

# **FREE AND FAIR ELECTIONS: regulations that ensure a “fair go.”**

## NOTES FOR A TALK BY

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It is a great honour for me to be given the opportunity to talk about electoral democracy in the Victorian Parliament, a place where parliamentary democracy has been practiced for more than 150 years.

### **INTRODUCTION<sup>1</sup>**

As a political scientist, I have to say that my visit to Melbourne has been well timed; that is, the political process has been, to say the least, lively. The press has been full of allegations of dirty tricks, unfair propaganda and, most important for my topic today, questions have been raised about the proper role of advertising in election campaigns. There have been concerns in particular about advertising by unions and corporations – what in Canada we call “third party” advertising – and by government. Indeed, one headline alleged that “governments cheat taxpayers in propaganda wars.”<sup>2</sup>

After more than 40 years as a journalist, election campaign strategist, and researcher, I do understand that in practice democracy is messy, always imperfect, always changing, and often loud. The barracking that accompanies electoral competition is an essential part of the process. Although I have been involved in studying and drafting electoral regulations for nearly two decades, I am not one of your wowsers who wants political debate to resemble a tea party.

Now that we have something close to continuous election campaigns, however, it appears to me that we need to consider the best rules of engagement for the never-ending rhetorical wars that have emerged in all of the representative democracies.

My talk today will deal with a number of difficult issues, including the meaning of “free” and “fair” in the context of elections, the evolution of the rules of the game – laws, regulations and conventions – and, in particular, some of the current dilemmas we face as a result of the emergence of what has been called the public relations state. I am not wise enough to propose answers, especially for a country in which I am only a visitor. Rather I want to suggest some key questions and options that people concerned about free and fair elections should consider.

My goal, then, is to highlight some of the developments in Canada that appear to be relevant to current issues in Australia. So my focus will be on Canada. However, despite the claim of the travel writer Bill Bryson that Australian politics are more or less incomprehensible to outsiders, I will venture the odd comparison with developments here. If the comparisons are too odd, I am counting on you to correct me where I have it wrong.

Students of electoral administration regard Canada and Australia as having exemplary regimes.<sup>3</sup> Officials from both countries are frequently called upon to advise and to monitor elections in emerging democracies, would-be democracies and, perhaps, even pseudo-democracies. They share independent election administrations and elections that, within the limits of the possible, are free from fraud.

But, in fact, they exemplify two rather different models of election campaign regulation: the egalitarian and the libertarian. As I hope to make clear, considering developments in Canada in the context of the Australia political process is useful partly because of some sharp differences between the two. Indeed, Andrew Geddis has suggested that Canadian elections, with the most recent reforms, are among the most tightly regulated in the world – and Australian elections much less so.<sup>4</sup> In this overview, I will focus on the federal regime, but I will touch briefly on the system in Ontario, a province in Canada’s federal system that, I am told, is similar in many ways to Victoria.

There is general agreement, among scholars and practitioners alike, that the essential feature, indeed the defining characteristic, of a democracy is free and fair elections. Where controversy arises is when we try to define these key terms in sufficient detail to provide a basis for assessing and – where necessary reforming – the actual operation of elections. In general, we can agree that a free and fair election has the following necessary characteristics:

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### Necessary Conditions for Free and Fair Elections

- Impartial administration, to ensure that enrolment is open to all eligible voters and that casting a vote is a reasonably accessible process
- Something approaching universal suffrage, so that all citizens are able to participate
- Freedom from coercion, so that voters are not coerced in making their choices
- Freedom of expression and association, so that citizens can participate in electoral debate
- A system that ensures that votes are counted fairly and accurately

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For some, these are also sufficient conditions, but most commentators agree that we need to consider the election **campaign** as well. Because an election is a contest for power and influence, the competitors are always seeking an advantage. As with other contests, the goal is to establish a system of regulated competition that encourages participation – for political parties, candidates, and citizens – and ensures fairness in the competitive arena of election discourse. As electoral law specialist Graeme Orr has put it, “the quest . . . is for rules that promote political equality and deliberation over the law of the political jungle.”<sup>5</sup> Today, I

want to focus on the rules surrounding two kinds of political advertising: government advertising and third party advertising, with only passing mention of advertising by political parties and candidates.

