

Truly Equal? An Analysis of Whether Canada's Political Finance System Fulfills the Egalitarian Model

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Abstract

This thesis is an examination of whether the “egalitarian model” for political finance that has been established by the Supreme Court of Canada, other Canadian courts and legal scholars and commentators is actually egalitarian and has been applied consistently (in Chapter 2), and whether Canada’s political finance system measures up to the Court’s model (in Chapters 3 and 4), and how it could be changed to comply with a more egalitarian model that would also be ethical in terms of preventing even the appearance of a conflict of interest (in Chapters 6 and 7). Chapter 1 sets out a general theoretical framework for evaluating the Supreme Court’s egalitarian model, and I develop and set out a more egalitarian model in Chapter 5. In the Chapter 8 conclusion, I summarize the findings and propose structural and positive *Charter* rights court cases as a way forward, given that the platforms federal politicians and political parties from the past few elections, and the reports of parliamentary committees, have not called for the most of the changes I propose are needed to make the system more egalitarian.

The thesis addresses political finance broadly defined as money, property, use of property, gifts, services, favours and other benefits and advantages provided to nomination contestants, election candidates and political party leadership contestants, electoral district associations, political parties, politicians and their staff during election campaign periods and also during the time period between elections, including support provided by “third-party” interest groups, lobbyists and other individuals, and by media outlets. In Chapter 3, I examine the rules that apply to each of these political actors in the areas of registration, donations and loans, spending, public subsidies and disclosure (including auditing), including a separate section on the role of media and social media.

Given that political systems include providers (whether as contractors or donors) of money, property and the use of property (including gifts and other benefits and advantages), and services (including favours) to politicians, and given that providers could be lobbyists, I also examine in Chapter 4 the rules concerning gifts, favours and other benefits and relations between voters, lobbyists and politicians, and concerning the conflicts of interest that can be caused by these activities.

Other than disclosure and auditing, I do not cover enforcement measures or systems in any of the areas. However, I do note at various points in the thesis that, as several studies and history have shown clearly, effective enforcement measures, policies and practices are key to ensure compliance with such rules.

The main contentions that I make are: that the key principles of the Supreme Court of Canada's egalitarian model have not been consistently upheld by the Court and other Canadian courts, that Canada's federal political finance system does not fulfill the Court's egalitarian model, and that several changes are needed to make the model and the system more egalitarian, only a few of which have been addressed by Canadian courts and scholars to date. These contentions counter the claim made in the Court's rulings, and by many scholars and commentators, that Canada's political finance system has developed and is based on an egalitarian model.

In Chapters 5 through 7, I develop a more egalitarian model and set out specific proposed changes to make Canada's systems more egalitarian, both in theory and in practice, within the framework of a democratic good government political system (meaning a system with separation of powers, elections, human rights protections, rule of law etc.) and a mixed market economy with both public sector institutions and private sector businesses, unions and other organizations (cooperatives, non-profit, religious organizations etc.). Both the model and many of

the specific proposed measures should also be applicable in other jurisdictions with different political systems and economic systems.

The framework of 19 standards for a more egalitarian model that I develop in Chapter 5 is based mainly on John Rawls' theory of justice, but modified and expanded to incorporate critiques of Rawls' theory, other legal principles and democratic good government theories, international standards, government ethics case law, behavioural psychology studies, and evidence of the public's expectations.

The 201 proposals I make in Chapters 6 and 7 for specific changes to the rules of Canada's current federal political finance system (again, broadly defined), are based on the model, measures from various jurisdictions in Canada and elsewhere, and international standards. I am not claiming that these changes would definitely result in "better" or more "public interest" policy-making decisions, however that would be determined. I am only contending that the framework I develop is more egalitarian than the Supreme Court's model, and that the rule changes I suggest would make the political finance, gifts, favours, conflict of interest and lobbying systems align with the more egalitarian model I propose.

I primarily use the doctrinal research methodology by examining scholarly research and, given I also examine aspects of the laws of Canadian provinces and municipalities, and other countries, I also deploy some aspects of the comparative methodology (most fully when comparing Canada's federal rules to Quebec's rules, and somewhat when comparing Canada's rules to the U.S. and U.K. rules). The research results from these sources inform the conclusions I set out in my thesis.

The thesis advances knowledge in the following areas:

1. It is the first complete evaluation of the federal Canadian political finance, gifts-favours-benefits, conflict of interest and lobbying rules

and systems in their current state as of May 2023, based on the findings of extensive new research into key parts of these systems;

2. It sets out the first comprehensive analysis of how the Supreme Court of Canada's egalitarian model has been applied by the Court and other courts inconsistently, in ways that do not comply with the model;
3. It sets out the first analysis of how Canada's political finance statutory rules, again defined broadly to include rules that apply to donations, loans, gifts, services, favours and other benefits, lobbying and conflicts of interest, do not comply with the Supreme Court's egalitarian model, based in part on new statistical research set out in 28 charts, and;
4. It sets out a new theoretical framework based on 19 standards, and a comprehensive set of 201 innovative proposals for changes to make Canada's political finance rules (again defined broadly) more egalitarian, and more ethical in terms of preventing conflicts of interest. Five comprehensive studies of key parts of the political finance, ethics and lobbying systems are also proposed to gather key information needed to inform the design of some of the 201 proposed changes. Eight structural and positive *Charter* rights cases are also proposed to challenge current rules that do not comply with the egalitarian model.

Keywords

Political finance; campaign finance; donations; lobbying; electoral integrity; integrity; government integrity; political integrity; government ethics; political ethics; corruption; conflict of interest; gifts; equality; political equality; egalitarian; Rawls; transparency; disclosure, Supreme Court of Canada; *Canadian Charter of Rights and Freedoms*; *Charter* rights; section 2; section 3; constitutional rights; constitutional principles; freedom of expression; free speech; freedom of association; bias; United Nations; *Universal Declaration of Human Rights*; *International Covenant on Civil and Political Rights*; *United Nations Convention Against Corruption*; *Inter-American Convention Against Corruption*; Organisation for Economic Co-operation and Development (OECD); public interest; right to vote; democratic rights; democratic reform; structural rights; positive rights; right to meaningful participation; guarantee of effective representation; Canada; ethics rules; ethics codes; conflict of interest codes; citizen groups; interest groups; unions; business lobbying; corporate lobbying, elections

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1 Introduction

1.1 Overview

This thesis is an examination of whether Canada's "egalitarian model" as it has been articulated by the Supreme Court of Canada, other Canadian courts, and legal scholars and commentators, is actually egalitarian and has been applied consistently to various areas of Canada's political finance system, and an in-depth analysis of whether Canada's political finance system (broadly defined) measures up to the Court's egalitarian model, and how it could be changed to comply with a more egalitarian model that would also be ethical in terms of preventing even the appearance of a conflict of interest.

I use primarily the doctrinal research methodology by examining scholarly research and, given I also examine aspects of the laws of Canadian provinces and municipalities, and other countries, I also deploy some aspects of the comparative methodology.

The thesis addresses Canada's political finance system broadly defined as money, property, use of property, gifts, services, favours and other benefits and advantages provided to contestants (for nomination and party leadership contests), election candidates, electoral district associations, political parties, politicians and their staff during election campaign periods and also during the time period between elections, including support provided by "third-party" interest groups, lobbyists and individuals, and by media outlets. I examine the rules that apply to each of these political actors in each area of the political finance system. Given that political systems include providers (whether as contractors or donors) of money, property and the use

of property (including gifts), and services (including favours) to politicians, and given that providers could be lobbyists, I also examine the rules and enforcement systems concerning relations between lobbyists and politicians, and conflicts of interest that these relations can create.

The first main contention that I make in Chapter 2 is that the Supreme Court's egalitarian model has nine inconsistencies because of the Court's deference to the legislature required under the *Charter* analysis framework, and because of the way in which the Court has applied three key egalitarian principles in its rulings. My second contention in Chapters 3 and 4 is that Canada's federal political finance system does not fulfill the Supreme Court's egalitarian model, and that several changes are needed to make it actually egalitarian, only some of which have been addressed by Canadian courts and scholars to date. This contention counters the claim made in Supreme Court of Canada rulings, and by many commentators, that Canada's political finance system has developed and is based on an egalitarian model.

In Chapter 5, I examine various frameworks, including Rawls' theory of justice, but modified and expanded to incorporate critiques of Rawls' theory, international good government standards, legal principles, democratic good government theories, government ethics case law and behavioural psychology studies, and then develop a framework of 19 general standards for a more egalitarian political finance system. In Chapter 6 and Chapter 7, I then apply that framework and set out 201 specific proposals for changes to make Canada's political finance model more egalitarian, both in theory and in practice, within the framework of a democratic good government political

system (meaning a system with separation of powers, elections, human rights protections, rule of law etc.) and a mixed market economy with both public sector institutions and private sector businesses, unions and other organizations (cooperatives, non-profit organizations, religious organizations).

The first overall objective of the more egalitarian model that I develop in Chapter 5, and the 201 proposals for changes I suggest in Chapter 6 and Chapter 7, is to prevent political finance from having undue influence over candidates entering politics, given that once the undue influence has occurred. The second overall objective is to ensure that, whether or not politicians are personally ethical, the political finance system effectively ensures that the decisions and actions of candidates and others involved in elections are not undermined by conflicts of interest caused by the system. The third overall objective is to ensure that, after a candidate wins and becomes a public office holder, the political finance system ensures their decisions and actions are not undermined by conflicts of interest.

There have, of course, been many articles, book chapters and books written about Canada's political finance system addressing: 1. analyses of the theoretical bases of the system before the Supreme Court rulings established the egalitarian model;¹ 2. analyses of the characteristics of Supreme Court's egalitarian model, including comparisons with court rulings in other jurisdictions;² 3. analyses of Canada's past statutory rules, including

¹ See, for example, A. Brian Tanguay and Barry J. Kay, "Third-party advertising and the threat to electoral democracy in Canada: The mouse that roared" (1998) 17 (Spring) *International Journal of Canadian Studies* 57.

² See, for example, Colin Feasby, "Libman v. Quebec (A.G.) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model," (1998-1999) 44

comparisons with other jurisdictions combining both theoretical analysis and empirical evidence;³ 4. empirical studies of donations and public funding of

McGill L. J. 5 at 9 (hereinafter “Feasby (1998-1999)”). Heather MacIvor, “Judicial Review and Electoral Democracy: The Contested Status of Political Parties under the Charter,” (2002) 21 *Windsor YB Access Just* 479 (hereinafter “MacIvor (2002)”). Colin Feasby “The Supreme Court of Canada’s political theory and the constitutionality of the political finance regime,” in K.D. Ewing and Samuel Issacharoff, eds., *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart Publishing, 2006 – (hereinafter “Ewing and Issacharoff (2006)”) at 243 (hereinafter “Feasby (2006)”). Janet L Hiebert, “Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise,” in Ewing and Issacharoff (2006), *supra*, at 269 (hereinafter “Hiebert (2006)”). Yasmin Dawood, “Democracy, power, and the Supreme Court: Campaign finance reform in comparative context,” (2006) 4(2) *April International Journal of Constitutional Law* 269 (hereinafter “Dawood (2006)”). Christopher P. Manfredi and Mark E. Rush, *Judging Democracy* (Peterborough, Ont.: Broadview Press, 2007). Christopher P. Manfredi and Mark E. Rush, “Electoral jurisprudence in the Canadian and U.S. Supreme Courts: Evolution and convergence,” (Autumn 2007) 52(3) *McGill Law Journal* 457. K.D. Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Oxford: Hart Publishing, 2007) at 197-224 (Chapter 9, “Lessons from Canada”). Richard S. Katz, “Democracy as a Cause of Electoral Reform: Jurisprudence and Electoral Change in Canada,” May 2011), Vol. 34, No. 3 *West European Politics* 587. Colin Feasby, “Canadian political finance regulation and jurisprudence,” (hereinafter “Feasby (2012)”) in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham, eds., *The Funding of Political Parties: Where Now?* (London: Routledge, 2012) at 212-214 (hereinafter “Ewing, Rowbottom and Tham (2012)”). Yasmin Dawood, “Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality,” (2012) 26 *CJLJ* 293 (hereinafter “Dawood, “Democracy and Freedom of Speech” (2012)”). Jay Makarenko, “Rawls and the Practice of Political Equality,” (Spring 2012) A thesis submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy, Department of Political Science, University of Alberta, online: <<https://www.bac-lac.gc.ca/eng/services/theses/Pages/item.aspx?idNumber=1019487918>>. Rachel Atkinson, “Too Much or Too Little? A Comparison of the Canadian and American Supreme Courts’ Approaches to Third Party Expenditures in Election Campaigns,” (November 2014), 8 *Journal of Parliamentary and Political Law* 687 at 706-716 (hereinafter “Atkinson (November 2014)”). Michael Pal, “B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General): Mandatory Registration Rules, and Limits on Third Party Political Expression under the Charter,” (2019) 88 *Supreme Court Law Review* 249. Hoi L. Kong, “Comparative Election Law in Canada,” in James A. Gardner, ed., *Comparative Election Law* (Northampton, Mass.: Edwin Elgar Publishing Inc., 2022) at 32.

³ See, for example, Colin Feasby, “Issue Advocacy and Third Parties in the United Kingdom and Canada,” (2003) 48:1 *McGill LJ* 11 (hereinafter “Feasby (2003)”). Lisa Young, “Regulating campaign finance in Canada: Strengths and weaknesses,” (2004) 3(3) *September Election Law Journal: Rules, Politics, and Policy* 444 (hereinafter “Young (2004)”). William P. Cross, *Political Parties* (Vancouver: UBC Press, 2004) at 142-170 and 180-182 (hereinafter “Cross, *Political Parties* (2004)”). Colin Feasby, “Constitutional Questions About Canada’s New Political Finance Regime,” (2007) 45:3 *Osgoode Hall LJ* 513 (hereinafter “Feasby (2007)”). Heather MacIvor, “A Missed Opportunity: Political Finance and the Federal Accountability Act,” (March 2008), 1 *Journal of Parliamentary and Political Law* 105 (hereinafter “MacIvor (March 2008)”). Christopher Stoney and Catherine Waters, “The Federal Accountability Act: The Impact of Changes in Party Finances on the Democratic Functions of Political Parties,” (March 2008), 1 *Journal of Parliamentary and Political Law* 155 (hereinafter “Stoney and Waters (2008)”). Lisa Young and Harold J. Jansen, eds., *Money, politics, and democracy: Canada’s party finance reforms* (Vancouver: UBC Press, 2011) (hereinafter “Young and Jansen (2011)”). Pauline E. Beange, “Canadian Campaign Finance

candidates, political parties and third parties, including how they relate to statutory measures and the egalitarian model,⁴ and; 5. empirical studies of spending by candidates, political parties and third parties, including how they relate to statutory measures and the egalitarian model.⁵ And there have also been several analyses of Canada's lobbying laws and, to a lesser extent, the rules concerning gifts and favours and conflicts of interest (usually in the context of overall reviews of government ethics rules), as well as empirical

Reform in Comparative Perspective 2000-2011: An Exhausted Paradigm or Just a Cautionary Tale?" (2012) A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy, Department of Political Science, University of Toronto, online: <https://tspace.library.utoronto.ca/bitstream/1807/32664/3/Beange_Pauline_E_201206_PhD_thesis.pdf> (hereinafter "Beange (2012)"). Erin Crandall and Andrea Lawlor, "Third Party Election Spending in Canada and the United Kingdom: A Comparative Analysis," (2014) 13(4) *Election Law Journal: Rules, Politics, and Policy* 476. Lori Turnbull, Ian Greene and Robert Shepherd, "Money in Politics: The Ethics of Election Finance Regulation and Expense Claims Oversight," in Ian Greene and David Shugarman, eds., *Honest Politics Now: What Ethical Conduct Means in Canadian Public Life* (Toronto: James Lorimer & Company, 2017) at 154. Andrea Lawlor and Erin Crandall, "Comparing third party policy frameworks: Regulating third party electoral finance in Canada and the United Kingdom," (2017) 33(3) *Public Policy and Administration* 332. Michael Pal, "Third party political participation and anti-collusion rules," (2018) 61(2) *Canadian Public Administration* 284.

⁴ See, for example, Lisa Young, Anthony Sayers, and Harold Jansen, "Altering the political landscape: State funding and party finance," in Alain Gagnon and Brian Tanguay, eds., *Canadian Parties in Transition* (Peterborough, Ont.: Broadview Press, 2007).

⁵ See, for example, Richard Johnston, "The Volume and Impact of Third-Party Advertising in the 1988 Election," preliminary study (Vancouver: University of British Columbia, December 1990) (hereinafter "Richard Johnston (1990)"). Janet L. Hiebert "Interest groups and Canadian federal elections," in F. Leslie Seidle, ed. *Interest Groups and Elections in Canada* (Toronto: Dundurn Press, 1991) (hereinafter "Hiebert (1991)"). Richard Johnston, André Blais, Henry E. Brady, and Jean Crête, *Letting the People Decide: Dynamics of a Canadian Election* (Montreal: McGill-Queen's University Press, 1992) (hereinafter "Richard Johnston et al (1992)"). Andrea Lawlor and Erin Crandall, "Understanding third-party advertising: An analysis of the 2004, 2006 and 2008 Canadian elections," (2011-2012) 54(4) *Canadian Public Administration* 509 (hereinafter "Lawlor and Crandall (2011-2012)"). A. Paul Pross, "Barriers to third-party advertising in Canadian elections," (2013) 56(3) *Canadian Public Administration* 491. Pauline Beange, "Canadian Campaign and Election Finance: Regulation by Law and by a Network of Oversight," (Spring 2015), 2015 *Journal of Parliamentary and Political Law* 261 (hereinafter "Beange (Spring 2015)"). Andrea Lawlor and Erin Crandall, "Policy versus practice: Third party behaviour in Canadian elections," (2018) 61(2) *Canadian Public Administration* 246. Tamara A. Small, "Digital third parties: Understanding the technological challenge to Canada's third party advertising regime," (2018) 61(2) *Canadian Public Administration* 266 (hereinafter "Small (2018)"). Michael Pal, "Is the Permanent Campaign the End of the Egalitarian Model for Elections?" in Richard Albert, Paul Daly, and Vanessa MacDonnell, eds., *The Canadian Constitution in Transition* (University of Toronto Press, 2019) 338 (hereinafter "Pal, Permanent Campaign (2019)").

studies of lobbying activities in Canada and examinations of theoretical frameworks that seek to explain the activities.⁶

While I draw on these sources, and many other sources, especially in Chapter 5 where I develop a framework for a more egalitarian model, and chapters 6 and 7 where I set out specific proposals for measures to make Canada's political finance system (including gifts and favours, especially from lobbyists, and lobbying transparency) more egalitarian, this thesis advances knowledge in the following areas:

1. It is the first complete evaluation of the federal Canadian political finance system in its current state (again defined broadly, including gifts and favours from lobbyists and conflicts of interest caused by them,⁷ and lobbying transparency requirements)⁸ taking into account court rulings and changes made to federal statutes from 2018 to 2022, and taking into account new research into key parts of the system presented through the dissertation, including in 28 statistical charts;⁹

⁶ For these areas, see citations in Chapter 4, section 4.1.

⁷ The requirements of the provisions in the federal *Conflict of Interest Act* and ethics codes for MPs, Senators and federal government employees as of 2015 are described in Gregory J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia, Second Edition* (Toronto: Canada Law Book, 2015).

⁸ The requirements of the provisions in the federal *Lobbying Act* are described in Volume 1, chapters 2-E and 2-F (in French) of the continuously updated book: Pierre B. Meunier, André Turmel and Guy W. Giorno, *Lobbying in Canada / Le lobbyisme au Canada* (Toronto: Carswell, 2003, Rel. 4 (August 2022)). However, while chapters 1-E and 1-F have a general overview that compares the federal law to the laws in all the provinces and the Yukon (which all have lobbying laws), the book does not evaluate the requirements or examine what is not required of lobbyists.

⁹ A description of the details of the current political finance rules in the *Canada Elections Act* (CEA) are provided in Donald J. Bourgeois, Jess Spindler and Susan B. Campbell, *Election Law in Canada*, 2nd ed. (Toronto: LexisNexis Canada Inc., 2021), esp. chapters 6 and 7. A description of many of the current rules is also set out at various points in all of the chapters of Gregory Tardi, *Anatomy of an Election: Canada's Federal General Election of 2019*

2. It sets out the first comprehensive arguments detailing the nine inconsistencies in how the Supreme Court of Canada and other Canadian courts have applied the Court's egalitarian model – inconsistencies that contradict the three key egalitarian principles of the model;¹⁰
3. It sets out the first analysis of how Canada's political finance statutory rules, again defined broadly, do not comply with the three key principles of the Supreme Court's egalitarian model,¹¹ and;

Through the Lens of Political Law (Toronto: Irwin Law, 2020), which also contains a summary of major case law in Appendix 3. However, the descriptions in these books do not cover several key details concerning the political finance system, and while both contain limited commentary concerning the rules, they do not amount to an evaluation of the current rules. A summary, but not full evaluation, of the political finance and other changes to the CEA can also be found in: Michael Pal, "Evaluating Bill C-76: The Elections Modernization Act," (2019), 13 *Journal of Parliamentary and Political Law* 171, and; Tamara A. Small, "Promises, Promises: Assessing the Liberals' Electoral Reform Agenda," (2020) 89 *Canadian Studies* 41. Some of the political finance rule changes are also summarized in Pal, *Permanent Campaign* (2019), *supra* note 5, at 361-363.

¹⁰ Two articles have argued that the Supreme Court's upholding of limits on third-party advertising spending in its ruling in *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33 (CanLII), online: <<http://canlii.ca/t/1h2c9>> (hereinafter "*Harper* (2004)") was not consistent with the egalitarian model given third parties have just as important an informational and participation opportunity role as parties: Colin Feasby, "Freedom of Expression and the Law of the Democratic Process," (2005), 29 *S.C.L.R.* (2d) 237 (hereinafter "*Feasby* (2005)"), and; Christopher D. Bredt and Laura Pottie, "Liberty, Equality and Deference: A Comment on Colin Feasby's 'Freedom of Expression and the Law of the Democratic Process'" (2005) 29 *S.C.L.R.* (3d) 291, online: <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1080&context=sclr>> at 293-299 and 301-303 (hereinafter "*Bredt and Pottie* (2005)"). See also a comprehensive examination of inconsistencies in the Supreme Court's rulings on four conflicting democratic rights/principles in Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter," (Fall 2013) Vol. 51(1) *Osgoode Hall Law Journal* 251, esp. 290-295 (hereinafter "*Dawood* (Fall 2013)").

¹¹ How federal election and political finance rules apply to small parties compared to third parties has been evaluated, but not essentially in terms of an evaluation of whether the rules comply with the egalitarian model's principles – see: Colin Feasby, "Continuing Questions in Canadian Political Finance Law: Third Parties and Small Political Parties," (June 2010), Vol. 47-4, *Alberta Law Review* 993. Some of these issues are covered in Beange (2012), *supra* note 3. However, Beange focuses on evaluating why changes to Canada's political finance system (defined narrowly) occurred from 2000 to 2011, and suggesting what effects they may have on a variety of political actors in the system. Some of these issues are also covered in Daniel Gold, "Lobbying Regulation in Canada and the United States: Political Influence,

4. It sets out a new theoretical framework based on 19 general standards, and innovative proposals for 201 measures to make Canada's political finance, lobbying and ethics rules more egalitarian, including proposing five comprehensive studies to gather key information about political actors and their activities in order to inform the design of the new rules, that, in order to comply with the egalitarian model's principles of ensuring equality of opportunity for participation, and ensuring the public's

Democratic Norms and Charter Rights" (August 2020) Thesis submitted to the University of Ottawa in partial fulfillment of the requirements for the Doctorate of Philosophy in Law, online: <<https://ruor.uottawa.ca/handle/10393/40908>> (hereinafter "Gold (2020)"). See also: Daniel Gold, "Lobbying Reform: A Response to Lobbying Scandal," (March 2021), 15 *Journal of Parliamentary and Political Law* 69 (hereinafter "Gold (2021)"). However, Gold only summarizes the Canadian laws (and misses some details of gaps in Canada's federal lobbying law), and focuses mainly on a comparison between Canada and the U.S., the political economy of lobbying in both countries (mostly presenting evidence from the U.S.), and only summarizes how stronger lobbying regulations could be designed to be consistent with *Charter* rights. Political finance issues and rules (not including gifts, favours and lobbying rules) in Canadian cities are covered in Samuel Austin, "*Regulating Political Finance in Canadian Cities*," (April 2008), Thesis submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Arts, Department of Political Science, University of Calgary, online: <<https://www.bac-lac.gc.ca/eng/services/theses/Pages/item.aspx?idNumber=640330135>>. In Simon Weschle, *Money in Politics: Self-Enrichment, Campaign Spending and Golden Parachutes* (Cambridge, UK: Cambridge University Press, 2022) the author, as the title states, covers the issues of politicians enriching themselves while in office, raising and spending money in campaigns, and securing "golden parachute" jobs after leaving office, three of the areas of money in politics that this thesis also covers and, as in this thesis, draws connections between these different forms of money in politics. Finally, Sophie Louise Moxon, "Can money buy access? Political finance contributions and the impact on interest group access to legislative committees in Australia, Canada, Ireland, and the United Kingdom," (June 2022), Thesis submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy, Department of Political Science, University of York, online: <<https://etheses.whiterose.ac.uk/30831/>> sets out the results of an empirical study of access to committees by interest groups in four countries (including Canada) based upon political contributions by the groups. It should be noted that this study inaccurately claims that corporate, union and organization contributions were banned at the federal level in Canada in 2000 (in fact, the ban came into force on January 1, 2007), and that the annual individual donation limit in 2022 was \$1,500 annually (in fact it was \$1,675), and that federal Canadian political parties receive an election expense reimbursement for each district in which their candidate obtains 5 percent or more of the total vote (in fact the threshold is 10 percent). It should also be noted that the study examines access from 2005-2020 based on contributions from the same time period even though, as noted above, group contributions in Canada were banned from 2007 on.

confidence in the integrity of political processes (which I argue the courts have established as democratic rights), the rules must be aimed at preventing the creation of even the appearance of a conflict of interest for public office holders in terms of how they are elected and in all policy-making processes (and requiring them to recuse themselves if they have even an apparent conflict), the rules must ensure substantive equality of opportunity to substantive equality of participation, and the rules must require a very high level of transparency (in order to ensure voters are provided with key information needed to make informed choices in all political processes).¹²

1.2 Research Questions

To answer the overall questions of what is the “egalitarian model” for a political finance system that has been established in Canada, and whether Canada’s political finance system fulfills that model, including in terms of how the rules in the system are enforced, and finally to set out summary proposals of considerations and specific proposed changes that could be made to make the model and the system more egalitarian, I answer the following sub-questions that address theoretical issues, legal issues and practical concerns:

¹² See a brief summary of a similar multi-pronged framework aimed at the same goal in U.S. politics in: Thomas M. Susman, “Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good,” (2008) Vol. 19, No. 10 *Stanford Law & Policy Review* 10.

1. What is the “egalitarian model” as it has been established by the Supreme Court of Canada and described by legal scholars and commentators in Canada?
2. How has the egalitarian model been applied to Canada’s political finance system covering the following political actors:
 - a) nomination race candidates?;
 - b) election and party leadership candidates?;
 - c) political parties? and;
 - d) voters (including in their roles as donors, volunteers, lobbyists and interest groups (so-called “third parties”))?
3. How has the egalitarian model been applied to Canada’s political finance system in terms of:
 - a) donation types and amounts/limits?
 - b) categories of donors?
 - c) disclosure of donations?
 - d) election spending by candidates, electoral district associations and political parties?
 - e) election spending by individuals and organizations (i.e. third parties)?
 - f) public subsidies of candidates, electoral district associations and political parties?
 - g) public subsidies of individuals and organizations (i.e. third parties)?
 - h) indirect support of candidates, electoral district associations and political parties?
 - i) indirect support of individuals and organizations (i.e. third parties)?
 - j) media and social media corporations and cooperatives and organizations?
 - k) gifts, benefits and favours?

- l) conflicts of interest (especially between office holders and lobbyists)?
4. Does the Canadian federal political finance system measure up to the egalitarian model for all political actors in terms of:
- a) donations/limits?
 - b) categories of donors?
 - c) disclosure of donations?
 - d) election spending?
 - e) in-between election spending?
 - f) public subsidies?
 - g) indirect support?
 - h) the role of media?
 - i) gifts, benefits and favours?
 - j) conflicts of interest?
 - k) lobbying?
5. What theoretical framework, and practical changes, could make the Canadian egalitarian model, and political finance system (again defined broadly), more egalitarian?

1.3 Methodology

I use primarily the doctrinal research method – textual analysis and statutory interpretation methods, researching primary and secondary sources, and relying on existing data including peer-reviewed science. Given that I also examine aspects of the laws of Canadian provinces and municipalities and other countries and international best-practice standards, especially in the final chapters of my thesis in which I attempt to develop proposals for a more

egalitarian political finance system that applies to democratic societies with mixed-market economies, I also deploy some aspects of the comparative methodology.¹³ While I do not complete a full comparison using the functional comparative method (which involves comparing the laws, court rulings and political processes and culture in the jurisdictions being compared), I do compare the laws and court rulings and some aspects of political processes and culture in various jurisdictions, most fully when comparing Canada's federal rules to Quebec's rules, and somewhat when comparing Canada's rules to the U.S. and U.K. rules).

The scholarly research and comparative studies all inform the rules I evaluate in Canada's current political finance system, and the proposals I attempt to develop and set out in the final chapters of my thesis for a more egalitarian political finance system, and for changes to Canada's system. In Chapter 5 of the thesis I begin the process of developing a framework and proposals for a model egalitarian political finance system using an approach based on Rawls' theory of justice but modified and expanded. Initially, this method involves, as Rawls did in a very general way, imagining what you would design as an ideal political finance system if you were put under a "veil of ignorance" as before you were born and did not know what your societal status would be and wanted a system that was arranged so as to benefit most the least advantaged people in society.¹⁴ I also consider and incorporate

¹³ John C. Reitz, "How to Do Comparative Law," (1998) 46 *American Journal of Comparative Law* 617.

¹⁴ John Rawls, *A Theory of Justice* (Boston: Belknap Press of Harvard University Press, 1999) at 13 (hereinafter "Rawls (1999)"). John Rawls, "The Basic Liberties and Their Priority," (April 10, 1981) The Tanner Lectures on Human Values (University of Michigan), online:

critiques of Rawls' theory. The framework and proposals that I begin to develop in this final section are also based on best-practice international standards as set out by international organizations such as the United Nations, OECD and World Bank, as well as case studies in Canada and elsewhere that have revealed loopholes in those standards.

1.4 General theoretical approach

1.4.1 Political process ethics vs. substantive ethics

Various schools of the philosophy of ethics have attempted to answer the question: What is a good decision or action? In politics, this question can be framed, among other ways, as: "What is a good public policy decision or action?" (examining the substantive effect of the decision or action) or as: "What is a good policy-making process?" (examining the process by which a policy decision or action is made). My thesis is an examination of whether part of the policy-making process is egalitarian, not the substantive effects of the process.¹⁵ In my thesis, I examine the political finance system as part of the overall processes and systems through which politicians obtain and exercise their public policy decision-making powers.

While the philosophy of ethics mainly addresses the substantive effects of decisions and actions by humans, underlying schools of ethics philosophy

<https://tannerlectures.utah.edu/_documents/a-to-z/r/rawls82.pdf> at 7 (hereinafter "Rawls (1981)"). John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard, 2001) at 42-43 (hereinafter "Rawls (2001)").

¹⁵ In Frederick Schauer, "Judicial Review of the Devices of Democracy," May 1994, Vol. 94(4), *Columbia Law Review* 1326 at 1327, the author drew a similar distinction in setting out the basis for his focus on, and analysis of, issues of political process.

are also frameworks for the ethics rules of decision-making processes, including fundamental rules that are common for both people in and out of politics. For example, taking a bribe was prohibited in the first ethics and legal codes that have been discovered, including the codification of Babylonian law by King Hammurabi around 1754 BC.¹⁶ Utilitarianism defines rightness in terms of the maximization of pleasure and minimization of pain (utility)¹⁷ -- and under this school of ethics a relevant question is whether an effective political ethics system maximizes the pleasure of voters (although rule utilitarianism avoids this issue by holding that the utility of certain just principles is great and therefore the effects of a political ethics system do not have to be taken into account in order to determine its rightness). As well, John Stuart Mill argued that democracy itself was utilitarian as political participation engaged the higher faculties of a people, yielding qualitatively better utility.¹⁸ As a result, an effective political process ethics system within a democracy would, it seems, be judged as delivering even better utility. In the general framework set out below, and in Chapter 5, I draw on these kind of process-focused rules from various schools of thought as the basis for framework for a more egalitarian model for a political finance system, and proposals for making the registration, donation, spending, public subsidies, disclosure, gifts, favours and lobbying rules in the system more egalitarian.¹⁹

¹⁶ Philip M. Nichols and Diana C. Robertson, *Thinking About Bribery: Neuroscience, Moral Cognition and the Psychology of Bribery* (Cambridge: Cambridge University Press: 2017) 1 (hereinafter "Nichols and Robertson, *Thinking About Bribery*").

¹⁷ John Stuart Mill, *Utilitarianism* (Mineola, NY: Dover Publishing: 2007), p. 6.

¹⁸ John Stuart Mill, *Representative Government* (London: J.M. Dent & Sons Ltd.: 1910), p. 203.

¹⁹ See a similar exploration of the theoretical bases of political finance systems in: Beange (2012), *supra* note 3, at 4-33.

1.4.2 The scope of corruption of the political system

Political corruption wastes the public's money by increasing the cost of public goods and/or divert public goods for the profit of private interests.

Given that political corruption usually involves criminal, quasi-criminal or illegal behaviour, it also undermines the rule of law. Given that it distorts policy-making, it also undermines democracy and good governance.²⁰

Beyond these direct political and economic effects, political corruption and unethical actions by people in politics can also undermine regulatory regimes in the areas of human rights, labour rights, public health and safety, social welfare, environmental protection and consumer protection, weakening rules or enforcement of laws, regulations, codes, policies etc. These are, of course, substantive effects of political decisions resulting, in part, from political policy-making process flaws. Again, though, in this thesis I am focused on the political finance rules as one part of the electoral process and policy-making process, and examining whether they themselves are egalitarian, and ethical in terms of preventing even the appearance of a conflict of interest, and also examining changes that could be made to make the rules more egalitarian and effective at preventing conflicts of interest. I am not claiming that these changes will result in “better” or more “public interest” substantive policy-making decisions, however “better” or “public interest” would be defined using

²⁰ *United Nations Convention Against Corruption*, online: (2004) United Nations Office on Drugs and Crime (Vienna International Center, V.04-56160), <<https://www.unodc.org/ropan/en/AntiCorruptionARAC/united-nations-convention-against-corruption.html>> or <<https://www.unodc.org/unodc/en/corruption/uncac.html>> at iii (hereinafter “UNCAC (2004)”).

any deontological or teleological analytical approach.²¹ I am also not claiming that they will definitely result in better outcomes in other parts of the political process – for example, even though they are aimed at equalizing the opportunity to participate in political processes based on the fundamental principle of one person, one vote, in part by preventing conflicts of interest, there is no guarantee that more participation will occur, nor what the exact results of that participation will be. I am simply, and only, contending that the changes I suggest will make the rules better than the current rules for equalizing that opportunity, and for preventing conflicts of interest.²²

Political corruption is usually defined only as the use of power by people in politics to benefit themselves, their family members, friends or associates.²³ Under this narrow definition, political corruption actions by politicians, political staff or government officials (including both appointees and employees) include fraud, embezzlement, patronage, cronyism and nepotism. Political corruption actions by lobbyists, contractors and others who deal with government include bribery (offering any kind of benefit in relation to actions by a politician or official), influence peddling (pretending to have influence over politicians or government officials) and kickbacks (paying

²¹ See this point re: separating the process from the outcome discussed in Yasmin Dawood, “Classifying Corruption,” (2014) 9 *Duke Journal of Constitutional Law and Policy* 103 at 110 (hereinafter “Dawood, Corruption (2014)”).

²² For a discussion of the difficulties of predicting what ends will be reached by what means in political finance systems, see: Beange (2012), *supra* note 3, at 319-351, esp. 336-351, and; Lisa Young, “Regulating Political Finance in Canada: Contributions to Democracy?” in Richard Simeon and Patti Tamara Lenard, eds., *Imperfect democracies: the democratic deficit in Canada and the United States* (Vancouver: UBC Press, 2012) 138 (hereinafter “Young (2012)”).

²³ See, for example, the “Preamble” section in *UNCAC* (2004), *supra* note 20, at 5-6. Julio Bacio Terracino, *The International Legal Framework against Corruption: States’ obligations to prevent and repress corruption*. (Cambridge: Intersentia, 2012) at 9.

back to a politician or government official part of the amount of a contract, grant etc.). Political corruption actions in which politicians, officials and lobbyists may participate include extortion (of each other or voters), electoral fraud and repression of political opponents.

However, the dictionary definition of corruption is broader and includes any “impairment of integrity.”²⁴ Another dictionary definition also defines corruption broadly as “dishonest or fraudulent conduct by those in power, typically involving bribery; dishonest, immoral; the act or effect of making somebody change from moral to immoral standards of behavior.”²⁵ The initial international anti-corruption conventions also adopted this broader definition, as negotiations from 1994 to 1996 that resulted in first the Organization of American States (OAS) enacting the *Inter-American Convention Against Corruption*, and then the General Assembly of the United Nations passing an anti-corruption resolution that required public office holders to “act in the public interest” (clause 1) and “at no time to afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual” (clause 3) and to not make decisions when in “situations of possible or perceived conflict of interest” (clause 5) and to “not solicit or receive directly or indirectly any gift or other favour that may influence the

²⁴ Merriam-Webster Dictionary, online:
<<http://www.merriam-webster.com/dictionary/corruption>>.

²⁵ Oxford English Dictionary, online:
<<http://www.oxfordlearnersdictionaries.com/definition/english/corruption>>.

exercise of their functions, the performance of their duties or their judgement” (clause 9).²⁶

My examination of political finance is based on this broader definition that encompasses not only criminal actions but also politically unethical actions. Again, I am focusing not on the ethics of the substantive effects and outcomes of policies, but instead on the ethics of the political finance system as a component of public policy-making processes, including both financing that amounts to political corruption as well as financing that creates a conflict of interest that makes it an unethical act for a politician to take part in a decision-making process (even if the politician does not benefit from the decision they make). I am not claiming that making the political finance system more egalitarian, and more effective at preventing conflicts of interest, will necessarily result in substantively better decisions.

