Third-Party Advertising and Electoral Democracy: The Political Theory of the Alberta Court of Appeal in *Somerville v. Canada (Attorney General)* [1996]

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Comme l'indique la décision du Procureur Général dans l'affaire *Somerville v. Canada*, la Cour continue a avoir une attitude hostile sur les restrictions en matière des dépenses des indépendants ou des tierces parties tels qu'énoncé dans le *Canada Elections Act*. La difficulté réside dans le fait que ces restrictions sont un sous-ensemble d'un régime de dépenses à des fins électorales qui vise à garantir une compétition équitable entre les différents partis et candidats. En examinant l'affaire *Sommerville* cet article montre que si les restrictions sur les dépenses des triers partis étaient enlevées, alors les restrictions concernant les partis et les candidats vont aussi disparaître. De plus Elections Canada ressemblera à une entité non-réglementée et gratuite. Sous ces conditions, et de façon ironique, les partis politiques peuvent se trouver en meilleure posture vis-à-vis des groupes de pression car ces derniers ne seront plus des participants actifs et visibles du processus électoral mais plutôt des vehicules de transmission de fonds pour la campagne électorale.

As the decision in *Somerville v. Canada (Attorney General)* [1996] indicates, the courts are continuing to prove hostile to the restrictions on third-party or independent spending that are set out in the *Canada Elections Act*. The difficulty is that these restrictions are part of a larger election-expenses regime that is designed to encourage fairness in the electoral competition between parties and candidates. Through an examination of the *Somerville* case, this paper argues that if the restrictions on third-party spending are eliminated, then the restrictions on parties and candidates are sure to fall as well, and Canadian elections will come to resemble an unregulated, free-for-all. Ironically, under these conditions the position of political parties may well be strengthened in relation to interest groups as the latter become conduits for campaign finance rather than active and visible participants in the electoral process.

Introduction

The freedoms of speech and association and the right to vote are among the most important to be found in the *Canadian Charter of Rights and Freedoms*. As a result, it is tempting to applaud their affirmation by the Alberta Court of Appeal in a recent decision overturning the restrictions in the *Canada Elections Act* on what is variously referred to as "third-party" or "independent" advertising during election campaigns. Such advertising, it should be stressed, is undertaken by individuals or interest groups rather than registered political parties and candidates.

Yet, significantly, the court's reasoning in *Somerville* is at odds with some of the central features of Canadian electoral democracy, namely, the primacy of political parties and the balanced and meaningful electoral competition between them. Indeed, in seeking to protect individuals' rights the court articulates a theory of elections, and the role of political parties in them, that points to a very different election-expenses regime than the one that Canadians have experienced since 1974 — a regime that would place no limits on expenditures made during elections either by political parties or anyone else. Should the *Somerville* verdict stand — and it is worth stressing that on 8 October 1996 Justice Minister Allan Rock announced that the federal government had decided not to appeal the Alberta court's decision[1] — the ramifications of the decision for electoral democracy will be considerable and for this reason alone warrant close examination.

This paper begins with a reminder of the rationale behind the landmark legislation passed in 1974 governing federal campaign financing and related matters, especially the concept of electoral fairness. Next, the earlier court cases in which the third-party spending provisions have been tested are briefly reviewed. Then the *Somerville* opinion is examined, with particular attention paid to the court's conception of electoral democracy and the role of participants in it, both party and non-party. In the conclusion, the likely consequences of the absence of restrictions on third-party spending — restrictions that often are pointedly referred to as the "gag law" — are explored. Since three federal elections (1984, 1988, and 1993) have been and gone in which the government has declined to enforce the restrictions, readers are entitled to wonder whether they matter much. Our answer is that they do, not because of the fate of third-party advertising per se, but because of the integrity of the election-expenses regime as a whole.[2] In the absence of third-party spending restrictions, the ceiling that remains on the expenditures of parties and candidates is both unfair and untenable. If it, too, should be removed, then political parties will find themselves under considerable pressure to raise and spend as much money as possible in order to prosecute successful elections. And they will be compelled again to rely largely on the corporate sector — as they did prior to 1974. From the standpoint of the court's anti-party position in *Somerville*, the irony is that the elimination of spending restrictions will do nothing to weaken the parties. On the contrary, they will become even more important in electoral politics than they are now.

Electoral Fairness and Parliament's Election-Expenses Regime, 1974

W.T. Stanbury writes that money is the "fuel" of politics, and cites the supporting observation of Prime Minister Jean Chrétien that all political parties need it (1996, p. 372). Sometimes they are thought to need it too much. By the time of the 1963 general election, there was sufficient concern among politicians about the spiralling costs of election campaigns, particularly media advertising, to impel the Liberal Party to include a promise of election finance reform in its campaign platform. A year later the Liberal government appointed an Advisory Committee to Study Curtailment of Election Expenditures, chaired by Alphonse Barbeau. Thus began the decade's worth of work by policy advisers and legislators that culminated in the 1974 Act. As Leslie Seidle (1985) observes, it was the first major

overhaul of federal election law since the nineteenth century.