## **EGALITARIAN AND LIBERTARIAN MODELS**

In a landmark constitutional decision in 2004, the Supreme Court of Canada distinguished between two models of the electoral system: the **egalitarian** and the **libertarian**.<sup>6</sup> The egalitarian regimes stress measures that promote the equality of the various participants in election campaigns, measured particularly in terms of their capacity to participate in electoral debate. The libertarian regimes stress the freedom of the participants to use their own resources to influence the contest for power and influence. In practice, all electoral campaign regimes have elements of both models, but one can say that Canada, along with the UK and New Zealand, tilt towards the egalitarian side and the US and Australia to the libertarian side. What this means in practice is that Canadian regulations stress fairness as the primary value, whereas Australia stresses freedom.

The central arguments underlying the egalitarian model were developed by the Royal Commission on Electoral Reform and Party Financing in 1991.<sup>7</sup> The Commission took the view that the **principle of voter equality** in a democracy included the proposition that the inequality of resources inherent in a market economy should not extend into the electoral arena, where equality should be the guiding principle. Tight financing regulations were required to reduce the risk – and perception – of undue influence of major contributors to parties and candidates and to ensure that access to financial resources was not a necessary ticket to participation in the political arena. The Commission also stressed that the right to vote included the right to an informed vote, **which required that political discourse not be dominated by the most affluent groups.**

## **EVOLUTION OF CAMPAIGN REGULATION IN CANADA**

In Canada, the gradual shift from libertarian to egalitarian came, as in most regimes, in response to specific abuses or concerns. The process began in 1923, with the appointment of the first independent Chief Electoral Officer.<sup>8</sup> The first attempt to regulate election campaigns themselves was legislation in the 1930s which allocated a specified amount of paid and free radio broadcast time to each party represented in the House of Commons.<sup>9</sup> This reform is typical of the way in which regulations emerge. With the advent of private radio in Canada, the Liberal Party found itself unable to purchase advertising time because the owners were willing to sell time only to the governing Conservative Party. When the Liberal Party won the election of 1935, despite the Conservative monopoly on radio advertising, it brought in regulations to ensure access. The new law also forbade the use of actors, since they had effectively made fun of the Liberal leader and new Prime Minister, Mackenzie King. **Regulation often follows a perceived abuse and often has, shall we say, idiosyncratic elements.**

The move towards the modern era began in the 1960s, with the advent of television and American-style campaigning. The issue of regulating campaigns themselves was driven, initially, by a growing concern over the cost of election campaigns. Because Canada has always had a mixture of private and public broadcasting, it was one of the first of the British-style parliamentary democracies to confront this issue. The availability of free party election broadcasts did not satisfy the major parties.

Campaign spending by political parties and the fund raising that it required led to concerns about the possibilities of **undue influence** by contributors and about ensuring that all parties and candidates could have a “fair go.” The cost of polling and, especially, advertising was threatening the financial viability of the parties and the result, after extensive study and debate, was a regime of spending limits for both parties and candidates, set out in the 1974 Election Expenses Act.

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### **Major changes introduced in 1974 Elections Expenses Act**

- Spending limits for political parties and candidates
  - Disclosure of expenditures by parties and candidates
  - Partial public financing through reimbursement of election expenses
  - Tax credit for contributions to assist fund-raising
  - Allocation of free and paid broadcast advertising time
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The basic structure for the current regulatory scheme was established in the 1974 Act. It led inevitably to a regime of registration for political parties and began to challenge the notion that they were private associations, a status that insulates them from to some degree from regulatory oversight. According to one of my colleagues, they are now “public utilities” with the responsibility of nominating candidates, organizing public opinion, and filling the various roles in Parliament.<sup>10</sup> This shift reached its full flower with the regime of contribution limits and public funding that was introduced in 2004 and tightened in 2007.<sup>11</sup> Since this is, to some extent, beyond the scope of my talk today, I will note only that political fund raisers now face tough restrictions. The rules are set out in the slide.