1.4.3 A general approach for evaluating Canada’s egalitarian model

In Chapter 2, I set out Canada’s egalitarian model, and then I evaluate in Chapter 3 whether the registration, donations, spending, public subsidies and disclosure parts of Canada’s political finance system complies with the model, while Chapter 4 evaluates whether the gifts, favours and lobbying parts of the system complies with the model. By necessity, this process

²⁶ *Inter-American Convention Against Corruption*, online: Organization of American States <<http://www.oas.org/juridico/english/treaties/b-58.html>>. “Action against corruption” online: (December 12, 1996) United Nations General Assembly (A/RES/51/59: 82nd plenary meeting) <<http://www.un.org/documents/ga/res/51/a51r059.htm>>.

somewhat involves also evaluating the model itself, and for that I need a basic evaluation framework. First, as the Supreme Court of Canada has articulated (as detailed in Chapter 2), upholding the democratic principle of one person, one vote means ensuring that no one person has more influence than anyone else in political processes. There are, of course, many factors that influence the outcomes of political processes, and again I am not addressing the substantive effects of those decision-making processes. I am focused on addressing the question of what measures are needed in political finance to uphold the principle of one person, one vote. Such an evaluation does not involve claiming that donations, significant volunteering, and/or campaign support spending actually gives anyone or any organization more votes. However, my search of Elections Canada's online database from 1993 to 2016 found that all federal registered parties (on average 12 were registered any given year), and almost all candidates, seek donations.²⁷ As the aphorism attributed to former Speaker of the California State Assembly Jesse M. Unruh goes, "Money is the mother's milk of politics."²⁸ As a result, though various studies have shown that having and spending more money in an election or being supported by third parties and volunteers does not guarantee a party or candidate will win an election, in part because it is very

²⁷ Elections Canada, *Financial Reports* online: <<http://www.elections.ca/WPAPPS/WPF/>>.

²⁸ Mark A. Uhlig, "Jesse Unruh, a California political power, dies" online: *New York Times*, (August 8, 1987), online: <<http://www.nytimes.com/1987/08/06/obituaries/jesse-unruh-a-california-political-power-dies.html>>. Unruh was also credited with saying about lobbyists ""If you can't eat their food, drink their booze, screw their women, take their money and then vote against them you've got no business being up here." Charles Matthews, "Boyarsky's 'Daddy' tells of politician with a penchant for partying" online: SFGATE, (November 11, 2007), online: <<http://www.sfgate.com/books/article/Boyarsky-s-Daddy-tells-of-politician-with-a-3235114.php>>.

difficult to isolate and determine the causal effect of spending and/or because other factors (including being the incumbent candidate) have just as much or more influence on outcomes, by their own actions, parties and candidates make clear that donations and money overall are important to them.²⁹

Therefore, what I am contending first is that larger than average donations, significant free campaign assistance, and spending to support a campaign, can all give a person or organization who is trying to influence political decisions more influence over political decision-makers than the average voter because the money the lobbyist gives or spends is a favour for the party and/or candidate trying to win power and become a political decision-maker. Generally, the favour of the support, in whatever form it is offered, is of more concern when it is given to a candidate or party that wins power and, therefore, has the right to make most policy and process decisions. However, whether the decision-makers who are assisted by the lobbyist end up in power or in opposition, the assistance can distort

²⁹ Among many other studies and analyses of the effects of campaign spending, see: Susan E. Scarrow, "Political Finance in Comparative Perspective," (2007) *Annual Review of Political Science*, 10:1, 193. Kevin Milligan and Maria Rekkas, "Campaign Spending Limits, Incumbent Spending, and Election Outcomes," (Nov. 2008), Vol. 41, No. 4, *The Canadian Journal of Economics* 1351. Jordan Press and Joan Bryden, "Money a factor in 2015 election results, but no guarantee of success: analysis," (April 3, 2016), iPolitics.ca, online: <<http://ipolitics.ca/2016/04/03/money-a-factor-in-2015-election-results-but-no-guarantee-of-success-analysis/>>. B. Barutt and N. Schofield, "Measuring Campaign Spending Effects in Post-Citizens United Congressional Elections," in M. Gallego, N. Schofield (eds), *The Political Economy of Social Choices. Studies in Political Economy* (Springer, Cham., 2016), online: <https://doi.org/10.1007/978-3-319-40118-8_9>. Y. Bekkouche and J. Cagé (2018), "The Price of a Vote: Evidence from France, 1993-2014," CEPR Discussion Paper 12614, online: <https://cepr.org/active/publications/discussion_papers/dp.php?dpno=12614>. Centre for Responsive Politics, "Did Money Win" undated, online: <<https://www.opensecrets.org/elections-overview/winning-vs-spending?cycle=2020>>. Steven Sprick Schuster, "Does Campaign Spending Affect Election Outcomes? New Evidence from Transaction-Level Disbursement Data," (October 2020), Vol.82 (4) *The Journal of politics* 1502 (hereinafter "Scharrow, Milligan and Rekkas, Press and Bryden, Barutt and Schofield, Bekkouche and Cagé, and Schuster").

democratic representation. Support by lobbyists for candidates and/or political parties that exceeds what an average voter (or, following Rawls' principle, what the least advantaged voter) can give therefore distort the results of elections because the influence of the demands that the diverse, broad mass of voters make on any party or candidate they support can be overridden (or at least diluted) by the influence of those lobbyists.

Secondly, even if this influence does not lead to parties or candidates changing their promises in their election platforms, these actions by lobbyists also undermine democratic representation and the public interest whenever political decision-makers protect the private interests of lobbyists who have provided them with significant assistance (during an election campaign or between elections). I am not contending that in every policy-making process politicians will choose to protect private interests that have assisted them. However, I am contending that if politicians appear to the public to have a sense of obligation to a private interest/lobbyist, or if they consider "returning a favour" to a lobbyist, or (of course) if they ever actually return a favour, then democratic representation is undermined. In these ways, these actions by lobbyists give them more "votes" metaphorically than the thousands of votes from voters that elect a representative because the lobbyist has more influence than the thousands of voters over how that the representative casts his/her one vote in the legislature on policy proposals.

Whether politicians are viewed as "trustees" who should not take into account the views of voters but instead should exercise their own judgment in making decisions (as Edmund Burke proposed they should be) or as

“delegates” of the voters who elect them (as James Madison proposed they should be), and whether they act as either or both, receiving financial or other assistance from a person trying to influence a decision-making process can influence and therefore undermine the capacity of the politician to make decisions in the public interest.³⁰ Even if a politician is not elected or holds absolute power as a dictator, significant assistance, gifts or favours provided by a lobbyist can undermine the capacity of the politician to make decisions that take into account the interests of all members of the public.

Of course, what decision is in the “public interest” or democratically representative in any situation is not easy to determine. Many may view some lobbyists as advocating for a policy that is in “public interest” or that a lobbyist is providing expertise that assists the government to determine what is in the public interest. I am not attempting to answer the question of what is in the public interest on any issue except the issue of the egalitarian nature of the decision-making process itself. Whether a deontological (Kantian, Aristotelian, etc.) or teleological (utilitarian, environmental ethics, etc.) approach is used to determine the most ethical decision, determining if the decision-maker has a conflict of interest that ties him/her to a specific private interest is one key theoretical factor in assessing whether a decision has been made in the public interest.³¹ That is the factor I am focused on – how the

³⁰ Edmund Burke, *Reflections on the Revolution in France*, (London: Penguin Books, 1790 [1968]) at 115 (hereinafter “Burke 1790 [1968]”). James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, Isaac Kramnick (ed.), (Harmondsworth: Penguin, 1787–8 [1987]) as cited in “Political Representation” online: Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/political-representation/>> (hereinafter “Stanford Encyclopedia”).

³¹ Stanford Encyclopedia, *supra* note 30. See also discussion of conflicts of interest as a separate, distinct ethics issue in policy-making and administrative decision-making processes

political finance system can be designed to prevent conflicts that undermine a decision-maker's ability to determine what is in the public interest.

A third pillar of this analytical framework is government ethics (i.e. prevention of corruption). The ethical objective of preventing decision-makers from being in even an appearance of a conflict of interest by limiting donations, spending and gifts to a level an average voter can afford is not only grounded in legal and political theory but is also supported by clinical testing by behavioural psychologists showing that one of the most potent means of social influence, of persuasion, is "reciprocity" – the principle that giving a gift or doing a favour for someone creates a subconscious obligation that they return the favour.³² As a result, I contend that another part of the political finance system must be regulated, namely lobbyists giving gifts or doing favours for political decision-makers during or in between elections, as gift-

in Lorne Sossin and Charles Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government," (2003) 40 *Alberta Law Review* 867 at 874-884. It should be noted that this article misidentifies the ethics code that applied to federal public servants at the time as the "Code for Public Office Holders" (at 873) – that Code applied only to Cabinet ministers, their staff and Cabinet appointees, while other codes applied to public servants (see Chapter 4 for details).

³² Robert Cialdini and Noah Goldstein, "The Science and Practice of Persuasion," (2002) 43(2) *Cornell Hotel and Restaurant Administration Quarterly*, online: <<https://www.influenceatwork.com/wp-content/uploads/2012/02/Cornell-HotelRestAdminQrtly.pdf>> 40 at 44 (hereinafter "Cialdini and Goldstein (2002)"). Robert Cialdini and Steve Martin, "The Power of Persuasion," (2006) Dec. *Training Journal* 40 at 41 (hereinafter "Cialdini and Martin (2007)"). Robert Cialdini, "The Science of Persuasion," online: (2007) 14(1) *Scientific American* 70 <https://www.influenceatwork.com/wp-content/uploads/2012/02/SAM_Reprint.pdf> (hereinafter "Cialdini (2007)"). Douglas T. Kenrick, "The 6 Principles of Persuasion: Tips from the leading expert on social influence" (December 8, 2012), online: *Psychology Today* <<https://www.psychologytoday.com/blog/sex-murder-and-the-meaning-life/201212/the-6-principles-persuasion>> (hereinafter "Kenrick (2012)"). David Schultz, "Ethics Regulation Across Professions: The Problem of Gifting," (2010) 12:2 *Public Integrity* 161 at 165-166 (hereinafter "Schultz (2010)"). Dan Ariely, *The (Honest) Truth about Dishonesty: How We Lie to Everyone – Especially Ourselves* (London: HarperCollinsPublishers, 2013) at 75-77 (hereinafter "Ariely (2013)"). Adam Graycar and David Jancsics, "Gift Giving and Corruption," online: (2017) *International Journal of Public Administration*, Vol. 40(12) <<https://doi.org/10.1080/01900692.2016.1177833>> 1013 at 1015-1016 (hereinafter "Graycar and Jancsics (2017)").

giving gives private interests more “votes” in political decision-making processes and therefore violates the one-person, one-vote principle.

Overall, I contend that in order for a political decision-making process to uphold the fundamental principle of one person one vote it must, as the famous precedent-setting British court ruling by Lord Chief Justice Hewart put it in reference to the prevention of judicial bias, “not only be done, but should manifestly and undoubtedly be seen to be done.”³³ That ruling also contains other statements of principle that I think echo the behavioural science studies and apply to maintaining integrity in politics. The situation addressed by the ruling was that the clerk for the justices was a member of a law firm that was acting for plaintiffs in a civil lawsuit against the defendant (who was being prosecuted for dangerous driving that caused an accident). The clerk left the court with the justices after the court hearing. Even though the justices filed affidavits that they did not consult the clerk, Justice Hewart articulated that the question was not “what actually was done but what *might appear* to be done. Nothing is to be done which creates *even a suspicion* that there has been an improper interference with the course of justice” [emphasis added].³⁴

As with the exercise of justice, political processes must not only have integrity, they must also appear to have integrity, and not create even a suspicion that there has been improper interference. Why? Because, as the

³³ *R v. Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

³⁴ *R. v. Sussex Justices, supra* note 33. ES Nwauche, “A return to the manifest justice principle: a critical examination of the “reasonable suspicion/apprehension of bias” and “real possibility of bias” tests for judicial bias in South Africa and England,” online: (2004) Vol.7(2) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad <<http://www.ajol.info/index.php/pelj/article/view/43461/>> at 6 (hereinafter “Nwauche (2004)”).

Supreme Court of Canada stated in *R. v. Hinchey*, it is not necessary “to expand on the importance of having a government which demonstrates integrity. Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question.”³⁵ The court also stated soon after in the ruling: “it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern.”³⁶ In *Harvey v. New Brunswick*, the Supreme Court stated that ensuring the integrity of elections “is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society”³⁷ and that “If democracies are to survive, they must insist upon the integrity of those who seek and hold public office.”³⁸

In addition, as the Canadian Federal Court of Appeal articulated in a unanimous 2009 ruling, “Any conflict of interest impairs public confidence in government decision-making” (para. 48). The Court of Appeal’s ruling went on to clarify the need for rules to restrict lobbyists from doing or giving things that create any conflict of interest:

A lobbyist’s stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist’s effectiveness depends upon the decision maker’s personal sense of obligation to the lobbyist, or on some other

³⁵ *R. v. Hinchey*, [1996] 3 SCR 1128, 1996 CanLII 157 (SCC) <<http://canlii.ca/t/1fr57/>> at paragraph 14 (hereinafter “*R. v. Hinchey*”).

³⁶ *R. v. Hinchey*, *supra* note 35 at paragraph 17.

³⁷ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 SCR 876, 1996 CanLII 163 (SCC), <<https://canlii.ca/t/1fr6z>> at paragraph 38 (hereinafter “*Harvey*”).

³⁸ *Harvey*, *supra* note 37 at paragraph 61.

private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed.³⁹

In this ruling, the Court of Appeal used the same “sense of obligation” phrase deployed by behavioural psychologists to describe the effect of giving a gift to, or doing a favour for, someone, and highlighted that the operating standard is whether an appearance of conflict exists. Who is the “judge” of whether the appearance of what was done is suspicious? Although there are ongoing arguments concerning whether judges on any court need a reference point outside of their own reasoning to determine if they are biased, many commentators and courts have proposed that the “judge” should be the hypothetical “fair minded observer” who is a reasonable member of the public (and also well-informed to varying degrees depending on the standard applied).⁴⁰ I propose that the same reasonable member of the public should be positioned as the “judge” of whether any action in politics lacks integrity. In other words, the public’s standard and expectations should be paramount.

This, of course, raises the question of what evidence is needed to determine what the public’s standards and expectations are? I accept the Supreme Court’s standard for the *Oakes* test as applied in *Charter* litigation that “[s]cientific proof is not required...” only proof on a balance of

³⁹ *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, online: <<https://canlii.ca/t/22vcj>>, para. 53 (hereinafter “*Democracy Watch v. Campbell*”). Democracy Watch, Media Release: Federal Court of Appeal Rules That Lobbyists Violate Rule 8 of *Lobbyists’ Code of Conduct* If They Do Anything To Create Any Private Interest Or Obligation..., (March 17, 2009), online: <<http://dwatch.ca/camp/RelsMar1709.html>>.

⁴⁰ Matthew Groves, “The Rule Against Bias,” (2009) Vol. 39, *Hong Kong Law Journal* (Monash University Faculty of Law Legal Studies Research Paper No. 2010/21) 485, online: The Social Science Research Network Electronic Paper Collection <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592326> (hereinafter “Groves (2009)”).

probabilities, including social science evidence such as survey results.⁴¹ I set out all of the evidence I have been able to gather in chapters 2, 3 and 4 as I evaluate whether the Supreme Court of Canada and other Canadian courts have fully and consistently applied the egalitarian model the Supreme Court developed, and evaluate whether the registration, donations, spending, public subsidies, disclosure, gifts, favours and lobbying parts of Canada's political finance system fulfill the key principles egalitarian model.

In Chapter 5, based on an examination of political theories (beginning with Rawls and incorporating critiques of Rawls), international standards, behavioural psychology standards, Canadian case law concerning government integrity, evidence concerning the Canadian public's standards and expectations, and based on what I contend is a full and consistent application of the key principles of the Supreme Court's egalitarian principles, I develop and set out a framework of 19 standards for a more egalitarian model for a political finance system (again defined broadly) that prevents even the appearance of a conflict of interest in election and government policy-making processes, along with arguments concerning why the model and the standards meet the requirements of Canada's *Constitution*. In chapters 6 and 7, based on this framework model and standards, I set out 201 specific proposals for rule changes and new rules in the areas of registration, donations, spending, public subsidies, disclosure, gifts, favours and lobbying.

⁴¹ As expressed in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 39 (hereinafter "*Libman*").

2 The Supreme Court of Canada's Egalitarian Model and its Nine Inconsistencies

2.1 Summary of the Historical Basis of the Egalitarian Model

The basis of the structure of the current Canadian political finance system dates back to the 1966 Report of the Committee on Election Expenses (the “Barbeau Committee” – an advisory committee created by the Government of Canada).⁴² Together with the Chappel Committee of 1970 (a House of Commons Committee), their recommendations led to rules being enacted in 1974 in Canada's federal elections law that limited spending by candidates and political parties during elections, required disclosure of donations to candidates and parties annually and after elections, established a partial tax credit for donations and partial reimbursement of candidate and party election expenses.⁴³ The measures also prohibited all expenditures by third parties during election campaigns that directly promoted or opposed a candidate or party (i.e. “partisan” spending), with an exception that allowed for spending undertaken in “good faith” aimed at gaining support for views on an issue of public policy or advancing the aims of any non-partisan organization (i.e. “issues” spending) – an exception that was removed from the *CEA* in 1983.⁴⁴ The removal of this exception essentially banned all third-party

⁴² Committee on Election Expenses, *Report of the Committee on Election Expenses* (1966: Queen's Printer, Ottawa). Known as the “Barbeau Committee” after the name of its Chairperson, Alphonse Barbeau (hereinafter “Barbeau Committee”).

⁴³ *Harper* (2004), *supra* note 10, para. 56. Manitoba Law Reform Commission, *Report on Political Financing and Election Expenses*, (1979), online: <http://www.manitobalawreform.ca/pubs/pdf/archives/31-full_report.pdf>.

⁴⁴ *National Citizens' Coalition Inc. v. Canada (Attorney General)*, 1984 CanLII 1181 (AB QB), <<https://canlii.ca/t/27rmr>>, paras. 26-29 (hereinafter “*National Citizens' Coalition* (1984)”). Herman Bakvis and Jennifer Smith, “Third-Party Advertising and Electoral Democracy: The Political Theory of the Alberta Court of Appeal in *Somerville v. Canada (Attorney General)*”

expenditures. The candidate and political party spending limits have never been challenged in court. However, the ban on third-party spending was challenged in 1984 by the National Citizens Coalition, and the Alberta Court of Queen's Bench struck down the prohibition as a violation of subsection 2(b) *Charter* right to freedom of expression. The court ruled that the federal government's argument that the value of the prohibition was "to ensure a level of equality amongst all participants in federal elections" (given candidates and parties had spending limits) did not outweigh the importance of the right of freedom of expression because "the true test of free expression to a society is whether it can tolerate criticism of its fundamental values and institutions" and, therefore, "A limitation to the fundamental freedom of expression should be assessed on the basis that if it is not permitted then harm will be caused to other values in society."⁴⁵ Though the ruling only applied in Alberta, the 1984 federal election was held soon afterwards, and the federal government did not appeal the ruling, and Elections Canada decided not to enforce the ban anywhere in Canada.⁴⁶

The federal government initiated another study of political finance rules after the 1988 election, the Royal Commission on Electoral Reform and Party Financing (commonly referred to as the "Lortie Commission" after the Chair of the Commission, Pierre Lortie). The Commission's 1991 report

[1996]" (1997) *Canadian Public Policy*, Vol. 23, No. 2 164 at 166 (hereinafter "Bakvis and Smith (1997)"). Feasby (2005), *supra* note 10. Richard Haigh, "'He Hath a Heart For Harping: Stephen Harper and Election Spending in a Spendthrift Age,'" (2005) 29 S.C.L.R. (2d) 305 at 306.

⁴⁵ *National Citizens' Coalition* (1984), *supra* note 44, para. 54. See also paras. 47-50 and 53-57.

⁴⁶ *Harper* (2004), *supra* note 10, para. 56.

recommended a restriction of \$1,000 on third-party spending on advertising during election campaign periods, and the federal government enacted that limit in 1993.⁴⁷ The limit was again challenged by the National Citizens Coalition, and was again struck down in a 1993 ruling by the Alberta Court of Queen's Bench, which was affirmed unanimously in 1996 by the Alberta Court of Appeal in its ruling in *Somerville*, on the basis that the limit amounted "in effect to a ban on direct national third party advertising" and, therefore, "...impairs far too severely the right to vote and the freedoms of expression and association to be justified as a "reasonable" limit on these core democratic rights.⁴⁸ The federal government again did not appeal the ruling.

This balancing act between the right to free expression and fair and equal political processes has continued through legislative policy-making processes both at the federal, provincial and territorial level since the initial federal expense limits, subsidies and donation disclosure requirements were enacted at the federal level, and the cases summarized above challenging third-party limits were filed and ruled on by the courts. Expense limits for parties, candidates and third parties, and public subsidies using various methods, have been enacted in most jurisdictions in Canada. The federal government and various jurisdictions across Canada have extended donation disclosure requirements to electoral district associations. Starting with he

⁴⁷ Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services Canada, 1991), Vol. 4, pp. 350-356 (referred to as the "Lortie Commission" after the Chair of the Commission, Pierre Lortie – hereinafter "Lortie Commission"), as cited in *Libman*, *supra* note 41, paras. 77-79.

⁴⁸ *Canada (Attorney General) v. Somerville*, 1996 ABCA 217 (CanLII), online: <<https://canlii.ca/t/1p6lj>>, para. 99. *Harper* (2004), *supra* note 10, para. 56.

Quebec government in the late 1970s, then the Manitoba government in 2002, and the federal government and most provincial governments during the following 15 years, donations from corporations, unions and other organizations and entities were banned, and individual donations limited.⁴⁹ Only some of these statutory measures have been challenged in court.

2.2 *Libman*: fairness, equality and priority of parties, candidates

In its 1997 ruling in the case *Libman v. Quebec*,⁵⁰ the Supreme Court of Canada (“Supreme Court”) ruled for the first time since the *Charter* was enacted in 1982 on the issue of statutory restrictions on political spending, specifically in that case on spending during a referendum campaign period. Mr. Libman challenged the very restrictive statutory limits in Quebec’s *Referendum Act* that allowed only minimal spending by individuals or groups that did not become affiliated organizations of the official, registered yes or no referendum committees. The *Act*’s limits allowed only expenses for travelling that are not reimbursed (subsection 404(5)), and up to \$600 total for events (subsection 404(9)). The Québec Superior Court and the Court of Appeal both found that the restrictive provisions infringed freedom of expression but were justifiable as a reasonable limit under section 1 of the *Charter*. The basis of the Supreme Court’s analysis in its unanimous ruling began with a quotation from one of the court’s past rulings:

⁴⁹ Elections Canada, Compendium of Election Administration in Canada – Archives, online: <<https://www.elections.ca/content.aspx?section=res&document=index&dir=loi/com/arc&lang=e>>.

⁵⁰ *Libman*, *supra* note 41.

“It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions....”⁵¹

As required by section 1 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), the Supreme Court was attempting to balance the principles that “Political expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by subsection 2(b) of the *Charter*” and that “Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion”⁵² with concerns about the influence that wealthy participants could have over election/referendum debates through spending money on advertising and other outreach activities.

In its application of the section 1 *Charter* test established in the *Oakes*⁵³ case, the Supreme Court in *Libman* stated that the three-pronged objective of restrictions on spending is:

“...egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters’ point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by

⁵¹ *Libman*, *supra* note 41, para. 28, quoting Cory J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at p. 1336.

⁵² *Libman*, *supra* note 41, para. 36, quoting LeDain J. in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 391.

⁵³ *R. v. Oakes*, [1986] 1 S.C.R. 103 (hereinafter “*Oakes*”).

others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.”⁵⁴

And later the Supreme Court states, relating to all three objectives, that:

“The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens ...

To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person’s exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard. Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties. Thus, the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy.”⁵⁵

And again later in the ruling the Court states that the restrictions at issue are aimed at “referendum fairness” and that this goal:

“is related to the very values the Canadian *Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society. The impugned provisions impose a balance between the financial resources available to the proponents of each

⁵⁴ *Libman*, *supra* note 41, para. 41. The Supreme Court expands on these points in paras. 47-57, frequently citing the Lortie Commission, *supra* note 47, Vol. 1. See also statements in paras. 61 and 84.

⁵⁵ *Libman*, *supra* note 41, para. 47.

option in order to ensure that the vote by the people will be free and informed and that the discourse of each option can be heard.... From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions.”⁵⁶

The Court concludes that fairness in campaigns:

“is a laudable objective that will necessarily involve certain restrictions on freedom of expression” [emphasis in original text]. Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process.⁵⁷

Despite the rational, substantial and pressing objective for the limits, the extent of the spending restrictions led the Supreme Court to conclude that the entire law was unconstitutional as it did much more than “minimally impair” the freedom of expression of these individuals and groups, and therefore failed that part of the *Oakes* test.⁵⁸

It is important to note two things. First, the Supreme Court established in the *Oakes* test itself the same fundamental principles of equality, accommodation of a wide variety of expressions of beliefs, and enhancement of participation of individuals and groups in society, that are the basis of the

⁵⁶ *Libman*, *supra* note 41, para. 61.

⁵⁷ *Libman*, *supra* note 41, para. 84.

⁵⁸ *Libman*, *supra* note 41, paras. 74-77.

egalitarian model the Court later developed, starting with *Libman*, in the area of political finance.⁵⁹ In this way, the Court's egalitarian assessment of political finance rules was somewhat pre-determined by its *Oakes* ruling in 1986. Secondly, in making the rational connection between these three objectives and the restrictions at issue in the case, as required by the *Oakes* test, the Court stated in *Libman* that "Scientific proof is not required to meet this standard" only proof on a balance of probabilities, in part because "Referendum campaigns fall within the realm of social science, which does not lend itself to precise proof."⁶⁰ This suggests that the Court would accept as compelling evidence studies showing that, for example, those who spend the most on election campaigns usually win, or those who spend the most on lobbying campaigns usually win the policy changes they want, even though it would be very difficult to prove precisely that spending was the actual key factor in any victory.

In fact, the majority of the Court did accept such evidence in *Libman*, citing as one of the bases of its ruling the, at the time, six-year old assertion in the Lortie Commission report that "expenses incurred in an election campaign – advertising, for example – have a considerable impact on the outcome of the vote".⁶¹ The Court accepted this claim despite the Commission's report actually contained little evidence to prove that claim (though the Court also cited the testimony of Professor Peter Aucoin during the lower court

⁵⁹ *Oakes*, *supra* note 53, para. 64.

⁶⁰ *Libman*, *supra* note 41, para. 39.

⁶¹ *Libman*, *supra* note 41, para. 47, citing Lortie Commission, *supra* note 47, Vol. 1, pp. 324 and 339.

proceedings in support of this claim).⁶² The Court also used the 1988 federal election result as the sole basis for the claim that third-party advertising spending in favour of a party “benefits” a party, based on the fact that big businesses and other third parties spent more than \$3.5 million (1988 figures)⁶³ on ads in favour of a free trade agreement with the U.S., which only the winning Progressive Conservative Party supported in that election.⁶⁴

In the later *Harper* series of cases discussed below that also addressed third-party spending limits, part of the Alberta Court of Appeal (ABCA) record in its 2002 ruling in the case shows that the initial 1990 report by Richard Johnston about the 1988 federal election⁶⁵ that led to the Lortie Commission’s conclusion that election spending has a significant impact on the outcome, and led the Supreme Court to make the same assertion in *Libman*, was disavowed by Johnston in a follow-up book he did with colleagues that was published in 1992, in which he set out how his initial analysis and conclusion was incorrect.⁶⁶ The Court mentions this in its 2004 appeal ruling in *Harper*,⁶⁷ but still states that the ABCA erred in dismissing the Court’s ruling in *Libman*⁶⁸ because the goal of electoral fairness, and the egalitarian model, are not only based on evidence of an effect on an election outcome, but also on ensuring that the electoral process appears to be fair

⁶² *Libman*, *supra* note 41, para. 47.

⁶³ Hiebert (1991), *supra* note 5 at 22-23.

⁶⁴ *Libman*, *supra* note 41, para. 51.

⁶⁵ Richard Johnston (1990), *supra* note 5.

⁶⁶ Richard Johnston et al (1992), *supra* note 5. See discussion of the two reports in *Harper v. Canada (Attorney General)*, 2002 ABCA 301 (CanLII), online: <<https://canlii.ca/t/5bm5>> at paras. 101-109 and Appendix B (hereinafter “*Harper* (2002)”).

⁶⁷ *Harper* (2004), *supra* note 10, paras. 51 and 95.

⁶⁸ *Harper* (2004), *supra* note 10, para. 64.

and to have integrity so that it maintains the “confidence that Canadians have in their democratic electoral system”.⁶⁹ As a result, the Court concluded that: “Among other things, integrity of the electoral process requires that political advertising is not perceived as manipulating voters.”⁷⁰ The Court in *Harper* also criticized the B.C. Supreme Court for focusing in another third-party spending limit case solely on conflicting evidence that the spending had an effect on outcomes, and not taking into account the perceived unfairness of unlimited spending.⁷¹

In *Libman*, the Court also accepted very limited evidence for its conclusions that spending limits were needed to maintain the confidence of Canadians in the integrity of the electoral system. The evidence was only the results of one-time surveys conducted by the Commission, again six years before the Court’s ruling, which showed that Canadians supported limits on electoral spending.⁷² I mention all of this here to point out that part of the Court’s egalitarian model is based not only on definite or even probable evidence of fair outcomes but instead almost solely on the appearance of integrity and fairness in the political process. I also mention here the Court’s consideration of this evidence because in Chapters 3 and 4, in which I evaluate whether Canada’s current political finance system fulfills the criteria of the Court’s egalitarian model, and in Chapters 6 and 7 where I suggest proposals for making the system more egalitarian, I attempt to provide more

⁶⁹ *Harper* (2004), *supra* note 10, para. 97, and see also paras. 95-96 and 98-99.

⁷⁰ *Harper* (2004), *supra* note 10, para. 97.

⁷¹ *Harper* (2004), *supra* note 10, paras. 95 and 99, citing *Pacific Press v. AGBC*, 2000 BCSC 248 (CanLII), online: <<https://canlii.ca/t/53tn>> (see paras. 77-93 and 104-110).

⁷² *Libman*, *supra* note 41, paras. 47 and 52.

extensive evidence than the Court had available to rely on in its *Libman* and *Harper* rulings.

In section 2.9 below, I set out a full list of the elements of the Supreme Court of Canada's egalitarian model as it has been expressed in court rulings to date that apply to the political finance system but, to summarize briefly here, *Libman* and parts of *Harper* (and subsequent cases summarized below) established the key fundamental principles that the system: 1. should uphold political equality based on the fundamental democratic principle of one person, one vote; 2. must appear, and actually be, fair and to have integrity so the public has confidence in it, and; 3. must provide adequate information to voters to participate in political processes.

The Supreme Court in *Libman* also established a hierarchy of actors in elections because, while "what [third parties] have to say is important, it is the candidates and political parties that are running for election"⁷³ and, therefore, the candidates and parties have priority as actors in the election, and their campaigns and interests must be protected. This has been labelled the "party-democracy model" with its counterpoint being the "open-democracy model" that emphasizes the role of all actors – not only parties but also voters and third parties.⁷⁴ Immediately after making it clear that it prioritized the interests of parties and candidates, the Court stated that, given every individual voter could be a third-party spender, along with every interest

⁷³ *Libman*, *supra* note 41, para. 50.

⁷⁴ Bakvis and Smith (1997), *supra* note 44, at 172-173. See also a critique of how the party-democracy model conflicts with the egalitarian model in Bredt and Pottie (2005), *supra* note 10, at 293-299 and 301-303.

group, the possible “disproportionate” impact of such spending meant “Limits on independent spending must therefore be lower than those imposed on candidates or political parties.”⁷⁵

The Supreme Court stated in *Libman* that it was up to the legislature to decide what larger amount non-affiliated groups and individuals should be allowed to spend on paid advertising during a referendum. It suggested, in a decidedly vague sentence, that “the amount of \$1,000 proposed by the Lortie Commission in the Canadian election context” would be fine as the limit, but “is not necessarily appropriate in the context of a Quebec referendum” and that: “The appropriate amount will have to be fair while being small enough to be consistent with the objective of the Act.”⁷⁶ These sentences seem to suggest that a constitutional limit in Quebec could be lower than \$1,000, but this is confusing because the Court in *Libman* rejected a limit on third-party spending that allowed only \$600 in travel expenses to hold events during a Quebec referendum. Is the Court saying that it would have found the limit to be constitutional if it had allowed \$600 in travel expenses plus \$1,000 (or somewhat less) in ad spending? It is unclear.

As a result, it is also unclear in the ruling in *Libman*, which was issued in 1997, whether the Court was rejecting the Alberta Court of Appeal’s (ABCA) unanimous 1996 ruling in the *Somerville* case that found a limit of \$1,000 on ad spending by a third party during a federal election (along with a requirement to disclose the sponsor of each ad, and a prohibition on colluding

⁷⁵ *Libman*, *supra* note 41, para. 50.

⁷⁶ *Libman*, *supra* note 41, paras. 80-81. The complete discussion in the ruling of this issue is from paras. 66-82 (esp. paras. 75-81).

with anyone else to exceed the limit) to be unconstitutional because it was much lower than the spending limit for parties and candidates.⁷⁷ As noted in the previous section, the *Somerville* case was part of a separate stream of cases since 1983 challenging the two bills that the federal government enacted limiting advertising spending by third parties. The Alberta courts consistently struck down the limits as unconstitutional restrictions on political expression in challenges filed by the non-profit, conservative National Citizens Coalition (NCC) organization.⁷⁸

As mentioned in the previous section, the Canadian government did not apply to the Supreme Court for leave to appeal the ABCA's *Somerville* ruling. If it had, it is possible, based on its 1997 ruling in *Libman*, that the Court may have upheld the \$1,000 limit. If that had happened, it would have significantly changed developments in the law across Canada since 1997 as a \$1,000 third-party ad spending limit would have been the norm. In contrast, since then the federal and several provincial governments (except Quebec) have proposed and enacted limits on third-party ad spending that are much higher than \$1,000 – they range from limits of \$100,000-\$150,000 in the provinces that have set limits to initially \$150,000 and currently more than \$500,000 during a federal election campaign period.

⁷⁷ *Libman*, *supra* note 41, paras. 55 and 79.

⁷⁸ Kristen Douglas and Mollie Dunsmuir, "Charter of Rights and Freedoms: Fundamental Freedoms," online: Library of Parliament <<http://publications.gc.ca/Collection-R/LoPBdP/CIR/8416-e.htm#a.%20Political>>.

2.3 *Harper*: fair, reasonable limits on paid speech, and registration and disclosure requirements, are constitutional

The final case in the stream of cases filed in Alberta since 1983 was filed in response to the Liberal government's enactment of Bill C-2 in June 2000 which, among other mostly minor changes requiring more disclosure of donations, added significant measures to the *Canada Elections Act* ("CEA")⁷⁹ limiting third-party advertising spending during the election campaign period to \$150,000 nationally and \$3,000 in each electoral district, increasing each year by the rate of inflation.⁸⁰ As it had in the past, the National Citizens Coalition (NCC) filed the case in the same Alberta court that had twice ruled that such limits were unconstitutional. The NCC's executive director at the time was Stephen Harper and so the case was entitled *Harper v. Canada*.

The Alberta courts granted the NCC an injunction suspending the limits (which was removed by the Supreme Court of Canada (SCC) late in the election campaign period)⁸¹ and subsequently ruled the limits unconstitutional.⁸² As a result, the limits were not in force for most of that election campaign period. Given the Supreme Court of Canada's unanimous ruling in the *Libman* case had established that limits, if they are high enough, are constitutional and needed for fair voting processes,⁸³ the federal

⁷⁹ *Canada Elections Act* (S.C. 2000, c. 9), online: <<https://laws-lois.justice.gc.ca/eng/acts/e-2.01/index.html>> (hereinafter "CEA")

⁸⁰ Bill C-2, An Act respecting the election of members to the House of Commons, repealing other Acts relating to elections and making consequential amendments to other Acts, online: LEGISinfo <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8975>>.

⁸¹ *Harper v. Canada (Attorney General)*, 2000 ABCA 288 (CanLII), online: <<https://canlii.ca/t/5rp2>>. *Harper v. Canada (Attorney General)*, [2000] 2 SCR 764, 2000 SCC 57 (CanLII), online: <<https://canlii.ca/t/524l>>.

⁸² *Harper v. Canada (Attorney General)*, 2001 ABQB 558 (CanLII), online: <<https://canlii.ca/t/5m2j>>.

⁸³ *Libman*, *supra* note 41.

government appealed the Alberta Court ruling. On December 16, 2002, the Alberta Court of Appeal rejected the federal government's appeal. However, unlike in its 1996 *Somerville* ruling, one justice dissented, citing the Supreme Court's fairness reasons in *Libman*.⁸⁴ The federal government then applied for leave to appeal, which the Supreme Court granted.

In spring 2004, in a 6-3 ruling, the majority of the Supreme Court ruled in the *Harper* case⁸⁵ that the limits violated the subsection 2(b) *Charter* right to freedom of expression, but upheld the limit under the *Oakes* test as rationally connected to their objectives and a minimal impairment of the freedom in comparison to their benefit. The Court's reasons were that third-party advertising is unrestricted prior to the commencement of the election period; the limit only covers "advertising" that is associated with a candidate or party (i.e. the limit only covered "paid speech" – spending was not limited on things such as news releases, op-eds, holding events, website posts and communications with group supporters); and the limit allows third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties, while precluding the voices of the wealthy from dominating the political discourse.⁸⁶ In doing so, the Court echoed the principles set out in *Libman*,⁸⁷ that subsection 2(b) of the *Charter* guarantees "meaningful" equal participation in order to prevent wealthy

⁸⁴ Justice Berger, quoting from *Libman*, *supra* note 41, para. 84: Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. *Harper* (2002), *supra* note 66 at para. 293.

⁸⁵ *Harper* (2004), *supra* note 10.

⁸⁶ *Harper* (2004), *supra* note 10, paras. 112, 114-118, and 120-121.

