing the constitutional merits of government policy, courts often consider vagueness with overbreadth in the context of proportionality analyses.[88] Courts

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being one of the reasons to be wary of vagueness. *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1157, 4 W.W.R. 481.

[82] Timothy A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) at 203.

[83] Geoffrey R. Stone *et al.*, eds., *Constitutional Law*, 4th ed. (New York: Aspen Law & Business, 2001) at 1100-101.

[84] Post, *supra* note 81 at 497.

[85] Article 10(2) of the *ECHR* (*supra* note 12) reads: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are *prescribed by law and are necessary in a democratic society*" [emphasis added].

Section 1 of the *Charter* (*supra* note 11) reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits *prescribed by law as can be demonstrably justified in a free and democratic society*" [emphasis added].

[86] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 632, 93 D.L.R. (4th) 36 [*Nova Scotia Pharmaceutical* cited to S.C.R.].

[87] Overbreadth is also an interpretive tool used under section 7. See *Heywood*, *supra* note 78 at 496-97.

[88] Vagueness may be considered as a preliminary matter where the court asks whether the limit is "prescribed by law" under section 1 of the *Charter*. See *Nova Scotia Pharmaceutical*, *supra* note 86 at 632. This was Cairns J.'s approach in *Harper*. The European Court uses the same doctrinal approach to vagueness. See *e.g. Sunday Times*, *supra* note 80.

typically give vague terms the widest possible meaning and then question whether that meaning is overbroad. The European Court, however, avoids this tendency and considers vagueness as a preliminary question. Despite this difference, all definitional questions concerning the *Canada Elections Act* and the *PPERA* are canvassed together below.

The *Charter's* analytical framework provides that once a violation of a protected right has been identified, the question of whether the infringement is justified in a free and democratic society must be determined by asking two questions. To begin with, one must ask whether the objective of the legislation is "pressing and substantial". If the objective is pressing and substantial, then one must ask whether the means employed to further the objective strike a proportionate balance between the infringed right and the legislative objective.[89] The proportionality inquiry is made up of three separate parts: (1) an assessment of whether there is a rational connection between the objective and the means employed to realize the objective; (2) a determination of whether the means employed to realize the objective impair the protected right more than is necessary to achieve the objective; and (3) an evaluation of the salutary and deleterious effects of the impugned provision. Overbreadth has been held to be an issue for consideration under the second aspect of the proportionality analysis (minimal impairment). When considering a question of minimal impairment, courts ask whether the legislative objective might have been accomplished through less drastic means. The standard developed under *Oakes*, however, does not demand that legislatures employ the least drastic means conceivable. Rather, it has been held that "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement."[90] Although some commentators have criticized the Court's approach as unduly deferential,[91] minimal impairment remains a significant obstacle for broad legislative restrictions to overcome.[92]

The evaluation of the proportionality between impaired rights and means chosen to realize legislative objectives exists more in theory than in fact under the *ECHR*. The European Court has not articulated a cogent analytical framework to consider proportionality.[93] In part, this is attributable to the European Court's role as a

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[89] *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes*].

[90] *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 342, 127 D.L.R. (4th) 1, McLachlin J.

[91] For a critique of what is argued to be the Court's overly deferential approach in freedom of expression cases, see Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997) 35 Osgoode Hall L.J. 1.

[92] See *e.g. Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877, 159 D.L.R. (4th) 385 (striking down opinion poll publication restrictions on the minimal impairment grounds); *United Food and Commercial Workers, Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, 176 D.L.R. (4th) 607 (striking down the overbroad definition of "picketing" in the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244).

[93] See Michael J. Beloff, "'What Does it All Mean?' Interpreting the Human Rights Act 1998" in Lammy Betten, ed., *The Human Rights Act 1998: What it Means* (The Hague: Martinus Nijhoff

supranational court. The European Court factors into its calculus considerations of comity and the need to maintain flexibility to permit principles to be realized differently in different national contexts. This necessity has given rise to a doctrine of deference known as "margin of appreciation". Under this doctrine, once it is determined in the abstract that a legislative objective is important, the European Court is loathe to question the means employed by a contracting state to realize the objective.[94] As a result, the European Court does not often quibble with either the breadth or the severity of restrictions on freedom of expression.[95]

How a doctrine of overbreadth might look in the domestic courts of the U.K. under the *HRA* remains unclear. The *HRA* requires U.K. courts to consider European Court cases, but does not make those cases binding upon the courts.[96] As a result, it might be reasonable to suppose that judicial policing of overbreadth will be as tepid as in the European Court.[97] There are reasons to believe, however, that such a supposition might be wrong. In *R. v. Director of Public Prosecutions, ex parte Kebilene*,[98] Lord Hope held that the European Court's margin of appreciation doctrine was inappropriate for domestic adjudication and stated instead that deference under the *HRA* must be exercised only on "democratic grounds".[99] Whether the recognition of the inappropriateness of margin of appreciation will translate into a sceptical use of

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Publishers, 1999) 11 (noting that with respect to proportionality, "courts have glossed the balance struck" at 45).

[94] See *e.g.* the holding of the European Commission in *Müller v. Switzerland* reprinted in the annex of *Müller v. Switzerland* (1988), 133 E.C.H.R. (Ser. A) at 34-47, 13 E.H.R.R. 212. In that case, the European Commission held:

> The Commission does not agree with the Swiss courts that confiscation of Mr. Müller's paintings was the only alternative to destroying them outright which was capable of protecting morals. Apart from the fact that the confiscation order was automatic, in deciding whether confiscation was necessary to protect morals in a democratic society the courts could have considered whether such measures as prohibiting all further exhibition of the paintings or imposing a prior-permission requirement or setting an age-limit for admission to the exhibition would have been enough to protect morals within the meaning of Article 10 § 2 of the Convention.

(*Ibid.* at 45.) The European Court overturned the European Commission's ruling, holding that, "having regard to their margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was 'necessary' for the protection of morals" (*ibid.* at 25).

[95] See P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d ed. (The Hague: Kluwer Law International, 1998) at 94 (noting increasing deference in recent judgments).

[96] Section 3(1) of the *HRA* provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights" (*supra* note 13).

[97] See Heleen Bosma, *Freedom of Expression in England and under the ECHR: In Search of a Common Ground: A Foundation for the Application of the Human Rights Act 1998 in English Law* (Antwerp: Intersentia, 2000) (advocating that U.K. jurisprudence emulate that of the European Court).