In addition to the control of campaign expenditures, the Act was designed to strengthen public confidence in the electoral system by guaranteeing the transparency of the financial activities of the parties and the candidates. These two objectives — the control of election expenditures and transparency — were deemed to be fully consistent with the democratic norms of fair competition and openness. The norm of fair competition is not simply a matter of competitors facing the same rules. It also implies that no competitor may possess a non-natural or conventional advantage over the rest, like superior financial resources. In many ways this conception of balanced competition goes to the heart of what electoral fairness is about in the Canadian context. The norm of openness, in turn, signals the democratic distaste for secrecy, which is based on the realization that secret deals hidden from the public eye mean that someone else, certainly not the public, is in charge. A final objective of the Act was to increase public participation in politics, mostly in the form of independent citizens making donations to the parties and candidates, an objective that amounts to a democratic norm in its own right (Canada 1966, pp. 37-64).

Taken by themselves, perhaps, neither the objectives of the legislation nor the democratic norms to which they are related presuppose a party democracy rather than a non-party one. But the ways in which the legislators choose to pursue the objectives, indeed, the very design of the scheme, presuppose precisely the party system that is Canada's. For example, the Canadian system places limits on the ''election expenses'' (as defined in the legislation) of parties and candidates, but not on contributions to these participants. Only contributions to them from foreign sources are outlawed. The limits on election expenses help to equalize the competition between the parties and their candidates, and also to assist them in avoiding undue or easy reliance on the contributions of the big business battalions. Moreover, the limits minimize the one advantage — money — that independent candidates might use to break into the competitive circle. The American system, by contrast, limits contributions rather than expenditures (except in the case of presidential candidates who accept the use of public monies), which enables wealthy party outsiders, like Ross Perot, to try to spend their way to office (Stanbury 1996, pp. 375-78).

Most of the provisions of the election-expenses scheme focus on registered parties and their candidates. But the assumption of party democracy is also clear in the provisions on third-party or independent spending (Paltiel 1979, pp.100-09).[3] Individuals or groups other than candidates or registered parties were left free to publicize their position on issues (advocacy spending), but they were prohibited from incurring election expenses, that is, promoting or opposing candidates and registered parties. The prohibition was designed to ensure that the prospects of participants in an electoral competition were not unfairly harmed by the impact of unaccountable and unregulated money. It was also intended to keep the candidates and parties themselves from soliciting the aid of third-party spending and thereby escaping the restrictions on their own campaign expenses. As such, it was entirely consistent with the primary purpose of the legislation, which was to curtail the expenses of politicians, not to keep interest groups out of the electoral arena (Paltiel 1989, p. 347). However, if third parties did incur such expenses, and were prosecuted for doing so, they could mount a defence to the effect that the effort was aimed at gaining support for a public policy stance and was undertaken "in good faith."

In 1983, Parliament removed the good-faith defence. As Janet Hiebert explains, it was turning into a loophole that threatened to render enforcement of the third-party spending prohibitions increasingly uncertain (1989-90, p. 73). Unhappy with this turn of events, and with the scheme in general, the National Citizens' Coalition (NCC) launched an action in January 1984 in the Alberta Court of Queen's

Bench to have the provisions on third-party spending declared unconstitutional. It was armed with the *Charter of Rights and Freedoms*, in effect since 1982.

The Courts and Third-Party Spending

The Initial Cases

At trial, Justice Medhurst agreed with the NCC that the provisions in question amounted to a restriction of the freedom of expression which, under section 2 of the Charter, belongs to everyone in Canada. Moreover, he concluded that the provisions could not be saved under section 1 as lawful, "reasonable limits" that are "demonstrably justified in a free and democratic society." The reason was the paucity of evidence of the likelihood of harm or mischief flowing from interest-group spending in the absence of the impugned restrictions (*National Citizens Coalition, Inc. v. Attorney General of Canada* 1984, p. 453).

The Canadian government chose not to appeal the decision, which meant that in subsequent federal elections advocacy groups and individuals across the country were free to spend as much money as they liked to support or oppose candidates and parties as well as to argue their preferred policy positions. In the 1988 general election, which featured the hotly contested issue of free trade with the United States, advocacy groups spent more to urge their policy positions than ever before — about $4.73 million on advertising in the print media (Hiebert 1991, p. 20). Stanbury points out that while this figure amounted to only 8 percent of the total of election expenses of the parties and candidates, it represented 40 percent of the advertising spending of the three major parties at that time (1996, p. 396).

Subsequently the Royal Commission on Electoral Reform and Party Financing (Lortie Commission)[4] took up the issue and argued against the original approach to third-party election expenses. The Lortie Commission regarded the idea of an outright ban on them to be a denial of meaningful freedom of expression. It dismissed as unrealistic the freedom of third parties to advertise their views so long as they managed not to link these views to the positions of parties and candidates (Canada. Royal Commission on Electoral Reform and Party Financing 1991, p. 351). At the same time, the commission emphasized that any regulation of third-party spending needs to respect the "essential and primary role of candidates and political parties in elections" (ibid., p. 352). It noted that in 1988 a full 98 percent of the contributions of individuals to parties and candidates featured an amount less than $1,000. In the case of business and unions, the comparable figure was 72 percent. Having decided on the course of regulating third-party election expenses, the commission recommended the $1,000 figure, inclusive of both issue and partisan advocacy, commenting that it "represents a significant political commitment on the part of individuals wishing to spend money independently of the official campaigns of registered participants" (p. 352).[5] The federal Parliament accepted the $1,000 limit, though only with respect to partisan advocacy. Independent spending on issue advocacy remained unregulated. The new spending limit on partisan advocacy took effect in June 1993, at which point the NCC returned to Alberta's Court of Queen's Bench to contest it and related rules; and hit another home run.