As you may know, the current rules, are part of the fall-out from the scandal known in Canada as Adscam, in which advertising agencies were involved in a variety of scams – can I say rorts -- in which taxpayers money went to reward agencies that had supported the governing party, some of which found its way back to the then governing party as contributions. As an aside, it is worth noting that the close ties between advertising agencies, pollsters and political parties, which exist in most industrial democracies, should be a matter of concern to students of election administration.<sup>12</sup>

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### **Amendments to the Canada Elections Act, 2004 and 2007**

- Maximum contribution of \$1,100 in any calendar year to each registered party or to “entities” of a registered party (registered associations, candidates)
  - Only individuals who are canadian citizens or permanent residents can make contributions
  - **An outright ban on contributions by corporations, trade unions, and associations**
  - Prohibition of cash donations of more than \$20.
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I want to draw particular attention to the fact that contributions to political parties and candidates from corporations and unions are **banned altogether** and, as I will discuss in greater detail, these organizations face rather restrictive limits on **independent advertising** as well. As I understand it, neither of these provisions is contemplated in Australia.

It should be noted here briefly as well that the restrictive contribution limits were accompanied by a “sweetener,” an array of new public funding arrangements. The partial reimbursement of election expenses was increased to 60% of expenses for candidates and 50% for registered parties, if they meet a threshold, which the major parties and their candidates almost always do. In addition, all registered parties that meet the threshold are now eligible for a **quarterly allowance** of \$1.75 (indexed) per vote in the previous election. Along with the tax credit, it is estimated that in 2007 public funding will amount to at least 80% of the income of the registered parties. Public funding in Australia is reported to total less than 20% of party income.<sup>13</sup> The only effect of these measures that is clear so far is the substantial benefit to smaller parties, which traditionally have more difficulty fund-raising.

### **THIRD PARTY ADVERTISING**

The next milestone in Canada’s regulatory evolution took place in the 1980s, after two elections in which “third party” advertising was thought to have played a major role. These interventions occurred both at the national level and in specific electoral districts. At the national level, a peak occurred in 1988, an election that was fought over free trade with the United States, when business groups and labour unions spent millions of dollars on display advertising during the campaign, with the pro-free trade forces outspending the opposition by about four to one. In addition, specific groups, particularly groups supporting or opposing access to abortions and gun control, began to intervene in targeted districts, sometimes threatening to outspend local candidates, who were restricted by the expenditure limits.<sup>14</sup>

It became clear that the regime of party and candidate spending limits could not survive an onslaught of unregulated third party spending. Indeed, such spending became an obvious way for candidates with well-funded supporters to circumvent the spending regime. The Elections Act prohibited third party spending in collusion with a candidate or party but the prohibition proved impossible to enforce effectively.

Thus began an odyssey of repeated attempts by the Parliament of Canada, which actually began with a ban in 1974, to restrict third party spending, each struck down by the lower courts until, finally, a case proceeded to the Supreme Court of Canada, which in a 2004 decision upheld the restrictions as “reasonable limit ... prescribed by law and demonstrably justified in a free and democratic society,” and thus not in violation of the *Charter of Rights and Freedoms*, by a vote of 6-3.<sup>15</sup> In the interests of full disclosure, I must tell you that I was a senior staff member for the Royal Commission that recommended these rules and an expert witness in support of the restrictions in this case.

The legislation is quite detailed and I will hit only the highlights here. The key provisions are registration, disclosure of advertising expenditures and contributions, identification of the entity paying for any election advertisement (in the ad) and a limit on expenditures during the formal election period. I would draw your attention to the definition of election advertising, the registration and disclosure requirements, the sponsor identification clause, and the authorization requirement.