[98] (1999), [2000] 2 A.C. 326, [1999] 3 W.L.R. 972 (H.L.) [cited to A.C.].

[99] *Ibid.* at 381.

European Court precedents predicated upon the doctrine is yet to be determined.[100] The recognition of the inappropriateness of the margin of appreciation doctrine in the domestic context would seem to require that any court looking to a European Court precedent should question how the case might have been decided in the absence of margin of appreciation. If the rejection of margin of appreciation opens the door to a less deferential understanding of what is necessary in a democratic society, then U.K. courts may adopt a more stringent approach to overbreadth. Indeed, such an approach can be inferred from the statements of Lord Steyn, who observed the following shortly before the *HRA* took effect:

> The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The *existence and width* of any exception can only be justified if it is underpinned by a pressing social need.[101]

There is good reason to expect that, whatever the vigour of the approach of U.K. courts, questions of overbreadth will be analyzed in much the same way in the U.K. as they are in Canada. The Lords sitting as the Judicial Committee of the Privy Council in *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,[102] a case that arose under the *Constitution of Antigua and Barbuda*,[103] had the opportunity to consider the appropriate framework for analyzing overbreadth. The *de Freitas* case concerned an individual who was charged with violating a provision of the *Civil Service Act*[104] that prohibited government employees from publishing "expressions of opinion on matters of national or international political controversy" except in limited circumstances where the prior approval of a government minister was acquired.[105] The defendant asserted that the *Civil Service Act* contravened his constitutional right of freedom of expression. The guarantee of freedom of expression in the *Constitution of Antigua and Barbuda* is limited only to the extent that restrictions may be placed on "public officers ... for the proper performance of their functions," so long as those limits are "reasonably justifiable in a democratic society."[106] The Privy Council found the restrictions at issue in *de Freitas*

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[100] Helen Fenwick & Gavin Phillipson, "Public Protest, the Human Rights Act and Judicial Responses to Political Expression" [2000] P.L. 627 at 643-44.

[101] *Reynolds v. Times Newspapers Ltd.* (1999), [2001] 2 A.C. 127 at 208, [1999] 4 All E.R. 609 (H.L.) [emphasis added].

[102] (1998), [1999] 1 A.C. 69, [1998] W.L.R. 675 (P.C.) [*de Freitas* cited to A.C.].

[103] *The Antigua and Barbuda Constitution Order 1981* (U.K.), S.I. 1981-1106, sch. 1, reprinted in Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 1 (Dobbs Ferry, N.Y.: Oceana Publications, 2002) [*Constitution of Antigua and Barbuda*].

[104] (Laws of Antigua and Barbuda), c. 87.

[105] *Civil Service Act, ibid.*, s. 10(3)(b), cited in *de Freitas, supra* note 102 at 74E-G.

[106] *Supra* note 103, s. 12(4), cited in *de Freitas, ibid.*

to be overbroad.[107] In doing so, the Privy Council employed a modification of the Canadian *Charter* analytical framework, which inquires as to whether

> (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[108]

Lord Hope of Craighead recently suggested that the *de Freitas* analytical approach is appropriate for the *HRA*.[109]

2. Interpreting the Breadth of the *PPERA* and the *Canada Elections Act*

a. Vagueness

A law regulating expression concerning issues or policies associated with a candidate or political party will be vague if the issues or policies of candidates and political parties cannot be determined with reasonable precision. The chief electoral officer of Canada defended the *Canada Elections Act* limit on third party spending on the grounds that a third party should be able to quickly ascertain the policies and issues associated with a party or candidate by calling the candidate's office or by referring to the candidate or political party's official internet site.[110] This would be a convincing rejoinder to allegations of vagueness if the information was in fact available and if remedying an information deficit was all that was required to clarify the application of the *Canada Elections Act* to third party expression. The word "associated" in section 319 of the *Canada Elections Act*, however, raises two distinct vagueness problems that cannot be resolved by improving access to information. The first is the issue of the perspective from which the assessment of association is to be

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[107] *de Freitas* also raised the question of vagueness in a roundabout way. The Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda) recognized that the *Civil Service Act* prohibition was hopelessly overbroad. As a remedy, the Court of Appeal read into the *Civil Service Act* prohibition the qualification that a civil servant's political expression was only limited "when his forbearance from such publication is reasonably required for the proper performance of his official functions" (*de Freitas*, *ibid.* at 77G). The Privy Council, however, found this formulation to be intolerably vague. Indeed, it was held that in the context of interference with individual rights "a degree of precision is required so that the individual will be able to know with some confidence where the boundaries of legality may lie" (*ibid.* at 78G-H). The Privy Council further observed that determining "where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual [i.e., prosecutorial] decision" (*ibid.*).

[108] *de Freitas*, *ibid.* at 80F-H.

[109] *Pretty v. Director of Public Prosecutions* (2001), [2002] 1 A.C. 800 at para. 93, [2001] 3 W.L.R. 1598, 2001 UKHL 61.

[110] *Harper*, *supra* note 10 at paras. 204-205. The same informational problem arises under section 85(3) of the *PPERA* (*supra* note 3), which refers to the "particular policies" of parties and candidates.

made. The second is the issue of how close the connection between the speaker and the subject matter must be before the two are considered to be "associated".

Sections 319 and 350 of the *Canada Elections Act* do not state whether association with issues is to be assessed from the perspective of the candidate/party or the reasonable voter. Under the *Canada Elections Act*, is association to be gauged by a candidate's words and actions, or is association to be determined by voters' impressions and understandings of a candidate? For example, a candidate may run on a platform of economic reform and scrupulously avoid taking any explicit positions on moral issues. At the same time, however, the hypothetical candidate is beset by a public scandal involving alleged sexual relations with an intern. Opponents of the candidate attack him on issues of "character", "morality", and "family values". Indeed, opinion surveys show that these issues are seen by many voters to be "associated" with the hypothetical candidate. A similar scenario could be concocted wherein a candidate who is a naturalized citizen is perceived by voters to be associated with immigration issues as a result of latent prejudice or the characterization imposed upon her by her opponents despite the absence of such issues from her platform.