The NCC challenged both the $1,000 limit, and the blanket prohibition on election advertising (the "black-out provision") that is in effect from the date of the issue of the election writ to the 29th day before polling day and the day before and day of the election. The relevant provisions are found in sections 259.1(1), 259.2(2) and 213 of the *Canada Elections Act*, R.S.C. 1985, c.E-2. Justice Macleod agreed with the NCC that they breach not only the freedoms of expression and association set out in sections 2(b) and 2(d) of the Charter, respectively, but also section 3, which stipulates the right of every citizen of Canada to vote and to run in federal and provincial elections. Further, he found that the

provisions could not be saved under section 1 of the Charter, the reasonable limits clause.[6]

In an effort to justify the limits contained in the provisions, counsel for the federal government had urged their importance in terms of the general objective of maintaining some measure of financial equity in the electoral competition between candidates and parties. In other words, the regulation of third-party spending is meant to preserve the integrity and effectiveness of the spending limits on candidates and parties. Justice Macleod did not accept that the objective is sufficiently important or pressing to justify the breach of the Charter rights, largely because he found no conclusive evidence that third-party spending constitutes an inappropriate influence on election outcomes, or for that matter any influence at all (*Somerville v. Canada* 1993, pp. 15-20). Since the impugned provisions failed the test of importance in terms of the objective they were designed to meet, there was no real need for the trial judge to assess the proportionality of the provisions in relation to the objective. However, he commented that the provisions failed there too, thus concluding what might be described as a legal rout (ibid., pp. 20-22).

The chief electoral officer chose not to enforce the third-party spending provisions in the 1993 general election. However, the government did appeal the trial judge's decision to the Alberta Court of Appeal. Our analysis of the appellate court's decision is confined to the issue of third-party spending.[7]

Somerville v. Canada (Attorney General), 1996

Three judges heard the appeal, with Justice Conrad writing for herself and Harradence J.A. (Kerans J.A. stated his general agreement with the others in a separate opinion.[8]) After setting out the background of the appeal, she turned to the issue of the breach of rights. Her conclusion, like that of the trial judge's, is that the impugned provisions offend the freedoms of association and expression and the right to vote.[9] We make no comment on her presentation of the legal points that compel such a conclusion, although we will take note of the observations on democracy that appear in her discussion of the right to cast an "informed vote." Instead, we focus on her analysis of the government's justification of the third-party spending limits under section 1.

Fundamental to the analysis is Justice Conrad's reference to the "Oakes test," which is used to determine whether a breach of rights is justifiable under section 1 *(Somerville v. Canada (Attorney General)* 1996, p. 226).[10] The first stage of the test concerns the importance and significance of the objective(s) that the measures in question are designed to pursue. On this point, Justice Conrad warned that while the objectives advanced by federal counsel might be one thing, the *reality* of them in the light of the expansive restrictions on rights and freedoms that they entail might be quite another. She then took up the government's three objectives, assessing each in turn. The fourth, or true objective, is her own discovery. We turn to each of these objectives in sequence.

The Public-Confidence Objective

Federal counsel argued that the limits on third-party spending are necessary to encourage public confidence in the electoral system, or to discourage the idea that third parties endorsing particular candidates or parties might benefit later from the activity. Justice Conrad rejected the argument altogether, particularly in view of the scheme as a whole. Her position is that a serious public-confidence concern would compel limits on contributions, which the legislation omits to do. Instead, she continued, the legislation tackles public confidence by relying solely on disclosure rules, which makes it "difficult to conclude that the real objective of this legislation is fear of patronage." And even if it were, the fear would not be sufficiently important to justify overriding rights and freedoms by the imposition of spending limits (ibid., p. 228).

It is worth contemplating whether the large issue of public confidence is easily reducible to the fear

of patronage. As Leslie Seidle (1996) argues, public confidence is affected by a variety of concerns, including the openness of the system to new parties. It is also worth wondering why public confidence in the electoral system is not a social value of sufficient importance to justify some restrictions on individual rights. However, setting those questions aside, there is still the puzzle of why Justice Conrad supposed that the legislation relies solely on disclosure rules to counter public fears of private influence. The spending limits serve the same purpose by removing the incentive for large contributions. After all, what is the point of making contributions that cannot be used?

According to Stanbury (1996), there is very little point. He estimates that prior to the establishment of the election-expenses scheme in 1974, the Liberal and Conservative parties appear to have depended on corporate donations for more than 90 percent of their revenues (ibid., p. 373). (Owing to lax enforcement of the rules that did exist, figures prior to 1974 are uncertain.) In his analysis of the data for the period between 1974 and 1993, he finds that small contributions from individuals generated about half the funds raised by the Liberals and Conservatives, three-quarters for the NDP and 90 percent for the Reform Party (ibid., p. 379). In the same period, for the Liberals, the Conservatives, and Reform, the rest of the revenue came from corporate contributions (ibid., p. 384). For the NDP, the remainder came from trade unions (ibid., pp. 386-87). It continues to be the case that only a small percentage of Canadians makes donations to political parties, and a fraction of those donations are defined as large (over $2,000). Still, since the amount of small contributions calculated as a percentage of the total has increased dramatically, Stanbury concludes that the 1974 legislation has "greatly broadened the financial base of political parties" (ibid., p. 382). It can be argued that reliance on many small contributions rather than a few large ones encourages public confidence in the system as a whole.