## Definitions

A “third party” is any individual or group, other than a registered party or candidate

Election advertising: “advertising during an election period that promotes or opposes a registered party or the election of a candidate, **including by taking a position on an issue with which the registered party or candidate is associated**”

Exceptions: news, editorials, speeches or interviews published or broadcast by the media, publishing a book, communicating with members, employees or shareholders, and transmitting personal views over the Internet.

## Third Party Advertising Regulations

### Specific provisions

- Registration: any organization planning to spend more than \$500 on election advertising during the election period must register and file an election advertising report within 4 months of the election disclosing expenditures on election advertising and identities of donors contributing more than \$200
  - All election advertising must identify the third party that is paying for it
  - Limit on expenditure on election advertising during formal election period
  - The current limit (April 2007) is \$3 600 in any electoral district and \$180 000 nationally
  - Prohibition on setting up multiple organizations or pooling / colluding with another group
  - **If the third party is a trade union, corporation or other entity with a governing body, the application must include a copy of the resolution passed by the governing body authorizing it to incur election expenses.**
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Has the legislation been effective? In the most recent controversial election in the Province of Ontario (1999), where there are no such limits, 29 groups spent more than \$6 million on advertising, more than either of the opposition parties.<sup>17</sup> In the 2006 federal election, 81 groups registered and spent a total of less than \$1 million; only five groups spent more than \$50,000. The election was close and with many divisive issues.<sup>18</sup> I think those numbers indicate that the regime has been effective.

The rationale for this regime is set out very clearly in the majority opinion of the Supreme Court of Canada:

“In the absence of spending limits, it is possible for the affluent or a number of persons pooling their resources and acting in concert to dominate the political discourse, depriving their opponents of a reasonable opportunity to speak and be heard, and undermining the voters’ ability to be adequately informed of all views. Equality in the political discourse is thus necessary for meaningful participation in the electoral process and ultimately enhances the right to vote.”<sup>19</sup>

The Court went on to argue that the regime only “minimally impairs the right to free expression” for three reasons. First, the harm is slight because “third party advertising is unrestricted prior to the commencement of the election period.” Second, because issue advertising, that is advertising not connected to a party or candidate is unrestricted. And, finally, because third parties even under the limits are able to participate in electoral debate, but not in a way that “will overwhelm candidates, political parties, or other third parties,” thus ensuring that “the voices of the wealthy from dominating the political discourse.”<sup>20</sup>

On the other side of this issue, it is important to consider the most pressing criticisms of the third party advertising regime.

First, it is argued that the limitation on advertising that takes a position on issues with which a party or candidate is associated, without naming a party or candidate, actually restricts electoral discourse.<sup>21</sup> It is not clear whether or not this provision will be given a broad interpretation, meaning that a good deal of issue advertising will be counted against the third party spending limits, or a narrow interpretation, requiring that the connection with a party or candidate be very clear. So far, third party groups have themselves tended to assume that most issues fall under the spending limits.

Second, it is argued that the limits are too low to permit an effective national campaign. Certainly, a national advertising budget of \$180,000 will not purchase more than a handful of national television advertisements. The Court accepted this argument but responded that, first, the limits had to be low to avoid individual candidates being overwhelmed by the expenditures of numerous groups, each spending the maximum of \$3600; and, second, that because unlimited advertising is permitted prior to the formal election period, an informational campaign should be sufficient to remind voters of a group’s position.

Finally, Andrew Geddis and others argue that the limits empower the parties to set the electoral agenda.<sup>22</sup> In my view, this argument probably gives advertising too much importance. Like political parties, organized groups have a whole range of communication options to raise issues, from press releases to the Internet, and have a legitimate role to play in electoral discourse. **In addition, I would argue that those who are willing to stand for office should have a period of time in which their case has the best chance to be heard. In addition, it is important to consider the proliferation of attack ads. In the US, the most negative advertisements come from non-party groups that can fire away without leaving their bunkers, while parties are exposed and have to take ongoing responsibility for their ads.**