The word "associated" used in section 319 of the *Canada Elections Act* is also vague insofar as the degree of association required for something to be "associated" is unclear from the face of the legislation. Even the addition of the adverb "particularly" in subsection 350(2) of the *Canada Elections Act* dealing with constituency campaigns does not significantly clarify what is meant by "associated". The question of degree of association remains because "particularly" is itself an indeterminate term. When does a policy advocated by a third party bear sufficient resemblance to a policy advocated by a political party to be subject to regulation? The problem may be illustrated by an example that is plausible in Canada. Consider an election where the adoption of the U.S. dollar is the dominant campaign issue. In such an election, all candidates and parties can be expected to take positions for or against the adoption of the new currency. Each party and candidate, however, can reasonably be expected to hold views that cannot be simply reduced to "for" or "against". Put simply, an election is not a referendum. For example, Party A might be unequivocally opposed to the new currency. Party B might favour the adoption of the U.S. dollar if certain circumstances prevailed and specific protections were negotiated. Would a business group that ran an advertisement that unequivocally favoured the adoption of the U.S. dollar be considered to be advocating the policies of Party B or one of its candidates? On its face, the business group's advertisement is a distinct message that does not advocate the particular policies of any party. At the same time, the business group's position is closer to the position of Party B than to that of Party A, and might reasonably be expected to indirectly advance Party B's fortunes. With respect to the *Canada Elections Act*, the answer is unclear.

The *PPERA* is not as fraught with vagueness as the *Canada Elections Act*. The *PPERA* is more clear (clearly overbroad) than the *Canada Elections Act*. This is not to say, however, that the *PPERA* avoids the problem of vagueness entirely. Paragraph 85(3)(a) of the *PPERA* avoids the first vagueness problem that the *Canada Elections Act* faces by clearly indicating that it is the party/candidate's actions that matter, not

voter impressions, in referring to parties and candidates who "advocate ... particular policies". The approach of paragraph 85(3)(a) of the *PPERA* is preferable to the *Canada Elections Act* approach in that it only captures expression concerning policies with which parties and candidates are explicitly and voluntarily associated. Third parties should be able to ascertain, by reference to official internet sites and other published election material, which policies or issues a given party or candidate has chosen to be associated with. Paragraph 85(3)(b) of the *PPERA*, however, undermines paragraph 85(3)(a) by reintroducing vagueness. Paragraph 85(3)(b) extends third party regulation to material that "otherwise enhance[s] the standing" of candidates and political parties. The phrase "otherwise enhance" provides no guidance to third parties and cannot be viewed as anything but hopelessly vague.

The *PPERA* tries to resolve the second vagueness problem that plagues the *Canada Elections Act* by resorting to an objective test of the intention of the third party (i.e., reasonable person test).[111] Such a test of intention, however, does not solve the constitutional problems presented by vagueness. The test of intention outlined in the *PPERA* provides little guidance to citizens on how to govern their conduct and it does not accurately define the discretion accorded to the new Election Commission. As a result, a person may be certain of her own intention in engaging in politically expressive activity, but highly suspect of the intention that may be ascribed to her by enforcement officials with reference to her overt acts and the text of her message. The lack of guidance as to what contextual considerations might factor into the determination of intent is also worrisome. Furthermore, to the extent that the objectively assessed intent of an accused individual or organization is rebuttable, the accused will be forced to lay bare her inner political motives or the organization's internal communications.[112] This, in turn, raises significant constitutional concerns regarding privacy, freedom of conscience, and freedom of association.

b. *Breadth of the* PPERA

The breadth of the definitions of election expenses and third party spending restrictions in the *PPERA* and the *Canada Elections Act* must be ascertained by interpretation before they can be measured against the underlying justification for the provisions. The *HRA* is distinct from the *Charter* and other constitutional bills of rights in that it grants the courts no remedial power. If a statutory measure is found to violate the *HRA*, a court may only make a declaration of inconsistency; it cannot strike down the statute, sever offending parts of the statute, or otherwise modify the

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[111] "'Election material' is material which can *reasonably be regarded as intended to* (a) promote or procure electoral success at any relevant election ... " (*PPERA*, *supra* note 3, s. 85(3) [emphasis added]).

[112] Briffault, "Redrawing the Elections/Politics Line", *supra* note 9 at 1777.

application of the impugned provision.[113] Under the *HRA*, the incompatible statute remains in force until such time as it is amended by ministerial order or replaced by new legislation.[114] Because of the limited capacity of the courts under the *HRA*, great emphasis is placed on section 3, which obliges courts to interpret statutory provisions as "compatible" with the *ECHR*. Essentially, litigants can seek to accomplish by methods of construction what they cannot accomplish by way of a declaration of inconsistency. The defence of freedom of expression through the narrow construction of limits is consistent with the traditional U.K. mode of guarding civil liberties and may be viewed as reinforcing the common law, not replacing it. There is no agreement, however, as to what is meant by a "compatible" interpretation.[115] An aggressive approach to interpretation, as advocated by Lord Irvine, would resemble the Canadian approach[116] to the interpretation of legislation using international agreements:

> It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.[117]

On the other hand, a more restrictive approach to interpretation using customary principles of interpretation requiring ambiguity as a prerequisite for external interpretive aids will not bolster the protection of freedom of expression. Indeed, the latter approach would preserve the pre-*HRA* approach where international treaties and conventions were only used as interpretive aids as a last resort.[118]

The wording of the *PPERA* third party expenditure provisions presents a formidable challenge to attempts at narrow interpretation. The critical aspect of the *PPERA* definition of "election material" in paragraph 85(3) is the objective test of intention. A plain reading of paragraph 85(3) suggests that the provision is very broad and, indeed, might effectively sweep up most paid political communications. In order to avoid such a conclusion, a court might interpret the objective test of intention to

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[113] See *e.g.* Geoffrey Marshall, "Two Kinds of Compatibility: More About Section 3 of the Human Rights Act 1998" [1999] P.L. 377 (describing a declaration of inconsistency as "a species of booby prize" at 382).

[114] *HRA*, *supra* note 13, s. 10.

[115] For divergent views see *e.g.* Lord Irvine of Lairg, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] P.L. 221 at 228; Marshall, *supra* note 113; Francis Bennion, "What Interpretation is 'Possible' Under Section 3(1) of the Human Rights Act 1998?" [2000] P.L. 77.

[116] *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449. "The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic law is ambiguous on its face is to be rejected" (*ibid.* at 1371).

[117] Lord Irvine of Lairg, *supra* note 115 at 228.