The Circumvention Objective

According to Justice Conrad, federal counsel argued that, in the absence of spending limits on third parties, parties and candidates could get these people to advertise "on their behalf" in an effort to circumvent the restrictions on their own spending. As she points out, it is a misdirected argument because, if third parties plan to advertise on behalf of candidates or parties, the legislation requires that such expenses be authorized by the beneficiaries and, once authorized, be subject to the spending limits imposed on them (*Somerville* 1996, p. 229). Unauthorized, "independent" advertising on behalf of candidates and parties is prohibited.

However, if federal counsel meant "in support of," then the argument changes. If there were no restrictions on independent spending, candidates and parties would have an incentive to encourage tacitly — or at least not to discourage — independent advertising that had the effect of supporting them or attacking their opponents. In other words, there would be an incentive for *collusion* between candidates and parties, on the one hand, and third parties on the other.[11] Viewed in this light, the present restrictions on independent spending certainly help to block candidates and parties from evading their own spending limits.

The Objective of Effective Regulation of the Politicians

The primary argument of federal counsel, Justice Conrad wrote, is that the limits imposed on third-party spending are a condition of the successful regulation of the spending of parties and candidates. Her response to this argument is notable, not because she repudiates it, but because she questions the very purpose of the legislation as a whole, which is the restriction of the campaign expenditures of political parties and candidates. And here she comes close to endorsing the prevailing American model of election finance.

Justice Conrad tackled federal counsel's argument by pointing out that it rests on two *desiderata*

that require demonstration: the need to restrict the advertising expenditures of parties and candidates; and the consequent need to restrict those of third parties, too. She explored the two kinds of evidence that were offered, namely, comparative data on election-expenses regimes and data on the impact of advertising on voters' intentions. On the comparative data, she simply drew different conclusions than federal counsel. The data disclose that most Western countries do regulate election spending by both political parties and third parties. France, for example, prohibits all paid political advertising during an election and Britain restricts spending to candidates at the constituency level and prohibits third-party broadcast advertising at the national level (Gerstlé 1991, pp. 12-13; Semetko 1991, p. 57). Some Canadian provinces have legislated similar restrictions (three when the case was heard in 1993; five at the time of the appeal court's decision). However, Justice Conrad found the data inconclusive: "The mere fact that other governments have chosen to pass similar legislation is not conclusive of its need; rather it is some evidence to consider" (*Somerville* 1996, p. 230). She also considered the data to be non-comparable and incomplete. For example, the British case is not applicable, she argued, because the country possesses no entrenched bill of rights, while the United States, which does possess one, imposes no limits on third-party spending. Alberta also imposes no such limits. "The fact," she writes, "that other jurisdictions have been functioning without such legislation, and without allegations or proof of unfairness, suggests no pressing need" (p. 230).[12]

The crucial issue here appears to centre around the concept of fairness. The term is nowhere defined in the decision, but in an earlier section there is a reference to some of the core values that Patrick Boyer (1981, pp. 88-89) considers to be part of the section 3 guarantee of the right to vote, values that are incorporated in formal rules governing the individual's access to and exercise of the vote, for example, the requirement of a secret ballot (*Somerville* 1996, pp. 220-21). Political scientists would agree with Justice Conrad that fairness in the context of electoral law includes Boyer's list. But they would also want to consider things not on the list, like the ease of entry of new parties into the electoral arena and the comparability of the parties' access to the financial resources necessary for an election campaign — in other words, the indicators of a competitive party system. Negative indicators would be regarded as highly problematic by many political analysts. Justice Conrad, by contrast, dismisses them because she thinks that they have little weight in relation to the rights of expression and association. Her easy reference to the American example, however, illustrates the problem with this viewpoint. While presidential elections are competitive to the extent that the two main competitors enjoy relatively equal levels of resources, the same is not true for congressional elections. There, the extremely high levels of incumbency (Frenzel 1994, p. 119), the low voter turnout rates (Burnham 1990, pp. 125-55), the considerable resources necessary for prospective party candidates to gain entry to the primaries (Wayne 1996, pp. 28-32), the difficulty that independent candidates experience in gaining access to the ballot (Lowi and Ginsberg 1996, p. 470) and the absence of meaningful competition in many districts raise serious concerns about electoral fairness (Ferejohn and Gaines 1991, p. 298). Certainly the Lortie Commission, which emphasized the establishment of a level playing field for candidates and parties and more equitable access to financial resources, considered the United States to fall short on these key dimensions of electoral fairness. Furthermore, the commission and others would attribute the problems in good part to the absence of spending limits in American electoral law (Canada. Royal Commission on Electoral Reform and Party Financing 1991, p. 336). The point to stress is that the conception of fairness that the court is using is much more restrictive than the one used by those who study elections as well as the one that is manifest in the legislation itself.