## **“PARTISAN” GOVERNMENT ADVERTISING**

To a visitor, this seems to be the most contentious of the campaign regulation issues facing Australia today. I refer to this as an issue of **campaign regulation**, even though the convention in Australia, as in Canada, calls for the cessation of non-essential government advertising after the writs are issued. The advent of the continuous campaign and the growth of government advertising in many jurisdictions make it an issue. In a remarkable coincidence, in many jurisdictions government advertising budgets often increase substantially in the fiscal year prior to an election. **Most will agree that governments do need to communicate with citizens but, in my view, at least, governments should not be able to turn this need into an advantage of incumbency.**

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**Australia: Federal Government Advertising Expenditures for Advertising Campaigns over \$10 000**

<b>Year</b>	<b>Nominal \$m</b>	<b>2004-05 value \$m</b>
1991-92	48	63
<b>1992-93</b>	<b>70</b>	<b>91</b>
1993-94	63	81
1994-95	78	100
<b>1995-96</b>	<b>85</b>	<b>106</b>
1996-97	46	56
<b>1997-98</b>	<b>76</b>	<b>92</b>
1998-99	79	96
<b>1999-00</b>	<b>211</b>	<b>250</b>
<b>2000-01</b>	<b>156</b>	<b>177</b>
2001-02	114	126
2002-03	99	106
<b>2003-04</b>	<b>143</b>	<b>149</b>
<b>2004-05</b>	<b>138</b>	<b>138</b>
TOTAL	1 406	1 525

**SOURCE: Parliament of Australia. Parliamentary Library, Research Note no. 2 2006-07, p. 2.**

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According to one source, government advertising has become an issue in Australia because per capita spending on government advertising in Australia is among the highest among the representative democracies. It is said that this issue arises at both the Commonwealth and state levels.<sup>23</sup>

Until the most recent reforms, Canada was in the same league, but the Adscam reforms seem likely to change that. However, as in Australia, and unlike the UK and New Zealand, Canada has as yet no explicit national policy on government advertising that might be deemed partisan. But the new rules do restrict government options by requiring politicians to remain at arm's-length from the advertising procurement process.<sup>24</sup>

At the federal level, the 2006 reforms address one of the two issues involving government advertising: **transparency**. The key provisions are explicit rules and centralized procedures for awarding advertising contracts, a requirement that all advertisements and advertising contracts be deposited with the Auditor General within a reasonable period of time, an annual report on contracts, expenditures, and effectiveness of advertising, and “a concerted effort to remove the involvement of ministers and political staff from the processes and operations ...”<sup>25</sup> Under these regulations, the Prime Minister’s Office retains the capacity to make decisions regarding general communication and advertising strategies. Only time will tell how well this works.

In Ontario, after many years of complaining by opposition parties, the Provincial Parliament brought in new regulations in the *Government Advertising Act, 2004*,<sup>26</sup> largely a result of publicly funded advertising by the previous governing party that was widely seen as partisan.

The most important elements of the legislation are the requirements of prior approval by the Auditor General before an advertisement can be broadcast or published and an explicit ban on partisan advertising by the government. These provisions came into force a little over a year ago and there has been little controversy to date, even though an election is expected this coming October.

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## ONTARIO – Government Advertising Act, 2004

The Auditor General must approve any government ad before it can be published / broadcast and the decision is final

### Required standards

- 1, The advertisement must be a reasonable means to achieve one of the more of the following purposes:
  - i. To inform the public of current or *proposed* government policies, programs or services available to them. [emphasis added]
  - ii. To inform the public of their rights and responsibilities under the law.
  - iii. To encourage or discourage specific social behaviour, in the public interest.
  - iv. To promote Ontario or any part of Ontario as a good place to live, work, invest, study, or visit or to promote any economic activity or sector or Ontario's economy.
2. It must include a statement that the item is paid for by the Government of Ontario.
3. It must not include the name, voice or image of a member of the Executive Council or a member of the Assembly.