[118] See Marshall, *supra* note 113 (suggesting that "[f]or determining what the legislature has enacted the normal rules should suffice" at 383). For an example of an application of this approach, see *R. v. Radio Authority, ex parte Bull* (1996), [1998] Q.B. 294, [1997] 2 All E.R. 561 (C.A.).

apply only to a third party's principal intent. One could argue that a paid political communication cannot reasonably be intended to enhance the standing of a candidate or party if, viewed objectively and contextually, the promotion of a candidate or party was not the principal purpose of the advertisement. Contextual factors such as the proximity of an election and identification of a candidate, though precluded by section 85 from being determinative individually, might be used in concert to assess intention. Consider how a political issue advertisement that did not name a candidate or political party would be treated if it were placed three months before an election. Even if other contextual factors suggested a connection to an election, the lack of proximity to an election and the failure to identify a candidate or political party, taken together, would be a strong indication that the principal intent of the advertiser was something other than to enhance the standing of any political actor. The incidental effect of the communication on the standing of any party or candidate would not be sufficient to meet the objective test of intention. Under such an approach, the proviso in paragraph 85(3) that material may be election material even if it "can reasonably be regarded as intended to achieve any other purpose as well" might be understood to apply only in circumstances where it could be said that a third party has two or more equally important objectives.

While the foregoing approach is a plausible reading of section 85 of the *PPERA*, if an aggressive approach to interpretation is adopted under the *HRA*, such a test of intention must be clearly framed if it is to avoid replicating the chilling effects associated with vagueness and overbreadth. Such a clear explication of a principal purpose test is constrained by the language of section 85 of the *PPERA*, which deprives courts of the ability to frame guidelines or explicitly attach weight to certain criteria. Moreover, the expansive language of the *PPERA* third party spending limits leaves little doubt that the U.K. Parliament intended the breadth of the provisions to be very wide. Such a view is consistent with the Neill Committee recommendations (made after consideration of the impact of the *HRA*) that suggested that in drafting what would become the *PPERA*, "the opportunity be taken to reconsider the formulation of the definition of 'election expenses' ... so as to ensure that it is drafted in a way that makes clear the intention that the concept is not to be interpreted restrictively."[119] In the face of Parliament's clear preference for a broad interpretation of the third party limits, a court would be hard pressed to impose a narrow interpretation akin to the principal purpose approach.

c. *Breadth of the* Canada Elections Act

Under the *Charter*, a narrow interpretation of impugned provisions may resolve any controversy concerning overbreadth. According to Dreidger's classic statement on interpretation, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the

[119] U.K., "Neill Committee Report", *supra* note 26 at 125.

object of the Act, and the intention of Parliament."[120] When constitutional issues are engaged, it is presumed that Parliament intended to enact constitutionally valid legislation. As a result, where an impugned provision can be read in either a constitutional or unconstitutional manner, the constitutional reading is to be preferred. The Supreme Court of Canada recently observed that in the context of overbreadth, "[t]he law must be construed, and interpretations that may minimize the alleged overbreadth must be explored."[121] Reading provisions down is less injurious to the intent of Parliament than the remedies of severance or reading in.

The breadth of the *Canada Elections Act* expenditure restrictions turns on the scope of the term "associated" in the definition of "election advertising" in section 319. The term "associated" denotes a connection but does not indicate whether it is a weak or a strong connection. The stronger the connection that is found to be denoted by the word "associated", the narrower the scope of the definition of "election advertising expenses" and the less problematic third party expenditure limits are. One alternative is to read "associated" as pertaining to issues that a candidate or party has enumerated in campaign promotional material, as suggested by the chief electoral officer in his testimony in *Harper*. The obvious benefit of this approach is that it is objective. There are, however, two problems. First, as noted in the discussion of vagueness, a practical constraint is the availability of information concerning candidate and party positions. Second, and more problematic from an overbreadth perspective, is the possibility that party platforms will be so thorough that between the various parties no issue will be left unaccounted for. What appears to be a partial restriction on political expression can, in practice, amount to a prohibition. Moreover, in the fluid context of an election campaign, candidates and political parties could add issues to their platforms or modify their stance on issues, thereby creating uncertainty and further narrowing the ambit of permissible third party activity.

"Associated" could be read even more narrowly to pertain only to issues that are "synonymous" with a candidate or party. Requiring an issue to be "synonymous" with a candidate or party before coming within the ambit of regulation would significantly narrow the application of the *Canada Elections Act*. Such a reading addresses the problem identified in the context of the 1988 federal election and that prompted the Lortie Commission recommendations. During the 1988 election, the Progressive Conservative Party was closely identified with the Free Trade Agreement between Canada and the U.S. and was publicly perceived, though not proven, to have benefited from disproportionate third party spending in favour of the Free Trade Agreement.[122] Reading "associated" as "synonymous" relieves much of the overbreadth problem in an environment where there are only a small number of parties that can be viewed as "synonymous" with one or more issues and where the number of issues so covered is limited. Overbreadth is not relieved by such an interpretation when there are a large

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[120] Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87.

[121] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 32, 194 D.L.R. (4th) 1, 2001 SCC 2 [*Sharpe*].

[122] Richard Johnston *et al.*, *Letting the People Decide: Dynamics of a Canadian Election* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 163.

number of single-issue parties. The existence of a large number of single-issue parties effectively narrows the scope of permissible third party expression. For example, if environmental issues were found to be synonymous with the Green Party, third party advertising expenses concerning environmental issues might be regulated.[123] Under this scenario, the debate would descend into a squabble over whether some environmental issues or all environmental issues are "synonymous" with the Green Party and, indeed, what criteria are needed to establish that candidates or parties are synonymous with issues.