⁸⁷ *Libman*, *supra* note 41, para. 41.

individuals from dominating election debates so that voters can obtain information to make choices for, and obtain, effective representation.⁸⁸

The Court also extended those *Libman* principles to become the basis also for compliance with section 3 of the *Charter*, holding that reasonable spending limits during elections do not violate section 3 because they are aimed at the objectives established in *Libman*, and that “s. 3 does not guarantee a right to unlimited information or unlimited participation”⁸⁹ nor a right “to mount a media campaign capable of determining the outcome” of an election.⁹⁰ In other words, “third parties are permitted to engage in informational but not necessarily persuasive campaigns, especially when acting alone.”⁹¹ Again, as in *Libman*, the Court emphasized that the public must perceive, and have confidence in, the fairness and integrity of every aspect of the system. To express this in reverse, every aspect of the system must appear to be fair and to have integrity, in order for the public to have confidence in the system.⁹²

To summarize the distinct principles set out in *Harper*, spending limits during election campaign periods for third parties: 1. must only apply to paid advertising, not to other forms of communication; 2. must be at a level that ensures electoral fairness, but not so low that expression and participation in the election at a level that is meaningful, and the flow of adequate information

⁸⁸ *Harper* (2004), *supra* note 10, paras. 61-63 and 67-70.

⁸⁹ *Harper* (2004), *supra* note 10, para. 72. See also paras. 71-74.

⁹⁰ *Harper* (2004), *supra* note 10, para. 74.

⁹¹ *Harper* (2004), *supra* note 10, para. 121.

⁹² *Harper* (2004), *supra* note 10, paras. 23-24, 63, 79, 82-83, 91-92, 97, 99, 101-104, 108-109, 120, 122, 142 and 146. *Libman*, *supra* note 41, paras. 41, 52 and 84.

to voters, are effectively prohibited, and; 3. the limit can be the same for third parties of various types and characteristics (individuals, corporations, unions and other organizations).

As well, in order to help ensure the integrity of the system, the Court in *Harper* also upheld the related rules prohibiting third-party groups from splitting into sub-groups, or colluding, in order to spend more than the limit.⁹³ The Court also upheld the rules requiring third parties that spend more than \$500 on advertising to register in a public registry (to be clear, spending on small-scale personal expressions such as putting up a lawn sign or wearing a t-shirt with a political message are not counted),⁹⁴ disclose their identity on each ad, file with the CEO within four months after election day a report disclosing the amount of its own money the third party spent on ads and the identities of donors of more than \$200 who donated to pay for the advertising during the six-month period before the election campaign period begins (with the CEO making the reports public within one year after election day), and to appoint an auditor if more than \$5,000 is spent on ads, because these rules inform voters about third parties (thereby protecting their section 3 rights) and are needed to assist enforcement of the rules.⁹⁵ In addition, the Court upheld the prohibition on third parties advertising on polling day, to prevent voters being misled by a misleading ad without any time for correction of the ad.⁹⁶

⁹³ *Harper* (2004), *supra* note 10, paras. 122-127.

⁹⁴ The Supreme Court reaffirmed the constitutionality of the requirement to register for sponsoring paid advertising in *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6 (CanLII), [2017] 1 SCR 93, <<https://canlii.ca/t/gx3xm>> at paras. 24-31 (re: exclusions from “sponsorship” definition and also 45-56).

⁹⁵ *Harper* (2004), *supra* note 10, paras. 136-146.

⁹⁶ *Harper* (2004), *supra* note 10, paras. 128-135.

The dissent in *Harper* by then-Chief Justice MacLachlin, Justice Major and Justice Binnie disagreed that the spending limits were reasonable, but agreed that the prohibition on advertising survey results on election day, and the third-party registration and disclosure measures, were justifiable.⁹⁷

It is important to highlight here that the principles set out by the Supreme Court in *Harper*, and *Libman*, only apply to third-party spending, not party and candidate spending, during election campaign periods. As noted above, candidate and party spending limits have not been challenged in Canadian courts since they were enacted in the mid-1970s and, as a result, the Supreme Court has not addressed the issue of whether those limits are reasonable. I contend that this is a gap in the Court's model that I attempt to close in section 2.11 below (in which I present a summary list of projections of the Court's model onto areas of the political finance system that the Court has not addressed). I also contend in section 2.10 below that this is an inconsistency in the Court's model because, in *Harper* and *Libman*, it considered the third-party limits as if they exist in a vacuum instead of comparing fully whether the candidate- and party-spending limits are set at a level that, compared to the third-party limits, complies with the egalitarian model.

As well, the Court upheld a singular, blanket third-party ad spending limit in *Harper* (and suggested a blanket limit in *Libman*) even though the Court stated that spending limits "must be carefully tailored"⁹⁸ for candidates,

⁹⁷ *Harper* (2004), *supra* note 10, paras. 47-48.

⁹⁸ *Harper* (2004), *supra* note 10, para. 73.

parties and third parties, and even though different situations involving various political actors raise the question of whether some sort of sliding scale or differential limits should apply, specifically in order to uphold the principle of one person, one vote. To give one example of many possible examples, the Court stated in *Harper* when discussing why third-party limits must be lower than candidate and party limits:

“It cannot be forgotten that small political parties, who play an equally important role in the electoral process, may be easily overwhelmed by a third party having access to significant financial resources.”⁹⁹

However, the Court then ignored that reasonable supposition, which points to having a lower third-party ad spending limit when small parties are involved in an election and/or when a small party is being targeted by a third party, and instead upheld blanket limits of \$150,000 nationally and \$3,000 locally for every third party, and every ad spending initiative, in every election campaign period. I include this inconsistency in the list of nine inconsistencies in the Supreme Court’s model set out below in section 2.10. I acknowledge that having limits that are varied is more complex than accepting a blanket limit. In Chapter 3, sections 3.14 to 3.19, and 3.27 and 3.28, I examine more fully how the spending limits for various political actors are not egalitarian, and in Chapter 6, sections 6.5-6.6 and 6.12-6.13, I propose changes to make all the spending limits more consistently egalitarian, including ways of making varying limits workable.

⁹⁹ *Harper* (2004), *supra* note 10, para. 116, citing *Libman*, *supra* note 41, paras. 49-50.

2.4 Supreme Court, BCCA and (somewhat) Ontario rulings: pre-election third-party ad spending limits are unconstitutional

The Supreme Court has not ruled directly and fully on a related area – pre-election (also known as “pre-campaign”) spending on advertising by third parties. The Court suggested in *Harper* that section 3 of the *Charter* applies to the pre-election period as it spoke of the section protecting the right to meaningfully participate not only in the electoral process but also “in the political process” – which suggests that the Court may favour pre-election ad spending limits to protect section 3 rights.¹⁰⁰ However, the Court, at least in part, upheld the limits that apply to spending during election campaign periods at issue in *Harper* based on the fact that:

...third party advertising is not restricted prior to the commencement of the election period. Outside this time, the limits on third party intervention in political life do not exist. Any group or individual may freely spend money or advertise to make its views known or to persuade others. In fact, many of these groups are not formed for the purpose of an election but are already organized and have a continued presence, mandate and political view which they promote. Many groups and individuals will reinforce their message during an electoral campaign.¹⁰¹

The Supreme Court of Canada’s rulings in *Libman* and *Harper* were cited by the B.C. courts in a series of rulings addressing the area of pre-campaign spending from 2009 to 2011. In 2009, the B.C. Supreme Court (BCSC) ruled on newly enacted third-party ad spending limits of \$150,000 total across the province, and \$3,000 in each riding, that applied during not

¹⁰⁰ *Harper* (2004), *supra* note 10, para. 73.

¹⁰¹ *Harper* (2004), *supra* note 10, para. 112.

just the 28-day election campaign period but also during a 60-day pre-campaign period.¹⁰² It is important to note that, at the time, a spending limit of \$1.1 million existed for political parties during a 60-day pre-campaign period, and \$70,000 for candidates, along with an election campaign period limit of \$4.4 million for parties and \$70,000 for candidates.¹⁰³ The BCSC ruled that the third-party limits did not violate the subsection 2(d) freedom of association rights of the unions who were among the plaintiffs, holding that the measures were not related enough to collective bargaining rights to fall within the unions' association rights, even for public sector unions, and that the anti-collusion measures were aimed at ensuring the integrity of the spending limits, and so also did not violate association rights.¹⁰⁴ For the same reasons as set out in *Harper*, the BCSC also ruled that the limits did not violate section 3.¹⁰⁵ The B.C. government conceded that the limits violated subsection 2(b).¹⁰⁶ The BCSC found that, in its section 1 *Oakes* test analysis: the limits were adequately clear;¹⁰⁷ had the rationally connected, pressing and substantial objective of electoral fairness by fulfilling the same four requirements as set out in *Harper*;¹⁰⁸ and that deference was due to the legislature given the context and purpose of the limits; and that the limits were reasonably minimally impairing (in part because Internet, website and social media

¹⁰² *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436 (CanLII), online: <<https://canlii.ca/t/22z75>>, paras. 20-21 (hereinafter "*B.C.T.F. v. B.C. (2009)*").

¹⁰³ *B.C.T.F. v. B.C.* (2009), *supra* note 102, para. 23.

¹⁰⁴ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 58-76 and 77-84 and 85-94.

¹⁰⁵ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 95-105.

¹⁰⁶ *B.C.T.F. v. B.C.* (2009), *supra* note 102, para. 106.

¹⁰⁷ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 111-128.

¹⁰⁸ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 158-188.

technologies allow for spreading a message relatively inexpensively).¹⁰⁹

However, in the end, the BCSC found that the limits were not justifiable under section 1 of the *Charter* because they covered the pre-election period, which made them broader than necessary to fulfill the objective of electoral fairness¹¹⁰ and, as a result:

266. Even according the Attorney General a healthy measure of deference, I am not satisfied that the harm sought to be addressed by extending the third party spending restrictions into the pre-campaign period has been adequately demonstrated. On the other hand, I consider their effect in impairing the plaintiffs' s. 2(b) freedoms to be anything but minimal.

267. By operating in the 60 days prior to the campaign period, the spending restrictions encompass part of the legislative session.

...

268. ...To curtail the ability of third parties to engage in political speech at that crucial time in the absence of an evidentiary or logical basis as to why it is necessary to do so is not a minimal impairment of freedom of expression.

...

270. ... Even accepting the necessity of approaching the question with deference, I am not satisfied that the impugned provisions are minimally impairing. I ground this conclusion on the overly broad definition of election advertising together with the application of the spending restrictions to the pre-campaign period.

... [and, finally]

280. While I accept that the salutary effects identified in *Harper* exist in the present case insofar as the campaign period is concerned, I am not

¹⁰⁹ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 189-237.

¹¹⁰ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 238-256, especially paras. 253 and 256.

satisfied that they all exist in relation to the pre-campaign period. As is evident from my discussion of minimal impairment, I do not consider that the impugned provisions are necessary to protect the integrity of the political party and candidate spending limits during the pre-campaign period. I also do not consider that they increase confidence in the electoral process, given the extent to which they unnecessarily inhibit political speech while the legislature is in session...¹¹¹

In its appeal, the B.C. Attorney General focused on the argument that, under a section 1 analysis, the government's limits reasonably balanced the interests of all stakeholders – parties, candidates, third parties of various sizes and types, and voters – in the same way other jurisdictions had, while addressing the harm to non-wealthy individuals and groups of not having limits and allowing wealthy interests to dominate pre-election debates.¹¹² The B.C. Court of Appeal (BCCA) agreed that the trial judge may have erred in his analysis, although it did not specify exactly how, but that the trial judge's conclusion was correct "that restricting third-party advertising during the pre-campaign period would unjustifiably interfere with third parties' issue advocacy, lobbying activity, and other advertising endeavours unrelated to the election."¹¹³

The British Columbia government amended the law in 2012 by shortening the pre-campaign time period during which the limits apply to the

¹¹¹ *B.C.T.F. v. B.C.* (2009), *supra* note 102, paras. 257-283, esp. paras. 266-268, 270 and 280.

¹¹² *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2011 BCCA 408 (CanLII), <<http://canlii.ca/t/fnh4t>> (hereinafter *B.C.T.F. v. B.C.* (2011)), paras. 30-31 and 44.

¹¹³ *B.C.T.F. v. B.C.* (2011), *supra* note 112, paras. 31 and 64-70.

shorter of 40 days before the campaign period begins or “the period beginning 21 days following any sitting of the Legislative Assembly and ending at the beginning of the campaign period” and referred the new statutory provisions to the BCCA for a ruling on their constitutionality.¹¹⁴ The BCCA agreed that the amendments made the limits “less impairing” of freedom of political expression than they were previously, but still rejected the limits as unconstitutional based on the fact that the definition of advertising in the statutory provision was overly broad as it covered not only advertising that promoted or opposed a candidate or party but also advertising about issues and, as a result, “could not be said to be minimally impairing because it captured political expression well beyond what could be said to have as its purpose the influencing of an election in the pre-campaign period.”¹¹⁵

In November 2017, the B.C. legislature again amended its provincial election law to limit third-party ad spending (including on canvassing by phone or in person, and on mailings) during the 60-day period before the election campaign period, and during election campaigns. However, for the pre-election period, the law attempts to address the concerns expressed in the previous court rulings with a much more specific limit that only applies to advertising that “directly promotes or opposes” a party or candidate (during

¹¹⁴ *Reference re Election Act (BC)*, 2012 BCCA 394 (CanLII), <<http://canlii.ca/t/ft1n3>>, paras. 12-19 (hereinafter “*Reference re Election Act (BC)*”).

¹¹⁵ *Reference re Election Act (BC)*, *supra* note 114, paras. 31 and 36-45. See discussions of this issue in: Tom Flanagan, “Political Communication and the ‘Permanent Campaign,’” in David Taras and Christopher Waddell, eds, *How Canadians Communicate IV: Media and Politics* (Edmonton: Athabaska Press, 2012) 129.

the election campaign period, issue-related advertising is also limited).¹¹⁶ The new law has not been tested in court.

In 2016, the Ontario government amended the province's *Election Finances Act (EFA)*, which already limited third-party advertising spending during the election campaign period to a maximum of \$100,000 in total, and \$4,000 in any electoral district (adjusted by the rate of inflation since 2017), and required registration after spending \$500, and prohibited collusion on spending with other third parties to exceed the spending limit, and required filing a donation and spending report six months after the election.¹¹⁷ The amendments added limits on pre-election ad spending by parties and third parties, only for a much longer period than in B.C. – \$1 million for parties, and for third parties \$637,200 total (\$600,000 multiplied by the rate of inflation since 2017) and \$25,488 in any electoral district (\$24,000 multiplied by the same inflation rate) – for the six months leading up to the beginning of the election campaign period, and covering issue ads as well as partisan ads.¹¹⁸ The limits do not apply to advertising by the Ontario government.¹¹⁹

Several unions filed a case in January 2018 challenging the pre-election limits as a violation of their, and their members', subsection 2(b) *Charter* rights to free expression, but did not move the case forward in the

¹¹⁶ *Election Act*, [RSBC 1996] c. 106, subsections 1(1), (2) and (3) (definitions) and Part 11. In Manitoba, *The Election Financing Act*, C.C.S.M, c. E27, sections 115 (definition) and 82-83, limit ad spending by third parties to \$100,000 during the 90 days before the election campaign period, and to \$25,000 during the campaign.

¹¹⁷ *Election Finances Act*, R.S.O 1997, c. E-7, section 1 (definition of "political advertising"), subsection 37.10.1 and sections 37.01, 40.1, 37.2 to 37.10, and 37.12 (hereinafter "*EFA* (Ont.)").

¹¹⁸ *EFA* (Ont.), *supra* note 117, section 1 (definition of "political advertising"), subsection 37.10.1(2).

¹¹⁹ *EFA* (Ont.), *supra* note 117, section 37.0.2.

following three years. In spring 2021, the Ontario government enacted Bill 254 that, among other changes to the election law, extended the time period of the third-party ad spending limits to 12 months before the election begins, while maintaining the same spending limit, and required a report on ad spending to be filed with the CEO, and made public, every time an additional \$1,000 was spent.¹²⁰ The unions quickly amended their case filing and pursued the *Charter* challenge.

On June 8, 2021 Ontario Superior Court Justice Morgan issued a ruling finding that the extended pre-election limits violated subsection 2(b) but were not reasonably justified as a minimal impairment, and were disproportional, only because the government had filed expert affidavits in the earlier case that stated that a six-month time period was reasonable.¹²¹ In other words, in contrast to the B.C. courts, Justice Morgan found that pre-election limits were enacted for pressing and substantive objective,¹²² and had a rational connection to that objective,¹²³ and would have met the minimal impairment and proportionality tests, with deference to the legislature's decisions concerning the exact amount and time period of the limits, if the limits were only in effect for six months before the election campaign begins.

The Ontario government reacted to the ruling by re-imposing the limits through Bill 307, invoking the notwithstanding clause in the bill in an attempt

¹²⁰ *EFA* (Ont.), *supra* note 117, subsection 1(1) (definition of “political advertising”), subsection 37.10.1(2) and 40.1. Democracy Watch, News Release (March 30, 2021), online: <<https://democracywatch.ca/ford-governments-bill-254-makes-undemocratic-unethical-and-likely-unconstitutional-changes-that-will-make-ontario-elections-unfair/>>.

¹²¹ *Working Families Ontario v. Ontario*, 2021 ONSC 4076 (CanLII), <<https://canlii.ca/t/jg9h9>>, paras. 34, 63-66, and 80 (hereinafter “*Working Families 1*”).

¹²² *Working Families 1*, *supra* note 121, paras. 46-56.

¹²³ *Working Families 1*, *supra* note 121, paras. 57-62.

to shield the measures from judicial review.¹²⁴ The unions filed a new *Charter* challenge on the basis that the limits also violated section 3 of the *Charter*, and Democracy Watch, the Canadian Civil Liberties Association, Criminal Lawyers Association and the Centre for Free Expression intervened in the case. Justice Morgan was again assigned to rule on the application and ruled in December 2021 that the limits comply with section 3.¹²⁵ Before I summarize the main basis of this ruling, it is important to note that this ruling clarified and qualified the June 2021 ruling in a significant way. In the June 2021 ruling, Justice Morgan summarized the definition of “political advertising” applicable to third-party advertising as follows:

Section 1.1(1) of the EFA defines “political advertising” broadly to include advertising that directly or indirectly promotes or opposes a party, leader or candidate. It also covers “... advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any... position on an issue that can reasonably be regarded as closely associated with a registered party or its leader or a registered candidate”.¹²⁶

Although another point of the June 2021 ruling states that, unlike the B.C. law’s provisions, the Ontario provisions “effectively limit the application of the term “political advertisement” to “election-oriented communications”, Justice Morgan did not expand on that point. This, I contend, seemed to establish

¹²⁴ Democracy Watch, News Release (June 14, 2021), online: <<https://democracywatch.ca/35000-voters-call-on-doug-ford-not-to-use-notwithstanding-clause-to-overrule-courts-and-arbitrarily-extend-third-party-ad-spending-limits/>>.

¹²⁵ *Working Families Coalition (Canada) Inc. v. Ontario*, 2021 ONSC 7697 (CanLII), <<https://canlii.ca/t/jl5xv>> (hereinafter “*Working Families 2*”).

¹²⁶ *Working Families 1*, *supra* note 121, para. 12. Note that the paragraph refers to an incorrect section – it should begin “Section 1(1) of the EFA defines...” and same correction changing “1.1(1)” to “1(1)” should be made in the second sentence of para. 15.

that the definition of “political advertising” included issue-oriented advertising. However, the following statements in Justice Morgan’s December 2021 ruling clearly established that “political advertising” as defined in subsection 1(1) of the *EFA* does not include issue advertising (with my emphasis added to para. 75 quoted below):

73. Importantly, the restricted activity of “political advertising” refers to election-oriented advertising – i.e. the promulgation of advertisements “promoting or opposing a registered party, party leader or candidate for office.” It does not capture advertising on matters of public policy and public debate that are not part and parcel of that specifically electoral context.

74. As I stated in my analysis with respect to the section 2(b) challenge, and as is now made even more clear in the Ontario government’s *Election Handbook for Third Parties*, the interpretive guidance contained in the enumerated factors in section 37.0.1 of the *EFA*, together with the overall context of the legislation, serves to limit the application of the term “political advertisement” to election-oriented messages. Contrary to the Applicants’ arguments both here and in the prior litigation, the definition is not so broad as to be incapable of predictable interpretation or so uncertain that even the Chief Electoral Officer will not be able to properly enforce it. Indeed, the Chief Electoral Officer, in its intervenor submissions here, expresses no such concern.

75. Counsel for the Applicants also state that they worry that politicians will be able to, in effect, “shut down” a third party’s advertising campaign by making an issue an election issue and thereby bringing the advertisement within the ambit of restriction. I do not see this as a realistic concern. The *EFA* does not restrict issue advertising, including

advertising with respect to issues which are also the topic of campaigning and debate among candidates. **Third parties can spend as much as they want on issues of the day, provided they stay focused on issues themselves rather than on the candidates, parties, and leaders that embrace or oppose them.**

76. To illustrate using what is by now a cliché of an electoral issue, third parties can advertise all they want that tax rates are too high and should be lowered or that tax rates are too low and should be raised; they can advertise in an unlimited way that there is a need for new taxes or that there is a need to eliminate existing taxes. The issues of tax policy are untouched by the EFA spending restrictions. On the other hand, if a candidate in an election were to declare, as an American presidential candidate famously did, “Read my lips. No new taxes”, a hypothetical third party advertisement similar to the one described earlier declaring a political party leader to be a liar would come within the spending restrictions.¹²⁷

By restricting the application of the Ontario limits in this way, Justice Morgan significantly diluted their force and effect as a limitation on free speech. Justice Morgan then expanded on that basis to hold that the limits complied with section 3 because they met the requirement that they be “carefully tailored” to address the harm of wealthy interests dominating public policy debates given that:

1. despite the fact that Bill 307 was enacted within days, the limits (originally enacted by Bill 254) were developed by the government over months;¹²⁸

¹²⁷ *Working Families 2*, *supra* note 126, paras. 73-76.

¹²⁸ *Working Families 2*, *supra* note 126, paras. 89 and 98-100.

2. the limits apply to all third parties, and so cannot be said to be targeted only at the applicant unions;¹²⁹
3. the limits are not unconstitutional “self-dealing” by the government because (as the Supreme Court established in *Harper*), while they are not perfectly designed, the limits allow for modest informational campaigns, which are the only type of campaigns that third parties have a right to undertake on any issue (or during any election) given that they are not the primary actors in any public or election debate, politicians and political parties are, and given that they do not face the public accountability of an election that politicians and parties face,¹³⁰ and;
4. as a result, a section 1 analysis of the limits under section 3 is not required.

The applicant unions appealed Justice Morgan's ruling and on March 6, 2023 the majority of the Ontario Court of Appeal overturned the ruling and suspended the 12-month limit period for 12 months (to give the Ontario government time to amend the provisions) on the grounds that, given the time period of the limit was doubled but the spending limit was not increased: 1. the measures were required to be, and clearly were not, carefully tailored (which the majority says is required overall not just as part of the *Oakes* section 1 test), and; 2. under section 1 the provisions were more than minimally impairing, and that Justice Morgan had not considered fully enough, and the Ontario government (Attorney General) had not shown clearly, whether the limits actually allow for a modest informational campaign that is

¹²⁹ *Working Families 2*, *supra* note 126, paras. 90-95.

¹³⁰ *Working Families 2*, *supra* note 126, paras. 96-97 and 102-109.

constitutionally guaranteed under the egalitarian model.¹³¹ The dissenting judge concluded, I think correctly, that Justice Morgan had actually reviewed the evidence (summarized above) and properly concluded that the limits allow for a modest informational campaign (paras. 174-196), and pointed out that the majority was setting a precedent by not deferring to the government at all and, instead, requiring the government to show that the measures were “carefully tailored” which, in the past, was a requirement the courts have only applied as part of their *Oakes* section 1 analysis (paras. 166-173). The one part of the dissent I disagree with is paragraph 191 which cites paragraph 109 of Justice Morgan’s ruling in which he claimed that the Ontario government had completed “multiple studies” to show that a 12-month limit “was also aimed at fostering an egalitarian electoral playing field.” In fact, neither the government nor anyone else has ever completed such studies.

In any case, based on the BCCA case rulings, and the two Ontario case rulings, and also because while the Supreme Court has not directly ruled on the issue of pre-election spending it expressed in *Harper* the suggestion that it did not support pre-election spending limits,¹³² I include in my summary of the Court’s egalitarian model a principle that pre-election ad spending limits are unconstitutional unless they only limit spending on ads that promote or

¹³¹ *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139 (CanLII), online: <<https://canlii.ca/t/jvxww>>, paras. 87-91, 100-122, 123-136, 139-141 and 143 (hereinafter “*Working Families 2 (Appeal)*”). The Ontario government announced that it would apply for leave to appeal to the Supreme Court of Canada, but as of May 20, 2023 the author could not verify that the government actually did apply for leave to appeal. Canadian Press, “Ontario’s top court strikes down third-party election ad spending rules,” (March 6, 2023), CBC.ca, online: <<https://www.cbc.ca/news/canada/toronto/third-party-spending-court-1.6769636>>

¹³² *Harper* (2004), *supra* note 10, para. 112.

oppose parties or candidates, and only for a brief period of time – and even better is if that period of time is when the legislature is adjourned. That may not be exactly how the Supreme Court may rule on the issue if the Ontario government has appealed the ONCA’s ruling in *Working Families II* and is granted leave to appeal, but I propose it as a plausible summary of how it seems the Court would rule on the issue based on the case law to date.

2.5 *Figueroa*: unfair, unreasonable barriers to parties are unconstitutional

In the 2003 *Figueroa* case, the Supreme Court reviewed another area of Canada’s political finance system – a CEA provision that required a party to have 50 candidates in order to be a registered party, and thereby excluded smaller parties from three public subsidies/benefits, namely the right of donors to receive a tax deduction for donations made to the party (and the corresponding right of the party to issue a tax receipt to donors), the right to retain unspent election campaign funds, and the right to have the party’s name listed with its candidate’s name on the election ballot.¹³³ The majority relied upon the egalitarian principles set out in the Court’s ruling in *Libman* in striking down the 50-candidate requirement because it violated s. 3 *Charter* electoral participation rights, stating that, given registered political parties receive these two public benefits:

there already is reason to be concerned that the most affluent parties will dominate the public discourse and deprive their opponents of a

¹³³ *Figueroa v. Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37 (CanLII), <<http://canlii.ca/t/1g6pl>>, para. 18 (hereinafter “*Figueroa* (2003)”).

reasonable opportunity to speak and to be heard. Legislation that augments this disparity increases the likelihood that the already marginalized voices of political parties with a limited geographical base of support will be drowned out by mainstream parties with an increased ability to both raise and retain election funds. This, in turn, diminishes the capacity of the individual members and supporters of such parties to play a meaningful role in the electoral process... by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders... The restriction on these benefits has a more general adverse effect as well. The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences... By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.¹³⁴

The Court also stated that the right to effective representation under s. 3 requires that “each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives”¹³⁵ and that “Irrespective of their capacity to influence the outcome of an election, political parties act as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process.”¹³⁶ The majority concluded that, given the objectives of political parties, parties should

¹³⁴ *Figueroa* (2003), *supra* note 133, paras. 52-54. See also paras. 48-51.

¹³⁵ *Figueroa* (2003), *supra* note 133, para. 30.

¹³⁶ *Figueroa* (2003), *supra* note 133, para. 39.

not be required to have more than one candidate in order to be registered, and the law was changed soon after that to require only one candidate.¹³⁷

To summarize briefly the principle established by *Figueroa*, barriers to parties forming, registering and enjoying the benefits of being a registered party cannot unfairly or unreasonably prevent voters from meaningfully participating in the electoral process.

2.6 Reference re Prov. Electoral Boundaries (Sask.): only close to relative equality required

An important Supreme Court precedent that qualifies the principle of equal opportunity of equal participation in order to obtain effective representation, and that was further developed in the Court's rulings in *Harper*¹³⁸ and *Figueroa*,¹³⁹ was set out in the Supreme Court's 1991 ruling *Reference re Prov. Electoral Boundaries (Sask.)* with regard to the scope of section 3 of the *Charter*. The qualifier is that, to obtain effective representation, the opportunity to participate does not have to be absolutely equal, but is required to be at a level of "relative parity"¹⁴⁰ taking into account "a broad range of social factors".¹⁴¹ While Cory J. wrote the dissent in the

¹³⁷ *Figueroa* (2003), *supra* note 133, para. 92. To register, subsection 385(2) of the *CEA*, *supra* note 79, requires one candidate, forms signed by 250 supporters and a declaration by the leader that the party intends to participate in public affairs by attempting to elect one candidate.

¹³⁸ *Harper* (2004), *supra* note 10, paras. 68-73.

¹³⁹ *Figueroa* (2003), *supra* note 133, paras. 21-37.

¹⁴⁰ *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 SCR 158, pp. 183-184 (subsection III.C) of PDF at:

<<https://www.canlii.org/en/ca/scc/doc/1991/1991canlii61/1991canlii61.pdf>> (hereinafter "*Reference re Prov. Electoral Boundaries (Sask.)*").

¹⁴¹ *Figueroa* (2003), *supra* note 133, paras. 24 and 108, citing *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, pp. 181 and 184.

case, I think his statement of this qualifier importantly makes it clear that “relative parity” does not allow for a significant deviation from actual equality, because:

If the right to vote is to be of true significance to the individual voter, each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency. Any significant diminution of the right to relative equality of voting power can only lead to voter frustration and to a lack of confidence in the electoral process.¹⁴²

In writing for the majority, McLachlin J. set out the key practical choice that faced the Court, stating:

The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the “one person - one vote” rule? The answer to this question turns on what one sees as the purpose of s. 3. Those who start from the premise that the purpose of the section is to guarantee equality of voting power support the view that only minimal deviation from that ideal is possible. Those who start from the premise that the purpose of s. 3 is to guarantee effective representation see the right to vote as comprising many factors, of which equality is but one. The contest, as I see it, is most fundamentally between these two views,...¹⁴³

And McLachlin goes on to conclude that absolute parity is not possible, that it is not possible to uphold the “one person – one vote” rule entirely, and that the Canadian tradition has emphasized effective representation more than absolute

¹⁴² *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, p. 170.

¹⁴³ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, p. 182.

voter parity. As a result, “deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation” or better government – however, “Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced.”¹⁴⁴ As McLachlin sums up the principle being established later in the ruling, upon which the court upheld variations in the population of electoral districts of up to 25 percent higher or lower than the average population of the districts in Saskatchewan:

Respect for individual dignity and social equality mandate that citizen's votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated.¹⁴⁵

It is important to note a few things about this ruling. First, it was a case concerning electoral boundaries. Secondly, the Supreme Court was split 5-4 (with a fourth justice also filing a separate dissent) and the ruling for the three justices who dissented together suggests that the variation in representation between districts should be no more than 15 percent, unless there is a compelling reason for a greater variant (such as creating more than one district in a sparsely populated area of a province to ensure that area has effective representation).¹⁴⁶ Thirdly, the ruling has been criticized for failing to set a clear acceptable variance rate, or a list of set criteria for determining

¹⁴⁴ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, pp. 184-185. See also pp. 186 to 188.

¹⁴⁵ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, p. 188.

¹⁴⁶ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, pp. 173-174.

whether and how much a variance should be allowed, which has allowed commissions broad discretion to vary the size of districts by even greater than 25 percent.¹⁴⁷ For all these reasons, even though a variance of 25 percent in the area of political finance limits would not be extraordinarily significant, I think it is fair to say that the Supreme Court's standard of "relative parity" means quite a small variation, more like 15 percent as the dissent suggested.

2.7 Szuchewycz: undemocratic barriers to candidates are unconstitutional

With regard to another electoral process finance issue, a lower court ruling in 1999 in *Figueroa* that struck down another barrier to running for office, namely the rule in the *CEA* at the time that half of the \$1,000 deposit required to be filed by each candidate would only be refunded if the candidate won 15 percent of the vote, led to the federal government changing the rule to make the deposit fully refundable no matter how many votes the candidate garnered.¹⁴⁸ In October 2017, based on the principles established in *Figueroa*, this \$1,000 financial barrier to becoming an election candidate in then-subsection 67(4) of the *CEA* was ruled to be entirely unconstitutional and was struck out of the *CEA* in the Alberta Court of Queen's Bench ruling in *Szuchewycz v. Canada (Attorney General)*, and the federal government

¹⁴⁷ See Michael Pal, "The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts," (2015) 61(2) *McGill Law Journal* 231 (hereinafter "Pal, *Fractured Right to Vote* (2015)").

¹⁴⁸ *Figueroa v. Canada (Attorney General)*, 1999 CanLII 14787 (ON SC), <<https://canlii.ca/t/1vvm3>> at paras. 16, 38-43 (hereinafter "*Figueroa* (1999)"). See also *Jong v. Ontario (Attorney General)*, 2007 CanLII 44348 (ON SC), <<https://canlii.ca/t/1tc1t>> which struck down, for similar reasons, a similar provision in Ontario's election law.

decided not to appeal the ruling.¹⁴⁹ As a result, while federal election candidates are still required to obtain, in the presence of a witness, the signatures of 50 or 100 people in the electoral district (depending on the size of the district) in order to register as a federal election candidate, they are not required to deposit any money.

2.8 *Longley*: public subsidies can be constitutionally withheld from small parties

The Supreme Court's *Figueroa* ruling also set the stage for the 2007 ruling by the Ontario Court of Appeal (ONCA) in *Longley* by stating that thresholds for some benefits parties receive could be constitutional.¹⁵⁰ It should be noted that the Quebec Court of Appeal upheld in 1994, before the egalitarian model was established by the Supreme Court in its 1997 ruling in *Libman*, thresholds for the partial reimbursement of election campaign costs to candidates, on the grounds that they did not amount to discrimination under subsection 15(1) of the *Charter*.¹⁵¹ While the trial judged in *Longley* also invoked the subsection 15(1) test, the ONCA evaded it and, instead, simply carved a place for thresholds out of the equality guarantees of section 3. The plaintiffs in *Longley* challenged the fact that the then-\$1.75 per-vote annual public funding subsidy (given to federal parties in quarterly amounts, based on

¹⁴⁹ *Szuchewycz v. Canada (Attorney General)*, 2017 ABQB 645 (CanLII), <<http://canlii.ca/t/hmqj6>>. Marie-Danielle Smith, "Liberals won't appeal court decision that struck \$1,000 deposit requirement for federal election candidates," (November 27, 2017), *National Post*, online: <<https://nationalpost.com/news/politics/liberals-wont-appeal-court-decision-that-struck-1000-deposit-requirement-for-federal-election-candidates>>.

¹⁵⁰ *Figueroa* (2003), *supra* note 133 at para. 91.

¹⁵¹ *Barrette c. Canada (Procureure générale)*, 1994 CanLII 5505 (QC CA), <<https://canlii.ca/t/1p9q8>>. See an analysis of this ruling in Feasby (2006), *supra* note 2 at 256-259.

the votes received in the previous federal election) that came into force on January 1, 2004 included a threshold that meant, to receive the subsidy, a party was required to receive two percent of the total number of valid votes cast in the previous election or five percent of the votes cast in the districts in which the party ran candidates.¹⁵²

At the trial level in *Longley*, Ontario Superior Court Justice Matlow had ruled that the principles set out in *Figueroa* were applicable to the funding threshold and, as a result, as in *Figueroa* the thresholds violated section 3. The thresholds were not justifiable under section 1 because they were not rationally connected to the government's goal of preventing misuse of public funds (as larger parties could also misuse the subsidy funds), and were not a minimal impairment of the right of voters to be informed and meaningfully participate in electoral politics (as misuse could be prevented through disclosure and auditing requirements).¹⁵³ To obtain the subsidy, the thresholds required a smaller party to determine whether to devote resources to a few electoral districts or spread its limited resources across the country, which "has the potential to deny electoral choice to citizens if parties are encouraged to target only certain constituencies in order to protect their funding."¹⁵⁴ Justice Matlow also held that the thresholds violated subsection 15(1) of the *Charter* because they discriminated against smaller parties (who are legal persons and so enjoyed the protection of subsection 15(1)), and also

¹⁵² *Longley v. Canada (Attorney General)*, 2007 ONCA 852 (CanLII), online: <<http://canlii.ca/t/1v2hb>> at para. 25 (hereinafter "*Longley* (2007)").

¹⁵³ *Longley v. Canada (Attorney General)*, 2006 CanLII 36358 (ON SC), <<https://canlii.ca/t/1pw82>>, paras. 18-21, 26-28 (hereinafter "*Longley* (2006)").

¹⁵⁴ *Longley* (2006), *supra* note 153, para. 24.

could not be saved under section 1 because there was no reasonable justification for the discrimination given “Small and weaker political parties play a very important role in the Canadian electoral process whether or not they receive large numbers of votes.”¹⁵⁵

The ONCA also held that the thresholds violated section 3 of the *Charter* because they increased the imbalance between large and small parties in a way that has a negative effect on the ability of small party supporters to “participate meaningfully in the electoral process.”¹⁵⁶ However, the ONCA ruled that the thresholds were justifiable under s. 1 because the government had a rationally connected and pressing objective in preventing the “misuse of public funds” that harms the integrity of, and public’s confidence in, the electoral process, and this objective was reasonably pursued by not giving parties that don’t meet either threshold the subsidy because some smaller parties run campaigns that are not “true electoral competition” and are instead satirical or focused on fringe ideas or may be aimed promoting a commercial interest.¹⁵⁷ As well, for essentially the same reasons, the ONCA ruled that the thresholds satisfied the minimal impairment test.¹⁵⁸

This part of the ONCA’s ruling is, I contend, particularly unjustifiable because it says, essentially, that thresholds are minimally impairing because they prevent the misuse of the subsidy funds by small parties that have clearly

¹⁵⁵ Longley (2006), *supra* note 153, paras. 32, and 33-34.

¹⁵⁶ Longley (2007), *supra* note 152, paras. 39-43.

¹⁵⁷ Longley (2007), *supra* note 152, paras. 51-56, especially para. 54.

¹⁵⁸ Longley (2007), *supra* note 152, paras. 57-65, especially paras. 64-65.

illegitimate purposes, and that audits by Elections Canada of the use of funds by parties would not be less impairing because then Elections Canada would have to determine whether any party was illegitimately misusing the subsidy funds. In other words, the ONCA was easily able to determine that some parties will in the future definitely misuse the funds for clearly illegitimate purposes and so a threshold is fine to prevent them from doing that, but Elections Canada wouldn't be able to determine through audits that some parties are misusing the funds for clearly illegitimate purposes.¹⁵⁹ The ONCA acknowledges that the thresholds will prevent some parties with "genuine political goals" from receiving the subsidy,¹⁶⁰ but still concludes that the thresholds are proportional because they had a greater salutary effect (again by guarding against the "subversion" of elections by illegitimate small parties, and by directing public money to "genuine electoral and political endeavours") than deleterious effects.¹⁶¹

The ONCA also held that the thresholds did not violate sections 2(b) or 2(d) because they did not "lead to any substantial interference with the ability of members or supporters of political parties to exercise their freedom of expression or their freedom of association."¹⁶² The ONCA also held that the thresholds did not violate section 15(1) of the *Charter* because they did not "control or affect in any way a person's political beliefs or affiliation"¹⁶³ with any party, and that parties could not claim protection of subsection 15(1)

¹⁵⁹ Longley (2007), *supra* note 152, paras. 66-74, especially paras. 69-70.