There remains the evidence of the impact of third-party spending on elections, and Justice Conrad's

view of it is worth examining since it sheds some light on the court's use of social science data and its understanding of the role of money in elections. Considerable sympathy is owing to Justice Conrad, who had to grapple with limited and contradictory evidence. And as she, herself, noted, much of it is very difficult to quantify (*Somerville* 1996, p. 231). Moreover, matters were not helped by the fact that Richard Johnston, the author of a memorandum showing third-party advertising to have had some effect on voters' opinions during the 1988 general election (Hiebert 1991, p. 66), later changed his mind. In a subsequent book on the same election, Johnston *et al*. determined that "third-party advertising coefficients defy substantive interpretation: some are large and significant but the pattern is offsetting and the total coefficient effectively zero" (1992, p. 163; quoted in *Somerville* 1996, p. 232). The trial judge interpreted this to mean that there is no proof of the impact of third-party spending, and Justice Conrad agreed. But she went further:

> In any event, I have great difficulty accepting that an opposite finding would justify suppression of the expression. Quite the contrary. An important justification for the Charter guarantees of free expression and association, and an informed vote, is the need in a democracy for citizens to participate in and affect an election. It follows that there can be no pressing and substantial need to suppress that input merely because it might have an impact (p. 232).

Three observations might be made about the court's handling of the data on impact. First, while it is true that the data disclose nothing firm about the effects of third-party advertising, still from a social-science perspective it would be unwise to reject altogether the possibility of such effects. Certainly Johnston *et al.* did not reject the possibility. On the contrary, they pursued it in the hope of figuring out what exactly moved opinion in the last days of the campaign.[13] As indicated, they found that the data defy "substantive interpretation" because the coefficients that describe the relationship between third-party advertising and public opinion offset one another. It was not a matter of no effects but, rather, no cumulative effect. Further, in their discussion of this result, the authors explicate one of the principal dilemmas in determining the effects of third-party advertising in elections, that is, how to disentangle them from the effects of the news (1992, pp. 161-64).

It should also be observed that Justice Conrad comes dangerously close to suggesting that political advertising in general — or advertising of any kind, for that matter, whether for politicians or corn flakes — is ineffectual, or that its effects cannot be demonstrated. This clearly runs against the evidence in the political-science literature on the positive impact of a well-financed, political advertising campaign (Johnston *et al*. 1992, p. 166; Kenny and McBurnett 1994, p. 705).[14] It might also be pointed out that in political advertising, as with all advertising, there are campaigns that produce results opposite to those intended as well as campaigns that produce the desired results. In recent years, while some *negative* campaigns have succeeded others have backfired.[15]

Finally, one of the more striking features of the evidence on the supposed non-effects of third-party advertising that was presented to the court at the original trial by the plaintiff was its limited nature. The NCC's expert witness, Professor Neil Nevitte, a political scientist, was able to cite only two items in addition to the findings of Johnston *et al*. One is a study entitled "What Moves Public Opinion," which investigated "the impact upon public opinion of the statements and actions of certain actors as reported in the media" (Page *et al*. 1987, p. 23). In relation to interest groups, the study concluded that "groups perceived to represent narrow interests, generally have no effect, or even a negative impact, on public opinion" (ibid., p. 39).[16] While this finding is suggestive in its own right, it is worth stressing that the study made no reference at all to either elections or third-party advertising in elections. In other words, it was concerned with political agenda

setting outside the electoral context. Nonetheless, in what by social-science standards is a stunningly bold inference, Justice Conrad was able to determine that the study showed that "third party advertising had no effect on people's voting intentions" (*Somerville* 1996, p. 231). Professor Nevitte's third item was a quotation from a former Conservative minister, Mr. Harvie Andre, to the effect that 'I can't think of an election anywhere that was altered by somebody spending too much' (*Somerville* 1996, p. 231).

Justice Conrad's ability to apply findings in a study of news reports of interest groups and their impact on public opinion to the voting intentions of individuals, even though the study makes no reference at all to voting intentions, stands as an interesting comment on the use, and possible misuse, of social-science data by the courts. The more critical point, however, is the very limited nature of all the evidence in this area. In short, there is a dearth of studies on the phenomenon of third-party advertising, and one of the reasons is that even in the United States third-party advertising constitutes only a small proportion of the total spent on political advertising.[17] Instead, most third parties there prefer to channel funding directly to candidates and parties, that is, to let the campaign team of the candidate decide on the most effective forms of advertising.

It needs to be kept in mind that, contrary to Justice Conrad's belief, the primary aim of third parties is *not* to provide an independent voice on the qualities of the candidates and their programs during election campaigns.[18] Rather, it is to use the most effective means possible to help elect the candidate or party of their choice, and more often than not this means contributing money directly to the political campaigns. In other words, the non-partisan rhetoric notwithstanding, the primary aim is to affect the outcome of an election. As is true of any advertising campaign, election spending to be effective needs to be integrated and coordinated. And logically it is the candidate and the campaign manager who are best positioned to provide the coordination and direction.