The only reading of "associated" that comes close to solving the overbreadth problem without creating further difficulties is one that understands "associated" to be descriptive of the content of the communication. A plain reading of section 319 suggests that "associated" refers to a prior or external association between a candidate or party and an issue. It is possible, however, to read "associated" in section 319 as referring to a connection internal to the advertisement (i.e., read "associat*ed*" as "associat*es*"). In other words, the association between the candidate or party and issue must be evident in the language and imagery of the communication and not determined with referenee to contextual factors. In addition to the obvious tension between such a narrow reading and the plain meaning of section 319, the narrow reading is contrary to the legislative history of the provision. The origins of section 319 can be traced to the Lortie Commission's recommendation for a sweeping definition of "election expenses". Although reading the definition of "election advertising expenses" to mean communication that "associates" a candidate or party with an issue substantially narrows the ambit of the restrictions on third party spending, it is probably inconsistent with the intent of Parliament. Unlike in *Sharpe*, where the Supreme Court of Canada found that a restrictive interpretation of a criminal charge for possession of child pornography was consistent with Parliament's intentions because "[t]hrough qualifications and defences Parliament indicated that it did not seek to catch all material that might harm children,"[124] in the present circumstances the only indication is that Parliament intended to sweep up as much

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[123] On 7 November 2000—twenty days before election day—Greenpeace, the Sierra Club of Canada, and many other environmental organizations co-sponsored a full page advertisement in *The Globe and Mail* at A12, which displayed sympathetic pictures of a bear, a dolphin, and a mother and child and read as follows:

> We Share the Same Environment, Only You can Vote.
>
> Our health and well being, in fact, our very survival, depends on clean air, water, and soil. The federal government's environmental negligence is threatening the life of every Canadian.
>
> ...
>
> When your federal candidate comes to your door, ask them what they will do to ensure the health of Canadians and our environment. Environmental protection must be a key issue in the upcoming federal election.
>
> Vote for a candidate who is committed to the environment.

[124] *Sharpe*, *supra* note 121 at para. 34.

third party activity as possible. Given that the only available narrowing construction of "associated" is manifestly at odds with both plain meaning and the legislative history of third party spending limits, there is no possible conclusion other than that section 319 and the limits predicated upon it are overbroad.

IV. Fixing the Issue Advocacy Problem

A. Less Drastic Approaches to Issue Advocacy

The preceding discussion showed how the *Canada Elections Act* and *PPERA* restrictions on third party expression are overbroad. Establishing overbreadth, however, does not resolve the question of validity. Under both the *ECHR* and the *Charter*, overbroad statutes may be justified if the legislative objective is sufficiently important and the overbreadth is minimized as much as reasonably possible. Accordingly, it must be considered whether less drastic restrictions on third party expression that still realize the legislative objective can be crafted.

One way to justify the overbroad limits in the *Canada Elections Act* and the *PPERA* is to argue that any attempt to distinguish between political expression and electoral expression is doomed to fail. If this could be established, the argument would then be that the legislative objective is so important that it justifies the collateral impact on third party issue advocacy. Indeed, this was the view of the Neill Committee and the Lortie Commission. The Lortie Commission, in particular, concluded that no meaningful distinction can be drawn between express advocacy and issue advocacy.[125] Accepting for the moment that this view is correct, it should then be considered whether it is tolerable to simply regulate all paid political expression during an election period. In Canada, an election period commences when the prime minister requests that the governor-general dissolve Parliament and issue an election writ and runs for a maximum of thirty-six days until voting. In practice, this means that political expression will be limited for approximately one month out of every four years. Moreover, it may be noted that during the election period, save for extraordinary circumstances, legislative activity is suspended. Correspondingly, it may be presumed that lobbying-type political advertising intended to influence the fate of matters pending before Parliament would cease or at least subside for the duration of an election. Put differently, with the call of an election, pure issue speech fades to the background and electioneering becomes the dominant mode of political expression. If this is true, what appears to be an overbroad restriction of political expression in concept might prove to be a fairly inconsequential limit in fact. The same argument, however, cannot be made in support of the *PPERA*. The *PPERA*, unlike the *Canada Elections Act*, reaches beyond the writ period. The *PPERA* regulates all expenditures on material that "enhance[s] the standing" of any party or

[125] Canada, *Final Report*, *supra* note 27 at 340.

candidate "in connection with future relevant elections (whether imminent or otherwise)."[126]

While the Lortie Commission dismissed the idea that a distinction between express advocacy and issue advocacy can be drawn, reform-minded U.S. scholars and legislators continue to attempt to do just that under the strict conditions imposed by the First Amendment. The efforts of reformers to temper the issue advocacy problem in the U.S. show that a less restrictive alternative to the third party restrictions in the *Canada Elections Act* and the *PPERA* might indeed exist. Richard Briffault proposes a cautious reform using the basic principles laid down in *Buckley*.[127] Briffault argues that *Buckley* does not mandate the existing definition of express advocacy. Rather, it requires a definition of express advocacy that (a) avoids vagueness, (b) does not consider the speaker's intent, and (c) is not overbroad. As a result,

> it should be constitutional to adopt a definition that regulates as election speech any communication that (i) refers to a clearly identified candidate; (ii) is made within a defined period before an election ... ; and (iii) involves a sufficiently large expenditure ...[128]

A "large expenditure" is suggested to be an amount of one to five percent of the "average expenditure of the winning candidate for the office in question in the two preceding elections."[129] Using these principles, Briffault proposes that any communication that uses the name or likeness of a candidate within a prescribed period (e.g., four weeks) prior to an election should be presumed to be express advocacy. This presumption "may be rebutted on a showing that, based on the content and context of the speech, viewers, listeners, or readers are unlikely to treat it as an election-related communication."[130] The rebuttable presumption, though providing a safety hatch for unfairly impugned communications, has been criticized for reintroducing vagueness to the equation.[131]

The recently adopted *Bipartisan Campaign Reform Act* features a definition of "electioneering communication" that closely resembles the Briffault bright line test:

> (i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within—

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[126] *PPERA*, *supra* note 3, s. 85(3). As noted above in Part II.C.1, under the *PPERA* the regulated period is the 365 days immediately preceding an election.

[127] Briffault, "Redrawing the Elections/Politics Line", *supra* note 9. See also, Association of the Bar of the City of New York, Commission on Campaign Finance Reform, *Dollars and Democracy: A Blueprint for Campaign Finance Reform* (Executive Director: Richard Briffault) (New York: Fordham University Press, 2000) at 140-49 [City of New York Bar Association, *Dollars and Democracy*].

[128] Briffault, "Redrawing the Elections/Politics Line", *ibid.* at 1779.

[129] *Ibid.*

[130] City of New York Bar Association, *Dollars and Democracy*, *supra* note 127 at 147.

[131] *Ibid.* at 210 (comment of Jerome S. Fortinsky).

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[132]

The *Bipartisan Campaign Reform Act* definition, unlike the Briffault test, does not specifically provide for a rebuttable presumption or a dollar threshold below which expenditures are not considered "electioneering communications". It does, however, create a similar effect to the threshold by applying only to expenditures over ten thousand dollars.