¹⁶⁰ Longley (2007), *supra* note 152, para. 77.

¹⁶¹ Longley (2007), *supra* note 152, paras. 81-83.

¹⁶² Longley (2007), *supra* note 152, paras 104-111, especially para. 109.

¹⁶³ Longley (2007), *supra* note 152, paras 85-103, especially para. 98.

because they are legal persons only for the purposes and scope of the provisions of the *CEA*.¹⁶⁴

It should be noted that the ONCA's ruling in *Longley* contradicts not only the principles established by the Supreme Court in *Figueroa* requiring equal treatment of small and large parties (no matter what their "purpose"), but also the Court's holding in *Libman* that it was fair and democratic for groups "affiliated" with the "no" and "yes" referendum committees to receive part of the grant that the Government of Quebec gave to each committee, with the amount received determined based on how many supporters each affiliated group had.¹⁶⁵ The Court in *Libman* didn't conclude that some groups or parties would be deprived of equal treatment based on speculative conclusions like the ONCA reached in *Longley* about their purpose, views or tactics.

Despite these contradictions, the application of the small parties and their supporters for leave to appeal the OCA's ruling in *Longley* was denied by the Supreme Court.¹⁶⁶ The appeal was of public importance and significance, which are the criteria the Supreme Court uses for reviewing leave to appeal applications,¹⁶⁷ because if the thresholds were struck down several small parties may have formed to follow the Green Party's example which, for the first time, ran candidates in every electoral district across the country in the

¹⁶⁴ *Longley* (2007), *supra* note 152, paras. 95-96 and 114-125.

¹⁶⁵ *Longley* (2007), *supra* note 152, paras. 70 and 72.

¹⁶⁶ *Blair T. Longley, Kevin Peck, Miguel Figueroa, Jim Harris, Marijuana Party, Canadian Action Party, Communist Party of Canada, Green Party of Canada, Christian Heritage Party and Progressive Canadian Party v. Attorney General of Canada*, 2008 CanLII 18947 (SCC), <<https://canlii.ca/t/1wqj0>>.

¹⁶⁷ *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, subsections 40(1) and 43(1).

2004 election and received 4.3 percent of the overall vote, enough to qualify for the subsidy.¹⁶⁸ However, the Court only hears only approximately 80 (13 percent) of the approximately 600 appeals filed annually.¹⁶⁹ Despite this statistic, based on the Court's denial of the leave to appeal, and its ruling in *Figueroa*, I conclude that the Court considered it consistent with its egalitarian model for the ONCA to rule that it was constitutional to withhold public subsidies from small parties.

2.9 Summary of the egalitarian model as established by Canadian courts

Underlying the Supreme Court's egalitarian and fairness concerns, as Colin Feasby first pointed out,¹⁷⁰ are theoretical frameworks such as John Rawls' "veil of ignorance" thought-experiment concerning the justice system – the system one would choose if one did not know in advance one's race, ethnicity, gender, age, income, wealth, natural endowments, comprehensive doctrine etc. nor the political, class structure or economic system and level of development of society.¹⁷¹

Rawls posits that one would want a justice system that has the greatest likelihood of making decisions that give the most benefit to you for

¹⁶⁸ Andrew Heard, 2004 Canadian Election Results, online: <<https://www.sfu.ca/~aheard/elections/2004-results.html>>. See also, Green Party of Canada, The 2% Solution, (undated), Collections Canada, online: <https://www.collectionscanada.gc.ca/eppp-archive/100/205/300/green_party-ef/06-01-09/www.greenparty.ca/page161.html>.

¹⁶⁹ Supreme Court of Canada, Important information about seeking leave to appeal to the Supreme Court of Canada, (June 22, 2022), online: <<https://www.scc-csc.ca/unrep-nonrep/app-dem/important-eng.aspx?q5>>, Question 5.

¹⁷⁰ Feasby (1998-1999), *supra* note 2 at 9, citing John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972).

¹⁷¹ Rawls (1999), *supra* note 14 at 17.

your entire life, and to your children, no matter what your position in society – a social-contract system based on fairness. An extension of that justice system would be, he proposes, a fully democratic election process that: upholds the principle of one person-one vote; has relatively equal-sized electoral districts; provides equal opportunity to participate, and; that limits, in reasonable ways that don't dictate the content of expressions or favour one group over another, the capacity of those with private wealth to have more influence.¹⁷²

Based on these objectives, Rawls expressed explicit support for public funding of elections, restrictions on campaign contributions and spending, and substantially equal access to the media to prevent politics from being captured by concentrations of private economic power that result in unequal opportunities to influence politics.¹⁷³ With these recommendations, Rawls' framework puts the equality of opportunity of voters and candidates (and parties) to influence politics above the opportunity for third parties (individuals and interest groups) to have influence. Others who have formulated more candidate- and party-centred frameworks also place their interests above third-party participants, as the Supreme Court's rulings have, based on the proposed core purpose of elections being to elect representatives of voters.¹⁷⁴

¹⁷² Feasby (1998-1999), *supra* note 2 at 9-12. See also Robert A. Dahl, "What Political Institutions Does Large-Scale Democracy Require?" *Political Science Quarterly*, (2005) 120(2) 187 at 195. Robert A. Dahl, *On Political Equality* (Princeton, NJ, Yale University Press, 2006) at 9 and 34-36.

¹⁷³ Rawls (1999), *supra* note 14 at 199.

¹⁷⁴ Feasby (1998-1999), *supra* note 2 at 16, and 34-36.

Based on this underlying framework and, as summarized in previous sections, the Supreme Court's rulings and other Canadian courts' rulings that apply the Supreme Court's egalitarian model, I contend that the "egalitarian model" that the courts have established as it applies to Canada's political finance system can be summarized as follows:

1. The system should uphold, as much as possible (while taking into account "a broad range of social factors"¹⁷⁵ and also practical considerations to ensure effective representation),¹⁷⁶ the fundamental democratic principle of one person, one vote ("political equality"¹⁷⁷ and "equal participation"¹⁷⁸) so as to ensure that, again as much as practically possible, no voter has more influence in the electoral system or the government public policy-making system (the "political process")¹⁷⁹ than any other voter;
2. The public must perceive, and have confidence in, the fairness and integrity of every aspect of the system. To express this in reverse, every aspect of the system must appear to be fair and to have integrity, and actually be fair and have integrity, in order for the public to have confidence in the system;¹⁸⁰
3. The fairness and integrity of the system, and whether it upholds the fundamental principle of one person, one vote, is to be

¹⁷⁵ *Figueroa* (2003), *supra* note 133, paras. 24 and 108, citing *Reference re: Prov. Electoral Boundaries* (Sask.), *supra* note 140, pp. 181 and 184.

¹⁷⁶ *Reference re Prov. Electoral Boundaries* (Sask.), *supra* note 140, pp. 170, 183-185 and 188. "Absolute parity" is not required, but "relative parity" is required, and "dilution of one citizen's vote as compared with another's" is only allowed for the reason of effective representation and better government.

¹⁷⁷ *Libman*, *supra* note 41, paras. 41, 47 and 61.

¹⁷⁸ *Harper* (2004), *supra* note 10, paras. 61-63. *Libman*, *supra* note 41, para. 47.

¹⁷⁹ *Reference re Prov. Electoral Boundaries* (Sask.), *supra* note 140, p. 183. *Harper* (2004), *supra* note 10, para. 73.

¹⁸⁰ Again, see *Harper* (2004), *supra* note 10, at paras. 23-24, 63, 79, 82-83, 91-92, 97, 99, 101-104, 108-109, 120, 122, 142 and 146. *Libman*, *supra* note 41, at paras. 41, 52 and 84.

judged on the basis of the process of the system, “independent of its impact upon the actual outcome”;¹⁸¹

4. Barriers to candidates registering and running in an election cannot be financial in nature, and should be minimal and based on democratic expressions of support by voters (such as obtaining a certain number of signatures from voters in the riding), to ensure that voters can become candidates easily;
5. Barriers to parties (no matter how small) forming and meaningfully participating in elections should be minimal to ensure that parties can present themselves to voters as a possible representative, and so voters can obtain effective (but not exactly equal) representation through their votes;
6. Spending on advertising by third parties during election campaign periods, at both a jurisdiction-wide level and also an electoral district level, must be limited at a level proportionally low enough to ensure electoral fairness by ensuring that the combined effect of many third parties’ total ad spending will not drown out other voices or overwhelm a candidate in an electoral district or a party across the entire jurisdiction;
7. For the same reasons, spending on advertising by third parties during election campaign periods, at both a jurisdiction-wide level and also an electoral district level, must also be limited by explicitly prohibiting collusion by two or more third parties in order to exceed the spending limit;
8. Limits on spending on advertising by third parties during election campaign periods, at both a jurisdiction-wide level and also an electoral district level, cannot be so low as to prohibit expression and participation in the election at a level that is meaningful nor to prohibit the flow of information to voters;

¹⁸¹ *Harper* (2004), *supra* note 10 at paras. 64 and 97, and see also paras. 95-96 and 98-99. *Figueroa* (2003), *supra* note 41 at para. 29.

9. Limits are not justifiable on spending by third parties on other not-for-payment forms of communication, such as: op-eds, letters to the editor and general media coverage; events; publishing of books (that were planned to be published regardless of the election); mailings and emails etc. from organizations to employees, shareholders and/or members; postings on the Internet, and; phone calls or other communications that only encourage voters to vote;
10. It is constitutional for the limits on spending on ads by third parties to be the same no matter whether the third party is an individual voter or an organization with thousands or more members or supporters;
11. It is constitutional to require candidates, parties and third parties, even those spending small amounts, to register in a public registry, disclose their identity on their ads and, after the election, disclose the donors who paid for the advertising;
12. Restrictions on third-party advertising spending between elections are unconstitutional unless they only restrict spending on ads that promote or oppose parties and candidates, and only for a brief time period before an election begins. Otherwise, pre-election limits are not justifiable because they unreasonably restrict advocacy during government policy-making processes;
13. It is constitutional not to provide direct public funding or subsidies to parties that have low voter support and/or are not clearly trying to win the election, and;
14. Everyone (except the media) should be prohibited from publishing survey results on election day in order to ensure voters are not misled by a misleading survey published by a candidate, party or third party (all of whom, unlike the media, are assumed to have an interest in obtaining a specific result in the election).

2.10 The nine inconsistencies in the application of the Supreme Court's egalitarian model

While the Supreme Court's egalitarian model may be based on Rawlsian principles, I contend that there are nine significant inconsistencies in the ways that courts have applied the Court's model, some of which are due to the Court or other courts ruling in a way that does not protect the most vulnerable in society, or their right to equality of participation. While Chapter 3 only evaluates whether the current rules in the political finance part of Canada's political finance system match the Court's model, I am summarizing these inconsistencies here to highlight them, and because in evaluating whether Canada's current system matches the model it is necessary to address these inconsistencies. I am also summarizing the nine inconsistencies here to preface my more in-depth critique of the Supreme Court's egalitarian model in Chapter 5 in which I develop and set out a proposed framework for a more egalitarian model based on 19 general standards, and to preface the list of 201 proposed changes to the rules to make the system more egalitarian that I set out in Chapter 6 and Chapter 7.

In the list set out below, I am not questioning the Court's completely understandable point that it "is difficult, if not impossible, to measure" exactly the harms and unfairness caused by wealthy interests dominating political discourse, and the effectiveness of statutory provisions in addressing those harms, and that, therefore, social science evidence is adequate for proofing the harms.¹⁸² However, as noted above in section 2.2, I am questioning the

¹⁸² *Harper* (2004), *supra* note 10, para. 79.

fullness and accuracy of some of the evidence on which the Court has based its past rulings. I attempt to present more, and more accurate, evidence than the Court considered in the *Libman* and *Harper* cases when evaluating the current rules in chapters 3 and 4 and suggesting changes to the rules in chapters 6 and 7.

I also contend that the list of inconsistencies below shows that the Court has not applied “logic and reason”¹⁸³ to the social science evidence in developing and establishing its egalitarian model. The nine inconsistencies all arise, I contend, because in issuing rulings on various parts of the system the Court has contradicted its own reasoning that established the three fundamental tenets that are key bases of its egalitarian model, namely that: 1. the principle of one person, one vote and equality of participation must be upheld throughout the system; 2. the public must perceive, and have confidence in, the fairness and integrity of every aspect of the processes of the system (no matter what the outcomes), and; 3. voters must be allowed to express themselves enough, and receive enough information, in order to meaningfully participate in political processes. I contend that the nine inconsistencies in how the Supreme Court’s model has been applied by the Court and other Canadian courts are as follows:

1. The Court established in *Harper* that third-party advertising spending limits must allow a third party to inform, but not persuade voters¹⁸⁴ or determine the outcome of an election.¹⁸⁵ However, the Court in *Harper* did not consider fully how the

¹⁸³ *Harper* (2004), *supra* note 10, para. 79.

¹⁸⁴ *Harper* (2004), *supra* note 10, para. 121.

¹⁸⁵ *Harper* (2004), *supra* note 10, para. 74.

electoral district and national limits it upheld for third parties related, and were proportional, to the candidate and party spending limits. Candidates, parties and third parties all have the goal of persuading voters – when the Supreme Court limited third-party spending to informing voters only, and stated that limits “must be carefully tailored”¹⁸⁶ for candidates, parties and third parties, to be consistent and fair it should have considered, and evaluated, candidate and party limits in relation to third-party limits more fully, and explained more fully how the third-party limits were carefully tailored in comparison to the candidate and party limits.

While it is consistent with the party-democracy model to allow candidates and parties to speak louder than all third parties in elections solely because they are candidates and parties, as that model prioritizes candidates and parties’ interests and role in politics over third parties,¹⁸⁷ it is inconsistent with the one person, one vote principle. I explore more fully in chapters 5 and 6 how the spending limits for all political actors could be more consistently, and comprehensively, evaluated to align with a more egalitarian model.

2. The Court established in *Harper* that third-party advertising spending limits must prohibit a third party from overwhelming any candidate or party (even a small party)¹⁸⁸ or from drowning out any other voices¹⁸⁹ and, again, that limits “must be carefully tailored”¹⁹⁰ for candidates, parties and third parties. However, the Court in *Libman* and *Harper* also established that the system

¹⁸⁶ *Harper* (2004), *supra* note 10, para. 73.

¹⁸⁷ Bakvis and Smith (1997), *supra* note 44. Again, see also a critique of the how the party-democracy model conflicts with the egalitarian model in Bredt and Pottie (2005), *supra* note 10 at 293-299 and 301-303.

¹⁸⁸ *Harper* (2004), *supra* note 10, paras. 116 (citing *Libman*, *supra* note 41, paras. 49-50) and 118.

¹⁸⁹ *Harper* (2004), *supra* note 10, para. 72.

¹⁹⁰ *Harper* (2004), *supra* note 10, para. 73.

must be based on political equality/equality of participation¹⁹¹ – in other words, the principle of one person, one vote.

The inconsistency is that, if a third-party citizen group is supported by many more voters than a candidate, or many more voters even than a party, it logically follows that it should have a greater voice than the candidate, party or other third party. A candidate is only one voter, a small party is small because few voters support it. In other words, the Court essentially considered the third-party ad spending limits compared to the amounts that big wealthy candidates and parties spend during elections, but didn't address, let alone clarify, how the limits relate to the amounts spent by candidates and parties that don't have a lot of money.

3. The Court has ruled that it is constitutional for the same very high advertising spending limit for third parties to apply to voters whether a voter is wealthy or has a low income. The inconsistency is that in upholding the \$3,000 per electoral district and \$150,000 national limits on third party advertising in *Harper*, the Court almost completely ignored the fact that those amounts are much more than a significant percentage of the Canadian voting population can afford to spend. Bastarache J. began in *Harper* to address this inconsistency when he stated that:

“Further, the reality in Canada is that regardless of the spending limits in the Act, the vast majority of Canadian citizens simply cannot spend \$150,000 nationally or \$3,000 in a given electoral district. What prevents most citizens from effectively exercising their right of political free speech as defined by the Chief Justice and Major J. is a lack of means, not legislative restrictions... As discussed, the objective is to ensure the political

¹⁹¹ *Libman*, *supra* note 41, para. 47. *Harper* (2004), *supra* note 10, paras. 61-63.

discourse is not dominated by those who have greater resources. The proper focus is on protecting the right to meaningful participation of the entire electorate.¹⁹²

However, he then went on to analyze the limits without returning to this point and taking into account the means of the entire electorate, and the fact that many (if not most) citizens have no right to meaningful participation through advertising because they have no money to spend on advertising, and that their voices would be drowned out by the wealthy individuals who could afford to spend \$3,000 on advertising in a district and/or \$150,000 nationally. Again, *Libman* set out that the system must be based on the fundamental principle of political equality,¹⁹³ and suggested a \$1,000 limit would be appropriate for third-party spending,¹⁹⁴ an amount much closer to what most voters could possibly afford to spend on an ad campaign. However, the Court essentially ignored that part of the *Libman* ruling when ruling on the *Harper* case.

4. The Court has ruled that it is constitutional for the same advertising spending limit for third parties to apply to one voter and to organizations supported by many voters. The inconsistency is that one voter represents only one voter's views on any issue. Therefore, if the Court's principle of relatively equal opportunity to relatively equal participation is to be complied with, an organization that represents many voters' views on an issue should be allowed to spend a multiple of what one voter is allowed to spend;
5. The Court has ruled that it is constitutional for the same advertising spending limit for third parties to apply to a private

¹⁹² *Harper* (2004), *supra* note 10, para. 113.

¹⁹³ *Libman*, *supra* note 41, para. 47.

¹⁹⁴ *Libman*, *supra* note 41, paras. 76-78 and 81.

corporation with one or a few shareholders, a publicly traded corporation with hundreds or thousands of shareholders, and a union or citizen organization with hundreds or thousands of members or supporters. This inconsistency is most clear with a private corporation with one or few shareholders, as they only represent a few voters at most, and so should have a lower spending limit than unions or citizen organizations that represent hundreds or thousands of voters. Broadly held, publicly traded corporations raise difficult questions concerning whether they “represent” the political interests of their shareholders, or their employees. I address those questions in Chapters 5 and 6 where I develop a framework and proposals for a more consistently egalitarian system;

6. Appeal courts in B.C. and Ontario have ruled that limits on partisan and issue advertising spending by third parties are justifiable to prevent wealthy interests from dominating election debates in a way that is perceived to be unfair, but that limits are not justifiable between elections on partisan or issue advocacy advertising. The Supreme Court suggested in *Harper* that it agrees with this distinction. The inconsistency is that, if spending limits are justifiable during elections to prevent wealthy interests from dominating election debates in a way that drowns out other voices and is perceived to be unfair, then I contend spending limits are also justifiable between elections during public policy debates;
7. I contend that it is unfair, and is inconsistent with the principle of one person, one vote, to provide direct public funding and subsidies only to candidates and parties that are supported by what the Ontario Court of Appeal (ONCA) defined in *Longley* (and, in 1994 by the Quebec Court of Appeal, in *Barrette*) as a legitimate number of voters and/or that meet what the Court has

defined as a legitimate purpose.¹⁹⁵ If any voters support a candidate or party, then the candidate or party should receive public funding and subsidies that are at least proportional to the voter support received, no matter what political purpose the money is used for by the candidate or party. In other words, I contend that the Supreme Court's rulings in *Libman* (which endorsed giving part of the government grants to referendum third parties based on voter support for each group)¹⁹⁶ and *Figueroa* (which struck down barriers on small parties registering in part because registration allows party donors to receive a tax deduction) contradict the ONCA's ruling in *Longley* (which upheld a threshold of voter support that a party was required to obtain in order to receive annual per-vote public funding).

It is true that the majority in *Figueroa* stated clearly that its ruling "does not stand for the proposition that the differential treatment of political parties will always constitute a violation of s. 3" nor that "an infringement of s. 3 arising from the differential treatment of political parties could never be justified."¹⁹⁷ However, as I summarized above, I contend that the ONCA in *Longley* essentially ignored the principles set out in *Figueroa* based on the invalid, speculative reason that smaller parties had illegitimate intentions and views and would, therefore, misuse the subsidy funds while large parties wouldn't. The Court in *Figueroa* and *Libman* refrained from expressing or imposing its views on the legitimacy of the intentions and expressions of various smaller groups and parties. I contend that the ONCA in *Longley* improperly imposed its very narrow view of the

¹⁹⁵ See this point made re: the party equality approach in: MacIvor (2002), *supra* note 2, at 485-491.

¹⁹⁶ *Libman*, *supra* note 41, paras. 70-72.

¹⁹⁷ *Figueroa* (2003), *supra* note 133, para. 91.

legitimate purpose of political parties,¹⁹⁸ and that the Ontario Superior Court justice in *Longley* ruled correctly and consistently with the egalitarian model that it was unjustifiable violation of section 3 to require parties to meet a vote percentage threshold in order to receive the per-vote subsidy;¹⁹⁹

8. The Supreme Court in *Harper* ruled that the requirement that third parties file a report with the CEO within four months after election day disclosing the identities of donors who donated \$200 or more to pay for advertising during the election campaign period, with the CEO making the reports public within a year after election day, were measures that informed voters.²⁰⁰ The reports do inform voters, but long after they have voted, which is inconsistent with the egalitarian model's principle that voters must be informed during the campaign period before they vote.

There is also an argument for requiring disclosure of all donations, not just donations of more than \$200, in order to inform voters and protect the integrity of the system. For example, if a third-party organization spent \$4,000 on advertising in an electoral district, which would allow it even in 2004 to reach a significant number of voters, only 21 voters each donating \$199 would be needed to pay for the advertising. None of their identities would be required to be disclosed in the third party's report. As a result, the 21 voters could actually easily be four or five voters donating on behalf of themselves and four or five of their family members.

9. Media outlets are not required under Canadian law to be fair or non-partisan and, therefore, it should not be assumed that all

¹⁹⁸ *Longley* (2007), *supra* note 152, paras. 25 and 54.

¹⁹⁹ *Longley* (2006), *supra* note 153, ruling that the threshold violates section 3 and section 15(1) of the *Charter* and cannot be saved under section 1, paras. 18-21, 24, 26-28, and 32-34. See also questioning of the constitutionality of the thresholds in: Feasby (2006), *supra* note 2, at 253-259.

²⁰⁰ *Harper* (2004), *supra* note 10, paras. 136-146, and dissenters concurring in paras. 47-48.

media outlets have no interest in a specific result in an election. Therefore, it is inconsistent and unfair to prohibit candidates, parties and third parties from publishing the results of a survey on election day to prevent a false or fraudulent attempt to influence voters in the direction of the specific result, and limit their spending (and, therefore, their political speech), but allow a media outlet to publish the results of a survey on election day that may attempt to influence voters in the direction that the owners, publishers or editors of the outlet may want, and not limit the political speech of media outlets in any way other than libel. As others have pointed out, this also leaves open a loophole that allows a third party to establish a media outlet in order to escape third-party spending limits.²⁰¹

2.11 Projections of the Supreme Court's model to other parts of the political finance system

The Supreme Court and other Canadian courts have not issued rulings concerning several parts of Canada's political finance system. Because of the nine inconsistencies listed above that I contend are part of the Court's egalitarian model, it is difficult to project exactly how the Court would apply its model to these other parts of the system. For the purposes of the list set out below, and the evaluation set out in Chapter 3, I use the three key fundamental bases of the Court's egalitarian model – the principle of one person, one vote (relative equality of opportunity for relatively equal participation and influence in elections and in government public policy-

²⁰¹ Ronald Dworkin, "What is Equality? Part 4: Political Equality," (1987) 22(1) *U. San Francisco L. Rev.* 17. Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993), at 36-37 and 107-108.

making processes); the objective of ensuring that the public perceives that the system is fair and has integrity in terms of process, not outcomes, and; the objective of informing voters – as the bases for projecting the Court’s egalitarian model onto the other parts of the political finance system. I contend that the list set out below accurately summarizes, briefly, what the results would be if the Supreme Court’s model was applied to the parts of the system which have not been ruled upon by the Court or other Canadian courts. As I evaluate in Chapter 3 whether various parts of Canada’s current political finance system match the Court’s model, I also explain more fully why I think the following list is an accurate projection of the Court’s model onto each part of the system listed below:

1. Re: donations and loans to nomination race contestants during their campaign period – A limit based on the principle of one person, one vote is justifiable to prevent wealthy interests from having a dominant influence over contestants;
2. Re: donations and loans to parties and candidates during the pre-election and election campaign period – A limit based on the principle of one person, one vote is justifiable to prevent wealthy interests from having a dominant influence over parties or candidates;
3. Re: donations and loans to party leadership race contestants during their campaign period – A limit based on the principle of one person, one vote is justifiable to prevent wealthy interests from having a dominant influence over contestants;
4. Re: donations and loans to parties and electoral district associations between elections – An annual limit based on the principle of one person, one vote is justifiable to prevent wealthy interests from having a dominant influence over parties or EDAs;

5. Re: spending by nomination contestants during their contest period – A limit based on the principle of one person, one vote is justifiable to ensure a fair opportunity for all candidates to participate meaningfully in contest debates and inform and persuade voters;
6. Re: spending by parties and candidates during an election or by-election campaign period – A limit based on the principle of one person, one vote is justifiable to ensure a fair opportunity for all parties and candidates to participate meaningfully in election debates and inform and persuade voters;²⁰²
7. Re: spending by political party leadership contestants during their contest period – A limit based on the principle of one person, one vote is justifiable to ensure a fair opportunity for all candidates to participate meaningfully in contest debates and inform and persuade voters;
8. Re: spending by parties and electoral district associations in-between elections – A limit based on the principle of one person, one vote is justifiable to ensure a fair opportunity for all parties at the national, regional and local level to participate meaningfully in policy debates and inform and persuade voters;
9. Re: public subsidies to electoral district associations (EDAs) and candidates – As with parties, subsidies should be provided to all EDAs and candidates based on their actual level of voter support;
10. Re: disclosure requirements for contestants, candidates and parties – Disclosure should be required of all donations of \$200 or more after voting has taken place;
11. Re: donations to third parties – Possibly a limit based on the principle of one person, one vote on donations to third parties is justifiable to prevent wealthy interests from having a dominant

²⁰² *Harper (2004)*, *supra* note 10, at para. 62. *Figueroa (2003)*, *supra* note 41, at paras. 19-21 and 25-31.

influence over third parties, or some other system to ensure that third parties are broadly representative of all their members/supporters and can only spend amounts based on their actual level of voter support;

12. Re: public subsidies to third parties – Subsidies should be provided to all third parties based on their actual level of voter support;
13. Re: disclosure by third parties – Disclosure should be required of all donations of \$200 or more after voting has taken place;
14. Re: media and social media – Requirements on media and social media outlets to present the viewpoints of many voices fairly and equally on each issue, with the amount of coverage given based on the principle of one person, one vote, during an election and in-between elections, are justified to ensure an equality of opportunity for voters and third parties to participate meaningfully in election debates and public policy debates, and to inform and persuade voters.

In Chapter 3, I evaluate whether the rules in all areas of the registration, donations, spending, public subsidies and disclosure part of Canada's current political finance system match the Supreme Court's egalitarian model, including in the 14 areas listed above. I evaluate the rules in all those areas first for nomination and party leadership contestants, candidates, electoral district associations and parties, and then the rules in those areas for third parties and the media. I do this because third parties and the media play a different role than these other political actors and, as a result, raise distinct issues and questions.

It should be noted that I only evaluate the rules below, not whether the rules are enforced properly or effectively. Enforcement is, of course, an

important issue, as proper and effective enforcement is needed to give effect to the rules by encouraging violations and discouraging violations, including by penalizing those who violate the rules. However, my inquiry is limited only to an evaluation of the rules. The only two areas in my evaluation that overlap with enforcement measures are that I mention when candidates, parties and third parties are required to appoint an official agent or auditor (who have the purpose of serving as “internal” checks on compliance with the rules), and I evaluate the rules that require all types of candidates, and parties and third parties to disclose donations and spending publicly and to the *CEA* enforcement agency Elections Canada (headed by the Chief Electoral Officer) and the enforcement investigator and tribunal, the Commissioner of Canada Elections. As the Supreme Court decided in *Harper*,²⁰³ these disclosure requirements assist in the enforcement of the rules.

²⁰³ *Harper* (2004), *supra* note 10, paras. 136-146, and dissenters concurring in paras. 47-48.

3 How the registration, donations and loans, spending, public subsidies and disclosure parts do not fulfill the egalitarian model

3.1 Introduction

The Supreme Court of Canada and several scholars and commentators have argued that Canada's federal political finance system is an "egalitarian model" because it prohibits corporate, union and organization donations, limits individual donations, and limits election spending by parties and candidates, and limits advertising spending during election campaign periods by "third parties" (individuals, businesses, unions and interest groups).²⁰⁴ In other words, the egalitarian model aims to uphold the one person, one vote principle, and the principle of the perceived fairness of the system, and the overall claim is that Canada's political finance system does actually uphold that principle.

As detailed below in this chapter concerning the political finance parts of Canada's federal political finance system, and in Chapter 4 concerning the gifts, favours and lobbying part of the system, I contend that a detailed analysis of the rules clearly shows that the "egalitarian model" has not actually been fully implemented in any of the parts of the system. Overall, while some

²⁰⁴ *Libman*, *supra* note 41. *Harper* (2004), *supra* note 10. *Longley* (2007), *supra* note 152. Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (1991), vol. 1 (known as the "Lortie Commission" after the name of its Chairperson, Pierre Lortie). Feasby (1998-1999), *supra* note 2. Feasby (2006), *supra* note 2, at 266. Daniel P. Tokaji, "The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison," (June 2011) 5 *Journal of Parliamentary and Political Law* 381 at 393-397. Lawlor and Crandall (2011-2012), *supra* note 5. Dawood, "Democracy and Freedom of Speech" (2012), *supra* note 2. Feasby (2012), *supra* note 2 in Ewing, Rowbottom and Tham (2012) 206 at 212-214, *supra* note 2. Gold (2020), *supra* note 11, at 288-290 and 297.

somewhat egalitarian-oriented changes have been made in the past 19 years, there have also been steps backwards, and I conclude that the federal Canadian political finance system is still very much skewed in favour of ruling parties and their candidates especially, and also existing parties and their incumbent candidates, and those with private wealth, including lobbying businesses, business associations and other wealthy organizations and individuals.²⁰⁵ While I agree with those who propose that the election campaign is a specifically unique time period for ensuring equality of opportunity to participate and influence,²⁰⁶ I contend that the Supreme Court made an overly broad assertion by claiming that the electoral process is the “primary means by which the average citizen participates in the open debate that animates the determination of social policy.”²⁰⁷ The period between elections can, of course, be equally important in terms of the effect on public policy and whether decision-making processes produce just and fair results, and millions of Canadians don’t just vote but also sign petitions, communicate in various ways with their Member of Parliament, post on social media in between elections about one or more issues that concern them, participate in boycotts, attend demonstrations and participate in myriad other civic actions. As a result, I also address the between-election time period in this chapter and in Chapter 4 (which addresses gifts, benefits, lobbying and ethics rules).

²⁰⁵ See discussion of the partisan, incumbent and entrenched structures and interests as forces that maintain such skewed systems in Michael Pal, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) 57:2 *McGill LJ* 299 at 333-344 (hereinafter “Pal, “Breakdowns,” (2011”).

²⁰⁶ C.E. Baker, “Campaign Expenditures and Free Speech” (1998) 33 *Harv. C.R.-C.L. L. Rev.* 1 at 2, cited in Feasby (1998-1999), *supra* note 2 at 15-16, and 33-34.

²⁰⁷ *Figueroa* (2003), *supra* note 133, para. 29.

The political finance registration, donation, spending, disclosure and subsidy rules examined in 30 areas through the rest of this chapter are set out in the *Canada Elections Act* (“the CEA”)²⁰⁸ which was most recently amended by Bill C-50²⁰⁹ and Bill C-76,²¹⁰ both of which were enacted in December 2018 (with some provisions of Bill C-76 coming into effect in spring 2019). Although it is sometimes repetitive, I detail each characteristic of each of the 30 areas that, I contend, does not comply with the egalitarian model. I provide this detail because there are specific differences in the rules that apply to nomination contestants, candidates, electoral district associations (EDAs), political parties and third parties, and because, as the old saying goes, the devil is in the details.

For some of the 30 areas of the political finance part of the system discussed below, I briefly summarize initial proposals for changes to more closely align the system with the egalitarian democracy model. Chapter 5 fully examines and sets out a theoretical framework to move Canada’s political finance system towards a more egalitarian model than the Supreme Court’s model, a model that also prevents conflicts of interests. Chapter 6 sets out proposals for changes to make the political finance system align with a more egalitarian model, and Chapter 7 does the same for the gifts, benefits, lobbying and conflict of interest parts of the system.

²⁰⁸ CEA, *supra* note 79.

²⁰⁹ LEGISinfo, Bill C-50, An Act to amend the Canada Elections Act (political financing), online: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8978368>> (hereinafter “Bill C-50”).

²¹⁰ LEGISinfo, Bill C-76 - An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments, online: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9808070>> (hereinafter “Bill C-76”).

Finally, although it is not the focus of this dissertation, it should be noted that the evaluation below mentions more than once that the calling of a snap election by the Prime Minister, which gives little or no advance notice of the election to opposition parties and their MPs, and people who may want to run as candidates and/or assist with campaigns, and sometimes even little or no advance notice to ruling party MPs and officials, undermines the fulfillment of the egalitarian model because it reduces the equality of opportunity for equality of participation by shortening the time periods for holding open nomination contests, raising funds, and sharing information with voters. In contrast, when an election is held on a fixed election date, everyone is given ample advanced notice and, as a result, nomination contests can be scheduled well in advance, and people can schedule and arrange their lives to participate in the election either by attempting to win a nomination and run as a candidate for a party or as an independent candidate (with all the fundraising and time and effort that can require), or volunteer for a party or candidate or, simply, become an informed voter.

3.2 Evidence, including of public expectations

In the evaluation below, I attempt to provide detailed evidence concerning how each area of the political finance part of Canada's system does not adhere to the Court's egalitarian model. I mention this because policy and court debates concerning political finance rules in Canada in the past couple of decades have been often undermined by poor quality evidence. For example, the dissenters in the Supreme Court's ruling in

Harper greatly exaggerated the effect of the ad spending limits in deciding they were not justifiable under section 1 of the *Charter*. First, the measures in the *CEA* allowed for spending an unlimited amount on holding events, issuing as many news releases, op-eds and letters to the media as a voter or business, union or other organizational third party wants, along with emailing friends, family and colleagues and posting on the Internet as many times as they want and, in addition, organizations could spend an unlimited amount on sending as many mailings and/or emails to employees, shareholders and/or members as it wants. In other words, the spending limits at issue were exponentially higher than the limits at issue in *Libman*.

Secondly, the dissenters based their conclusion that the national spending limit was too low on one national figure from the Chief Electoral Officer's testimony (it is unclear how or in what court the testimony was made or filed) "that it costs approximately \$425,000 for a one-time full-page advertisement in major Canadian newspapers."²¹¹ The dissenters also used one local figure, that the "Canada Post bulk mailing rate for some ridings amounts to more than \$7,500," as the basis for their conclusion that the electoral district spending limit was too low.²¹² And, overall, without citing any evidence, the dissenters concluded that the limits made "effective radio and television communication within constituencies or throughout the country beyond the reach of "third party" citizens."²¹³ Despite the many avenues remaining open for communicating with other voters, including the avenue of

²¹¹ *Harper (2004)*, *supra* note 10, para. 4.

²¹² *Harper (2004)*, *supra* note 10, para. 5.

²¹³ *Harper (2004)*, *supra* note 10, para. 6.

spending substantial sums on paid advertising, the dissenters also claimed that “Any communication beyond the local level is effectively rendered impossible...” and that:

“It is not an exaggeration to say that the limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period. In actuality, the only space left in the marketplace of ideas is for political parties and their candidates.

...

On this point, this case is indistinguishable from *Libman*...[in which the] Court stated that the restrictions were so severe that they came close to being a total ban and that better, less intrusive alternatives existed. The situation is precisely the same here.

...

[The spending limits] have a chilling effect on political speech, forcing citizens into a Hobson’s choice between not expressing themselves at all or having their voice reduced to a mere whisper. Faced with such options, citizens could not be faulted for choosing the former.”²¹⁴

In fact, in January 2004 the cost of running a national advertisement on CBC TV during the Grey Cup game or the Stanley Cup finals was only \$40,000, which means a third party could have aired three ads which, along with the cost of producing the ad, would have likely cost no more than the \$168,900 spending limit in effect that year.²¹⁵ As well, the actual cost figures for advertising in newspapers at the time the case was heard ranged from \$800 for a half-page ad in a small town to \$1,200 for a half-page ad in an

²¹⁴ *Harper (2004)*, *supra* note 10, paras. 35-36 and 42.

²¹⁵ William Houston, “Stanley Cup’s ad revenue pales in comparison to Super Bowl’s,” (January 30, 2004), *Globe and Mail*, online: <<https://www.theglobeandmail.com/sports/stanley-cups-ad-revenue-pales-in-comparison-to-super-bowls/article741581/>>.

urban community newspaper (which would reach all households in one or two electoral districts) to approximately \$12,000 for a half-page ad in the *Toronto Star* and \$29,500 for a half-page ad in the *Globe and Mail*, both of which would reach across several districts.²¹⁶ Therefore, running an ad multiple times would still fall within the \$4,000 per district limit and the \$168,900 national limit. Of course, one can argue about whether such advertising would be “effective” but I contend that the being allowed under the limits to air three national TV ads on CBC, or several newspaper ads in an electoral district or nationally, does not amount to a “virtual ban” on communications and does not restrict political speech during elections by third parties to a “mere whisper.”