The Real Objective

In the final section of Justice Conrad's analysis, it becomes clear that the contrast between her view of limits on independent spending and Parliament's view of them is rooted in their very different perceptions of the role of interest groups and political parties in electoral democracy. Federal counsel linked the limits on independent spending to the efficacy of the limits on spending by candidates and parties, the latter being justified by the desirability of encouraging a competitive balance among contending political parties. According to Justice Conrad, the argument assumes that political parties are the principal actors in the country's parliamentary democracy, while interest groups are only minor actors. It is an assumption that she does not share. As a result, she interpreted the real purpose of the spending restrictions to be the preservation of an electoral system "which gives a privileged voice to [registered] political parties and official candidates within those parties" (*Somerville* 1996, p. 233).

In dealing with the assumption of the primacy of political parties, Justice Conrad did not distinguish explicitly the empirical from the normative. However, it would appear that she accepted the primacy of political parties as a valid empirical claim, as do those whom she pointedly cited in this connection (ibid., pp. 233-34). What she rejected is the normative claim that this primacy is a good thing. Consequently, she was bound to be sceptical of a statutory scheme, the effect of which, in her view, is to help the parties to retain their principal role in elections. She called that role "privileged," a term that connotes the shabby practices of elitism and monopoly. She drew attention instead to the role of citizens during election campaigns and reminded us that the rights of citizens, not political parties, are enshrined in the constitution (ibid., p. 234). In the remainder of her analysis, she employed the perspective of the voter to evaluate third-party spending

limits, placing emphasis on the voter's need for information on the basis of which to choose among parties and candidates. The result is a theory of elections that accords a very important role to interest groups.

There is an immediate and compelling quality to the contention that, from the voter's perspective, the more information the better. In her discussion of the issue of information and voters, Justice Conrad made three claims. One is that voters want the independent advice and information that interest groups, and community and religious leaders generally, offer. She meant advice and information that is somehow independent of partisanship: "Voters want the benefit of the independent advice and information on candidates and parties from others with similar ideologies and without the self-interest involved in candidate and party advertising" (ibid., pp. 235-36). Her second claim concerns the "manipulated communication system," an evil perpetrated by the frequent attempts of political parties to avoid talking about some issues, often ones that are critical to voters (ibid., p. 236). Interest groups pry open the proverbial lid on these issues. Her third claim is that prime-time broadcast time is the most effective means of communication with voters (ibid., p. 235). Together, these three claims suggest that voters need to hear the independent voice of interest groups to advise and inform them on the issues most important to them. But, she argues, the limits on third-party spending are so severe as to ban this independent voice, for all intents and purposes, an outcome that disarms the voters in their battle against manipulative political parties. The sum of $1,000 is simply too paltry for effective advertising, that is, national advertising.

In summary, then, Justice Conrad and the federal Parliament disagreed entirely on the role of political parties in elections. From the perspective of Canadian parliamentarians, they are the principal institutions of a party democracy, and voters are best served if the party system as a whole is reasonably competitive and open, that is, if several parties battle one another for voters' favour. In the party-democracy model, regulations designed to promote the competitiveness and fairness of the party system are considered desirable, even at the cost of restricting interest-group spending. As for interest-group spending, itself, the concern is that, unregulated, it may serve to obstruct the establishment of fair competition between the parties. From Justice Conrad's perspective, on the other hand, political parties are the potential scourge of the open democracy that is enshrined in the Charter right to vote (ibid., p. 235). In what she calls the open-democracy model, interest groups take on a more elevated role as the potential saviour of voters subjected to a party-manipulated media. And restrictions on interest-group spending, being anti-voter, are indefensible.

Spending Limits on Parties and Candidates

As noted above, the appeal court considered and declared invalid only the black-out and third-party spending provisions of the *Canada Elections Act* which were at issue in the case. However, should the decision stand, it is difficult to see how the remainder of the elections-expenses regime, in particular, the limits on the expenses incurred by parties and candidates, could withstand a legal challenge. It seems patently unfair to tie the financial hands of parties and candidates, but not those of third parties. And as Justice Conrad points out, the National Citizens' Coalition agrees (ibid., pp. 213, 214). Assuming, then, that the end of the "gag law" spells the end of the expenses regime, it is worth asking whether this would help bring about the desired state of affairs sketched by Justice Conrad, that is, the "open democracy" in which political parties are no longer privileged and third parties and citizens offer independent views on issues to the voters.

There are compelling reasons for scepticism about the prospects of the Conrad model in an electoral world without limitations on election expenses. Third parties are interested not so much in providing

information and advice to voters as they are in affecting electoral outcomes. The former is but a means to the latter; and if third parties discover that alternative means are superior to achieving the desired result then they may well abandon direct expenditures on advertising. As noted earlier, this is largely what has occurred in the United States. There, third parties prefer to influence electoral outcomes by channelling money directly to candidates. The reason is that independently-produced advertisements, albeit uniformly supportive, tend to come across as discordant and risk being counterproductive. Far better that political advertising be delivered as part of an integrated campaign. For obvious reasons the locus for orchestrating such a campaign is the candidate and his/her campaign team. This helps to explain why a well-known party strategist involved in the 1988 Conservative election campaign stated that he found third-party advertising in support of free trade less than helpful.[19] Thus for major third parties that wish to affect election outcomes, there are pronounced incentives to provide direct financial support to parties and candidates — as distinct from playing an independent role.