One of the charges frequently laid against bright line tests in the First Amendment context is that constitutionally protected speech is inadvertently swept into the regulatory net. The problem with bright line tests is that they impose laser-like precision upon a fuzzy reality. The U.S. Supreme Court in *Buckley* avoided the problem of overbreadth by adopting a bright line test that was massively underinclusive. The Briffault bright line test and the *Bipartisan Campaign Reform Act* definition of electioneering communications try to more accurately mark the distinction between express advocacy and issue advocacy. These new approaches, however, are no different from other bright line tests in that nuance is sacrificed for precision. Richard Hasen observes, for example, that a large advertisement in *The New York Times* shortly before a presidential election asking the president to intervene in a labour dispute would be categorized by the Briffault bright line test as express advocacy.[133] Hasen, however, defends the test on the grounds that in practice, false positives like the labor dispute example will be rare. Applying the Briffault bright line test to a comprehensive database of issue advertisements used during the 1998 and 2000 U.S. federal elections, Hasen found that 6.5 percent (calculated by total airtime) of the 1998 advertisements caught by the Briffault bright line test were genuine issue advertisements and that for 2000 this number dropped to a mere 0.2 percent.[134] The impact of the definition of electioneering communications found in congressional reform proposals was also considered. The rates of false positives for the *Bipartisan Campaign Reform Act* definition of electioneering communications by airtime were

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[132] *Supra* note 6, § 201(3). Note that section 201(3)(ii) provides that in the event that section 201(3)(i) is found to be unconstitutional, "'electioneering communication' means any broadcast ... which supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

[133] Hasen, "Disclosure of Contributions and Expenditures", *supra* note 5 at 279-80.

[134] Hasen, "Measuring Overbreadth", *supra* note 5 at 1796-97.

13.8 percent in 1998 and 0.5 percent in 2000.[135] The difference between the results for the Briffault bright line test and the *Bipartisan Campaign Reform Act* definition of electioneering communication is attributable to the longer period (sixty versus thirty days) stipulated in the *Bipartisan Campaign Reform Act* definition of electioneering communications. The low rate of false positives under the Briffault bright line test, Hasen argues, demonstrates that it has a minimal impact on protected expressive activity and, if implemented, should not be found to be overbroad.

The example of the Briffault and *Bipartisan Campaign Reform Act* definitions and Hasen's empirical analysis of those definitions show that the Lortie Commission's conclusion that it is impossible to craft a definition that distinguishes between express advocacy and issue advocacy cannot seriously be entertained. The *PPERA* and *Canada Elections Act* definitions of election expenses and restrictions on third party expenditures are unjustifiably overbroad. The question now is whether judicial remedies might be employed to prune the provisions or whether they are irredeemable and can only be remedied by judicial invalidation and subsequent legislative reformulation.

B. Judicial Remedies

The vague and overbroad limits on third party advertising might be remedied under the *Charter* by severing the offending provisions or by reading in an exception or a defence.[136] Here, the comparison between the *HRA* and the *Charter* diverges. Under the *HRA*, reading in an exception is not possible. The closest analogue is an amendment by ministerial order under section 10 of the *HRA*. A ministerial order may be made in circumstances where there has been a judicial declaration of invalidity, where the removal of the incompatibility with the *ECHR* is deemed necessary, and where there are compelling reasons to make an amendment by order rather than by legislation. Such circumstances are likely to arise in the situations involving the *PPERA* because the irregular timing of elections under the parliamentary system dictates that a minister will have little confidence that amending legislation can be put in place before an election. Indeed, this problem is compounded by the fact that the *PPERA* pertains to elections for regional assemblies and for members of the European Parliament as well. A consideration of exceptions that might be read into third party spending limits is relevant to the *PPERA* in that a ministerial order is likely to attempt to resolve any incompatibility using a similarly minimal intrusion into the legislative domain.

The most important consideration for a court when deciding whether to read a qualification or exception into legislation is "what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional."[137]

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[135] *Ibid.* at 1796.

[136] *R. v. Schachter*, [1992] 2 S.C.R. 679 at 697-98, 93 D.L.R. (4th) 1.

[137] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 167, 156 D.L.R. (4th) 385 [*Vriend*].

Recently, in the context of a prohibition on the possession of child pornography, the Supreme Court of Canada read into the *Criminal Code*[138] exceptions for personal writings and drawings that are exclusively for personal use.[139] The Court also has read protection from discrimination on grounds of sexual orientation into provincial human rights legislation.[140] These cases show that

> reading in will be appropriate only where (1) the legislative objective is obvious and reading in would further that objective or constitute a lesser interference with that objective than would striking down the legislation; (2) the choice of means used by the legislature to further the legislation's objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and (3) reading in would not require an intrusion into legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise.[141]

Each of these criteria can be satisfied in the case of the *Canada Elections Act* spending limits on third parties. The salient question, however, is whether a workable exception can be crafted.

One example of an exception to a third party spending limit is found in *The Elections Act, 1996*[142] of Saskatchewan. The *SEA* features what is known as the good faith issue advocacy defence.[143] Section 233 of the *SEA* prohibits all third party expenses that "directly or indirectly" promote or oppose a candidate or party.[144] The *SEA*, however, exempts a third party from the application of the spending limit if the third party establishes

> that the expenses were incurred: (a) to gain support for views held by the person on an issue of public policy, or to advance the aims of any organization or association, other than a political party or an organization or association of a partisan political character, of which the person is a member and on whose behalf the expenses were incurred; and (b) in good faith and not to evade any provisions of this Act that limit the amount of election expenses that may be incurred by any other person.[145]

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[138] R.S.C. 1985, c. C-46.

[139] *Sharpe*, *supra* note 121 at para. 128.

[140] *Vriend*, *supra* note 137.

[141] *Sharpe*, *supra* note 121 at para. 121.

[142] *Supra* note 49.

[143] British Columbia's *Election Act* contained a good faith issue advocacy exception similar in substance to that found in the *SEA*, as well as a five thousand dollar ceiling on direct third party expenditures. The British Columbia third party definition of "election expenses" and third party expenditure limitation were challenged in *Pacific Press v. British Columbia* ([2000] 5 W.W.R. 219, 2000 BCSC 248 [*Pacific Press*]). The court in *Pacific Press*, much like the court in *Somerville*, ruled that Parliament did not have a legitimate interest in regulating third party electoral expression. For that reason the court did not have regard to the scope of the definition of "election expenses".