I think it is fair to say that the majority in *Harper* also exaggerated somewhat the negative effects of third-party ad spending, and conducted a somewhat cursory review of the government’s policy decisions concerning the amount of spending allowed under the limits. Of course, this is in part because the Court had established in earlier rulings that scientific proof was not required of the extent of the harm that the *CEA* measures aimed to prevent, only social science evidence that, on the balance of probabilities, provides the basis for a “reasoned apprehension” of the harm and a

²¹⁶ Staff Report, City of Toronto (December 2003), online: <<https://www.toronto.ca/legdocs/2004/agendas/committees/adm/adm040109/it025.pdf>>. AdReach.ca, Display Advertising – Gross Rates, October 17, 2005. *Globe and Mail*, Newspaper – standard modular ad formats, online: <<https://globelink.ca/newspaper-advertising-specifications/#adunits>>. *Globe and Mail*, Newspaper Specifications, online: <<https://globelink.ca/newspaper-advertising-specifications/#adunits>>. A half-page ad is, depending on the size of the newspaper, 6-10 columns wide by 100-140 ad lines (a full-page is 200-280 ad lines), and the calculation of the ad cost is: number of columns x number of ad lines x the rate per ad line.

reasonable conclusion that Parliament's measures address the harm without disproportionately violating *Charter* rights.²¹⁷ And it is, of course, also due in part to the related fact that the Court defers to Parliament's decisions, as the legislative body in our system of government, concerning the details of provisions in any statute, as the Court mentioned more than once in *Harper*, and also mentioned in *Libman*.²¹⁸ Again, I attempt to provide much more detailed evidence below and in other chapters than was considered in these and other Supreme Court rulings concerning how the 30 areas of the registration, donations and loans, spending, public subsidies and disclosure parts of Canada's political finance system examined below, and the gifts, favours and lobbying parts examined in Chapter 4, do not fulfill the egalitarian model.

With regard generally to the public's expectations and standards, which I proposed in Chapter 1 should be the standard by which the parts of Canada's politics examined in this dissertation should be judged, in accordance with the reasonable, well-informed person standard established by the Supreme Court of Canada²¹⁹ and also the Court's egalitarian model requirement that the public have confidence in the appearance of, and actual, integrity of the system, I note here that in *Libman*,²²⁰ the Supreme Court relied in part on survey evidence from the Lortie Commission, as follows:

²¹⁷ *Harper (2004)*, *supra* note 10, paras. 77-79 and 93-100. *Libman*, *supra* note 41, para. 39.

²¹⁸ *Harper (2004)*, *supra* note 10, paras. 37, 64, 87-88 and 111. *Libman*, *supra* note 41, paras. 59 and 81.

²¹⁹ *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p. 394.

²²⁰ *Libman*, *supra* note 41, paras. 47 and 52. Also see *Harper*, *supra* note 10, para. 83.

- a) At para. 47, the Court states: “It should also be noted that 93 percent of the respondents to a national survey conducted by the Lortie Commission supported limits on spending by political parties (Lortie Commission, *supra*, at p. 334). This high percentage shows that the majority of Canadians agree with limiting election spending in order to promote fairness as a fundamental value of democracy.”
- b) At para. 52, the Court states: “Furthermore, according to another survey conducted in 1991, 75 percent of Canadians supported limits on spending by interest groups (Lortie Commission, *supra*, at p. 337). These statistics also show the importance of controlling spending in order to maintain public confidence in the electoral system.”

I am not citing this evidence in an attempt to claim that those survey results from 1991 still express the Canadian public’s expectations and standards today, but instead to provide a baseline and example of how the Supreme Court has deployed such evidence when evaluating aspects of Canada’s political finance system. Set out below, and also in Chapter 5, I cite more recent surveys and other evidence of what the public’s expectations and standards are today concerning the 30 areas of the registration, donations and loans, spending, public subsidies and disclosure parts of Canada’s political finance system. In Chapter 4, I also present all the evidence I have been able to gather concerning the public’s expectations and standards concerning the gifts, favours and lobbying parts of Canada’s political finance system.

3.3 Registration of political parties

It may seem more orderly to address the registration of nomination contestants and election candidates first, as those are the entry points for individuals into Canada's formal political system. However, I am addressing the registration process for a political party first because parties at the federal level have legal control over the registration of electoral district associations, nomination contestants, and candidates and, as a result, how a party is structured and operates affects all those other political actors.

As noted above in section 2.5, due to the Supreme Court's ruling in *Figueroa*, the federal party registration system has been changed to comply with the egalitarian model of equal opportunity for equal participation. As a result, to register a party is only required to have its leader submit an application to the Chief Electoral Officer (CEO) with identification information (full name, short-form name, logo, contact information for officers, agents and auditor, and its policy for protecting private information), a list of three officers other than the leader, and a chief agent and auditor, along with declarations from 250 voters that they are members of the party and support it, and a declaration from the leader that one of its fundamental purposes is to participate in public affairs by electing one or more of its members.²²¹ Requiring the disclosure of this information, and the support of 250 voters, aligns with democratic, transparency and egalitarian principles.

The CEO can reject the request for registration only on specific, limited grounds:

²²¹ CEA, *supra* note 79, sections 385, 387, 391, 395 to 402, 404, and subsection 389(1).

1. The CEO can request detailed documents and information from the leader to confirm that one of the party's fundamental purposes is to elect one or more of its members;²²²
2. The party leader does not submit accurate identification information, privacy protection policy and/or one or more of its proposed officers, agent or auditor is ineligible;²²³
3. In the CEO's opinion, the party's name, short-form name, abbreviation or logo resembles an already registered party or an eligible party that has already applied for registration or includes the word "independent" or another word that resembles "independent".²²⁴

The CEO can deregister a party for essentially the same list of reasons, as well as any failure to file the annual and other reports and financial statements as required by various provisions in the *CEA*.²²⁵

The two related barriers that, I contend, can be seen as barriers to equality of opportunity to participate is that a party leader has to file the application at least 60 days before an election is called, and the party does not become a registered party until it has a candidate confirmed for the election.²²⁶ This creates the possibility that a Prime Minister as ruling party leader who has a faction split off from his/her party may call a snap election before the faction can register as a party for the election, or may call a snap election before a citizen movement that is gaining popularity very quickly and threatening the ruling party's power can register as a party for the election.

²²² *CEA*, *supra* note 79, subsections 385(3) and 521.1(5).

²²³ *CEA*, *supra* note 79, subsections 385.1(3) and 387(c) and sections 389 and 395-399.

²²⁴ *CEA*, *supra* note 79, subsection 387(a).

²²⁵ *CEA*, *supra* note 79, sections 409 to 420, and 521.1.

²²⁶ *CEA*, *supra* note 79, section 390.

Time has to be allowed for the Chief Electoral Officer to confirm the information in a party registration application, but the system could be designed to ensure that if an application is filed before a snap election is called, the application will be processed quickly so that the party can run candidates in the election.

It should be noted that the *CEA* does not contain any provisions requiring democratic structures and operating procedures within political parties in areas such as: the powers of the party leader; how an executive council/steering committee is chosen, structured and operates; whether the council/committee is required to follow policies passed at convention by the members; the structure, operation and powers of electoral district associations; membership qualification, role and powers etc. As mentioned in some of the sections below, the largely unrestricted power in many parties of the party leader and party executive to control and assist (or not assist), electoral district associations, nomination contestants and candidates undermines the equality of opportunity for equality of participation and, therefore, also the fairness and integrity of the political finance system, in ways that do not comply with the egalitarian model's principles.

3.4 Registration of electoral district associations

Under the *CEA*, electoral district associations cannot operate unless they are registered, and cannot be registered without filing forms with the CEO identifying the chief executive and other officers, and a financial agent and auditor, and keeping that information updated with the CEO, who

maintains a public registry containing the information.²²⁷ These requirements align with the egalitarian model as they are fair, accessible and transparent, thereby providing an equal opportunity for participation and information to voters. However, also required is a statement from the party leader certifying that the association is the party's association.²²⁸ This requirement puts associations under the control of party leaders, especially given that the party leader and two officers of the party can, other than during an election campaign period, have the association deregistered simply by filing an application with the CEO.²²⁹ While arguments can be made that political party leaders and/or the executive of a party, should have some say in approving electoral district associations, the egalitarian model is based on political equality of all citizens. As a result, it does not fulfill the model to allow one or a few citizens, a party leader and/or party executive members, to have this power to determine who shall represent the local members of the party in the local district.

3.5 Registration of nomination contestants

Nomination contests are largely regulated and overseen by political parties. The *CEA* only contains rules concerning the donations, spending and disclosure requirements that apply to nomination contestants.²³⁰ As a result, this area aligns with the Supreme Court's egalitarian model only when a

²²⁷ *CEA*, *supra* note 79, sections 447-449, 455-464.

²²⁸ *CEA*, *supra* note 79, clause 448(2)(c).

²²⁹ *CEA*, *supra* note 79, subsections 467(2) and (3), and 470-471.

²³⁰ *CEA*, *supra* note 79, sections 476-476.94.

political party makes its registration process to become a nomination contestant open, transparent, simple and equitable. However, there are many examples from every federal party in which the party leadership or a local district association either did not hold a nomination contest and instead appointed a candidate or created barriers for some people to register as a nomination contestant, usually when one contestant is preferred by the party or association.

A 2019 study of the 6,600 election candidate nomination processes overseen by the five main parties in the five federal elections from 2004 to 2015 found that:

- 2,700 of the candidates (40.9 percent) were appointed by a party – no nomination contest was held, and;
- Of the 3,900 nomination contests held, more than 70 percent only had one contestant (which may or may not have been because the party favoured one contestant or blocked other contestants from running).²³¹

If a party or electoral district association appoints an election candidate or favours one contestant in a nomination contest, it amounts to a significant gift/donation to the appointee/preferred contestant as it means they are not required to raise funds or devote time and/or resources to a nomination contest. As a result, appointments or barriers that thwart a nomination contest from occurring violate the egalitarian model's requirements of a relatively equal opportunity to participate equally in an election process, and

²³¹ The Samara Centre for Democracy, *Party Favours: How federal election candidates are chosen* (July 17, 2019), online: <<https://www.samaracanada.com/docs/default-source/reports/party-favours-by-the-samara-centre-for-democracy.pdf>>. (hereinafter "Samara, *Party Favours* (2019)").

of ensuring that those with money to donate or spend (or, in this area, the power to reduce the financial burden for a contestant) do not dominate or have undue influence.

While arguments can be made that political party leaders and/or the executive of a party should have some say in choosing the party's election candidates, the egalitarian model is based on the relative political equality of all citizens, with only a maximum 5-10 percent variation in the effectiveness of participation amongst various voters permitted. As a result, it does not fulfill the model to allow one or a few citizens, a party leader or party executive members, to have this exclusive power to grant such a significant favour to a person applying to run for office, as it gives them essentially 100 percent of decision-making power and reduces the participation rate by local voters to zero.

In terms of financial provisions in the *CEA* that apply to the registration of nomination contestants, they align with the egalitarian model as a person becomes a contestant simply when they "accept a contribution, incur a nomination campaign expense or borrow money..."²³² which are accessible actions for most everyone and also cover the various ways a contestant may begin to participate. Again, however, contestants also have to fulfill their party's requirements and overcome any barriers their party may put in their way in order to have a chance to win a nomination contest. As well, some parties require potential nomination contestants to pay a fee to register, which is an inegalitarian barrier to running that should be prohibited.

²³² *CEA*, *supra* note 79, section 476.2.

A loophole in nomination registration rules that does not align with the egalitarian model is that if a person raises money from contributors to explore becoming a nomination contestant, and then does not register, the contributors of the money are not required to be disclosed, and the person can keep the money. As well, no disclosure is required if the person exploring running is offered contributions, benefits or other advantages (including job offers) not to run for whatever reason, for example to give another person a better chance of winning. This is mainly a problem if the person exploring running is a sitting MP and/or a Cabinet minister, and it is unclear under the gift and benefits rules discussed below in Chapter 4 whether such contributions, benefits or job offers fall within the definition of a bribe under the *Criminal Code* or within the definition of benefits under federal ethics rules that are prohibited or, at least, required to be disclosed. I also address this loophole further below in sections 3.11 and 3.24.

3.6 Registration of election candidates

Obviously, as discussed above, the ability of a political party leader or executive to appoint someone as a candidate without a nomination contest is an inequitable power that violates the egalitarian model because it is much greater power than an average voter has to determine who will be the candidate in an electoral district.

A more equitable part of the registration process for candidates is that, as summarized above in section 2.7, in 2017 an Alberta Court struck down, based on the principles established by the Supreme Court in *Figueroa*, the

requirement to deposit \$1,000 with Elections Canada in order to become a candidate. As a result, the *CEA* was changed to comply with the egalitarian model, and registering to become an election candidate now only requires a person to obtain, in the presence of a witness, the signatures of 50 or 100 people (depending on the size of the district) who are residents of the electoral district (which is an attainable requirement for anyone who has support in the district),²³³ and to file forms identifying the candidate, their official agent.²³⁴ However, that is not the only barrier, as the forms must also identify the political party that is endorsing the candidate²³⁵ which allows the party leader and executive another form of override over the electoral district association in terms of the choice of candidate. As with the other powers mentioned above that the party leader and executive have to override the choice of voters in a district, this power does not align with the egalitarian model.

The prohibitions on the following people being eligible to be a candidate align with the egalitarian model in terms of ensuring public confidence that the system appears to be fair and has integrity: the Chief Electoral Officer (CEO) and other election officials; a person who has been convicted of an illegal or corrupt election practice who is still within their five to seven-year time period under paragraph 502(3)(a) of the *CEA* during which

²³³ *CEA*, *supra* note 79, paragraphs 66(1)(e) and (f) and subsection 66(4). Note that the Chief Electoral Officer recommended repealing the signature requirement in: Elections Canada, *An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election*, (2016), online: <https://www.elections.ca/content.aspx?section=res&dir=rep/off/rec_2016&document=index&lang=e> at 53.

²³⁴ *CEA*, *supra* note 79, sections 66-73, 75-76, 89 and 477, and subsections 477.1(1) and (2).

²³⁵ *CEA*, *supra* note 79, clauses 66(1)(v) and (vi), section 68 and subsection 71(2).

they are prohibited from being elected or sitting in the House of Commons; a person who was a candidate in the previous election and has not filed their required disclosure reports under subsection 447.59(1) of the *CEA* by the deadline or extension of the deadline granted by the CEO or a judge.²³⁶

However, I contend that it is inconsistent with the egalitarian model to prohibit, as the rules currently do, a member of the legislative assembly of a province from being a candidate.²³⁷ A member of an assembly has demonstrated that they have voter support by being elected, and in that way them becoming a federal candidate aligns with the egalitarian model. Other people are not required to give up their jobs in order to become a candidate, and members of territorial legislatures and municipal councils are allowed to be candidates. As well, a federal election campaign period is only five to seven weeks long,²³⁸ and the deadline for the filing of candidate forms with the CEO is only 21 days before election day,²³⁹ so a provincial member would not be distracted from their duties for a significant time period. As a result, as long as they fulfill all of their duties as a member of a provincial legislature and do not use their office resources or staff for their campaign (which would give them an unfair advantage), I don't see a justifiable reason for prohibiting members of provincial legislatures from being federal candidates. Another possible measure that could be implemented to address this situation, including for members of a territorial legislature or municipal council, would be

²³⁶ *CEA*, *supra* note 79, section 65, and see re: details required in report, and deadlines and extensions, sections 477.62 to 477.52.

²³⁷ *CEA*, *supra* note 79, subsection 65(c).

²³⁸ *CEA*, *supra* note 79, subsection 57(1.2).

²³⁹ *CEA*, *supra* note 79, section 69.

to require them to take an unpaid leave of absence while they run in a federal election, with the legislature appointing another member or another person to fulfill their constituent service duties while they were absent.

In terms of financial provisions in the *CEA* that apply to the registration of election candidates, they align with the egalitarian model as a candidate becomes a candidate simply when they accept a provision of goods or services, a transfer of funds or a contribution or borrow money or incur a campaign expense and, as noted above, they are required at that time to register and appoint a financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments.²⁴⁰

However, an area of concern is that if a person wins a nomination contest but then decides not to register as a candidate, no information is required to be disclosed concerning whether the person was induced by an offer of money, property, services or some other benefit (including a job offer) to not run for whatever reason, for example to give someone else a better chance of winning, or to allow their party leader or party executive to appoint a candidate. I address this loophole further below in sections 3.12 and 3.24.

3.7 Registration of political party leadership contestants

As with nomination contests, the general rules for political party leadership contests are largely regulated and overseen by federal political parties, other than a basic requirement that a party's chief agent inform the

²⁴⁰ *CEA*, *supra* note 79, sections 476.2 to 476.66, subsection 477.1(1), and sections 477.2, 477.4 to subsection 477.44(1).

Chief Electoral Officer of the start and end dates of a leadership contest and any changes to those dates.²⁴¹ However, the *CEA* does set out requirements concerning donations and loans, spending (but not the spending limit) and disclosure that apply to leadership contestants. These provisions align with the egalitarian model as a person becomes a contestant simply when they “accept a contribution, incur a leadership campaign expense or borrow money...”²⁴² which are accessible actions for most everyone. As well, contestants are required to disclose in their application, among other information, a statement detailing contributions and loans received before the first day of the leadership contest,²⁴³ and also in their application to appoint a financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments, and an auditor, and subsequently to appoint other agents to accept contributions, all of which aligns with the objective of ensuring the system has integrity.²⁴⁴

However, one loophole in these rules that does not align with the egalitarian model is that if person raises money from contributors to explore becoming a contestant, and then does not register, the contributors of the money are not required to be disclosed, and the person can keep the money. As well, no disclosure is required if the person exploring running is offered contributions, benefits or other advantages (including job offers) not to run for whatever reason, for example to give another person a better chance of

²⁴¹ *CEA*, *supra* note 79, section 478.1.

²⁴² *CEA*, *supra* note 79, section 478.2.

²⁴³ *CEA*, *supra* note 79, clause 478.3(2)(d).

²⁴⁴ *CEA*, *supra* note 79, sections 478.4-478.66, 478.71-478.72.

winning. This is mainly a problem if the person exploring running is a sitting MP and/or a Cabinet minister, and it is unclear under the gift and benefits rules discussed below in Chapter 4 whether such contributions, benefits or job offers fall within the definition of a bribe under the *Criminal Code* or offerings under federal ethics rules that are prohibited or, at least, required to be disclosed. I address this loophole further below in sections 3.13 and 3.25.

Another area of concern is that to register contestants are also required to pay their party's entry fee and fulfill other requirements. As a result, this area aligns with the Supreme Court's egalitarian model only when a political party makes its registration process to become a leadership contestant open, transparent, simple and equitable. For example, as with a nomination contestant or election candidate, it is equitable and democratic to require a leadership contestant to submit a form with the signatures of a certain number of party members from across the country as, for example, the NDP did in 2017 with a requirement to have 500 supporters total, with at least 50 from each of five regions, at least half from female members, and at least 100 from other equity seeking groups.²⁴⁵ If a person wants to be the leader of a political party, they should be able to show that they have a base of support in the party, and 500 voters represents a very small percentage of the number of voters across Canada, and even of the number of members in each of the main five federal parties.

²⁴⁵ Marie-Danielle Smith, "NDP sets rules for leadership race: Candidates need 500 signatures from party members across Canada," (June 14, 2016) *National Post*, online: <<https://nationalpost.com/news/politics/ndp-sets-rules-for-leadership-race-candidates-need-500-signatures-from-party-members-across-canada>> (hereinafter "Smith (June 14, 2016)").

It is also equitable for the party to have a screening process for contestants that ensures they meet ethical standards (and maintain them throughout the leadership contest), and are supporters of major policy positions of the party. In a case involving a candidate for the Conservative Party leadership in 2020 that received quite a bit of attention, the courts ruled that parties have the power to reject an application to become a contestant as long as the qualification rules are clear, the review process is at least somewhat procedurally fair (not to the standards required of courts or even tribunals, but with at least basic requirements of fairness), and the decision follows the rules, as the rules form a contract between the party and the applicant.²⁴⁶ This ruling does not entirely protect a prospective contestant from being rejected for arbitrary and/or political reasons. In the 2022 federal Conservative Party leadership contest, the registration applications of three contestants were rejected by the Party's oversight committee, and while one of the three accepted the Party's decision after further communications, because of the lack of any requirement to disclose details it remains unclear why the Party's committee made any of the decisions and why one contestant accepted the decision.²⁴⁷ This system violates the egalitarian principles of informing voters, and providing equal opportunity for equal participation.

²⁴⁶ *Karahalios v. Conservative Party of Canada*, 2020 ONSC 3145 (CanLII), <<https://canlii.ca/t/j7whr>>, paras. 226-233 and 237 and 241 (hereinafter "*Karahalios*"). Mr. Karahalios won the case as the incorrect Party committee had disqualified him, but one day after the court issued its ruling the correct, court-designated Party committee again disqualified him. See also *Graff v. New Democratic Party*, 2017 ONSC 3578 (CanLII) <<https://canlii.ca/t/h46sv>> (hereinafter "*Graff*"); *Arsenault v. Progressive Conservative Party of Ontario*, 2018 ONSC 1663 (CanLII), <<https://canlii.ca/t/hr07j>> (hereinafter "*Arsenault*"), and; *Trost v. Conservative Party of Canada*, 2018 ONSC 2733 (CanLII), <<https://canlii.ca/t/hrvt8>>.

²⁴⁷ Ian Bailey and Marieke Walsh, "Conservatives disqualify three candidates from leadership race, leaving six on the ballot," (May 2, 2002) *Globe and Mail*, online:

However, there are many examples from every federal party of the party executive setting high financial barriers to registering as a contestant and/or (less frequently) setting short timelines for contestants to meet registration requirements.²⁴⁸ For example, the non-refundable entry fee for the Liberal Party's 2013 leadership contest was \$75,000,²⁴⁹ for the NDP's 2017 contest it was \$30,000,²⁵⁰ for the Conservative Party's 2017 contest it was a \$50,000 non-refundable and for its 2020 contest it was \$200,000 non-refundable plus \$100,000 refundable plus 3,000 signatures of party members from across the country (\$25,000 initially, along with 1,000 signatures from members in at least 30 districts).²⁵¹ This was the highest entry fee for a party leadership contest ever in Canada.²⁵²

<<https://www.theglobeandmail.com/politics/article-six-candidates-make-the-cut-to-run-for-federal-conservative-leadership/>>. John Paul Tasker, "Anti-abortion activists claim corruption after Tories bar social conservative from leadership race," (May 2, 2022) CBC.ca, online: <<https://www.cbc.ca/news/politics/conservative-leadership-race-social-conservative-1.6438257>>. John Paul Tasker, "Rejected Conservative leadership candidate demands to know why the party dumped him," (May 4, 2022) CBC.ca, online: <<https://www.cbc.ca/news/politics/failed-conservative-candidate-joel-etienne-1.6441262>>. The Canadian Press, "Joel Etienne, failed Conservative leadership candidate, resolves issue with party," (May 6, 2022) CTVNews.ca, online: <<https://www.ctvnews.ca/politics/joel-etienne-failed-conservative-leadership-candidate-resolves-issue-with-party-1.5892427>>.

²⁴⁸ William P. Cross, André Blais, *Politics at the Centre: The Selection and Removal of Party Leaders in the Anglo Parliamentary Democracies* (Oxford, Oxford University Press, 2012) (hereinafter "Cross and Blais (2012)").

²⁴⁹ Tyler Sommers, "Liberal Leadership Race: Ready, Set, Spend!" (November 7, 2012), HuffPost.com, online: <https://www.huffpost.com/archive/ca/entry/liberal-leadership-race_b_1865973>.

²⁵⁰ Smith (June 14, 2016) *supra* note 245. NDP, Leadership Rules 2017, online: <<https://xfer.ndp.ca/2016/documents/LeadershipRules2017-EN.pdf>>.

²⁵¹ Stephanie Levitz, "Conservative leadership race to kick off Monday as party sets rules," (January 12, 2020) CBC.ca (publishing Canadian Press wire article), online: <<https://www.cbc.ca/news/politics/conservative-leadership-official-start-1.5424159>>.

²⁵² Éric Grenier, "Conservative leadership fee makes this the most expensive race ever — but is it worth the price?" (January 16, 2020) CBC.ca, online: <<https://www.cbc.ca/news/politics/grenier-conservative-leadership-fee-1.5427808>>.

For the Green Party's 2020 leadership contest, the entry fee was \$50,000.²⁵³ For the Conservative Party's 2022 leadership contest, the entry/registration fee was \$200,000 non-refundable plus \$100,000 refundable compliance deposit plus at least 500 signatures of party members in at least 30 districts across 7 provinces and territories.²⁵⁴ The inequity is not only the amounts required, but also that contestants who have \$25,000 to donate themselves and/or are supported by wealthy donors have an unfair advantage over contestants with low incomes who may be supported by more party members than wealthy, elite candidates, but will raise much less in funding if their supporters cannot afford to donate the maximum amount allowed.

When a party executive sets too-high financial barriers or requires quick action to register, it amounts to a significant gift/donation to the contestants who can afford the amounts that need to be raised in order to register, or who have free time to quickly launch a campaign, as they will face fewer competitors than if the contest has fair entry requirements and adequate timelines. As a result, barriers that thwart an open and fair contest from occurring violate the egalitarian model's requirements of a relatively equal opportunity to participate equally in an election process, and of ensuring that those with money to donate or spend (or, in this area, the power to

²⁵³ Mia Rabson, "Green party's leadership race rules, entry fee has some candidates balking," (February 3, 2020) CTVNews.ca (publishing Canadian Press wire article), online: <<https://www.ctvnews.ca/politics/green-party-s-leadership-race-rules-entry-fee-has-some-candidates-balking-1.4795180>>.

²⁵⁴ Conservative Party of Canada, Rules and Procedures for the 2022 Leadership, (March 8, 2022), online: <<https://cpcassets.conservative.ca/wp-content/uploads/2022/03/09111707/bb6620b6a719d2b.pdf>> pp. 11-13. Christian Paas-Lang, "How the rules could help shape who becomes the next Conservative leader," (March 13, 2022), CBC.ca, online: <<https://www.cbc.ca/news/politics/cpc-leadership-rules-influence-1.6382820>>.

reduce the financial burden for a contestant) do not dominate or have undue influence. It also does not fulfill the model to allow a few citizens, party executive members, to have this power to set the rules for a party leadership contest in a way that it favours wealthy contestants.

3.8 Donations and loans: general federal Canadian rules and issues

Under the *CEA*, a “contribution” (i.e. donation) can be monetary (money or a loan or loan guarantee) or non-monetary (property, use of property, and services) and includes money from a contestant’s or candidate’s own funds.²⁵⁵ Non-monetary transactions or contributions are required to be at fair market value²⁵⁶ and including contributions of cryptocurrencies which must be valued based on the exchange rate at the time the contribution is received (it is not clear whether all digital/intangible assets are covered by this requirement as interpreted and applied by Elections Canada).²⁵⁷ Transfers and loans between the party, its electoral district associations, and its candidates are not included under the definition of “contribution”.²⁵⁸ In other words, the *CEA* targets most “money being transferred from the private to the political domain” but not transfers within the political domain.²⁵⁹

²⁵⁵ *CEA*, *supra* note 79, subsections 2(1) and 364(1).

²⁵⁶ Elections Canada, Interpretation Note 2017-06 (July 2017): Contributions and Commercial Transactions, online: <<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2017-06&document=index&lang=e>> (hereinafter “Interpretation: Contributions and Commercial Transactions”).

²⁵⁷ Elections Canada, Interpretation Note 2018-10 (March 10, 2019): Cryptocurrencies, online: <https://www.elections.ca/res/gui/app/2018-10/2018-10_e.pdf>.

²⁵⁸ *CEA*, *supra* note 79, subsections 364(2)–(4), 373(5).

²⁵⁹ Feasby (2012), *supra* note 2 in Ewing, Rowbottom and Tham (2012) 206 at 208, *supra* note 2. Although some transfers within the political domain are prohibited – see Elections Canada, Interpretation Note 2020-07 (February 2021), online: <<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2020-07&document=index&lang=e>> (hereinafter “Elections Canada, Interpretation Note 2020-07”).

Other exclusions from the definition of “contribution” include annual party membership fees of \$25 or less.²⁶⁰ However, the *CEA* expressly includes fees for party and leadership conventions within the definition of “contribution.”²⁶¹ The *CEA* also clarifies that, if a candidate or party sells tickets to a campaign fundraising event, the amount of the contribution will be the difference between the price of the ticket and its fair market value.²⁶² Contributions are only permitted from individuals who are Canadian citizens or permanent residents.²⁶³ Loans are only allowed from registered Canadian financial institutions and individuals who are citizens or permanent residents of Canada, and the outstanding amount of a loan from an individual cannot exceed an individual’s annual contribution limit when combined with any other contributions made by that individual.²⁶⁴ This means that, generally, individual donations are limited, and Canadian corporations (other than financial institutions), unions, and other organizations (all non-natural legal persons) cannot donate or make loans to a political party or candidate or contestant.

Members of Parliament (MPs) are prohibited by various provisions and Elections Canada’s enforcement policy from using the MP resources or staff time to contribute in support of their own campaign during the pre-election period (if they are running for re-election) or to support nomination or party leadership contestants when those contests occur.²⁶⁵ Attempts to conceal the

²⁶⁰ *CEA*, *supra* note 79, section 364(7).

²⁶¹ *CEA*, *supra* note 79, section 364(8).

²⁶² *CEA*, *supra* note 79, section 377.

²⁶³ *CEA*, *supra* note 79, subsection 363(1).

²⁶⁴ *CEA*, *supra* note 79, subsections 373(3) and (4).

²⁶⁵ Elections Canada, Interpretation Note 2020-04 (May 2020), online: <<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2020->

identity of the source of a contribution are prohibited by section 368 of the *CEA*. Indirect contributions and loans are also prohibited, as source restrictions and contribution limits could otherwise be circumvented.²⁶⁶ This means an individual cannot make a contribution using money from another person or entity that was provided for the purpose of making a contribution.²⁶⁷

In 2023, individuals may contribute (in money (including a loan or loan guarantee), property, use of property and/or services the individual would usually charge for) no more than a total of \$1,700 per calendar year to each particular registered party and no more than \$1,700 per calendar year as an overall combined total to the registered electoral district associations, candidates, and nomination contestants of each registered party, and these limits both automatically increase by \$25 annually.²⁶⁸ To be clear, an individual can donate or loan or loan guarantee those amounts annually to more than one party, and to the nomination contestants, candidates and electoral district associations of more than one party. It should be noted that, although it occurs infrequently (the last time was the 2005-2006 federal election), if a nomination contest or election campaign period runs from one calendar year into the next calendar year, the limits for donations to contestants, candidates and parties would double.

04&document=index&lang=e> (hereinafter “Elections Canada, Interpretation Note (May 2020)”).

²⁶⁶ *CEA*, *supra* note 79, sections 370 and 373.

²⁶⁷ *CEA*, *supra* note 79, subsection 370(1).

²⁶⁸ *CEA*, *supra* note 79, subsections 367(1)–(1.1). Elections Canada, Limits on Contributions, online: <<https://www.elections.ca/content.aspx?section=pol&document=index&dir=lim&lang=e>>.

The overall concerns are how high the donation/loan limits are, and that there are significant exceptions to the prohibitions on businesses and other organizations making donations or loans, and on individuals making donations above the annual amounts. The first area of concern is that it is very questionable that these donation/loan limits are equitable given that the median annual income level of Canadians age 16 and over in 2019 was \$37,800 (the average was \$49,000).²⁶⁹ And these amounts are even more out of the reach of what the least advantaged voter or candidate (in Rawlsian terms) can afford, given that approximately 3.05 million Canadians over the age of 18 (11.7 percent of the total) lived in a low-income household in 2019 with less than \$29,000 in annual income.²⁷⁰

With average basic monthly expenses of rent/mortgage (\$1,500), food (\$600), heat/electricity/water (\$300), phone (\$100), transportation (\$100), and insurance (\$200), totaling \$33,600 annually, the median income earner would have approximately \$4,200 left over annually after expenses (assuming they had no dependents, and not taking into account any saving they may want to do for their retirement). Those in low-income households would be in debt at these expense rates, but would also very likely have much less than \$4,200 left over even at reduced rates of expenses. While the rates have fluctuated through the extraordinary time period since March 2020 when the COVID-19

²⁶⁹ Statistics Canada, "Income of individuals by age group, sex and income source," online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110023901>>.

²⁷⁰ A low-income household is a household with less than half the median after-tax household income. Statistics Canada, "Canadian Income Survey, 2019," online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/210323/dq210323a-eng.htm>>. Statistics Canada, "Table 3: Persons living below the poverty line (Market Basket Measure, 2018 base), Canada, 2015 to 2019," online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/210323/t003a-eng.htm#fn01>>.

pandemic began, according to Statistics Canada as of June 2021 approximately 16.5 percent of households had a financial situation that was “extremely vulnerable” and 22.8 percent were vulnerable.²⁷¹

Based on these income amounts, and detailed statistics I set out below in section 3.9 on political party donation patterns, I contend that it is reasonable to conclude that a median income person could afford to donate approximately \$75 annually in total if they wanted to make a donation, and people with low incomes a much lower amount. Others have proposed up to \$500-\$1,000 as amounts that would not result in undue influence.²⁷² However, in my opinion, based on the average income and low-income levels in Canada, those amounts are far more than the average voter can afford, and so they also do not align with the egalitarian model.

The second area of concern is the exception that allows for loans from financial institutions. As mentioned above, the outstanding amount of any loans made by an individual counts toward their contribution limit.²⁷³ However, banks and other federally regulated financial institutions are allowed to loan an unlimited amount of money to district associations, candidates, contestants, and political parties. This is one of the most unethical and inequitable aspects of Canada’s system as usually every party has a bank loan to finance its election campaign (as well as some candidates), which

²⁷¹ Statistics Canada, “The financial resilience and financial well-being of Canadians during the COVID-19 pandemic,” (September 9, 2021), online: <https://www150.statcan.gc.ca/n1/pub/75f0002m/75f0002m2021008-eng.htm>.

²⁷² See, for example: Ian Greene and David P. Shugarman, *Honest Politics: Seeking Integrity in Canadian Political Life* (Toronto: James Lorimer and Company, 1997) at 105 and 107 (although they also say up to \$1,000 would be fine).

²⁷³ CEA, *supra* note 79, section 373.

then puts every MP in a conflict of interest after the election when they are addressing proposals concerning financial institution and financial services issues.²⁷⁴ It is true that financial institutions are required to charge only a fair market rate of interest for such loans. However, the institution is still doing a favour by providing the loan, as well as building a relationship with the contestant, electoral district association (EDA), party or candidate that can, without very careful scrutiny, allow for other favours to be done by the institution – favours that can, over time, amount to undue influence. For example, a relatively easy way for a financial institution (or an individual lender) to do a relatively secret favour for a candidate, association or party is to extend the loan payment schedule (in effect extending the time before which the institution considers the loan to be an uncollectable debt)²⁷⁵ which gives more time to raise the funds to pay the loan amount. Given this, in order to comply with the egalitarian model, loans should also be limited to \$75 annually.

The third area of concern is the exception that, in effect, allows individuals, businesses and other organizations to provide, without receiving payment for up to three years, an unlimited amount of goods and/or services to a contestant, candidate, EDA or party.²⁷⁶ In the case of election candidates, EDAs and parties, the public post-election subsidy of 60 percent of their total campaign expenses that is provided to any candidate that wins

²⁷⁴ *CEA*, *supra* note 79, subsection 373(3).

²⁷⁵ *CEA*, *supra* note 79, see the consequences of uncollectable debts in section 477.6.

²⁷⁶ For nomination contestants, the three-year provision is set out in *CEA*, *supra* note 79, section 476.7. For election candidates, it is in section 477.54. For EDAs, it is in section 475.2. For leadership contestants, it is in section 478.75. For parties, it is in section 428.

more than 10 percent of the vote in an election, and 50 percent to any party that wins more than two percent of the national vote, along with the ongoing fundraising that parties and EDAs do in between elections, would usually allow them to pay off their campaign debts relatively soon after an election (or by-election). However, the possibility of an ongoing conflict of interest being created is still there, and allowing three years to negate that conflict seems like an excessively long time period.

With regard to party leadership contestants, several from the Liberals and Conservatives have gone into debt and then had difficulty paying off their debts within three years.²⁷⁷ I contend that it does not make sense to allow nomination and party leadership contestants to go into debt unless they can show, based on fundraising success and/or promises of future donations, that they will be able to pay off their debt promptly. If a contestant has not received contributions from voters (and cannot show that they will receive contributions from voters) to pay for their campaign expenses, they should be required to stop spending money on their campaign. As I set out below in Chapter 6, to ensure such a rule does not discourage contestants, candidates or parties that are supported by many voters who have limited financial resources (in other words to have an egalitarian system), public subsidies

²⁷⁷ Canadian Press, "Liberals won't face courts over 2006 leadership loans," July 30, 2013, CBC.ca, online: <<https://www.cbc.ca/news/politics/liberals-won-t-face-courts-over-2006-leadership-loans-1.1394561>> (hereinafter "CP, July 30, 2013"). John Paul Tasker, Vassy Kapelos, "Kevin O'Leary suing Elections Canada over fundraising limits," November 14, 2018, CBC.ca, online: <<https://www.cbc.ca/news/politics/powerandpolitics/pnp-tasker-oleary-suing-elections-canada-1.4905684>> (hereinafter "CBC.ca, November 14, 2018"). Nick Boisvert, "Peter MacKay still owes nearly \$300k for failed 2020 Tory leadership run," April 28, 2022, CBC.ca, online: <<https://www.cbc.ca/news/politics/peter-mackay-fundraising-update-1.6434319>> (hereinafter "CBC.ca, April 28, 2022").

should be extended to contestants, candidates and parties who have support from many voters who may not be as wealthy as voters who support other contestants, candidates and parties.

A directly related fourth concern is that, under Elections Canada's policy, any individual or entity can purchase goods or services from a vendor or supplier on behalf of a contestant or candidate or party, and then have the party owe the individual or entity for up to three years, without it being considered a contribution or loan, as long as it appears to be a commercial transaction.²⁷⁸ I contend that there is no reason to allow this, even if it appears to be a commercial transaction. If the contestant, candidate or party does not have or will not have funds to pay a vendor or supplier within the normal 30 days payment schedule, and the vendor or supplier will not extend credit to the contestant, candidate or party, then no individual or entity should be allowed to step in and finance whatever is being purchased without it being treated as a contribution or loan subject to the same limits and restrictions as all contributions and loans. If the individual or entity is not the vendor or supplier, they are a person in the middle who is, clearly in effect, making a contribution or loan. It is clearly inequalitarian to allow individuals and entities to exceed the contribution and loan limits and restrictions through such an arrangement, and it allowing it also favours contestants, associations, candidates and parties supported by wealthy individuals and entities that can afford to pay and not be repaid for up to three years.

²⁷⁸ Interpretation: Contributions and Commercial Transactions, *supra* note 256, "Transactions where the political entity is the buyer" and "Conclusion" sections.