### Partisan Advertising

4. **It must not be partisan.** [emphasis added]
  5. It must not be a primary objective of the item to foster a positive impression of the governing party or a negative impression of a person or entity who is critical of the government.
  6. It must meet such additional standards as may be prescribed.
- (3) An item is partisan if, in the opinion of the Auditor General, a primary objective of the item is to promote the partisan political interests of the governing party.
- (4) The Auditor General shall consider such factors as may be prescribed, and **may consider such additional factors as he or she deems appropriate, in deciding whether a primary objective of the item is to promote the partisan political interests of the governing party.**

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The standards set out here refer to advertisements having legitimate government purposes, being properly identified, and not being partisan. We might say that we know partisan advertising when we see it, but finding a clear test is not that straight forward. The “primary purpose” test proposed here for partisanship is similar to that in the UK and New Zealand<sup>27</sup> but we will not know how well this test works until we have a vocabulary of precedents. The New Zealand guidelines also require government advertising to use “unbiased and objective language.”<sup>28</sup>

However, the fact is that **openly partisan** government advertising campaigns are not very common. As Graeme Orr suggests, publicly funded advertisements that openly praised the

governing party or criticized opponents would probably backfire, in any case. Government campaigns usually focus on what Professor Orr calls “feel good policies,” selected in all probability by political communication consultants using polls and focus groups to try to play down **negatives** and draw attention to **positives** in the public image of the governing party.<sup>29</sup> So what kind of tests can we use? First, most ads criticized as partisan are display ads, using images, video, graphics, etc. to convey emotional impressions more than information. As the American expert, Kathleen Hall Jamieson reminds us, television spots often create “arguments by association.”<sup>30</sup> Such advertisements may, thus, convey both information and partisan impressions. Second, Professor Orr suggests that the amount and timing of government advertising counts for more than the explicit content.<sup>31</sup> If that is the case, it might be wise to restrict government advertising for some **specified pre-election period**, an issue to which I will return.

In addition, however, I would argue that we should return to the “legitimate purpose test.” Is there a legitimate public information need for this particular advertising? Is a display ad the best way to communicate it?

As an aside, there is one kind of government advertising that particularly concerns me. Professor Orr raises, in his words, “the spectre of a government using taxpayer money to sell a legislative policy *in advance* of parliament having a chance to consider that policy.”<sup>32</sup> The problem, which is becoming increasingly common in parliamentary democracies, is confusion between the **government of the day** and the **governing party**. If the convention that government policies must first be announced in parliament were still observed, taxpayer funded advertising would at least be delayed until the proposed policy could be announced and, preferably, debated. The argument is that the governing party is free to use its private resources to make its case but, as government, it must defer to parliament and, preferably, have legislative authority for policy-oriented advertising. In addition, we should not forget the many research studies that report that government leaders have privileged access to a wide range of free media opportunities!

In the end, we may be forced back to the Ontario model, relying on the judgement of the Auditor General to decide whether or not an advertisement is partisan. In the Ontario case, the Auditor General has hired consultants to assist him in this task, a political studies lecturer specializing in government advertising – not me, fortunately -- and a retired advertising agency executive.

## **THE CONTINUOUS ELECTION CAMPAIGN**

The advent of the continuous or permanent election campaign raises serious questions about many of the key features of the egalitarian regulatory regime. In Canada, as in most other jurisdictions, those elements that deal directly with the campaign – party and candidate expenditure limits, reimbursement provisions, and third party advertising rules – come into effect only during the formal election period, after the writs are issued. With the real campaign beginning much earlier, the rules intended to ensure a level playing field are much less effective. Similarly, the conventions that restrict government advertising after the writs are issued are also less effective, since much of the campaign takes place earlier. Ironically, perhaps, in Canada at least as the real campaign becomes longer, the formal campaign is becoming shorter, on the grounds that modern communication technologies make long campaigns unnecessary. The minimum campaign at the federal level is now just 36 days.