[144] The constitutionality of the *SEA* is questionable following *Libman* given the outright prohibition on incurring election expenses directly to promote or oppose a candidate or party.

[145] *Supra* note 49, s. 278(5).

If the *SEA*'s good faith issue advocacy defence were paired with the third party expenditure ceilings in the *Canada Elections Act* instead of a prohibition on third party advocacy as in the *SEA*, it would be a complete response to the problem of overbreadth. Even so, two problems remain. First, the existence of a defence does not necessarily guide the discretion of the commissioner of elections. A defence to a charge may reduce the prospects of a successful prosecution, but it does nothing to reduce the potential for abusive prosecutions. Second, under section 7 of the *Charter*, as under the common law, courts will be reluctant to enforce a provision that requires a defendant to prove her state of mind to exonerate herself.[146] The good faith issue advocacy defence differs from artistic merits defences in the context of obscenity and child pornography cases in that artistic merit has been held to be determined objectively without reference to the defendant's subjective state of mind.[147]

C. Constitutional Dialogue and the Design of Legislative Sequels

A popular analogy for understanding *Charter* review is "dialogue".[148] A *Charter* dialogue occurs when legislation is struck down, the court decision is considered by Parliament, and a choice is made to either re-enact the invalidated law in revised form or to abandon the field. According to this view, judicial review is democratic when it invites legislative deliberation and response. One of the unstated prerequisites for an effective dialogue is a common understanding of the underlying subject matter and the constitutional deficiencies of the invalidated legislation. The Canadian and U.K. dialogues concerning third party spending limits have been fundamentally flawed in this respect. *Bowman* and *Libman* were primarily concerned with the question of whether third party expenditures on election communications may be limited. The scope of the relevant third party spending limits was discussed by the European Court and the Supreme Court of Canada only in passing and, even then, without any degree of clarity. Seemingly oblivious to this point, both the U.K. and Canadian Parliaments took the decisions to be licenses to enact sweeping regulations of paid third party expression. To be fair, the U.K. and Canadian Parliaments acted upon the advice of independent commissions. Nevertheless, what is needed in both Canada and the U.K. is a frank new dialogue about the permissible scope of political finance legislation. Creative narrowing interpretations and other judicial remedies are unable to

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[146] See *R. v. Roach* (1978), 25 O.R. (2d) 767, 101 D.L.R. (3d) 736 (Co. Ct.) (applying common law principles to avoid enforcing a similar good faith advocacy exception). *Charter* principles suggest the same result. See *R. v. Whyte*, [1988] 2 S.C.R. 3, 51 D.L.R. (4th) 481. The good faith issue advocacy defence would probably run afoul of the *HRA* as well. *R. v. Lambert*, [2001] 3 W.L.R. 206, 3 All E.R. 577.

[147] *Sharpe*, *supra* note 121 at para. 63.

[148] Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75. For debate over the meaning of "dialogue", see *Vriend*, *supra* note 137 at para. 138, Cory and Iacobucci JJ.; *Sauvé v. Canada*, 2002 SCC 68 at paras. 8-9, 104-108, McLachlin C.J.C. and Gonthier J.

adequately resolve the problems of vagueness and overbreadth. What should be hoped for is the swift demise of third party spending limits and related provisions in both acts so that the U.K. and Canadian Parliaments can get on with the business of constructing new issue advocacy restrictions that respect the role of third parties in the democratic process.

Elsewhere I have written that third party spending limits are essential to the construction of an egalitarian model of election regulation. This is quite different from saying that third parties should be prohibited from participating in public electoral debate. Indeed, I argued that "the voices of [third parties] should not be silenced; they should be allowed to speak at a volume that is proportionate to their stake in the [electoral] process."[149] Embedded in this conclusion is the assumption that third party expression may only be limited insofar as it is part of the electoral process. The question that is germane to the drafting of third party spending controls is how to distinguish expression relating to the electoral process from political expression generally. In the U.S., under the First Amendment, it is accepted that limits on political finance legislation must be narrowly drawn and set-off by bright lines. Bright lines neutralize the chilling potential of political finance legislation by clearly marking the boundary between regulated and unregulated eonduct. At the same time, however, bright lines are blunt instruments. The *Buckley* bright line test, drawn as narrowly as possible, created the problem of sham issue advocacy that, together with the problem of soft money, threatens the viability of political finance controls in the U.S. The proposals made by U.S. reformers forced to accept the imperative of bright lines are limited to drawing different lines and thus to crafting prescriptions that are fated to be simultaneously overinclusive and underinclusive. Efforts to reform the *PPERA* and *Canada Elections Act* are unlikely to be constrained to the same degree by freedom of expression doctrine, although U.K. and Canadian law may yet be found to require bright lines in circumstances where the chilling potential is judged to be particularly high.

The most appropriate solution in the U.K. and Canadian contexts is the adoption of a narrow objective test based upon the content of the message and that permits limited consideration of identified contextual factors. Such a provision must, however, be strictly defined in terms of time like the Briffault proposal and the *Canada Elections Act*. An open-ended restriction on election expenses, no matter how narrowly drawn in other respects, exceeds the underlying justification for limiting election expenses. Similarly, the *PPERA* one-year limitation, though temporally defined, is simply too long to be justifiable. One criticism that may be levelled against the Briffault test and the *Bipartisan Campaign Reform Act* test in the U.S. constitutional context is that the time period chosen (thirty days or sixty days) appears arbitrary.[150] Indeed, drawing a line is difficult in the U.S. system because there is no

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[149] Feasby, *supra* note 1 at 36.

[150] See Samuel Issacharoff & Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform" (1999) 77 Tex. L. Rev. 1705 at 1716.

obvious or natural boundary between politics generally and election campaigns. In parliamentary systems, however, there is a very clear point at which campaigns switch from low gear into high gear; namely, when an election writ is issued.[151] To avoid the problem of subjects of spending regulation front-loading or back-loading expenses, any time limit must be phrased to catch expenditures on goods and services used within the election period and not just expenses booked within the election period. Of course, this approach will not catch all expenses that have an impact upon an election, but it draws a logical line that can be expected to be effective without overreaching.