A fifth area of concern is that, under the *CEA*, anyone and any entity can pay an unlimited amount of expenses of a nomination contestant, election candidate or party leadership contestant (including the contestant or candidate) for childcare, care for a person with a mental or physical disability, and assistance for themselves if they have a disability, and for any litigation expenses, as long as the expenses are in addition to their usual expenses (in other words, the expenses are incurred because the contestant or candidate is participating in a contest or campaign).²⁷⁹ These payments are not counted as a contribution, and these expenses are not counted toward the limits on expenses set in the *CEA* for all the entities except leadership contestants.²⁸⁰

A sixth concern is that, by decision of Elections Canada (i.e. not by a specific statutory provision in the *CEA*), anyone and any entity can pay an unlimited amount of other personal expenses (dry cleaning, personal grooming etc.) of a nomination contestant or leadership contestant, and up to \$200 for an election candidate.²⁸¹ A seventh concern is that, under the *CEA*,

²⁷⁹ Elections Canada: *Political Financing Handbook for Nomination Contestants and Financial Agents* (OGI 2021-06, October 2021), online:

<https://www.elections.ca/pol/nom/man/ec20182_c76/2021-06_e.pdf>, at 77-79 (hereinafter "*Nomination Contestant Handbook*"). Elections Canada: *Political Financing Handbook for Leadership Contestants and Financial Agents* (OGI 2021-08, January 2022), online: <https://www.elections.ca/pol/lea/man/EC20195/2021-08_e.pdf>, at 81-83 (hereinafter "*Leadership Contestant Handbook*"). Elections Canada: *Political Financing Handbook for Candidates and Financial Agents* (OGI 2021-04, July 2021), online: <https://www.elections.ca/pol/can/man/ec20155_c76/2021-04_e.pdf?ver=1.1>, at 87-89 (hereinafter "*Candidate Handbook*").

²⁸⁰ *CEA*, *supra* note 79, subsections 364(1.1), 374.1 to 374.4 (nomination contestants), 375, 376 and 377.1 and 378 (election candidates), and; 379.1 to 379.4 (party leadership contestants). See also: Elections Canada: *Nomination Contestant Handbook*, *supra* note 279, at 63, 78 and 85; Elections Canada: *Leadership Contestant Handbook*, *supra* note 279, at 69, 82 and 89. Elections Canada: *Candidate Handbook*, *supra* note 279, at 69, 88 and 95.

²⁸¹ Elections Canada: *Nomination Contestant Handbook*, *supra* note 279, at 78; Elections Canada: *Leadership Contestant Handbook*, *supra* note 279, at 84. Elections Canada: *Candidate Handbook*, *supra* note 279, at 90.

anyone and any entity can pay up to \$5,000 to compensate an election candidate's representatives at polling stations.²⁸²

These three expense payment exceptions are not used by many candidates, as only nine candidates during the 2019 federal election, and 30 during the 2021 election, had care, personal, litigation or candidate representative expenses paid by others.²⁸³ I did not review the financial returns of all nomination contest or party leadership contestants to determine how many have used these exceptions during the contests in recent years. However, even if only a few contestants and candidates are using these exceptions, they give an advantage to a contestant or candidate who is supported by people, businesses, unions or other entities that have extra money to pay for additional care expenses and/or litigation expenses or (in the case of a candidate) to compensate the candidate's representatives for attending at polling stations. As a result, these exceptions do not comply with the egalitarian model's principles of equal opportunity for equal participation.

An eighth area of concern is that, by decision of Elections Canada (i.e. not in the *CEA* as a statutory provision), a celebrity who usually charges for public appearances can appear at a nomination or leadership contest or candidate or party campaign event for free and, unlike every other contributor or supplier, it is not counted as a contribution or an expense. Only their costs of travelling to the event are counted as a contribution (or as an expense if the

²⁸² *CEA*, *supra* note 79, section 379. See also Elections Canada: *Candidate Handbook*, *supra* note 279, at 87-90.

²⁸³ Based on my search of: Elections Canada, Search for Financial Returns, online: <<http://www.elections.ca/WPAPPS/WPF/EN/Home/Index>> (hereinafter "Elections Canada, Financial Returns").

campaign pays the costs).²⁸⁴ This exemption gives contestants, candidates and parties that are supported by celebrities an advantage. The *CEA* prohibits nomination contestants, candidates and registered parties from colluding with a third party to circumvent the spending limits²⁸⁵ and (for candidates and parties) from sharing information to coordinate campaign activities.²⁸⁶ Corporations, unions and other entities are allowed to make contributions to third parties for the purpose of election advertising, or engage as a third party in campaigning and advertising themselves, and a third party's advertising or campaigning may directly or indirectly support a contestant, party or candidate, as discussed below in sections 3.27 to 3.30. Celebrities should be treated the same as other third parties and be allowed to mention at their own events that they support a candidate or a party. However, if they usually charge a fee to appear at another person or entity's event, then a nomination or leadership contestant, candidate and party should all be required either to pay the celebrity's usual fee if they appear at a campaign event and count it as an election expense or, if that amount is less than the contribution limit, the celebrity could count it as a non-monetary contribution to the contestant, candidate or party.

²⁸⁴ *Nomination Contestant Handbook*, *supra* note 279, at 81. *Candidate Handbook*, *supra* note 279 at 84. Elections Canada, *Political Financing Handbook for Registered Parties and Chief Agents* (OGI 2021-02, June 2021), online: <<https://www.elections.ca/content.aspx?section=pol&document=index&dir=pol/man/ec20231&lang=e>> at 87 (hereinafter "*Registered Parties Handbook*"). *Leadership Contestant Handbook*, *supra* note 279, at 79.

²⁸⁵ *CEA*, *supra* note 79, re: nomination contestants, subsection 476.68(2); re: candidates, subsection 477.52(2); re: parties, subsection 431(2).

²⁸⁶ *CEA*, *supra* note 79, re: candidates, subsection 351.01(2) and (3); re: parties, subsection 351.01(1).

A ninth and final area of concern is that party officials and/or party leaders can make a significant “contribution” to a nomination contestant by appointing them as an election candidate, as this saves them raising money and/or contributing their own money to a nomination contest campaign.²⁸⁷

I address the implications of lowering the donation and loan limit to \$75, and making other changes to restrict paying expenses and providing goods and services without payment, fully in Chapter 6 where I set out proposals for more egalitarian rules. An important point to note here though is that while campaigning for public office is generally viewed as requiring at least some money, how much money is needed depends very much on the size of the jurisdiction, the type of campaigning, the resources deployed, whether the jurisdiction has spending limits, and the level of funding that other candidates and/or parties have. While politicians and political parties across the spectrum claim that they need large sums of money to run campaigns and reach voters, their claim is not based on any evidence that all the spending they may want to do is necessary, nor on any evidence that the free media coverage they receive is insufficient to communicate their election platform and messages to voters.

Election campaigns at a local level can be completely volunteer-run with little funding if there are enough people interested with enough available

²⁸⁷ This concern is raised in Andrew Stark, “Canada’s Upside-Down World of Public-Sector Ethics,” (2005) 8:2 *International Public Management Journal* 187 at 188-190 (hereinafter “Stark (2005)”). It should be noted that, as Mr. Stark admits at some points, he relies on conjecture, anecdote and speculation for many of the claims, and suggested changes to rules, made in the article. He also inaccurately summarizes the federal ethics rules that were in force at that time.

free time. National campaigns of political party leaders usually necessitate spending on campaign and support staff, travel and event costs. However, they also often involve significant spending on surveys and broadcast advertising, and the necessity of that spending can also be justifiably questioned given that media outlets often publish survey results during elections, some jurisdictions offer an amount of free broadcasting time for party advertisements (in the UK that is the only advertising parties are allowed to do), and several studies show that the advertising has only a small effect on voters.²⁸⁸ As well, as addressed below in section 3.32, and in Chapter 6, section 6.17, the growing availability worldwide of email, cell phone and social media communications has reduced the costs of reaching voters and advertising, including through the phenomenon of a political ad posted only on social media that goes viral through a combination of sharing by the public and media coverage of the ad.²⁸⁹

²⁸⁸ Alan S. Gerber, James G. Gimpel, Donald P. Green and Daron R. Shaw, “How Large and Long-lasting Are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment” (February 2011) *The American Political Science Review*, Vol. 105-1 135. Joshua L. Kalla and David E. Broockman, “The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments,” (February 2018) *American Political Science Review*, Volume 112-1 148. Jörg L. Spenkuch and David Toniatti, “Political Advertising and Election Results,” (November 2018) *The Quarterly Journal of Economics*, Vol. 133-4 1981. Dunaway, Johanna, Kathleen Searles, Erika Franklin Fowler and Travis Ridout, “The Effects of Political Advertising: Assessing the Impact of Changing Technologies, Strategies, and Tactics,” in Philip Napoli, ed. *Mediated Communication* (Volume 7 in the Handbooks of Communication Science Series) (De Gruyter Mouton: Berlin, 2018) 431. Alexander Coppock, Seth J. Hill and Lynn Vavreck, “The small effects of political advertising are small regardless of context, message, sender, or receiver: Evidence from 59 real-time randomized experiments,” (02 Sep 2020) *Science Advances* Vol. 6, no. 36, online: <<https://advances.sciencemag.org/content/6/36/eabc4046/tab-pdf>>.

²⁸⁹ Maria Petrova, Ananya Sen and Pinar Yildirim, “Social Media and Political Contributions: The Impact of New Technology on Political Competition,” (May 2021) *Management Science* Vol. 65, No. 5 2997 (hereinafter “Petrova, Sen and Yildirim (2021)”).

3.9 Donations and loans to political parties

While it may be more orderly to address donations to nomination contestants and candidates first, as those are the entry points for individuals into the electoral system, because I have completed much more extensive research into donations to federal political parties, and this research reveals important patterns that affect the assessment of the equity and integrity of all donations in the federal Canadian system, I am addressing donations to parties first. As summarized in the previous section, an individual can make an annual donation of, in 2023, \$1,700 to each political party, including during an election year. Also as summarized in the previous section, it is very questionable whether this donation limit is equitable given, as mentioned in the previous section, Canada's median income in 2019 was \$37,800, and more than 10 percent of households have an income of \$29,000 or less.

The following five charts show that the estimated median donation to the five main federal Canadian political parties during the five years from 2016 to 2020 inclusive was \$75.03.²⁹⁰ As set out in subsections 367(1) and 1.1 of the *CEA* which were enacted in 2014, the limit for a donation/contribution by an individual to each party was set at \$1,500 for 2015 (plus an additional

²⁹⁰ In 2016, the estimated median contribution to the five main federal political parties was \$75.37 (\$376.84 total ÷ 5); in 2017 it was \$70.74 (\$353.71 total ÷ 5); in 2018 it was \$79.46 (\$397.29 total ÷ 5), and; in 2019 it was \$76.68 (\$383.39 total ÷ 5). The overall four-year estimated median contribution to the five main parties was \$75.56 (\$302.25 total ÷ 4). It is an estimate because federal political parties are not required to disclose the exact amount donated by anyone who donates less than \$200 annually – the only figures provided by each party are the total donated annually in amounts under \$200, and the total number of donors who each gave under \$200 each year. From that, the average amount donated under \$200 was calculated, and then that amount was used in the calculation of the estimated media donation for each party annually. Thank you to Cameron Flanagan for his assistance in these calculations from the annual data available in Elections Canada's Registered Party Financial Returns, online: <<https://www.elections.ca/WPAPPS/WPF/EN/PP/Index>> (hereinafter "Elections Canada, Registered Party Financial Returns").

\$1,500 combined total to the riding associations of each party), increasing automatically by \$25 each year. As a result, in 2016 the party donation limit was \$1,525; in 2017 it was \$1,550; in 2018 it was \$1,575; in 2019 it was \$1,600, and; in 2020 it was \$1,625. The high estimated median contribution through this five-year period for each party was as follows: Liberal Party - \$72.87 (2020); Conservative Party - \$96.68 (2016); New Democratic Party - \$84.08 (2016); Bloc Quebecois - \$76.63 (2020); Green Party - \$81.08 (2018). The low estimated median contribution amount through this four-year period for each party was as follows: Liberal Party - \$62.67 (2016); Conservative Party - \$91.21 (2018); New Democratic Party - \$48.59 (2017); Bloc Quebecois - \$61.50 (2016); Green Party - \$57.69 (2020).

I contend that this five-year period presents a recent representative average annual donation total for each main party because it includes an election year (during which donations usually increase), and a post-election year (during which donations usually decrease). I also contend that the estimated median contribution is as close as possible to an accurate figure of the amount that most individuals can afford to give, or want to give. Based on the statistics from 2016-2020, an individual donation limit that would conform to an egalitarian model would be no more than \$75 annually. I also contend that this amount should not be higher to allow a person to “hedge their bets” by donating to more than one party. According to research by CBC News reporter Roberto Rocha, only a small percentage of donors donate to more than one party in recent years – from 1.7 percent of Liberals in 2017; 0.3 to 0.7 percent of Conservatives from 2016 to 2019, and; also in 2017, 1.8

percent of NDP supporters and 6.3 percent of Green Party supporters.²⁹¹

Another factor to take into account from the five charts set out below is that all of the donation figures for 2016-2020 are based on donations made by, on average approximately, 234,000 donors annually (0.87 percent) out of Canada's approximate total of 27 million eligible voters through that time period. Overall, this indicates that only a small percentage can afford to, or want to, donate to any party or to more than one party which, I contend, also supports the argument against having an annual donation limit of more than \$75 (including a donation made by a loan or loan guarantee).

²⁹¹ Roberto Rocha, "More donors, smaller donations: How political fundraising has changed in Canada," (October 18, 2019) CBC.ca, online: <<https://www.cbc.ca/news/politics/elections-canada-data-donors-increase-1.5322682>>.

**Chart 1: Analysis of Contributions to Five Main Federal Canadian Political Parties
from January 1, 2016 to December 31, 2016**

2016 statistics	Liberal	Conservative	Bloc	NDP	Green
Total # of donors	82,285	82,662	5,773	26,754	17,907
Total amount donated	\$17,184,318.96	\$18,252,173.28	\$656,273.45	\$5,398,683.65	\$2,833,202.53
Average donation (Estimated Median donation)	\$208.84 (\$62.67)	\$220.80 (\$93.69)	\$113.68 (\$61.50)	\$201.79 (\$84.08)	\$158.22 (\$74.90)
# of donors who donated \$1,000+ (% of total # of donors)	5,569 (6.77%)	3,353 (4.06%)	33 (0.57%)	644 (2.41%)	305 (1.70%)
Total donated by donors of \$1,000+ (% of total donations)	\$7,862,895.30 (45.76%)	\$4,487,812.03 (24.59%)	\$42,573.46 (6.49%)	\$855,533.08 (15.85%)	\$391,507 (13.82%)

# of donors who donated \$500 to \$999 (% of total # of donors)	3,924 (4.77%)	6,137 (7.42%)	81 (1.40%)	1,455 (5.44%)	699 (3.90%)
Total donated by donors of \$500 to \$999 (% of total donations)	\$2,591,217.41 (15.08%)	\$3,851,151.24 (21.10%)	\$52,085 (7.94%)	\$943,834.33 (17.48%)	\$440,732.43 (15.56%)
# of donors who donated \$200 to \$499 (% of total # of donors)	8,482 (10.31%)	13,196 (15.96%)	679 (11.76%)	6,509 (24.33%)	2,941 (16.42%)
Total donated by donors of \$200 to \$499 (% of total donations)	\$2,700,165.02 (15.71%)	\$4,294,332.99 (23.53%)	\$255,323.17 (38.90%)	\$2,073,648.16 (38.41%)	\$955,248.66 (33.72%)
# of donors who donated \$0 to \$199 (% of total # of donors)	64,310 (78.16%)	59,976 (72.56%)	4,980 (86.26%)	18,146 (67.83%)	13,962 (77.97%)
Total donated by donors of \$0 to \$199 (% total donations)	\$4,030,041 (23.45%)	\$5,618,877.02 (30.78%)	\$306,292 (46.67%)	\$1,525,668 (28.26%)	\$1,045,714 (36.91%)

**Chart 2: Analysis of Contributions to Five Main Federal Canadian Political Parties
from January 1, 2017 to December 31, 2017**

2017 statistics	Liberal	Conservative	Bloc	NDP	Green
Total # of donors	64,444	94,786	6,276	39,053	14,773
Total amount donated	\$13,898,557.66	\$18,846,568.40	\$705,112.93	\$4,864,364.75	\$2,503,069.96
Average donation (Estimated Median donation)	\$215.67 (\$69.67)	\$198.83 (\$91.21)	\$112.35 (\$64.15)	\$124.56 (\$48.59)	\$169.44 (\$80.09)
# of donors who donated \$1,000+ (% of total # of donors)	4,178 (6.48%)	3,229 (3.41%)	28 (0.45%)	534 (1.37%)	269 (1.82%)
Total donated by donors of \$1,000+ (% of total donations)	\$5,892,910.79 (42.40%)	\$4,365,914.65 (23.17%)	\$37,000 (5.25%)	\$711,692.17 (14.63%)	\$344,230.44 (13.75%)

# of donors who donated \$500 to \$999 (% of total # of donors)	3,157 (4.90%)	5,249 (5.54%)	94 (1.50%)	1,304 (3.34%)	591 (4.00%)
Total donated by donors of \$500 to \$999 (% of total donations)	\$2,162,694.12 (15.56%)	\$3,219,183.56 (17.08%)	\$59,410 (8.43%)	\$825,143.39 (16.96%)	\$357,469.90 (14.28%)
# of donors who donated \$200 to \$499 (% of total # of donors)	7,459 (11.57%)	14,419 (15.21%)	693 (11.04%)	5,631 (14.42%)	2,814 (19.05%)
Total donated by donors of \$200 to \$499 (% of total donations)	\$2,383,800.33 (17.15%)	\$4,704,408.68 (24.96%)	\$258,395.69 (36.64%)	\$1,792,957.77 (36.86%)	\$912,403.86 (36.45%)
# of donors who donated \$0 to \$199 (% of total # of donors)	49,650 (77.04%)	71,889 (75.84%)	5,461 (87.01%)	31,584 (80.87%)	11,099 (75.13%)
Total donated by donors of \$0 to \$199 (% total donations)	\$3,459,152 (24.89%)	\$6,557,062 (34.79%)	\$350,307 (49.68%)	\$1,534,571 (31.55%)	\$888,966 (35.52%)

**Chart 3: Analysis of Contributions to Five Main Federal Canadian Political Parties
from January 1, 2018 to December 31, 2018**

2018 statistics	Liberal	Conservative	Bloc	NDP	Green
Total # of donors	66,192	104,138	4,322	25,114	16,719
Total amount donated	\$15,893,919.85	\$24,224,919.41	\$542,401.20	\$5,113,510.58	\$3,130,246.71
Average donation (Estimated Median donation)	\$240.12 (\$71.45)	\$232.62 (\$94.75)	\$125.50 (\$68.36)	\$203.61 (\$81.65)	\$187.23 (\$81.08)
# of donors who donated \$1,000+ (% of total # of donors)	4,463 (6.74%)	4,746 (4.56%)	33 (0.76%)	657 (2.62%)	424 (2.54%)
Total donated by donors of \$1,000+ (% of total donations)	\$6,302,939.86 (39.66%)	\$6,575,012.29 (27.14%)	\$42,864 (7.90%)	\$888,227.52 (17.37%)	\$552,991.46 (17.67%)

# of donors who donated \$500 to \$999 (% of total # of donors)	4,246 (6.41%)	8,262 (7.93%)	66 (1.53%)	1,528 (6.08%)	833 (4.98%)
Total donated by donors of \$500 to \$999 (% of total donations)	\$2,905,382.21 (18.28%)	\$5,067,522.68 (20.92%)	\$41,220 (7.60%)	\$984,804.52 (19.26%)	\$518,057.53 (16.55%)
# of donors who donated \$200 to \$499 (% of total # of donors)	10,445 (15.78%)	16,809 (16.14%)	551 (12.75%)	5,690 (22.66%)	3,211 (19.21%)
Total donated by donors of \$200 to \$499 (% of total donations)	\$3,324,506.43 (20.92%)	\$5,540,510.12 (22.87%)	\$207,292.30 (38.22%)	\$1,832,861.56 (35.84%)	\$1,065,867.03 (34.05%)
# of donors who donated \$0 to \$199 (% of total # of donors)	47,038 (71.06%)	74,321 (71.37%)	3,672 (84.96%)	17,239 (68.64%)	12,251 (73.28%)
Total donated by donors of \$0 to \$199 (% total donations)	\$3,361,091 (21.15%)	\$7,041,874 (29.07%)	\$251,025 (46.28%)	\$1,407,617.97 (27.53%)	\$993,331 (31.73%)

**Chart 4: Analysis of Contributions to Five Main Federal Canadian Political Parties
from January 1, 2019 to December 31, 2019**

2019 statistics	Liberal	Conservative	Bloc	NDP	Green
Total # of donors	86,047	123,688	12,587	39,218	36,226
Total amount donated	\$20,596,390.39	\$30,855,671.49	\$1,813,015.29	\$8,071,473.01	\$6,468,759.35
Average donation (Estimated Median donation)	\$239.36 (\$70.83)	\$249.46 (\$96.68)	\$144.04 (\$74.95)	\$205.81 (\$67.83)	\$178.57 (\$73.10)
# of donors who donated \$1,000+ (% of total # of donors)	5,871 (6.82%)	6,744 (5.45%)	120 (0.95%)	1,498 (3.82%)	982 (2.71%)
Total donated by donors of \$1,000+ (% of total donations)	\$8,360,661.57 (40.59%)	\$9,326,363.97 (30.23%)	\$163,047 (8.99%)	\$2,100,991.02 (26.03%)	\$1,320,944.24 (20.42%)

# of donors who donated \$500 to \$999 (% of total # of donors)	5,552 (6.45%)	9,992 (8.08%)	413 (3.28%)	2,727 (6.95%)	1,920 (5.30%)
Total donated by donors of \$500 to \$999 (% of total donations)	\$3,624,369.99 (17.60%)	\$6,197,726.26 (20.09%)	\$258,501.17 (14.26%)	\$1,746,131.69 (21.63%)	\$1,188,255.40 (18.37%)
# of donors who donated \$200 to \$499 (% of total # of donors)	13,907 (16.16%)	21,433 (17.33%)	1,694 (13.46%)	7,180 (18.31%)	5,796 (16.00%)
Total donated by donors of \$200 to \$499 (% of total donations)	\$4,310,883.46 (20.93%)	\$7,063,886.34 (22.89%)	\$615,012.80 (33.92%)	\$2,337,785.30 (28.96%)	\$1,947,273.85 (30.10%)
# of donors who donated \$0 to \$199 (% of total # of donors)	60,717 (70.56%)	85,519 (69.14%)	10,360 (82.31%)	27,813 (70.92%)	27,528 (75.99%)
Total donated by donors of \$0 to \$199 (% total donations)	\$4,300,475 (20.88%)	\$8,267,694.92 (26.79%)	\$776,454 (42.83%)	\$1,886,565 (23.37%)	\$2,012,285.86 (31.11%)

**Chart 5: Analysis of Contributions to Five Main Federal Canadian Political Parties
from January 1, 2020 to December 31, 2020**

2020 statistics	Liberal	PC	Bloc	NDP	Green
Total # of donors	64,541	90,591	10,139	33,386	26,052
Total amount donated	\$14,981,297.21	\$20,654,154.94	\$1,576,983.54	\$6,101,818.06	\$3,431,648.37
Average donation (Estimated Median donation)	\$232.12 (\$72.87)	\$227.99 (\$91.81)	\$155.54 (\$76.63)	\$182.77 (\$65.55)	\$131.72 (\$57.69)
# of donors who donated \$1,000+ (% of total # of donors)	4,079 (6.32%)	4,176 (4.61%)	159 (1.57%)	919 (2.75%)	413 (1.58%)
Total donated by donors of \$1,000+ (% of total donations)	\$6,181,484.28 (41.26%)	\$5,891,510.25 (28.52%)	\$223,763.60 (14.19%)	\$1,246,914.83 (20.44%)	\$549,309.23 (16.01%)

# of donors who donated \$500 to \$999 (% of total # of donors)	3,675 (5.69%)	6,293 (6.95%)	279 (2.75%)	1,941 (5.81%)	859 (3.30%)
Total donated by donors of \$500 to \$999 (% of total donations)	\$2,375,266.51 (15.85%)	\$3,852,889.59 (18.65%)	\$177,287 (11.24%)	\$1,233,833.02 (20.22%)	\$530,720.31 (15.47%)
# of donors who donated \$200 to \$499 (% of total # of donors)	9,739 (15.09%)	15,062 (16.63%)	1,461 (14.41%)	6,203 (18.58%)	3,396 (13.04%)
Total donated by donors of \$200 to \$499 (% of total donations)	\$2,996,327.29 (20.00%)	\$4,936,301.18 (23.90%)	\$544,481.62 (34.53%)	\$2,026,606.38 (33.21%)	\$1,118,021.92 (32.80%)
# of donors who donated \$0 to \$199 (% of total # of donors)	47,048 (72.90%)	65,060 (71.82%)	8,240 (81.27%)	24,323 (72.85%)	21,384 (82.08%)
Total donated by donors of \$0 to \$199 (% total donations)	\$3,428,219.13 (22.88%)	\$5,973,453.92 (28.92%)	\$631,451.32 (40.04%)	\$1,594,463.83 (26.13%)	\$1,233,596.91 (35.95%)

Another area of concern is that donations of “volunteer” labour are not limited or even monitored, which not only allows voters who do not have to work who can volunteer full-time to give more than average voters, but also facilitates corporations, unions and other entities “loaning” volunteers (including through giving people fake jobs and then giving them leave to volunteer) as a way of getting around the *CEA*’s ban on donations from entities.

As set out in the above section, annually in between election years as of 2023, individuals are allowed to donate (or loan or loan guarantee) up to \$1,700 worth of money, property or use of property or services to each political party, and another \$1,700 as a combined total to each party’s electoral district associations (and these amounts increase by \$25 annually), for a combined annual total of \$3,400 annually. As the charts in the previous section show, this level of donation limit also makes federal parties much more dependent on top donors during and in between election years. The chart below shows the average percentage of donors for each party who donated more than \$1,000 annually from 2016 to 2020, and the average percentage of total donations they provided to each party.

Chart 6: Average Percentage of Donors Donating More Than \$1,000 to the Five Main Political Parties and Average Percentage of Total Donations They Provided During 2016-2020 Calendar Years

	Liberal	Conservative	Bloc	NDP	Green
Average % of donors donating \$1,000 or more	6.6%	4.4%	0.86%	2.6%	2.1%
Average % of total donations received from these donors	41.9%	26.7%	8.5%	18.8%	16.3%
Average amount donated by donors of \$1,000 or more	\$6,921,880 (out of \$16.52 million average total donated annually)	\$6,018,180 (out of \$22.54 million average total donated annually)	\$89,250 (out of \$1.05 million average total donated annually)	\$1,109,200 (out of \$5.9 million average total donated annually)	\$596,580 (out of \$3.66 million average total donated annually)

As the figures in Chart 6 show, in each party the top donors during 2016 to 2020 were responsible for six to 10 times the percentage of total donations they represented compared to the percentage of total donors they represented, and arguably all of the parties received a significant amount of their funding from these top donors. One could claim that the Bloc receiving only about eight percent of its annual funding on average from donors donating \$1,000 or more is not “significant”. However, I contend that it is a significant amount because, based on the estimated median annual donation of \$75 to the five main federal political parties from 2016 to 2020, each party would have had to attract approximately 1,150 (Bloc) to 7,500 (Greens) to

14,000 (NDP) up to 88,000 (Liberals and Conservatives) more donors donating \$75 each annually in order to raise the amounts that they raised from the small percentage of their donors who donated \$1,000 or more annually. The time and costs that each party would incur reaching out to those \$75 donors should also be taken into account when considering how significant the \$1,000-plus donors are to each party.

The significance of top donors for each party is equally clear when the percentage of donors who donated the maximum legal amount annually is considered, as the chart below shows:²⁹²

Chart 7: Percentage of Donors Donating Maximum Legal Amount to the Five Main Political Parties and Percentage of Total Donations They Provided During 2016-2020 Calendar Years

	Liberal	Conservative	Bloc	NDP	Greens
% (#) of donors donating max. in 2016 (\$1,525)	0.48% (399)	1.61% (1,333)	0.16% (9)	0.58% (154)	0.42% (75)
% (total) of total donations from these donors 2016	3.94% (\$608,475)	11.14% (\$2,032,825)	2.09% (\$13,725)	4.35% (\$234,850)	4.04% (\$114,375)
% (#) of donors donating max. in 2017 (\$1,550)	0.17% (109)	1.52% (1,439)	0.06% (4)	0.23% (88)	0.43% (64)
% (total) of total					

²⁹² Thank you to Cameron Flanagan for his assistance in these calculations from the annual data available in Elections Canada's Registered Party Financial Returns, *supra* note 290.

donations from these donors 2017	1.22% (\$166,225)	11.83% (\$2,230,450)	0.88% (\$6,200)	2.80% (\$136,400)	3.96% (\$99,200)
% (#) of donors donating max. in 2018 (\$1,575)	0.26% (175)	2.21% (2,299)	0.21% (9)	0.76% (191)	0.70% (117)
% (total) of total donations from these donors 2018	1.73% (\$275,625)	14.95% (\$3,620,925)	2.61% (\$14,175)	5.88% (\$300,825)	5.89% (\$184,275)
% (#) of donors donating max. in 2019 (\$1,600)	0.37% (317)	2.56% (3,163)	0.37% (47)	1.17% (458)	1.05% (379)
% (total) of total donations from these donors 2019	2.46% (\$507,200)	16.40% (\$5,060,800)	4.15% (\$75,200)	9.08% (\$732,800)	9.37% (\$606,400)
% (#) of donors donating max. in 2020 (\$1,625)	0.28% (183)	2.23% (2,024)	0.66% (67)	0.66% (220)	0.39% (101)
% (total) of total donations from these donors 2020	2.23% (\$334,153.27)	15.94% (\$3,292,275)	6.90% (\$108,875)	5.95% (\$363,023.15)	4.78% (\$164,125)

As the figures in Chart 7 show, in each party the donors who donated the legal maximum amount annually from 2016 to 2020 were responsible for five to seven times the percentage of total donations compared to the percentage of total donors that they represented. The *Globe and Mail* reported in 2016, also based on Elections Canada figures, that only 790 people (0.85 percent of all donors to the Liberals) donated \$1,500 or more in 2015, and in 2014 only 522 people (0.68 percent out of 77,064 total donors) donated \$1,200 or more (the amount needed that year to attend a Laurier Club event).²⁹³ One other related statistic, according to research conducted by Canadian Press reporter Christian Paas-Lang, in 2018 at least 20 people donated the maximum amount allowed to both the Liberals and Conservatives, most of them executives in big businesses.²⁹⁴

While it is difficult to determine the exact characteristics of many of these top donors, a study of donations from 2007-2011 found that there is evidence that they live in wealthier neighbourhoods, and more likely have family members who also donate.²⁹⁵ Another study of donations from 2015-

²⁹³ Robert Fife and Steven Chase, "Donation stats indicate Liberal fundraisers are exclusive events," October 31, 2016, *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/donation-stats-indicate-liberal-fundraisers-are-exclusive-events/article32588273/>> (hereinafter "Fife and Chase (October 31, 2016 Part 1)"). As well, the Liberals held at least 20 small, high-priced, invite-only fundraising events in 2016 which some lobbyists attended. Robert Fife and Steven Chase, "Morneau fundraiser one in list of Liberal cash-for-access events," October 20, 2016, *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/morneau-fundraiser-one-in-list-of-liberal-cash-for-access-events/article32450347/>> (hereinafter "Fife and Chase (October 31, 2016 Part 2)").

²⁹⁴ Christian Paas-Lang, "At least 20 people donated max to both Liberals and Conservatives in 2018," (July 29, 2019) The Canadian Press / CTVNews.ca, online: <<https://www.ctvnews.ca/politics/at-least-20-people-donated-max-to-both-liberals-and-conservatives-in-2018-1.4527435>>.

²⁹⁵ Brianna Carmichael and Paul Howe, "Political Donations and Democratic Equality in Canada," (May 2014), Vol. 37(1) *Canadian Parliamentary Review* 16, online:

2020 to federal parties, electoral district associations (EDAs), and 2019 federal election candidates found similar evidence, as 15 of the 17 electoral districts with total donations greater than 95 percent of all districts also had higher median household incomes compared to the Canadian average in 2016.²⁹⁶ According to the study, the average amount raised per district during this time period was \$853,000, while the top 17 ridings' donations ranged from \$2.1 million total up to \$5.9 million. The four ridings that had the highest level of donations during this time period had exponentially higher total donations than the average, with Ottawa-Centre at \$5.9 million, University-Rosedale at \$5.4 million, Toronto-St. Paul's at \$4.1 million and Calgary Centre at \$4 million.

In addition to the statistics set out above and in the previous section showing clearly that the current federal annual donation limits do not align with the egalitarian model, there is also clear evidence that people who can donate the maximum receive greater access to top federal party decision-makers through “cash-for-access” events. For example, the federal Liberal Party held a series of special events in 2016 through 2018, which the Prime Minister and/or other ministers attended, for donors who donated \$1,500 or

<http://www.revparl.ca/37/1/37n1e_14_printversion.pdf> and
<<http://www.revparlcan.ca/series/vol-37-no-1-spring/>>.

²⁹⁶ Kayla Zhu and Michael Wong, “Donations from affluent ridings grease the wheels of political access, new analysis finds,” (January 18, 2023), LocalNewsDataHub.ca, online: <<https://localnewsdatahub.ca/2023/01/donations-from-affluent-urban-ridings-grease-the-wheels-of-politics-new-analysis-suggests/>>. The study was undertaken jointly with the Investigative Journalism Foundation (IJF), and the article can also be seen at: <<https://theijf.org/donations-from-affluent-urban-ridings-grease-the-wheels-of-politics-new-analysis-suggests>>. See also related articles on the LocalNewsDataHub.ca site at: <<https://localnewsdatahub.ca/donating-to-the-cause/>>.

more annually, including lobbyists.²⁹⁷ In addition, the Liberals continue to hold invite-only fundraising events for top donors whose donation gives them a membership in the Party's exclusive Laurier Club.²⁹⁸

As well, after the initial set of fundraising events was revealed in late 2016, the Liberal Party pledged not to allow lobbyists to attend events also attended by Cabinet ministers, especially ministers they are lobbying, but the Party continues to allow lobbyists to attend such events. A study of 72 Liberal Party fundraising events from April 2017 to through to August 2018 found that: nearly half were attended by lobbyists; 130 lobbyists in total attended the events; more than three-quarters of those lobbyists, attending events 200 times in total, attended an event where the Cabinet minister they were lobbying was speaking at the event.²⁹⁹ Another study of 120 Liberal Party fundraising events from January 2019 to July 2022 found that: lobbyists attended 51 of the events; a total of 166 lobbyists attended those events; those 166 lobbyists lobby for approximately 790 businesses and other

²⁹⁷ Fife and Chase (October 31, 2016 Part 2), *supra* note 293. See the list of all the events held in 2016 up to October 21st online at: <<https://democracywatch.ca/wp-content/uploads/Fundraising-Events-2016.pdf>>. And see the list of events held from April 27, 2017 on at: <<https://www.liberal.ca/fundraising-events/>>. As well, re: Liberal Party events from April 2017 on through the next year, see: Bill Curry, "Federal Liberals violated own fundraising rules," September 17, 2018, *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-lobbyists-still-attending-liberal-fundraisers-despite-promised-reform/>> (hereinafter "Curry (September 17, 2018)").

²⁹⁸ Liberal Party of Canada, Laurier Club, online: <<https://secure.liberal.ca/laurierclub/>>. While the Party's website has deleted the description of the rewards that Laurier Club members receive, an archive site states that they include receiving "invitations to Laurier Club functions with representatives of the Liberal Party of Canada" and attending "the Liberal Party Leader's annual summer reception in Ottawa". Liberal Party of Canada, The Laurier Club, online: <https://www.collectionscanada.gc.ca/eppp-archive/100/205/300/liberal-ef/06-10-26/https@www.liberal.ca/laurier_e.aspx>.

²⁹⁹ Curry (September 17, 2018), *supra* note 297. See also: Amy Minsky, "Registered to lobby Justin Trudeau? You can still make it into his 'cash-for-access' events," (July 12, 2017), GlobalNews.ca, online: <<https://globalnews.ca/news/3592513/justin-trudeau-cash-for-access-fundraiser-lobbyists/>>

organizations; 137 of the 166 lobbyists attended an event where the minister they were lobbying was speaking at the event,³⁰⁰ and; lobbyists from 15 organizations, mostly industry associations (which represent multiple companies in an industry) attended multiple events.³⁰¹

The current high annual individual donation limit also facilitates “bundler” fundraisers who organize high-priced, invite-only events and, evidence shows, thereby gain direct access to Cabinet ministers.³⁰² In spring 2016, the federal Liberal Party set up a “Leader’s Circle” that offered to “bundlers” who recruited 10 or more Laurier Club members “recognition opportunities” including “an annual dinner with the Leader and invitations to events and discussions with leaders within the party.”³⁰³ The Circle webpage on the Party’s site,³⁰⁴ which was removed after just a few months when the

³⁰⁰ Roberto Rocha, “Liberals quietly allow lobbyists to attend cash-for-access fundraisers despite pledging to stop” (January 4, 2023), Investigative Journalism Foundation (IJF), online: <<https://theijf.org/liberals-quietly-allow-lobbyists-to-attend-cash-for-access-fundraisers-despite-pledging-to-stop>>.

³⁰¹ Roberto Rocha, “Lobby groups attended Liberal fundraisers while seeking to influence the government,” (January 30, 2023), Investigative Journalism Foundation (IJF), online: <<https://theijf.org/lobby-groups-attended-liberal-fundraisers-while-seeking-to-influence-the-government>>.

³⁰² The federal Liberal Party held at least two such events in 2014-2015. See: Democracy Watch, “News Release: Lobbying Commissioner investigating Democracy Watch complaint about August 2014 fundraising event,” (March 29, 2017), online: <<https://democracywatch.ca/lobbying-commissioner-investigating-democracy-watch-complaint-about-august-2014-fundraising-event-organized-by-clearwater-seafoods-shareholder-and-board-member-for-justin-trudeau-and-liberals/>>. Democracy Watch, “News Release: Democracy Watch’s lawsuit challenges Lobbying Commissioner’s ruling that investigation should not continue into former Apotex Chairman Barry Sherman’s fundraising for Trudeau Liberals,” (March 6, 2018), online: <<https://democracywatch.ca/democracy-watches-lawsuit-challenges-lobbying-commissioners-ruling-that-investigation-should-not-continue-into-former-apotex-chairman-barry-shermans-fundraising-for-trudeau-l/>>.