There is precedent for extending the campaign period for certain purposes. For example, The Victorian *Electoral Act of 2002* provides a precedent for extending campaign regulation beyond the formal election period (from issuance of writ to election day) in s. 206, where it defines election expenditure as “expenditure incurred within the period of 12 months immediately before election day,” referring to a wide variety of electoral communication, including “the broadcasting of an advertisement relating to an election” To take another example, the Australian Electoral Commission rules note that, for certain purposes, in circumstances where there is a considerable speculation surrounding a possible election, the AEC may consider that the election period has commenced, notwithstanding that there has been no announcement or issuing of the writs.”<sup>33</sup> Therefore, one solution to these dilemmas might be to propose an extended election period in which some restraints on government and third party advertising might be applied, perhaps based in part on the date when the mandate ends. Of course, this kind of regulation is made easier by fixed election dates, which some Canadian provinces have recently adopted.

### **SOME FINAL THOUGHTS**

While the egalitarian model requires considerably more regulatory effort, even the libertarian model requires an effective set of rules of the game if it is to continue to meet the test of democracy. New issues arise with each election, with new technologies and innovative tactics, as “electoral participants [adapt] to the existing campaign rules and [seek] to exploit perceived loopholes in them.”<sup>34</sup> Regulators are always in catch-up mode and regular scrutiny of rules and practices is required. In an era when communication strategists engage in a worldwide search for “loopholes” that might give them a competitive campaign advantage, it is imperative that the rest of us try to keep up. Election administration should not be of concern only of the professionals at Elections Canada, the Australian Electoral Commission and their state counterparts but of all those who care about democracy.

For me, perhaps the most fundamental measures discussed today are those intended to increase transparency. The registration and reporting requirements for political parties, candidates, and third parties who wish to participate in election campaign discourse are a major step towards the stated goal of the Canadian regulatory regime: the truly informed voter. In practice, this also involves timely reporting and public access, before not after the vote, and requires a fair and vigilant press. The same can be said for reports on government advertising campaigns. Let the public have the full details before the vote. These rules apply equally to libertarian models – which rely on public scrutiny as a substitute for regulation<sup>35</sup> – and the egalitarian models.

It is equally important, however, in my view, to ensure that the amplified voices of the well-funded players – governments, large parties, and organized third parties – do not drown out softer voiced participants. This is the strongest rationale for some limits on all forms of advertising, at least during the formal campaign. As the Supreme Court of Canada put in its decision on third party limits, “where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard.”<sup>36</sup> The general objective should be to create space for participation on the grounds that “the more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner.”<sup>37</sup> My reading of the High Court decision in *Australian Capital Television Pty Ltd v. Commonwealth* (1992) is that it left the door for open for some form of advertising regulation.<sup>38</sup>

In practice, however, regulations must be carefully calibrated. For example, spending limits cannot be so low as to make meaningful participation impossible, nor so high as to be meaningless. In all cases, election laws and regulations have to try to balance equality and liberty.

Sometimes it is useful to regard campaign regulations as rules of engagement but, for some purposes, perhaps it is better to regard them as the equivalent of the Geneva Convention. The rules of war tend to grow out of the horrors of war. When the combatants push things too far, those with the power to decide sometimes begin to fear for their own safety or, perhaps in this case, for the survival of the system, as campaign excesses, whether government or third party advertising, threaten public confidence in the regime. This is a classic case of the “tragedy of the commons,” when the competitors, each seeking their own advantage, threaten the system as a whole. This is what led to the Canadian reforms I have been discussing. Only careful observers of the Australian scene can assess whether or not Australia too is reaching a tipping point.

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<sup>1</sup> I am grateful to Professor Julian Thomas, Director of the Institute for Social Research, whose invitation enabled me to undertake this work, and to Professor Brian Costar, for his invaluable advice and assistance. Of course, errors and opinions are mine.

<sup>2</sup> *The Age*, Melbourne, May 28, 2007, p. 12.

<sup>3</sup> Marian Sawyer, “Canada Elections – How Democratic?” *Democratic Audit of Australia*, May 2005.