Further, in the absence of expenditure limits, the pressures on party fundraisers are likely to be immense, as they are in the United States. While it might seem that interest groups would be the ones seeking out parties and candidates, more often than not it will be the politicians initiating the relationship. Aside from the increased danger of influence peddling that this entails (what Justice Conrad refers to as "patronage"), there is the problem of transparency, or the lack of it insofar as third parties take a less visible role as financial contributors only. In turn this suggests the likelihood of less in the way of information available to voters that is independent or distinct from that provided by political parties. In fact, much less information may be made available to voters since the dynamics of electoral competition will shift away from the open competition for votes to the behind-the-scenes competition for funding (Axworthy 1991, p. 198). Consider again the United States. Typically the incumbent member of the House of Representatives will have had at least a two-year opportunity to accumulate a war chest for the next campaign, while an incumbent senator will have six years. It is the size of the war chest that is crucial, for its primary use is to intimidate and ward off possible challengers.[20] Candidates also use favourable data on public opinion to attract financial backers.[21] Funding so obtained is then used by political candidates for additional advertising to reinforce their standing in the polls and in turn to raise further funds. Well before the election, one of the candidates (usually the incumbent) has a commanding lead both in fundraising and the polls. At this stage challengers, if there are any, find the battle extremely heavy going. To make any effective headway they must outspend the leader by a considerable margin (Kenny and McBurnett 1994, p. 705). But given their low standing in the polls they often find it difficult to attract financial backers. Overall, the end result is a low level of serious competition, as reflected in the high incumbency rates of congressional elections (both the Senate and the House of Representatives) and the much higher margins of victory obtained compared to those in Canada for the House of Commons (Blake 1991, pp. 256-60).

We are not suggesting that in the absence of the existing-election expenses regime (or what is left of it) the Canadian electoral process would immediately resemble the American one. For one thing, disciplined political parties are the lynchpin of the parliamentary system of responsible government, and for that reason alone the Canadian system is likely to remain party-centred rather than become candidate-centred like the American system. It is the parties rather than the candidates in Canada that would try and bring interest groups under their control. The irony, of course, is that this would lead to quite the opposite type of electoral democracy than Justice Conrad has in mind. Rather than open debate and competition involving parties, citizens and third parties, we would likely find collusion and

behind-the-scenes negotiating amongst parties and interest groups and competition centred on raising funds rather than informing citizens.

Conclusion

It is striking that a Canadian court would throw out an important element of Parliament's scheme to secure the conditions of a fair and competitive party system. Yet two decisive points in the court's reasoning in *Somerville* have produced just such an outcome. One is the handling of evidence on the impact of third-party advertising on voters' intentions. The court sought evidence of a harmful impact. Since it could not find a harmful impact, indeed, much impact at all, the justification for restricting third-party advertising, and thereby breaching rights, simply vanished.

The problem with this line of reasoning lies in the definition of a harmful impact. For defenders of the election-expenses scheme, the harm in unregulated third-party spending is not its impact on voters' intentions, per se, but its potential impact on the actions of political parties and candidates, who themselves possess perceptions about the impact issue. Political parties and candidates are rational actors whose spending patterns in elections evince their enormous faith in the importance of advertising — or in the importance of advertising as much as their competitors. Moreover, as rational actors, they respond to regulations in such a way as to maximize their interests. If they find that third-party spending is unregulated, then they will find ways of using that fact to their advantage, and thereby evade the restrictions on their own spending that currently remain in place. Such a prospect is the real harm, at least for those who regard the objective of a fair and competitive party system to be of the utmost importance. Here we reach the second, decisive point in the court's reasoning. The court denied that Canada's system of party government is the starting point of an election-expenses regime. Instead, it took an allegedly Charter-mandated open democracy as the starting point, and then determined that the real objective of the election-expenses scheme is to privilege political parties, and thereby sustain their principal role in electoral politics. Stating that political parties are privileged political actors is like stating that judges are privileged judicial actors. Of course they are. In the one case it is the effect of the system of responsible, party government, not restrictions on third-party spending in elections. In the other it is the effect of the principle of judicial independence. Appreciating political reality is not a matter of causal evidence. It is a matter of political judgement. In this case, one senses that the practical judgement of parliamentarians about the necessary conditions of a competitive party democracy is far better than the court's.

Notes

The authors wish to acknowledge the excellent research support of Gerald Baier, and the helpful comments of the anonymous reviewers. Research for this article was made possible by the generous financial support of the Social Sciences and Humanities Research Council of Canada.

[1]Minister Rock did state that the federal government would be searching for alternatives to the third-party advertising restrictions in order to preserve the integrity of the election-expenses regime but gave no indication of what these alternatives might be (McIlroy 1996, p. A8). In the meantime, the third-party spending restrictions under the Quebec referendum legislation have been appealed to the Supreme Court of Canada. Thus, these issues will receive further judicial consideration.

[2]As Jenson argues, "the regulatory framework [is] a regime, in the sense that its parts are interdependent. It can function as its designers intended it only with all of its parts and only if none of the parts [is] rendered ineffective" (1994, p. 28).

[3]Professor K.Z. Paltiel, then the leading authority on the federal election-expenses scheme, had served as the research director of the Barbeau committee.