³⁰³ Democracy Watch, “News Release: DWatch files complaints with Ethics Commissioner and Lobbying Commissioner about Trudeau Cabinet giving preferential access to “bundler” fundraisers,” (November 28, 2018), online: <<https://democracywatch.ca/dwatch-files-complaints-with-ethics-commissioner-and-lobbying-commissioner-about-trudeau-cabinet-giving-preferential-access-to-bundler-fundraisers-especially-lobbyists/>> (hereinafter “Democracy Watch, News Release (November 28, 2018)”).

³⁰⁴ Liberal Party of Canada, Leader’s Circle, online: <<https://democracywatch.ca/wp-content/uploads/FedLibLeadersCircleWebpageAug312016.jpg>>.

Party's fundraising scandal was revealed, said it was "designed to recognize" people who raise money for the Party through "donor networking and bundling" which is "of utmost importance to growing the Party." Changes to the rules made by Bill C-50 in 2018 only require more transparency about such events – they are not restricted in any way, let alone prohibited.³⁰⁵ Anyone who could bring 100 people together at an event, each paying the maximum average donation from 2016 to 2020 of \$1,575 as the ticket price, could raise \$157,500 for a party. As Chart 8 below shows, this represents (depending on which main party), 0.7 percent up to 15 percent of average total annual donations.³⁰⁶

Chart 8: Average Total Donations for Main Federal Parties 2016-2020 Calendar Years, and Percentage of Total an Average "Bundler" Fundraising Party Would Provide to Each Party

NOTE: An average "bundler" fundraising party involves 100 people attending with each donating the average maximum donation from 2016-2020 of \$1,575 = \$157,500 raised

	Liberal	Conservative	Bloc	NDP	Green
Average total annual donations 2016-2020	\$16.52 million	\$22.54 million	\$1.05 million	\$5.9 million	\$3.66 million
Average % of total donations provided by a "bundler" fundraising party	1%	0.7%	15%	2.7%	4.3%

³⁰⁵ See a summary of Bill C-50 (which came into effect on December 21, 2018) in Democracy Watch, News Release (November 28, 2018), *supra* note 303, at paras. 13-16.

³⁰⁶ Eric Grenier, "Conservatives had a better fundraising year in 2017 than Liberals, filings show," July 4, 2018, CBC.ca, online: <<https://www.cbc.ca/news/politics/federal-parties-annual-filings-1.4733189>>. Eric Grenier, "Federal NDP ended 2017 deep in the red, filings show," September 4, 2018, CBC.ca, online: <<https://www.cbc.ca/news/politics/ndp-annual-return-1.4809775>>.

As well, at the federal level and in other jurisdictions in Canada with a ban on corporate and unions donations and such a high individual donation limit, corporations mainly (and, in a few cases also unions) have been caught illegally funneling donations through their executives or employees.³⁰⁷ An in-depth audit is needed to determine how much funneling has happened, and is happening, at the federal level.³⁰⁸ The results of such an audit are also needed to determine whether the ban on corporate and union donations, and the individual donation limit, has actually made federal spending decision-making more egalitarian by reducing or stopping the buying of access and favourable contracting decisions overall compared to the patterns that existed during the time before the ban and limit.³⁰⁹

³⁰⁷ A 2012 audit of donations made in Quebec between 2006 and 2011 found \$12.8 million in likely funnelled donations. Elections Quebec, “Sectoral financing of political parties in the amount of nearly \$13M,” April 13, 2013, online: <<https://www.electionsquebec.qc.ca/english/news-detail.php?id=5387>> (hereinafter “Elections Quebec (April 13, 2013)”). Betsy Powell and Jennifer Pagliaro, “Corporate and union campaign donations still loom large at city hall,” April 9, 2016, *Toronto Star*, online: <https://www.thestar.com/news/city_hall/2016/04/09/corporate-and-union-campaign-donations-still-loom-large-at-city-hall.html>. The Canadian Press, “SNC-Lavalin violated election rules with campaign donations, commissioner rules,” September 8, 2016, CBC.ca, online: <<https://www.cbc.ca/news/business/snc-lavalin-campaign-donations-1.3752869>>. See list of these and other examples of likely funneling in jurisdictions across Canada at: Democracy Watch, “List of sham political donation systems across Canada that don’t stop big money in politics,” online: <<https://democracywatch.ca/wp-content/uploads/ListOfShamCanPoliticalDonationSystems-1-1.pdf>> (hereinafter “Democracy Watch, List of sham political donations systems”).

³⁰⁸ Elections Canada committed to completing such an audit in 2013. The Canadian Press, “Elections Canada audit seeks those dodging donation limits,” April 3, 2013, CBC.ca, online: <<https://www.cbc.ca/news/politics/elections-canada-audit-seeks-those-dodging-donation-limits-1.1302829>> (hereinafter “CP (April 3, 2013)”).

³⁰⁹ For example, a Democracy Watch study issued in 2002 found that, in 2001, 17 of the top 25 federal government contractors (by value of contract) were significant donors to governing Liberal Party, and that they donated 6.5 times more money that year to the Liberals than to all the opposition parties combined. As well, 80 to 90 percent of top donors to all the parties in 2002 were businesses (in the case of the Liberals, Conservatives and Bloc Quebecois) or unions (in the case of the NDP). Democracy Watch, “News Release: Donations and lobbying by top federal government contractors reveal problem of money in politics,” (October 31, 2002), online: <<http://www.dwatch.ca/camp/RelsOct3102.html>>. Democracy Watch, “News Release: New law must democratize donations, cut reliance on corporate, union money,” (January 28, 2003), online: <<http://dwatch.ca/camp/RelsJan2803.html>>.

A final concern in the area of donations to political parties is that party leadership contestants are allowed under the *CEA* to donate any surplus they have from their contest campaign to the party holding the contest (or to EDAs of that party).³¹⁰ This rule does not comply with the egalitarian model because it allows a contestant to make a much larger donation to a party than any other voter is allowed to make.

3.9.1 Loans to parties, including to fund election campaigns

As well, as mentioned above in section 3.8, suppliers of goods and services can in effect make loans to parties with no repayment required for three years, and individuals and entities can also pay the supplier for goods and services and then be owed the amount by the party, which is, in effect, also a loan (or a contribution). As I propose in Chapter 6, both of these practices should be restricted because they allow individuals and entities to exceed the contribution and loan limits and, therefore, violate the principles of the egalitarian model.

In addition, unlimited loans by Schedule I and II banks in Canada are allowed to be made to candidates and parties at market interest rates.³¹¹ As can be seen in Chart 9 below, according to financial returns submitted by the parties to Elections Canada for the election and the calendar year 2015, during which a general federal election was held, and in 2019 when again an election was held, all of the federal parties obtained significant loans from

³¹⁰ *CEA*, *supra* note 79, sections 478.94 to 478.97, especially section 478.96.

³¹¹ *CEA*, *supra* note 79, subsection 373(3).

financial institutions to pay for their election campaigns, ranging from 32 percent to more than 100 percent of the amount spent.

Chart 9: Amounts Spent, and Loans to, Main Federal Political Parties in the 2015 and 2019 Election Years³¹²

	Liberal	Conservative	Bloc	NDP	Green
Amount spent by party in 2015 election	\$43.12 million	\$41.87 million	\$2.67 million	\$29.76 million	\$3.91 million
Loan(s) from Financial Institutions in 2015 (% of total election expenses)	\$40 million (93%)	\$28.5 million (68%)	\$0.995 million (37%)	\$22 million (74%)	\$1.66 million ³¹³ (32%)
Amount spent by party in 2019 election	\$26.16 million	\$28.86 million	\$814,732	\$10.31 million	\$2.45 million
Loan(s) from Financial Institutions in 2019	\$27.4 million (>100%)	\$23 million (80%)	\$400,000 (49%)	\$7 million (68%)	\$1.5 million (61%)

³¹² Elections Canada, Financial Returns, *supra* note 293. Elections Canada, Statements of Assets and Liabilities and Statements of Revenues and Expenses, online: <<https://www.elections.ca/content.aspx?section=fin&document=index&dir=oth/pol/asset&lang=e>>. Figures are rounded to nearest \$10,000.

³¹³ \$1.25 million of the \$1.66 million was a bank loan. The remaining amounts were “unsecured private loans” from unspecified sources in amounts of \$5,000 up to \$50,000.

(% of total election expenses)					

Given that the banks providing the loans are regulated by the federal government, this rule allows them to extend a favour to candidates and parties that the bank favours, namely those that support the bank's position on laws that regulate the bank's activities. It also creates the very real possibility of a candidate or party not being able to repay the loan after the election and, therefore, getting away with spending more than it actually had in popular support. This has happened at the federal level with party leadership candidates in both the Liberal and Conservative parties, and with election candidates, causing enforcement and penalty dilemmas in each case.³¹⁴ Given the above, I see no reason to allow loans of amounts greater than the annual amount allowed to be donated.

These main federal parties obtained these loans even though they had three-and-a-half years to raise funds before each of the 2015 and 2019 election campaign years. In addition to the amounts that the electoral district associations of each of these main parties raised in contributions annually, and in addition to the public subsidies for these parties and many of their candidates for their 2015 election expenses (as discussed in section 3.20 below – essentially each party and many of their candidates received a subsidy paying for 50 percent of their total election expenses), as charts 1 to 4 above show: the Liberal Party raised from 2016-2018 a total of

³¹⁴ CP, July 30, 2013; CBC.ca, November 14, 2018, and; CBC.ca, April 28, 2022, *supra* note 277.

\$46,976,796, and then raised an additional \$20,596,390 in the 2019 election year; the Conservatives raised \$61,323,661 from 2016-2018, and then \$30,855,671 in 2019; the NDP raised \$15,376,559 from 2016-2018, and then \$8,071,473 in 2019; the Greens raised \$8,466,519 from 2016-2018, and then \$6,468,759 in 2019, and; the Bloc raised \$1,903,787 from 2016-2018, and then \$1,813,015 in 2019.

These amounts raise the fundamental question that must be answered before changes are made to Canada's laws overall in terms of private donation limits and public subsidies, which is: How much funding does a federal Canadian political party (the Bloc being an exception as it only runs candidates in one province) need to run its operations, and inform voters, during the years in between elections, and during election years (when nomination contests and the election campaign occur)? In Chapter 6, I recommend a study be undertaken to answer this question.

3.10 Donations and loans to electoral district associations

As detailed above in sections 3.8 and 3.9, the annual individual donation limit of \$1,700 (in 2023) to an electoral district association (EDA – or as a combined total to more than one EDA in a party) is much higher than an average voter can afford to give, especially given that same amount can also be donated to each party. Admittedly, this amount may be lower during an election year when that limit is the combined total that can be contributed to an EDA (or EDAs), nomination contestants and candidates of each party. However, even if a donor split their donation three ways during an election

year, they would still be donating more than \$550 to each entity, a much higher amount than the \$75 average annual median donation made to all the main federal parties from 2016 to 2020.

Secondly, as detailed in section 3.8 above, suppliers of goods and services can in effect make loans to EDAs with no repayment required for three years, and individuals and entities can also pay the supplier for goods and services and then be owed the amount by the EDA for three years, which is, in effect, also a loan (or a contribution) that is allowed to exceed the contribution and loan limits. As well, as detailed above in subsection 3.9.1, banks are allowed to make unlimited loans to EDAs. All of these practices do not comply with the egalitarian model.

Thirdly, political parties are allowed to transfer an unlimited amount of goods and services, and money (or a loan) to each of its EDAs, and EDAs are allowed to transfer funds to other EDAs, even if an EDA has little or no support from local voters.³¹⁵ This practice would be consistent with the egalitarian model, I contend, if the amount transferred by each party or EDA to an EDA was required to come only from donations by voters who live in the district of the EDA, but there is no such requirement in Canada's election law. As a result, an EDA with little or no local support can keep operating based only on support, through a transfer of funds, from its political party headquarters or other EDAs.

A significant number of EDAs receive such support. As Chart 10 below shows, in the 2019 federal election year, a fixed date election year which

³¹⁵ CEA, *supra* note 79, clauses 364(2)(b) and (3)(b), and 373(5)(a), and subsection 373(6).

means EDAs had four years to fundraise before the election, still 39.5 percent of EDAs received transfers from their party, and on average the transfer was approximately 33 percent of the total average amount raised by EDAs that received contributions from voters. As well, 16.2 percent of EDAs received transfers from other EDAs, and on average the transfer was approximately 28 percent of the total average amount raised by EDAs that received contributions from voters.

Chart 10: Key statistics re: contributions vs. transfers received by 1,485 electoral district associations (EDAs) in 2019³¹⁶

# of EDAs who received contributions (% of 1,485 total EDAs)	1,259 (84.8%)
Average amount of contributions received by each of 1,259 EDAs ³¹⁷	\$30,824.95
# of EDAs that received transfers from their party (% of 1,485 total EDAs)	589 (39.7%)
Average amount received by 589 EDAs that received transfers from their party	\$9,835.18 ³¹⁸
# of EDAs that received transfers from another EDA or other EDAs (% of 1,485 total EDAs)	241 (16.2%)

³¹⁶ Source: Elections Canada, Financial Returns, *supra* note 293. The total number of EDAs is five fewer in Chart 10 than the total in Chart 26 in Chapter 6, subsection 6.5.1, because when I did the calculation for Chart 10 in March 2022 five fewer EDAs had filed their 2019 returns with Elections Canada than when I did the calculations in July 2022 for Chart 26.

³¹⁷ Note: 79 of the 1,259 EDAs received less than \$500 total each in contributions; 42 received from \$500 up to \$999 each in contributions; 885 received from \$1,000 up to \$49,999; 189 received from \$50,000 up to \$99,999; 62 received from \$100,000 up to \$199,999, and; two received more than \$200,000.

³¹⁸ Note: 54 of the 589 EDAs received \$100 or less each in transfers from their party; 85 received from \$101 up to \$999 each in contributions; 450 received \$1,000 or more (including one that received slightly more than \$120,000, and two that received more than \$150,000).

Average amount received by 241 EDAs that received transfers from another EDA or other EDAs	\$8,675.78 ³¹⁹
# of EDAs that received transfers from candidates (% of 1,485 total EDAs – presumably from the EDA's 2019 election candidate)	357 (24%)
Average amount received by 357 EDAs that received transfers from candidates (presumably from the EDA's 2019 election candidate)	\$8,072.67 ³²⁰
# of EDAs that received transfers from nomination contestants (% of 1,485 total EDAs – presumably from the contest leading up to the 2019 election)	44 (2.96%)
Average amount received by 44 EDAs that received transfers from nomination contestants (again, presumably from the contest leading up to the 2019 election)	\$1,149.83

A final concern in the area of donations to EDAs is that party leadership contestants are allowed under the *CEA* to donate any surplus they have from their contest campaign to the party holding the contest (or to EDAs of that party).³²¹ This rule does not comply with the egalitarian model because it allows a contestant to make a much larger donation to a party or EDA than any other voter is allowed to make.

³¹⁹ Note: 18 of the 241 EDAs received \$100 or less each in transfers from another EDA or other EDAs; 52 received from \$101 up to \$1,000 each in contributions; 97 received from \$1,001 up to \$9,999; 67 received from \$10,000 up to \$49,999, and; 7 received more than \$150,000).

³²⁰ Note: 18 of the 357 EDAs received \$100 or less each in transfers from candidates; 67 received \$10,000 or more each in transfers from candidates.

³²¹ *CEA*, *supra* note 79, sections 478.94 to 478.97, especially section 478.96.

3.11 Donations and loans to nomination contestants

In this area, as detailed above in sections 3.8 to 3.10, the first concern that does not comply with the egalitarian model is that the individual donation limit of \$1,700 (in 2023) to a nomination contestant during an election year is too high, even when split between a contestant, riding association and candidate. Another undemocratic aspect is that contestants can accept donations from people who are not residents of the district for which they are trying to become an election candidate, which allows someone who does not have local support to have the resources to contend for a local nomination.

Secondly, as detailed in section 3.8 above, suppliers of goods and services can in effect make loans to contestants with no repayment required for three years, and individuals and entities can also pay the supplier for goods and services and then be owed the amount by the contestant for three years, which is, in effect, also a loan (or a contribution) that is allowed to exceed the contribution and loan limits. As well, as detailed above in subsection 3.9.1, banks are allowed to make unlimited loans to contestants. All of these practices do not comply with the egalitarian model.

Parties and electoral district associations are prohibited from favouring one nomination contestant over others directly financially, and any goods or services transferred from a party or association must be given in equal amounts to all contestants.³²² However, a third concern, as mentioned above in section 3.5 on registration of nomination contestants, is that political party

³²² CEA, *supra* note 79, clause 364(2)(c) and 365(1).

leaders, executives and electoral district association boards can make a significant “donation” to a nomination contestant by appointing them as the district’s election candidate, or rigging the contest in some way to favour them. These “donations” are not equitable because they are much more valuable than the amount an individual voter is permitted to contribute to a contestant, and they also are a barrier to equal opportunity for equal participation in the electoral system.

Given the *CEA* does not regulate nomination contests except in terms of financing, the contestants who lose due to unfair treatment by the party or association have no legal rights under the *CEA* to overturn the contest results. The courts have rejected claims by contestants that their *Charter* rights were violated on the basis that parties are not government actors and, therefore, are not subject to *Charter* claims³²³ nor to judicial review³²⁴ unless the party does not have an internal decision-making process for such disputes that provides procedural protections, or an appeal is launched on a point of law if that procedure is covered by another statute, such as a statute that regulates arbitrations.³²⁵

A party leader or a party executive council appointing a candidate in an electoral district is justifiable if there is no one who applies to run as a

³²³ *Galati v. Ontario Liberal Party*, 1999 CanLII 14899 (ON SC), online: <<https://canlii.ca/t/1w7ws>>, paras. 20, 30 and 39.

³²⁴ *Knox v. Conservative Party of Canada*, 2007 ABCA 295 (CanLII), <<https://canlii.ca/t/1szhd>>, paras. 20-22, 26-27 (hereinafter “*Knox* (2007)”). *Olumide v. Conservative Party of Canada*, 2015 FCA 218 (CanLII), <<https://canlii.ca/t/glnjt>>, paras. 7-8. See also: Ian Adams, “Judge rules door still open for would-be Simcoe-Grey conservative candidate to appeal nomination decision,” (October 29, 2021) *Toronto Star*, online: <<https://www.thestar.com/local-wasaga/news/2021/10/29/judge-rules-door-still-open-for-would-be-simcoe-grey-conservative-candidate-to-appeal-nomination-decision.html>>.

³²⁵ *Knox* (2007), *supra* note 324, paras. 30-35.

candidate in an electoral district. If there are people who apply to run, then the party leader or party appointing a candidate becomes a very significant donation to whomever they appoint, a donation that saves the appointed person a significant amount of time, energy and money that can, instead, be raised and spent on their election campaign. As a result of this donation, if the appointed person is elected, while they owe the voters in the district for voting for them, they also owe their party leader or party executive for appointing them. Owing this one person (the leader) or a few people (the executive) violates the principle of one person, one vote, and compromises the ability of the person to serve the interests of all voters in their district.

A fourth concern is that nomination contestants are allowed to donate (or loan or loan guarantee) up to \$1,000 to their own campaign, an amount that is not subtracted from the \$1,700 combined total annual amount (in 2023) that a contestant is allowed to donate to the associations, candidates and other contestants of each party.³²⁶ The donation total of \$1,700 is already inequitable – allowing a contestant who has the money to donate an additional \$1,000 is even more inequitable.

A fifth concern is that until someone accepts a donation of money, property or services (or a loan or loan guarantee) or spends money on their nomination campaign, they are not covered by the law.³²⁷ This allows for arrangements whereby someone is hired by an entity for a “fake” job, a job they don’t actually have to do, that allows them to spend some or most of their

³²⁶ CEA, *supra* note 79, subsections 367(5) and 373(4).

³²⁷ CEA, *supra* note 79, section 476.2.

time (with the support of that entity) networking and preparing for their nomination campaign without spending any money and, therefore, without facing the time or financial costs faced by contestants who have a job they are required to do every day. A related concern is raised when a campaign worker or workers for the contestant are also given fake jobs which allow them to campaign part- or full-time without having to be paid by funds raised by the contestant.

Sixth, while giving someone a fake job during a nomination contest is not legal under the *CEA* because it is, in effect, making a contribution that very likely would exceed the contribution limit of \$1,700 in 2023, and also violates the prohibition on contributions by businesses, unions and other organizations, the concern is that it is relatively easy for a business or other organization to get away with this contribution in secret. This is relatively easy because new work a contestant or their campaign workers may do while running for a nomination is not required to be disclosed by the contestant or the workers to Elections Canada or the public.

Seventh, the *CEA* also exempts from the donation limit (and from the prohibition on businesses, unions and other organizations making donations) an employer giving an employee a paid leave of absence to run in a nomination contest, even though this gives a significant financial advantage to any nomination contestant who has an employer willing to do this.³²⁸ This allows the “fake job” given by an entity before a nomination contest begins to

³²⁸ *CEA*, *supra* note 79, subsection 364(6). Also, under section 80, if an employee applies for it, an employer is required to give the employee leave, with or without pay, to run in a nomination contest or as an election candidate.

be extended into a paid-leave financial subsidy for a contestant through the contest period. A related concern is that incumbent MPs who are running again have an advantage in nomination contests because they are paid by voters through the contest period, and there are only very minimal legal work requirements for MPs³²⁹ so an MP can essentially spend all of their paid work time campaigning. While this “contribution” to an incumbent MP is from all voters who pay them through paying taxes, it still tilts the contest in favour of incumbents.

An eighth area of concern is that nomination contestants are allowed to accept gifts without any limit. All gifts should be prohibited other than a very low value gift or courtesy or hospitality (worth no more than \$30), and basic gifts and hospitality from relatives, and inheritances, as long as the giver is not connected to a lobbying effort or a business or organization that has dealings with the federal government.

Ninth, as mentioned above in section 3.8, anyone or any entity is allowed to pay an unlimited amount of a contestant’s expenses for childcare, for care of anyone with a mental or physical incapacity, for additional expenses related to any personal disability they may have,³³⁰ and for litigation, that are incurred because they are running in the contest. This allows people or entities who can afford to pay these expenses to give more support to contestants than other voters.

³²⁹ *Parliament of Canada Act*, R.S.C. 1985, c. P-1, subsections 57(1) to (3), and sections 58, 59 and 59.1.

³³⁰ *CEA*, *supra* note 79, subsection 374.4(1).

The tenth and final concern in this area is that, while nomination contestants are prohibited from colluding with a person or entity in order to exceed their contest expense limit,³³¹ there is no prohibition in the *CEA* on a contestant colluding with a third party, including by sharing information in order to influence the third party's activities during a nomination contest. As well, there is no limit in the *CEA* on the amount that a third party can spend supporting a nomination contestant, and no registration or disclosure is required of third parties that are active in nomination contests. This gives a contestant who is supported by a third party an advantage in the contest, including that the third party could also legally pay for the expenses noted in the paragraph above. That advantage may be a democratic advantage if the third party is a large citizen organization that has many voters as members who have made a decision in a democratic manner to support a contestant. However, it could also be an undemocratic advantage if a nomination contestant is supported by only one wealthy voter, or by a single wealthy private corporation, acting as a third party.

3.12 Donations and loans to election candidates

Again as mentioned in the sections above, the first concern in this area is that in 2023 an individual can make a combined annual total donation (or loan or loan guarantee) of up to \$1,700 (increasing by \$25 annually) to the associations, candidates, and nomination contestants of each registered party. This allows a person who has the money to donate or loan that entire

³³¹ *CEA*, *supra* note 79, subsection 476.68(2).

amount to the campaign fund of a district association for one candidate in an election year. Like all donation and loan limits, for the reasons set out above in section 3.9 concerning the amount that most voters can actually afford to donate, this limit should be lowered to the actual median average donation amount of \$75 annually.

A second area of concern is that election candidates are allowed to donate (or loan or loan guarantee) up to \$5,000 to their own campaign, including by using money lent to them by a federally regulated financial institution.³³² The donation limit described above is already inequitable – allowing a candidate who has the money to donate an additional \$5,000 to their campaign is even more inequitable.

Thirdly, as detailed in section 3.8 above, suppliers of goods and services can in effect make loans to candidates with no repayment required for three years, and individuals and entities can also pay the supplier for goods and services and then be owed the amount by the candidate, which is, in effect, also a loan (or a contribution) that is allowed to exceed the contribution and loan limits. As well, as detailed above in subsection 3.9.1, banks are allowed to make unlimited loans to candidates. All of these practices do not comply with the egalitarian model.

Fourth, while it is most directly a gift to a nomination contestant to be appointed as a candidate by an EDA or a party, it is a gift that keeps on giving to the candidate. Beyond saving time and money for the candidate, people

³³² *CEA*, *supra* note 79, subsection 367(6) and clause 367(7)(a), and subsections 370(2) and 373(4).

who may have only had enough money to make a donation to the person as a contestant can instead donate to the EDA, which can transfer the donation to the candidate's election campaign account, which makes it easier for the candidate to raise money for their campaign. As a result, the candidate ends up owing whomever appointed them doubly, which violates the egalitarian principle of not allowing any person to have substantially more influence than any other voter in a political process.

A fifth concern is, as with nomination contestants, the possibility that, even though it is illegal under the *CEA*, during the time period between being nominated and the election campaign period, or during the election campaign period, a candidate and/or their campaign worker or workers are given a fake job that they don't have to do that frees up a significant amount of time for them to campaign. Sixth, as it does for nomination contestants, the *CEA* also exempts from the donation limit (and from the prohibition on businesses, unions and other organizations making donations) an employer giving an employee a paid leave of absence to campaign as a candidate, thereby giving a significant financial advantage to any candidate who has an employer willing to do this.³³³ Seventh, also as in nomination contests, incumbent MPs enjoy a sort of "paid leave" because they are paid by voters during the pre-election and election campaign periods,³³⁴ and their job description allows them to campaign much of the time (although Cabinet ministers continue to

³³³ *CEA*, *supra* note 79, subsection 364(6). Also, under section 80, if an employee applies for it, an employer is required to give the employee leave, with or without pay, to run in a nomination contest or as an election candidate.

³³⁴ *Parliament of Canada Act*, *supra* note 329, section 69.

do some work as the government continues through the election period), and this “contribution” gives them an advantage over other candidates. As well, if an MP loses they receive a severance allowance and (depending on their age and other factors) a supplementary severance allowance and so, unlike other candidates, they don’t have to worry immediately about their post-election personal financial expenses.

An eighth concern is that candidates are allowed to donate up to \$1,700 (as of 2023) to their party during an election year, and then the party is allowed to transfer goods and services, and money (or a loan – including the amount the candidate donated to the party) back to its election candidate’s campaign account directly, or to an electoral district association and then to the association’s candidate campaign account, to pay all the costs of a campaign, even if the candidate has little or no support from local voters.³³⁵

Ninth, electoral district associations are also allowed to transfer funds between each other. This practice would be consistent with the egalitarian model if the amount transferred by each party, or from another association, to each candidate was required to come only from donations by voters who live in the candidate’s district made during the years since the last election, but there is no such requirement in the *CEA*. As a result, a candidate with little or no local support can run a fully funded election campaign based only on support, through a transfer of funds, from their political party headquarters or other district associations. This does not uphold the egalitarian principles of

³³⁵ *CEA*, *supra* note 79, clauses 364(2)(a) and (b), and 364(3)(a), and subsections 364(4), and 373(5) and (6).

equal participation, fairness and integrity as it gives the candidate a financial boost from people outside the district, who may not even know that their donations to the party or a district association have been transferred to support another association and its candidate's campaign. Only voters in the district have the right to vote for the candidate and, as a result, to comply with the egalitarian model I contend that it seems consistent to allow only voters in the district to donate to the candidate. In Chapter 6, I set out proposals about how, instead of allowing these favours from party headquarters to candidates who are not supported by local voters, public subsidies could be structured to supplement candidates in electoral districts that face higher relative costs than in other districts, for example in rural districts that are geographically larger and/or have fewer voters than the average district.

As Chart 11 below shows, 99.1% of the party-affiliated candidates in the 2019 federal election received a transfer from a party, their electoral district association or a failed nomination candidate.

Chart 11: Key statistics re: contributions vs. transfers received by the 996 election candidates in the 2019 federal Canadian election³³⁶

# of candidates who received contributions (% of 996 total candidates)	728 (73.1%)
Average amount of contributions received per candidate ³³⁷	\$8,925.75
# of party-affiliated candidates (991 total) who received transfers (%)	982 (99.1%)

³³⁶ There were 996 candidates in the October 2019 federal election, including five independent candidates. Source: Elections Canada, Financial Returns, *supra* note 293.

³³⁷ Note: 27 candidates received contributions totalling less than \$100 each.

Average amount received by 982 candidates who received transfers from their party, their electoral district association (EDA), or a defeated nomination contestant (monetary and non-monetary transfers)	\$63,836.84
# of candidates who received monetary transfers from their political party (% of 982 total who received transfers)	519 (52.8%)
Average amount received by 519 candidates who received party monetary transfers	\$15,774.82
# of candidates who received monetary transfers from their EDA (% of 982 total who received transfers)	835 (85%)
Average amount received by 835 candidates who received EDA monetary transfers	\$58,153.52
Average % of total amount transferred to candidates that came from their party (\$15,774.82 out of \$73,928.34)	21.3%
Average % of total amount transferred to candidates that came from their EDA (\$58,153.52 out of \$73,928.34)	78.6%
# of candidates who received monetary transfers from a nomination contestant (% of 982 total who received transfers)	29 (2.9%)

Tenth, nomination contestants who did not win the nomination in a district are allowed to transfer any surplus of their campaign to the district

candidate's campaign account, or to the district association or party which can then transfer it to the candidate's campaign, even if the donors to the contestant's campaign do not support the candidate.³³⁸ It should be noted that this is not a significant current concern, as only 29 candidates in the 2019 federal election received a transfer from failed nomination contestant and the total amount received was \$63,737.69 (for an average of \$2,197.85 per candidate). However, this rule still provides an opening for a candidate to receive financial support from voters who may not actually support the candidate.

Eleventh, as with nomination contestants, anyone or any entity is allowed to pay a candidate's expenses for childcare, for care of anyone with a mental or physical incapacity, for additional expenses related to any personal disability they may have,³³⁹ and for litigation, that are incurred because they are running in an election. Twelfth, anyone or any entity is allowed to pay up to \$5,000 in expenses for a candidate to have representatives at polling stations (instead of having to recruit volunteers to do this). These two extra areas allow for even more unequal support from some voters who can afford to pay for these expenses for a candidate, which does not comply with the egalitarian model. A related thirteenth area of concern is that after the election a candidate is allowed to keep any surplus from someone or some entity who has paid these expenses for them, which just expands the loophole

³³⁸ CEA, *supra* note 79, clause 364(5)(a), and sections 476.91 to 476.94.

³³⁹ CEA, *supra* note 79, clause 378(1)(b) to (d).

and the conflict of interest created by allowing these expenses to be paid by others.³⁴⁰

A fourteenth area of concern is that, while sections 477.89 and 477.9 in the *CEA* clarify that an election candidate is prohibited from accepting gifts that might reasonably be seen to be given to influence the candidate if they are elected, the exceptions to these rules are not only that they can accept campaign donations (which is obviously fine given they are a candidate), but also that they can accept courtesy/hospitality gifts with no restrictions, as well as gifts or advantages from relatives, and through unconditional inheritances. Such gifts should be prohibited if they are more than a very low value.

A related fifteenth area of concern is that, under 477.9(3) to 477.95, all gifts received during the election period that are worth more than \$500 are required to be disclosed only to the Chief Electoral Officer (CEO) within four months after the election.³⁴¹ The CEO is required to keep the disclosure statement confidential.³⁴² This secrecy clearly violates the egalitarian model's principles of informing voters, and also providing an equal opportunity for equal participation, as wealthy individuals and interest groups could give a candidate a significant gift (again, without the public being informed). See the related concern about lack of full disclosure of whether parties and EDAs maintain trust funds that may be used to give grants to community groups or candidates, detailed below as the seventh concern in Chapter 4, section 4.2.

³⁴⁰ *CEA*, *supra* note 79, clauses 477.82(3.1)(a) to (c).

³⁴¹ *CEA*, *supra* note 79.

³⁴² *CEA*, *supra* note 79, subsection 477.94(2). This is pointed out in MacIvor (March 2008), *supra* note 3 at 131-132 and 140.

A sixteenth area of concern is that if a person wins a nomination contest but then decides not to register as a candidate, no information is required to be disclosed concerning whether the person was induced by an offer of money, property, services or some other benefit (including a job offer) to not run for whatever reason, for example to give someone else a better chance of winning, or to allow their party leader or party executive to appoint a candidate. Contributing or offering or giving to induce someone not to run should be prohibited because it violates the egalitarian principles of integrity and equal opportunity to participate. This loophole is a special concern if the person who decides not to run is a sitting MP and/or a Cabinet minister, and I address below in Chapter 4 when examining the gift and benefits rules whether such contributions, benefits or job offers fall within the definition of a bribe under the *Criminal Code* or offerings under federal ethics rules that are prohibited or, at least, required to be disclosed. I address disclosure of these contributions and offerings further below in section 3.24.

A seventeenth area of concern is that a party candidate after an election is required under the *CEA* first to transfer any capital assets (computers, campaign signs etc.) to their party or EDA, or to sell the assets and transfer the money from the sale along with any other surplus funds to their party or EDA.³⁴³ The transfer should go to their EDA and their party proportionally based on how much of the candidate's funding came from their EDA compared to their party.

³⁴³ *CEA*, *supra* note 79, sections 477.8 (especially subsection 477.8(2)) to 477.84.

3.12.1 The independent candidate fundraising disadvantage

Another inequitable part of the candidate donation system is that an independent candidate is not allowed to accept contributions until the campaign period begins, whereas electoral district associations (and, as noted above, parties) are allowed to raise money every year in between elections and then, as mentioned above, transfer it to their candidate's election campaign account when the campaign period begins. This rule should be changed to allow independent candidates to begin fundraising at least one year before a fixed-date election campaign period begins. Obviously, if a "snap" election is called suddenly before the next fixed election date, any independent candidate would still very likely be disadvantaged financially compared to party candidates that receive a transfer of funds from their riding association or party, unless the independent candidate anticipated the snap election call and start fundraising a year or so before.

As well, in a continuation of the too-high donations allowed under the system, in addition to a donation to each party and its electoral district associations, nomination contestants and candidates of a combined total of up to \$3,400 during an election year, an individual is also allowed to donate in 2023 up to \$1,700 to an independent candidate (an amount that also increases by \$25 annually).³⁴⁴ Like all donation limits, this amount should be lowered to \$75 in order to comply with the egalitarian model and, if it can be shown to be needed, some other type of subsidy should be given to

³⁴⁴ CEA, *supra* note 79, subsection 367(1)(c).

independent candidates to ensure their financial opportunity for success in an election is, if they have relatively equal voter support, on par with party-supported candidates.

3.13 Donations and loans to political party leadership contestants

In addition to the donation amounts described above, when a party holds a party leadership contest, an individual can donate an additional \$1,700 (in 2023, increasing by \$25 each year) as a combined total to the leadership contestants in any party's contest that may occur during any year, and this raises the first concern in this area because that is an inequitable amount.³⁴⁵ A second, even more inequitable rule is that a party leadership candidate is allowed to donate (or loan or loan guarantee) up to \$25,000 to their own campaign, including by using money lent to them by a federally regulated financial institution.³⁴⁶

A third area of concern is, as detailed in section 3.8 above, suppliers of goods and services can in effect make loans to contestants with no repayment required for three years, and individuals and entities can also pay the supplier for goods and services and then be owed the amount by the contestant, which is, in effect, also a loan (or a contribution) that is allowed to exceed the contribution and loan limits. As well, as detailed above in

³⁴⁵ See an analysis of party leadership contests, and developments in the rules that cover them, that recommends limits on contributions and loans (and, possibly, donation-matching public funding) in: William Cross and John Crysler, "Financing Party Leadership Campaigns," in Young and Jansen (2011) 145 at 167 (hereinafter "Cross and Crysler (2011)").

³⁴⁶ CEA, *supra* note 79, subsections 367(6) to (7), and 370(2) and 373(4).

subsection 3.9.1, banks are allowed to make unlimited loans to contestants.

All of these practices do not comply with the egalitarian model.

A fourth area of concern is (as with other types of candidates), and again even though it would likely amount to an illegal contribution under the *CEA*, the difficulty of determining whether a person or entity has given a contestant and/or their campaign worker or workers a fake job (that they don't have to do) that frees up a significant amount of time for them to campaign before and during the contest.

Fifth, while the *CEA* prohibits an employer from giving a paid leave to a leadership contestant without it being counted as a contribution, even having a job that allows for unpaid leave is an advantage for a contestant, as they know they have employment to return to if they do not win the contest. Again, sitting MPs have an advantage over other contestants because voters "contribute" to their campaign by paying the taxes that pay the salary of an MP, whose job description again allows them to campaign most of the time. A possible solution that would equalize the opportunity of running with other contestants (at least those with jobs that allow for unpaid leave) would be to require an MP to take an unpaid leave from their position if they want to run in a contest.

Returning to the issue of the high individual donation limit, donation patterns in recent leadership contests for the main parties have been far from equitable. The following charts contain, according to financial returns filed by party leadership contestants with Elections Canada,³⁴⁷ key statistics relating

³⁴⁷ Elections Canada, Financial Returns, *supra* note 293.

to the financing of the top contestants in the party leadership contests since 2013 of the Liberal Party of Canada (2013), the Bloc Québécois (2014), the Conservative Party of Canada (2017), and the New Democratic Party of Canada (NDP – 2017), the Conservative Party of Canada (2020), and the Green Party of Canada (2020). I only include in the charts the data for the candidates that completed the campaign.³⁴⁸ As well, I have not included in the charts below the Bloc Québécois leadership contest in 2017 as there was only one candidate, nor in 2019 as again there was only one candidate, Yves-François Blanchet, who remains the current leader.³⁴⁹

Chart 12: Liberal Party Leadership Contest Results, Amounts Contributed and Spent (2013)

Candidate Name	Amount raised in contributions	# of Contributors (Avg. Contribution)	Amount spent	Percentage of vote won
Justin Trudeau	\$2,017,975	12,870 (\$157)	\$1,484,968	80.09%
Joyce Murray	\$288,165	2,537 (\$114)	\$333,683	10.16%
Martha Hall Findlay	\$251,163	1,696 (\$148)	\$303,493	5.72%
Martin Cauchon	\$221,998	364 (\$610)	\$295,859	2.65%

³⁴⁸ For example, in the 2020 Conservative party leadership contest, the four contestants listed in the chart completed the contest, while four others started campaigns but failed to meet one of the requirements of gathering 3,000 signatures from party members in at least 30 ridings across at least seven provinces, raising \$200,000 and making a returnable deposit of \$100,000, and four others failed to qualify at the first stage of the campaign which required depositing \$25,000 and being approved by the party's leadership campaign committee after filling out a questionnaire and being interviewed by the committee.