Conclusion

Distinguishing between issue advocacy and express advocacy will not solve all of the problems associated with political finance controls. That distinction does little to address the questions of whether limits on election expenses are set at appropriate levels for candidates, political parties, and third parties; whether the formulae for determining election expense limits are fair; or how election expense limits interact with other political finance mechanisms such as state funding and the allocation of free television broadcast time. Drawing such a line may not even solve all of the problems associated with third party advocacy. Indeed, the possibility that there may be some advertisements that will manage to communicate a partisan message notwithstanding conformity with the proposed approach must be acknowledged. Despite these caveats, the proposed approach (adopting a narrow objective test, strictly defined by parliamentary legislation, that focusses on the content of the message with very limited consideration of contextual factors) promises to enhance the quality and, indeed, the quantity of political debate in elections without sacrificing spending limits and the egalitarian principle of election regulation on the altar of freedom of expression.

Postscript

As this issue of the *McGill Law Journal* was going to press, the Alberta Court of Appeal upheld Cairns J.'s judgment in *Harper* in a two to one decision.[152] The majority decision of Madam Justice Paperny, however, rejected Cairns J.'s finding that the third party spending limits in the *Canada Elections Act* are vague. Instead, her decision is based upon Cairns J.'s alternative ground; namely, that the objectives of the third party spending limits in the *Canada Elections Act* are not pressing and substantial. Paperny J.A. further went on to find that, even if the objective of the third

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[151] In recent elections there has been an increasing level of pre-writ advertising in both the U.K. and Canada. While this pre-writ advertising also undermines deliberative equality, it is less effective and less threatening than campaign advertising. While it is reasonable to require disclosure of expenditures on pre-writ political advertising, expenditure limits should not be countenanced. Unlimited pre-writ political advertising reveals expenditure regulation as an imperfect guarantee of equality of resources, but it is the price that must be paid for a vibrant and open political domain.

[152] *Harper v. Canada (A.G.)*, 2002 ABCA 301 [*Harper* (Alta. C.A.)].

party spending limits were pressing and substantial, the limits were overbroad. While the conclusion of the majority of the Alberta Court of Appeal with respect to the overbreadth of the third party spending limits is correct in my view, Paperny J.A.'s vagueness and overbreadth reasoning is problematic in several respects.

The majority reasons deal with vagueness as a preliminary matter separate from overbreadth. Paperny J.A. begins her vagueness analysis quite correctly by focussing on the impact of vagueness upon citizens, stating that "the law must be sufficiently clear to permit citizens to foresee the consequences of their conduct and govern themselves accordingly."[153] By the time she concludes her vagueness analysis, however, Paperny J.A. seems to have lost her concern for citizens and is instead fixed on the question of whether "there is enough context to guide legal debate."[154] These are two different things. The problem with Paperny J.A.'s vagueness analysis is of interest not because her decision turns on it, but because it shows the tension between the idea that the law must be sufficiently clear for citizens to govern themselves and the concept of vagueness as it has developed in Canadian constitutional law. Among other things, *Harper* is a useful opportunity for the Supreme Court of Canada to clarify its doctrinal and theoretical approach to vagueness by stating once and for all (1) whether vagueness should be considered as a preliminary matter or as an aspect of minimal impairment; and (2) whether the relevant consideration is the ability of citizens to govern themselves or the presence of sufficient guidance for legal debate.

The majority's emphasis on context in defining the scope of the third party spending limits in the *Canada Elections Act* is disconcerting given that the reasons show a startling lack of appreciation of the context in question. The court observed that the "Chief Electoral Officer or Commissioner of Elections has the discretion to determine when the legislation is engaged and must give notice to third parties that they must comply with the legislation."[155] There are four main problems with this conclusion. First, the commissioner of elections ("Commissioner"), the authority charged with enforcing the *Canada Elections Act*, is a passive regulator—the Commissioner has insufficient resources to investigate and police *Canada Elections Act* violations; instead, he or she relies upon complaints from citizens and referrals from the chief electoral officer based on post-election financial returns. Second, the idea that the Commissioner could give notice to a third party assumes that there is a mechanism for preapproval of advertising messages, which there is not. What is a third party to do if it broadcasts messages at a cost in excess of the statutory limits with an honest belief that its communications are not subject to the *Canada Elections Act*? Third, even if there was a system of preapproval, it must be noted that candidates, political parties, and participating third parties are subject to intense time pressures during election campaigns. It is unreasonable to expect that during the cut and thrust of an election campaign third parties will have the ability or resources to

[153] *Ibid.* at para. 43.
[154] *Ibid.* at para. 61.
[155] *Ibid.* at para. 57.

alter an advertising campaign or regroup and develop a different advertising campaign based upon the advice of the chief electoral officer or the Commissioner. Third parties must, with a reasonable degree of certainty, be able to determine what the law is and, in the words of the majority of the Court of Appeal, "govern themselves accordingly" prior to committing resources to an advertising campaign. Fourth, the Court of Appeal overlooked the problem of the shifting ground of an election campaign—something that the Lortie Commission certainly contemplated.[156] What is a third party to do if a candidate or political party becomes "associated" with an issue promoted by the third party during the course of a campaign?

The dissenting reasons of Mr. Justice Berger are more interesting than the majority decision because he proposes a narrower interpretation of the *Canada Elections Act*'s third party spending limits. Berger J.A. suggests that the third party spending limits are engaged when "a reasonable person would perceive that third party election advertising takes a position on an issue that is particularly associated with a registered political party or a candidate."[157] This begs the question of what criteria Berger J.A.'s reasonable person would use to determine whether an issue is associated with a political party or candidate. Berger J.A. does not say. What he does say is that he disagrees with the submission that the third party spending limits embrace "potentially any topic and any issue."[158] Assuming that in any given election the various party platforms, taken together, state positions on all issues of public interest, Berger J.A.'s reasonable person must demand more than mere mention of an issue in a campaign platform before third party spending limits are engaged. The precise level of association required under Berger J.A.'s objective test is unclear. Though a step in the right direction, Berger J.A.'s objective test fails because it replicates the vagueness and overbreadth of the *Canada Elections Act*. If *Harper* is appealed and is given leave to be heard, the Supreme Court of Canada may be tempted to flesh out Berger J.A.'s objective test of "association". The Supreme Court of Canada, however, would be wiser to strike down the third party spending limits and give Parliament the opportunity to enact clearer and narrower restrictions.

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[156] Canada, *Final Report*, *supra* note 27.

[157] *Harper* (Alta. C.A.), *supra* note 152 at para. 227.

[158] *Ibid.*