<sup>4</sup> Andrew Geddis, “The regulation of election campaign financing in Canada and New Zealand,” *Democratic Audit of Australia*, March 2006.

<sup>5</sup> Graeme Orr, “Government advertising: Informational or Promotional,” *Democratic Audit of Australia*, March 2006, p. 2.

<sup>6</sup> *Harper v Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC33.

<sup>7</sup> Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Volume 1 (Ottawa: Minister of Supply and Service, 1992) p. 207. Hereinafter cited as Lortie Commission Report. See also Peter Aucoin, “The Politics of Electoral Reform,” *Canadian Parliamentary Review*, 16.1, 1993.

<sup>8</sup> John Courtney, *Elections*. Vancouver, University of British Columbia Press, 2004.

<sup>9</sup> Lortie Commission Report.

<sup>10</sup> Lisa Young, “Strengths and Weaknesses in the Regulation of Campaign Finance in Canada,” *Election Law Journal*, 2.3 (2004), pp. 444-462.

<sup>11</sup> The new regulations that came into effect on January 1, 2007, are summarized on the website of Elections Canada ([www.elections.ca](http://www.elections.ca)).

<sup>12</sup> Ian Sadinsky and Thomas Gussman, “Federal Government Advertising and Sponsorships: New Directions in Management and Oversight,” volume two of research reports for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, (2006), pp. 305 and 331.

<sup>13</sup> Anthony M. Sayer and Lisa Young, “Election Campaign and Party Financing in Canada,” *Democratic Audit of Australia*, September 2004, pp. 2 and 5.

<sup>14</sup> Janet Hiebert, “Interest Groups in Federal Elections, in *Interest Groups and Election Campaigns in Canada*. Toronto: Dundurn Press, 1991.

<sup>15</sup> *Harper v Canada*.

<sup>16</sup> Ontario. *Government Advertising Act, 2004*, S.O. 2004, Chapter 20

<sup>17</sup> Robert Macdermid, “Money and the 1999 Ontario Election,” *Canada Watch*, 7.6 (December 1999).

<sup>18</sup> Calculated by the author from data provided on the Elections Canada website ([www.elections.ca](http://www.elections.ca))

<sup>19</sup> *Harper v Canada*, p. 4

<sup>20</sup> *Harper v Canada*, pp. 5-6.

<sup>21</sup> Geddis, 17.

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- <sup>22</sup> Geddis, 17.
- <sup>23</sup> Orr, p. 3.
- <sup>24</sup> Treasury Board of Canada Secretariat. "Questions and Answers - Amended Communications Policy of the Government of Canada." August 11, 2006.
- <sup>25</sup> Sadinsky and Gussman, pp. 305 and 331.
- <sup>26</sup> The rationale for the Act is set out in Government of Ontario News Releases, issued by the Ministry of Government Services, December 6, 2004 and January 30, 2006. For background, see Frederick J. Fletcher, "Political communication and public discourse, *Canada Watch*, 7.6 (December 1999).
- <sup>27</sup> Auditor-General, New Zealand. *Government and parliamentary publicity and advertising*. June 2005, para. 2.10.
- <sup>28</sup> Auditor-General, New Zealand, para. 5(b).
- <sup>29</sup> Orr, p. 3.
- <sup>30</sup> Kathleen Hall Jamieson, *The Interplay of Influence* (1996), p. 241
- <sup>31</sup> Orr, p. 11.
- <sup>32</sup> Orr, p. 1.
- <sup>33</sup> Australian Electoral Commission. Electoral Background No. 15. *Electoral Advertising* (March 2007), p. 3.
- <sup>34</sup> Geddis, p. 25.
- <sup>35</sup> For a more extended argument on this point, see Colin A. Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia*. Sydney: UNSW Press, 2006, pp. 60-66
- <sup>36</sup> *Harper v Canada*, para. 72, p. 51.
- <sup>37</sup> *Harper v Canada*, para. 91, p. 60.
- <sup>38</sup> Orr, p. 18-22.