[4]Pierre Lortie served as the chairman of the commission.

[5]Among those who accept the idea of limits there is still disagreement on what the limit should be. For

example, although he finds the $1,000 spending limit per individual to be justifiable, William Cross (1994) argues that a $1,000 aggregate limitation does not enable a group adequately to convey its message to the voters. He proposes instead that individuals be allowed to pool all or part of their $1,000 limit for the purpose of advertising in elections.

[6]See Jenson's (1994) analysis of Judge Macleod's ruling.

[7]While the "black-out provision" raises some interesting questions in its own right, these questions are separate from the ones discussed here. Furthermore, the presence or absence of the black-out provision does not affect the integrity of the expense-limits regime in the same way as the restrictions on third-party advertising.

[8]Kerans J.A. did enter a note of caution about the "possible distortion of the modern electoral process by money," particularly in the use of advertising (*Somerville v. Canada* 1996, p. 243).

[9]Justice Conrad describes one small point of difference between her findings and those of the trial judge. Justice Macleod did not single out the black-out provision and write that it offends the right to vote, but he did conclude that, taken together, the impugned provisions (the black-out and the third-party spending restrictions) offend the rights to expression, association and the vote (p. 218). By contrast, Justice Conrad demurred on the black-out, which she found not to infringe the right to vote (p. 224).

[10]Dickson, C.J.C. (as he then was) set out a framework of analysis for courts to use in evaluating the justifications that governments advance to defend limitations of rights and freedoms. The framework requires an evaluation of the objective of the law (or executive act) in question, and the means used to pursue the objective. See *R. v. Oakes* 1986, pp. 135-40). In general, the courts have tended to be more critical of the means used than the objective advanced, much to the dismay of some legal scholars (Mendes 1996, pp. 3-13). Thus Justice Conrad's rejection of the reasons for the limits placed on third-party advertising in *Somerville* 1996 is noteworthy.

[11]A good example of collusion occurred in 1994 in the US when the Republican National Committee enlisted a coalition of interest groups in support of the proposed Contract With America (West and Francis 1996, p. 27). The Committee on Election Expenses (1966) recognized the problem early on: "The committee has learned from other jurisdictions that if these [interest] groups are allowed to participate actively in an election campaign any limitations or controls on the political parties or candidates become meaningless" (p. 50). The problem here is that as a practical matter the kind of evidence that the Crown would need to produce in court to demonstrate active collusion between candidates and parties would be well-nigh impossible to obtain. In other words, interest groups and candidates or parties wishing to evade the "on behalf of" provision in the law would probably find it easy to do so.

[12]The recent general election in March 1997 in Alberta has prompted concerns about fairness in connection with unregulated campaign finance. See Ditchburn (1997).

[13]In her analysis of the trial court's decision, Jenson (1994, p. 28) makes a similar point about the use of the evidence of Johnston *et al*.

[14]Johnston *et al.* (1992) describe the significance of advertising relative to other factors such as news reports in the 1988 election: "If news drove the immediate aftermath of the [leaders'] debate, advertising dominated the end game. The predicted advertising boost in the FTA support ... is over half the total predicted media boost.... News coverage did also play a role, though. The news line jumps at roughly the same time as the advertising line, just not as far. At the end, both factors worked to the FTA's advantage" (p. 166).

[15]The 1993 general election produced a striking example of an advertisement that backfired in the Progressive Conservative party's ad that drew attention to Liberal leader Jean Chrétien's facial palsy. The Conservative leader was compelled to repudiate it. See Whyte, "The Face that Sank a Thousand Tories," *Saturday Night*.

[16]These results were substantiated in a recent study involving one of the same authors, Benjamin Page. This time the authors were concerned about the indirect influence of interest groups, that is, the capacity of such groups to influence the opinions of actors more influential with the public than themselves. This indirect influence of interest groups they found to be much more potent than direct influence (Danielian and Page 1994, pp. 1056-78).

[17]In the restricted spending race for president, there is "soft" or unregulated money available for state and local

delegations or corporate donors to spend. However, soft money is kept under the control of the party or candidate. In addition, there are uncontrolled independent expenditures that resemble the third-party expenditures in Canada. In the 1988 election, expenditures of this type amounted to $7.2 million — far less than the $108.8 million controlled directly by the candidates and the $84 million in soft money coordinated by the parties (Alexander 1991, pp. 23-25). The independent expenditures dropped to $4.4 million in the 1992 election (Wayne 1996, p. 51).

[18] She suggests that groups provide independent commentary on candidates and parties: "Voters want the benefit of the independent advice and information on candidates and parties from others with similar ideologies and without the self-interest involved in candidate and party advertising" (*Somerville* 1996, p. 236).

[19]Remarks made by Hugh Segal on "Pamela Wallin Live," *CBC Newsworld*, 12 June 1996.

[20]Epstein and Zensky write: "Not only do war chests increase incumbents' election chances by allowing them to buy more advertising time, send out more mailings, or hire more campaign workers, they also make it easier for weak fundraisers successfully to bluff strong challengers out of entering the race" (1995, p. 303).

[21]See the detailed case studies of campaigns in gubernatorial elections in the United States in Carsey (1995).

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