³⁴⁹ A second candidate, Jean-Jacques Nantel, started a campaign in 2019 but did not meet the party's criteria.

Chart 13: Bloc Québécois Leadership Contest Results, Amounts Contributed and Spent (2014)

Candidate Name	Amount raised in contributions	# of Contributors (Avg. Contribution)	Amount spent	Percentage of vote won
Mario Beaulieu	\$34,545 ³⁵⁰	207 (\$167)	\$50,183	53.5%
André Bellavance	\$24,315	155 ³⁵¹ (\$157)	\$43,487	46.5%

Chart 14: Conservative Party Leadership Contest Results, Amounts Contributed and Spent (2017)

Candidate Name	Amount raised in contributions	# of Contributors (Avg. Contribution)	Amount spent	Percentage of vote won
Andrew Scheer	\$992,480	4,056 (\$245)	\$750,944	50.65%
Maxime Bernier	\$2,477,096	10,991 (\$225)	\$2,319,737	49.05%
Erin O'Toole	\$908,642	3,060 (\$297)	\$866,291	21.26%
Brad Trost	\$390,240	2,135 (\$183)	\$394,171	14.30%
Michael Chong	\$762,075	2,471 (\$308)	\$658,639	9.14%
Kellie Leitch	\$1,506,488	5,383 (\$280)	\$1,377,042	7.95%
Pierre Lemieux	\$405,567	2,946 (\$138)	\$298,926	7.67%

³⁵⁰ One donor named Marc Michaud loaned Mario Beaulieu's campaign \$4,000, and Beaulieu loaned his own campaign \$11,000.

³⁵¹ Six (3.8 percent) of the 155 total donors gave from \$1,000 to \$1,200. The Bloc Québécois de Richmond Arthabaska electoral district association also loaned Bellavance \$20,000.

Chart 15: NDP Leadership Contest Results, Amounts Contributed and Spent (2017)

Candidate Name	Amount raised in contributions	# of Contributors (Avg. Contribution)	Amount spent	Percentage of vote won
Jagmeet Singh	\$924,902	6,484 (\$143)	\$714,522	53.8%
Charlie Angus	\$476,065	4,936 (\$96)	\$312,708	19.4%
Niki Ashton	\$297,433	3,941 (\$75)	\$229,674	17.4%
Guy Caron	\$246,204	1,863 (\$132)	\$254,733	9.4%

Chart 16: Conservative Party Leadership Contest Results, Amounts Contributed and Spent (2020)

Candidate Name	Amount raised in contributions	# of Contributors (Avg. Contribution)	Amount spent	Percentage of vote won
Erin O'Toole	\$3,511,976	16,177 (\$217)	\$3,694,459	57%
Peter MacKay	\$4,057,706	14,104 (\$288)	\$5,399,992	43%
Leslyn Lewis	\$2,117,471 (including loans)	15,165 (\$140)	\$2,210,809	30% (in 2 nd round of ranked ballot)
Derek Sloan	\$1,623,036 (including loans)	14,767 (\$117)	No report filed	14.40% (in 1 st round of ranked ballot)

**Chart 17: Green Party Leadership Contest Results,
Amounts Contributed and Spent (2020)**

Candidate Name	Amount raised in contributions	# of Contributors (Avg. Contribution)	Amount spent	Percentage of vote won
Annamie Paul	\$234,418	2,237 (\$105)	\$228,452	50.65%
Dimitri Lascaris	No report filed with Elections Canada as of May 20, 2023	No report filed	No report filed	42.2% (on final ballot)
Courtney Howard	\$146,282	854 (\$171)	\$157,212	24.39% (in 7 th round of ranked ballot)
Glen Murray	\$125,327	593 (\$211)	\$123,310	15.6% (in 6 th round of ranked ballot)
David Merner	\$86,159	512 (\$168.28)	\$88,146	11.96% (in 5 th round of ranked ballot)
Amita Kuttner	\$54,828	577 (\$95)	\$53,419	7.32% (in 4 th round of ranked ballot)
Meryam Haddad	\$39,961 ³⁵²	611 (\$65)	\$60,552	5.69% (in 3 rd round of ranked ballot)
Andrew West	\$38,050	192 (\$198)	\$64,687	1.49% (in 2 nd round of ranked ballot)

What these charts show, for all five parties' leadership contests, is that five of the six winners raised more money only because they were supported by more voters, and their average donation was not significantly more than the other contestants who won a significant percentage of votes (the Green Party's contest winner is not included in this calculation as complete data for

³⁵² Does not include \$15,000 that Meryam Haddad contributed to her own campaign.

all the contestants is not available). At the same time, details behind the figures in the above charts of donations to leadership contestants reinforce the evidence that the federal donation and loan limit are much higher than an average voter can afford. In the above charts, the average contribution to each winning contestant, and the top contestants in each contest (which have been rounded to the nearest dollar), is between \$100-\$300, and that average is skewed upwards by the amounts the top donors gave.

For example, based on my own calculations, only 926 (7.2 percent) of Justin Trudeau's 12,870 donors donated between \$1,000 and \$1,200 (the legal donation limit in 2013) to his campaign (directly or via the Liberal Party). Also based on my own calculations, only five (2.4 percent) of Mario Beaulieu's 207 donors donated between \$1,000 and \$1,200 (the legal donation limit in 2014) to his campaign (directly or via the Bloc Québécois), and one donor named Marc Michaud loaned his campaign \$4,000, and Mario Beaulieu loaned his own campaign \$11,000. Only 117 (2.9 percent) of Andrew Scheer's 4,056 donors donated between \$1,000 and \$1,550 (the legal donation limit in 2017) to his campaign (directly or via the Conservative Party).

And only 261 (four percent) of Jagmeet Singh's 6,484 donors donated between \$1,000 and \$1,550 (the legal donation limit in 2017) to his campaign (directly or via the NDP). Only 984 (6.1 percent) of Erin O'Toole's 16,177 donors donated between \$1,000 and \$1,625 (the legal donation limit in 2020) to his campaign (directly or via the Conservative Party). Only 27 (1.2 percent) of Annamie Paul's 2,237 donors donated between \$1,000 and \$1,625 (the

legal donation limit in 2020) to her campaign (all via the Green Party). In other words, through these six leadership contests of five different federal parties since 2013, on average only four percent of donors donated to the winner between \$1,000 and the maximum donation amount allowed at the time of each contest.

Also based on my own calculations, those 926 donors (again, only 7.2 percent of the total number of donors) donated approximately \$1.04 million³⁵³ (51.6 percent) of the total amount Justin Trudeau raised in contributions. And those five donors (again 2.4 percent of total donors), plus the one donor who loaned Mario Beaulieu \$4,000, donated \$9,450 (27.3 percent) of the total amount Beaulieu raised in contributions. Those 117 donors (again, only 2.9 percent of total donors) donated approximately \$140,000 (14 percent) of the total amount Andrew Scheer raised.

And those 261 donors (again, only four percent of total donors) donated approximately \$315,000 (34 percent) of the total amount Jagmeet Singh raised. Those 984 donors (again, only 6.1 percent of donors) donated \$1,389,646 (39.5 percent) of the total amount Erin O'Toole raised, and those 27 donors (again, only 1.2 percent of donors) donated \$50,275 (21.4 percent) of the total amount Annamie Paul raised. In other words, through these six leadership contests of five different federal parties, on average only four

³⁵³ Of Justin Trudeau's 12,870 donors, 1,913 contributed directly and 10,957 contributed through the Liberal Party. I calculated the total to be \$1,041,650 by counting the amounts donated by the contributors to the Party. For some contributors, the Party retained part of the contribution as an administrative cost, so the actual amount transferred to Trudeau's leadership campaign account was approximately five percent lower than \$1.04 million. Some of the other parties' leadership contest winner's amounts are labelled "approximate" for the same reason.

percent of donors donated on average 31.3 percent of the total amount raised by the winner.³⁵⁴

These figures show that these top donors are very valuable to these contestants, and this pattern is both inequalitarian and also raises questions about how much these top-level donations create a sense of obligation on the part of the contestant to return the favour to the donor? This sense of obligation, I contend, creates a conflict of interest and undermines the perception of fairness and integrity, and actual integrity, of the leadership campaign financing system, and of federal political decision-making by party leaders.

The sixth area of concern is that leadership contestants are allowed to accept gifts without any limit. All gifts should be prohibited other than a very low value gift or courtesy or hospitality (worth no more than \$30), and basic gifts and hospitality from relatives, and inheritances, as long as the giver is not connected to a lobbying effort or a business or organization that has dealings with the federal government.

The seventh concern in this area is, as mentioned above in section 3.8, and as for nomination contestants and election candidates, anyone or any entity is allowed to pay an unlimited amount of a leadership contestant's expenses for childcare, for care of anyone with a mental or physical incapacity, for additional expenses related to any personal disability they may

³⁵⁴ Again, I have not included the 2019 Bloc Québécois leadership contest in this analysis because it had only one full candidate, Yves-François Blanchet. A second candidate, Jean-Jacques Nantel, started a campaign but did not meet the party's criteria.

have,³⁵⁵ and for litigation, that are incurred because they are running in a contest. This gives people and entities who can afford to pay these expenses a way of supporting a contestant that exceeds other voters, which does not comply with the egalitarian model.

The eighth concern is that the *CEA* does not prohibit a leadership contestant from colluding with a third party in order to exceed their contest expense limit, nor to influence the third party's activities (including surveys) or advertising during a contest. As well, there is no limit in the *CEA* on the amount that a third party can spend supporting a leadership contestant, and no registration or disclosure is required of third-party activities. These loopholes do not comply with the egalitarian model because they allow third parties to support a contestant in secret more than average voters, including by paying the expenses listed in the paragraph above.

These loopholes are significant especially given that a ruling party's leadership contest can effectively elect a Prime Minister. That support could be democratic and equitable if a third party is a citizen organization with many voters as members who decide democratically to support a contestant. However, it could also be undemocratic and inequitable if the third party is one wealthy voter or a wealthy private corporation with only a few shareholders.

A related ninth concern in this area, which is also mentioned below in sections 3.18, 3.27 and 3.28, and discussed in further detail below in Chapter 4, sections 4.2 and 4.3, is that even if a third party supported a sitting MP or

³⁵⁵ *CEA*, *supra* note 79, clause 379.4(1)(a) to (c).

Cabinet minister who was running in a leadership contest, it is unclear whether this support would be considered a gift or would create a conflict of interest that is prohibited by federal ethics laws. If it is considered a prohibited gift, then leadership contestants who are not sitting MPs or ministers would have an advantage because they could accept support from, and collude with, a third party or parties during a contest in secret.

As mentioned above in section 3.7, a tenth area of concern is that if a person raises money from contributors to explore becoming a party leadership contestant, and then does not register, the contributors of the money are not required to be disclosed, and the person can keep the money (or other benefit offered, including accepting an offered job). This potentially allows contributions, gifts, benefits of any kind (including job offers) to be offered or given to induce someone not to run in a leadership contest.

Contributing or offering or giving to induce someone not to run should be prohibited because it violates the egalitarian principles of integrity and equal opportunity to participate. This loophole is a special concern if the person exploring running is a sitting MP and/or a Cabinet minister, and I address below in Chapter 4 when examining the gift and benefits rules whether such contributions, benefits or job offers fall within the definition of a bribe under the *Criminal Code* or offerings under federal ethics rules that are prohibited or, at least, required to be disclosed. I address disclosure of these contributions and offerings further below in section 3.25.

3.14 Spending by contestants, candidates and parties: general rules

The spending limits in the *CEA* that are in force only in pre-election and election periods apply to “expenses,” which are defined comprehensively and in detail in various sections of the *CEA* as including not only spending of money, but also any costs incurred or non-monetary contributions received, whether paid or unpaid, and also always based on the actual commercial value, not any discounted cost offered by anyone or any entity.³⁵⁶ The only exclusion is for “volunteer labour” which means someone doing something they don’t usually do as their work or employment.³⁵⁷

Expenses that count towards the spending limit are further defined for a nomination contestant as “nomination contest expenses”³⁵⁸ and for a candidate³⁵⁹ and a registered party³⁶⁰ as “election expenses” and for a party leadership contestant as “leadership contest expenses”³⁶¹ – namely, expenses for any goods or services used to directly promote or oppose the contestant, candidate, party (or its leader) only during their respective and applicable contest or election periods, including for the usual campaign activities of renting a campaign office; producing and distributing promotional materials (including for fundraising), advertising (including for fundraising),

³⁵⁶ *CEA*, *supra* note 79, section 349, definition of “expenses”.

³⁵⁷ See re: volunteer labour Elections Canada, Interpretation Note 2019-01 (January 2019), online: <<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2019-01&document=index&lang=e>>.

³⁵⁸ *CEA*, *supra* note 79, sections 374.1 to 374.4 except subsections 374.1(2) and 374.2(2).

³⁵⁹ *CEA*, *supra* note 79, subsections 375(1), 376(1), (3) and (4), and sections 377.1, 378, 378.1 and 379.

³⁶⁰ *CEA*, *supra* note 79, subsections 376(1), (3) and (4).

³⁶¹ *CEA*, *supra* note 79, sections 379.1 to 379.4.

voter contact services (including websites, mass texting, calling etc.), holding campaign events, paying campaign staff and conducting surveys.

The definition of expenses that are counted toward the spending limits for contestants and candidates does not include: expenses to organize and hold a fundraising activity (as noted above, other than expenses paid to promote the activity);³⁶² a personal expense; travel and living expenses; a litigation expense; any non-reimbursed fees for an auditor, and; administrative monetary penalties for violations of the *CEA*.³⁶³ The definition of expenses for election candidates and parties that are counted toward their spending limits also excludes expenses to make campaign activities and materials accessible to people with disabilities during the election period.³⁶⁴ While these excluded expenses are not counted under the spending limits, as set out below in sections 3.22 to 3.25, they are required to be disclosed publicly in post-election reports.

For candidates and parties, the “election period” begins when the writ is issued and ends on polling day.³⁶⁵ Expenses outside of this period are not included in the definition of “election expenses”³⁶⁶ and are, instead, counted and reported as “other election campaign expenses” some of which are not counted toward their spending limits. As well, for candidates and parties another set of specific expenses are regulated during the pre-election period,

³⁶² *CEA*, *supra* note 79, subsections 374.2(2) (nomination contestants); 376(2) (candidates); 376(2) and 379.2(2) (party leadership contestants);

³⁶³ *CEA*, *supra* note 79, subsections 374.1(2) (nomination contestants); 375(2) (candidates), and; 379.1(2) (leadership contestants).

³⁶⁴ *CEA*, *supra* note 79, subsections 376(3.1) and 377.2 (candidates);

³⁶⁵ *CEA*, *supra* note 79, subsection 2(1) definition of “election period”.

³⁶⁶ *CEA*, *supra* note 79, subsection 376(1).

as detailed below in sections 3.16 and 3.17. Also as detailed in those sections, an electoral district association is generally prohibited from spending on election-related advertising during the pre-election and election periods because the spending is instead done, with some exceptions, through its candidate's campaign account. For nomination contestants, the contest begins when the electoral district association and party decides to schedule it, and some of their expenses are not counted toward their spending limit. For party leadership contestants, the contest period begins when their party decides to schedule it, and some of their expenses are also not counted toward whatever spending limit is set by their party.

The first problem in this area is that the spending limits are not based on any comprehensive assessment of the amounts actually needed to run a “successful” campaign as a party or party candidate or nomination contestant (and many parties also set party leadership contest limits that are not based on any assessment of actual costs). Until this assessment is completed, it is impossible to determine whether spending limits should be reduced or increased for parties and candidates, and therefore what exact changes should also be made to independent candidate spending limits (who do not have the possibility of receiving a funds transfer from party headquarters, as discussed below in section 3.16) and third-party limits (as discussed below in section 3.27). The factors considered in such an assessment should include, based on average costs for past successful campaigns: office and staff costs: the actual current cost of communicating in a way that reaches each voter in a district, and in a national campaign; actual current travel costs in a district,

and for a party leader's campaign, and; actual current cost for "get-out-the-vote" efforts (taking into account that Elections Canada spends millions each election to encourage voter turnout).

The sections below contain the details of the spending rules and limits for each of these political actors, and an initial analysis of whether the rules and limits comply with the egalitarian model. In Chapter 6, I explore the limits more fully and set out proposals about how the spending rules could be made more egalitarian.

3.15 Spending by nomination contestants

Of the 30 areas of the registration, donations and loans, spending, public subsidies and disclosure parts of Canada's political finance system that are examined in this chapter, this area most closely aligns to the Supreme Court's egalitarian model based on the fundamental principle of one person one vote, as the spending limit for each nomination contestant is based on a set amount multiplied by the number of voters in the electoral district. The expense limit is 20 percent of the limit for a candidate in the previous election in that district (unless the district boundaries have changed since the last election) and so the amounts spent are relatively low compared to all other campaigns that occur in Canada's system.³⁶⁷ As noted in the previous section, whether the overall amount allowed to be spent is the right amount

³⁶⁷ CEA, *supra* note 79, sections 476.67-476.68. See Elections Canada, Limits on Nomination Contest Expenses, online: <https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitnom&lang=e>.

needs to be assessed based on the actual costs of running a successful campaign.

However, there are seven things that raise concerns in this area. First, as mentioned above in section 3.11 on donations to nomination contestants, it is a concern that during the pre-nomination contest period someone who is planning to run is given a fake job which frees up time for them campaign without facing the time or financial costs faced by contestants who have a real job. Secondly, again as mentioned above in section 3.11, employers are allowed to give an employee a paid leave of absence to campaign. Third, that some people have a job that allows them to take a leave of absence so they have a job to return to if they lose the contest, with incumbent MPs having an even greater advantage as they can essentially spend all of their paid work time campaigning. Fourth, some people are independently wealthy which allows them to campaign without facing the time or financial costs faced by contestants who have to work.

Fifth, nomination contestants are allowed to spend money before the contest officially begins and after it ends. In addition to fundraising activity expenses (other than promotion of the activity, as mentioned in the previous section), some of that spending is not subject to the spending limit. Most of this “other nomination campaign expense” spending does not provide an advantage to any one contestant, as it covers the following activities that a usual campaign would engage in: paying campaign staff (again, before or after the contest begins); setting up an office; any contest entry fee that the EDA or party may impose; interest on loans; unused inventory; auditor’s fees;

costs of preparing reports to Elections Canada and; replacement or repair of damaged goods.³⁶⁸

However, one other expense provides an advantage to contestants who are supported by wealthy donors and, as a result, raise much more money than other contestants, and it is that “reasonable compensation” can be paid to a contestant. This is an advantage because it provides direct financial support to a contestant, which means they may not have to work as much during a contest period while other contestants who don’t have that support, and especially those who are working full time, would have less time to campaign.

Sixth, also as mentioned above in section 3.8 on donations, and in the previous section, while a contestant’s expenses for childcare, for care of anyone with a mental or physical incapacity, for additional expenses related to any personal disability they may have,³⁶⁹ and for litigation, that are incurred because they are running in the contest, do not count toward the spending limit, anyone or any entity is allowed to pay an unlimited amount of these expenses for a contestant. This gives an advantage to contestants who know people and/or entities who can pay those expenses for them because nomination contestants’ expenses are not subsidized or reimbursed with any public funds. As a result, a contestant with any of these expenses has to pay for them themselves if they cannot raise the money to pay them.

³⁶⁸ Elections Canada, *Nomination Contestant Handbook*, *supra* note 279, at 74 and 87-90.

³⁶⁹ CEA, *supra* note 79, subsection 374.4(1).

Finally, seventh, as mentioned above in section 3.11, while nomination contestants are prohibited from colluding with a person or entity in order to exceed their contest expense limit,³⁷⁰ there is no prohibition in the *CEA* on a contestant colluding with a third party, including by sharing information in order to influence the third party's activities during a nomination contest. As well, there is no limit in the *CEA* on the amount that a third party can spend supporting a nomination contestant in secret as neither registration nor disclosure by third parties is required. This gives a contestant who is supported by a third party an unfair advantage in the contest, including because the third party could pay for the expenses listed above.

3.16 Spending by candidates during pre-election and election campaign periods

This area also closely aligns to the Supreme Court's egalitarian model based on the fundamental principle of one person one vote, as the spending limit for each election candidate is also based on a set amount multiplied by the number of voters in the electoral district. The electoral district association (EDA) is prohibited from spending during the election campaign period³⁷¹ although, as noted above in section 3.12, it can transfer funds to the candidate and transfer funds it has received from the party to the candidate, and also it can incur an election expense on behalf of the party or candidate or another association that will be repaid or counted toward its candidate's or

³⁷⁰ *CEA*, *supra* note 79, subsection 476.68(2).

³⁷¹ *CEA*, *supra* note 79, subsection 450(1).

party's election expenses.³⁷² EDAs are also only allowed to spend money on partisan advertising during a regulated pre-election period (i.e. when the election is being held on the every-four-years fixed date) if the ad is "transmitted solely, or substantially solely" within the EDA, and is coordinated with the EDA's party.³⁷³

The election expense limit for each candidate in each electoral district is calculated by multiplying the number of voters in the district by amounts of money per registered voter (with higher amounts for the initial 15,000, and then 10,000, voters in the district) amounts that increase at the inflation rate each year.³⁷⁴ The expense limit is higher in districts with low population density because of increased costs of travelling in those districts to reach all voters.³⁷⁵ For example, in the 2019 federal election, the limits for districts across Canada varied from a low of approximately \$86,000 to a high of approximately \$145,000, with the average being about \$110,000,³⁷⁶ and in the 2021 election the limits varied from a low of approximately \$89,000 to a high of approximately \$149,000, with the average being about \$112,000.³⁷⁷ As noted above in section 3.14, whether the overall spending limit for candidates

³⁷² CEA, *supra* note 79, subsection 450(1.2).

³⁷³ CEA, *supra* note 79, sections 449.1 and 449.2.

³⁷⁴ CEA, *supra* note 79, subsection 477.49(1) and section 477.5.

³⁷⁵ CEA, *supra* note 79, subsection 477.5(6).

³⁷⁶ Elections Canada, Final Election Expenses Limits for Candidates, 43rd General Election (October 21, 2019), online:

<<https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitcan&lang=e>> (hereinafter "Elections Canada, Final Election Expenses Limits (2019)").

³⁷⁷ Elections Canada, Final Election Expenses Limits for Candidates, 44th General Election (September 20, 2021), online:

<<https://www.elections.ca/content2.aspx?section=can&dir=cand/canlim&document=index&lang=e>>.

is the right amount needs to be assessed based on the actual costs of running a successful campaign.

The spending limit is increased if the election period lasts longer than 36 days because the Chief Electoral Officer postpones an election day in a district.³⁷⁸ Like registered parties, candidates and their agents and associates are prohibited from colluding with a third party to circumvent the spending limit³⁷⁹ and from sharing information to coordinate campaign activities.³⁸⁰ The Chief Electoral Officer may also establish categories of personal expenses and fix maximum amounts of those expenses that may be incurred by election candidates.³⁸¹ However, at the time of writing, no personal expense limits appear to have been established by the CEO.

A similar list of things raises concerns with candidate spending as with nomination contestant spending, as mentioned above in section 3.12 on donations to candidates, along with some additional concerns. First, it is a concern that during the pre-nomination contest period someone who is planning to run is given a fake job which frees up time for them campaign without facing the time or financial costs faced by contestants who have a real job, and that the fake job continues through the contest period, and fake jobs may also be given to a campaign worker or workers. Secondly, employers are allowed to give an employee a paid leave of absence to campaign. Third, that some people have a job that allows them to take a leave of absence so

³⁷⁸ CEA, *supra* note 79, subsection 477.49(2).

³⁷⁹ CEA, *supra* note 79, subsection 477.52(2).

³⁸⁰ CEA, *supra* note 79, subsections 351.01(2) and (3).

³⁸¹ CEA, *supra* note 79, subsection 378(2). "Personal expenses" are defined in section 378 of the CEA.

they have a job to return to if they lose the contest, with incumbent MPs having an even greater advantage as they can essentially spend all of their paid work time campaigning, including being paid during the election campaign period, and they receive a severance allowance if they lose the election. Fourth, some people are independently wealthy and don't have to work which also frees up time for them to campaign.

Fifth, a candidate can start spending before the election period begins (and continue spending after the campaign ends), and some spending does not count toward the spending limit. While most of these "other electoral campaign expenses" are usual campaign expenses and so do not provide an advantage any candidate, candidates can be paid "reasonable compensation" if they raise enough money, which is an advantage to candidates who are supported by wealthy donors and are likely to raise enough.³⁸² Sixth, candidates are allowed to do unlimited partisan advertising during the pre-election period, and it is not counted as an expense under their election spending limit,³⁸³ and so candidates who are confirmed and register early and raise enough money (again, most likely candidates backed by wealthy donors) to do this advertising have an advantage.

Seventh, as mentioned above in section 3.8 on donations, and in section 3.14, while a candidate's expenses for childcare, for care of anyone

³⁸² Elections Canada, *Candidate Handbook*, *supra* note 279, at 83 and 101-104.

³⁸³ Elections Canada, *Candidate Handbook*, *supra* note 279, at 102. Note that, under subsection 429.2(2) of the CEA, potential candidates (i.e. candidates who have won their nomination contest but whose nomination has not been confirmed) are not allowed to collude with a party to do partisan advertising in order to exceed the party's spending limit on such ads.

with a mental or physical incapacity, for additional expenses related to any personal disability they may have,³⁸⁴ and for litigation, that are incurred because they are running in an election, do not count toward their spending limit, anyone or any entity is allowed to pay an unlimited amount of these expenses for a candidate. While 90 percent of these three expenses are reimbursed if a candidate wins more than 10 percent of the vote in the election,³⁸⁵ the candidate still has to have the money to pay the expenses during a campaign period, which means any candidate who knows people or entities that can pay these expenses for them has an advantage.

Eighth, as noted above in section 3.8, anyone or any entity is allowed to pay up to \$5,000 in expenses for a candidate to have representatives at polling stations (instead of having to recruit volunteers to do this), and this is also not counted toward a candidate's spending limit.³⁸⁶ This rule gives candidates who know people or entities willing to pay for representatives an advantage as it ensures they will have scrutineers and observers at polls.

Finally ninth, as mentioned above section 3.12, electoral district associations and political parties being allowed transfer money to a candidate's campaign account for spending during the campaign is, I contend, only egalitarian and democratic if the candidate's own district association transfers funds for the candidate's campaign spending that the association has raised from voters in the district. It isn't egalitarian or democratic if the funds are transferred from another district association, or from the party, as

³⁸⁴ CEA, *supra* note 79, clause 378(1)(b) to (d).

³⁸⁵ CEA, *supra* note 79, sections 477.73, 477.74 and 477.741.

³⁸⁶ Elections Canada, *Candidate Handbook*, *supra* note 279, at 88 and 90.

that support is coming from outside the district and can overwhelm the level of financial support that voters in the district give to various other candidates.

3.17 Spending by parties during pre-election and election campaign periods

A registered party's election expenses limit is calculated by multiplying an amount of money per registered voter (which was \$1.06 in 2019 – it increases at the inflation rate each year) by the number of voters in all the electoral districts in which the party has candidates.³⁸⁷ If the election period lasts longer than 36 days, the limit is increased by a certain amount for each day beyond the 36-day period.³⁸⁸ Unusually, the 2015 general election lasted 78 days and, as a result, a party that had candidates in every electoral district had a spending limit of \$54,936,320.15.³⁸⁹ Bill C-76 amended the *CEA* to limit the election period to 50 days maximum.³⁹⁰

Other than in 2015, the election period has usually been 36-42 days and so, for example, the expenses limit for a party that had candidates in every district in the fall 2019 election was the more usual amount of just over \$29 million.³⁹¹ As mentioned above in section 3.14, some compensation to workers before and after an election period are not counted as election

³⁸⁷ *CEA*, *supra* note 79, subsection 430(1) and section 431.

³⁸⁸ *CEA*, *supra* note 79, subsection 430(2).

³⁸⁹ Elections Canada, "Final Election Expenses Limits for Registered Political Parties", online: <<http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/pollim&lang=e>>.

³⁹⁰ *CEA*, *supra* note 79, clause 57(1.2)(c).

³⁹¹ Elections Canada, Final Election Expenses Limits for Registered Political Parties, 43rd General Election (October 21, 2019), online: <<https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limitpol&lang=e>>.

expenses,³⁹² but as the pay is for usual pre-campaign and post-campaign activities the exemptions do not give any party an advantage over any other party.

Bill C-76, enacted in 2018, established a new, pre-election period that, if an election is held on the fixed date (the third day in October every four years), begins June 30th and ends the day the election period begins.³⁹³ During this period, spending by parties on “partisan advertising” (i.e. advertising that promotes or opposes a party, nomination contestant, candidate or party leadership contestant (if a party happens to be having a leadership contest at that time))³⁹⁴ is limited.³⁹⁵ If it is a fixed election and the pre-election period limits apply, district associations are only permitted to produce and place partisan advertising messages if the advertising is limited substantially to the district or if the advertising is provided or sold to the association’s party.³⁹⁶

Parties are also prohibited from colluding with a potential candidate (whose nomination contest win has not been confirmed and registered) or with a third party to exceed the partisan ad spending limit.³⁹⁷ If the election is not held on the fixed election date, as the 2021 election was not because Prime Minister Trudeau called a snap election, then the provisions concerning the pre-election period are not in force. Given also that the limit is so high (in

³⁹² Elections Canada, *Registered Parties Handbook*, *supra* note 279, at 86.

³⁹³ CEA, *supra* note 79, subsection 2(1) definition of “pre-election period.”

³⁹⁴ CEA, *supra* note 79, subsection 2(1) definition of “partisan advertising”.

³⁹⁵ CEA, *supra* note 79, sections 429.1 and 429.2. See also: Elections Canada, *Registered Parties Handbook*, *supra* note 279, at 67-72. See also: Pal, Permanent Campaign (2019), *supra* note 5, at 361-363.

³⁹⁶ CEA, *supra* note 79, sections 449.1 and 449.2, and subsection 450(1).

³⁹⁷ CEA, *supra* note 79, subsections 449.2(2) and (3).

2019, the only election for which the limit was in force so far, it was slightly more than \$2 million, and it increases annually at the rate of inflation)³⁹⁸ the limit is essentially meaningless as no party will likely ever spend that much on advertising during the summer months leading up to the beginning of a fixed date election campaign period. For the 2019 federal election, Conservatives spent just more than \$1.76 million, the Liberals spent just under \$1.67 million, the NDP spent just over \$66,000, the Bloc Québécois spent only \$21,518, and the Green Party spent only \$1,800.³⁹⁹ If the pre-election ad spending limit was set at an amount that would actually restrict spending, then a snap election call would undermine the equity that the limit is meant to establish.

Another area of concern is that the Liberal federal Cabinet did not fully keep a 2015 election promise to ban partisan government advertising.⁴⁰⁰ Instead of establishing clear rules in a statute, the Liberals only changed a government policy, and while the policy suspends government advertising from June 30 on in a year when a fixed date election is being held, it allows

³⁹⁸ Elections Canada, Partisan Advertising Expenses Limit for Registered Political Parties, online: <https://www.elections.ca/content.aspx?section=pol&document=index&dir=limits/limpol_partisan&lang=e>. The exact amount was \$2,046,800, which is the limit of \$1.4 million multiplied by the rate of inflation in 1992.

³⁹⁹ Elections Canada, Registered Party Financial Returns, *supra* note 290.

⁴⁰⁰ Government of Canada, "News Release: Government of Canada announces independent oversight of government advertising, modern communications policy," (May 12, 2016) online: <<https://www.canada.ca/en/treasury-board-secretariat/news/2016/05/government-of-canada-announces-independent-oversight-of-government-advertising-modern-communications-policy.html>> (hereinafter "Government of Canada, News Release (May 12, 2016)").

for advertising during an election campaign period if approved by the deputy head of a government institution.⁴⁰¹

As well, instead of establishing an independent commissioner under the federal Auditor General's office to review and stop such advertising, the Liberals designated the Advertising Standards Canada (ASC – now called “Ad Standards”) as the arbiter of whether government advertising is partisan.⁴⁰² Given that Ad Standard's board is made up of representatives of businesses and organizations that bid on federal government contracts and/or are affected by federal government policy decisions, it lacks the independence needed to restrict partisan advertising by the federal government.⁴⁰³

Ad Standards then took until July 2019 even to define “government advertising”⁴⁰⁴ The policy allows the Auditor General to audit the new rules and system and, in a Spring 2019 report, the Auditor General found that only advertising initiatives of more than \$500,000 are covered, and that the review of initiatives for non-partisanship was not consistent or thorough.⁴⁰⁵ As a result, effectively the governing party can use partisan government advertising before June 30 in an election year on the fixed election date, and

⁴⁰¹ Government of Canada, News Release (May 12, 2016), *supra* note 400. Government of Canada, Directive on Management of Communications, online <<https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=30682>>, subsections 6.44 and 6.45.

⁴⁰² Bruce Cheadle, “Liberals announce new rules to limit government advertising,” (May 12, 2016) CBC.ca, online: < <https://www.cbc.ca/news/politics/brison-government-advertising-rules-1.3578904>>.

⁴⁰³ See Advertising Standards Canada, ASC Board of Directors, online: <<http://www.adstandards.com/en/AboutASC/ASCBoardOfDirectors.aspx>>.

⁴⁰⁴ Ad Standards, Interpretation Guideline #6 – scope of “government advertising”, – “political advertising” and “election advertising” (updated October 2020), online: <<https://adstandards.ca/code/interpretation-guidelines/>>.

⁴⁰⁵ Auditor General of Canada, 2019 Spring Reports of the Auditor General of Canada to the Parliament of Canada, *Report 4 – Oversight of Government of Canada Advertising*, online: <https://www.oag-bvg.gc.ca/internet/English/parl_oag_201905_04_e_43341.html>.

in the lead up to any snap election, to give itself an advantage over the other parties.

A related area of concern is that Cabinet ministers can travel to make, and re-make, announcements about government spending, policies or programs leading up to an election, with the public paying the costs of the travel. This gives the ruling party a promotion opportunity that opposition parties do not have, although opposition leaders do have a larger publicly funded travel allowance than other MPs.⁴⁰⁶ It seems that a rule that very clearly defines government and leader business and travel as distinct from political party business and travel would help ensure that the public is not paying for political party travel costs.

As mentioned above in section 3.14, the party spending limit is not based on any comprehensive assessment of the amounts actually needed to run a “successful” campaign as a party, particularly compared to the costs for a third party of running a successful election advocacy effort (and the limits imposed on third parties – discussed below in section 3.27).⁴⁰⁷ How much is actually needed to run a successful campaign as a party in a Canadian federal election? A comprehensive study is needed to answer that question, as recommended below in Chapter 6.

⁴⁰⁶ House of Commons, *Members’ Allowances and Services*, Fiscal Year 2022-2023, Chapter 11, section 3 House Officers, section 3.8 Travel: Opposition Party Leaders; Chapter 4, section 4.4 Travel Allocations; Chapter 6, section 6.6 Travel Points System, online: <<https://www.ourcommons.ca/Content/MAS/mas-e.pdf>>.

⁴⁰⁷ Also, it should be noted that the federal *Referendum Act* has not been updated since 1992 and, as a result, does not even refer to correct section of the federal elections law concerning expenses, and sets no limits on donations. *Referendum Act* (S.C. 1992, c. 30), online: <<https://laws-lois.justice.gc.ca/eng/acts/R-4.7/index.html>>, sections 14 to 16.

While it is true that in five of the eight elections from 1997 to 2019 the winning party has spent the most money on its campaign,⁴⁰⁸ the variations in the spending of the parties that came second and third shows that spending more does not always result in more success. The Bloc Quebecois proves this point somewhat, as it has run candidates only in Quebec and consistently in the five elections from 1997 to 2008, and in the 2019 and 2021 elections, it placed third while spending only 20-25 percent of the amount spent by each of the parties that placed first and second, and also much less than the party that came fourth.⁴⁰⁹ It is important to note that the Bloc's results are distorted by the fact that it has always run candidates only in Quebec, and so it concentrates its votes in only 75 ridings, and it does not have the national costs of the parties that run candidates across the country.

However, there are other compelling examples as well. In the 1997 election, the Reform Party spent approximately half as much as the Progressive Conservative Party, and approximately \$1 million less than the New Democratic Party (NDP) but Reform elected three times as many MPs as the other two parties.⁴¹⁰ In the 2004 election, the NDP spent only 31

⁴⁰⁸ Calculated from the figures at: Elections Canada, Election Expenses and Reimbursements, by Registered Political Party, online: <<http://www.elections.ca/content.aspx?section=fin&dir=oth/pol/remb&document=index&lang=e>> (hereinafter "Elections Canada: Election Expenses") and from the figures found at: Andrew Heard, "Canadian Election Results by Party: 1867 to 2015," online: <<https://www.sfu.ca/~aheard/elections/1867-present.html>> (hereinafter "Heard, "Canadian Election Results"). In the 2004 election, the winning Liberal Party spent approximately \$680,000 less than the second-place Conservative Party. In the 2011 election, the winning Conservative Party spent approximately \$862,000 less than the second-place New Democratic Party (NDP). In the 2019 election, the winning Liberals spent just under \$2.7 million less than the second-place Conservatives.

⁴⁰⁹ Elections Canada, "Election Expenses," and Heard, "Canadian Election Results," *supra* note 408.

⁴¹⁰ Elections Canada, "Election Expenses," and Heard, "Canadian Election Results," *supra* note 408. The Reform Party spent approximately \$4.9 million and elected 60 MPs; the

percent less than the Conservative Party, and only 28 percent less than the Liberal Party, but ended up with 81 percent fewer MPs than the Conservatives, and 86 percent fewer than the Liberals.⁴¹¹ The pattern was similar in the 2006 election, only with the winning Conservatives electing more MPs than the Liberals, and in the 2008 election the NDP spent \$2.2 million (14 percent) more than the Liberals but elected 40 fewer MPs.⁴¹²

In the 2011 election, the parties' fortunes changed significantly as the Liberals spent only approximately \$800,000 (four percent) less than the NDP but elected one-third as many MPs.⁴¹³ And in the 2015 election the pattern changed again as the Liberals spent approximately \$43.1 million to elect 184 MPs; the Conservatives approximately \$41.9 million to elect 99 MPs, and; the NDP \$29.7 million to elect 44 MPs.⁴¹⁴ In the 2019 federal election, the Liberals spent approximately \$26.2 million to elect 157 MPs; the Conservatives spent more, approximately \$28.9 million to elect 121 MPs; the NDP \$10.3 million to elect 24 MPs, and, as noted above, the Bloc a much lower \$815,000 to elect 32 MPs. While these figures give some indications

Progressive Conservative Party spent approximately \$10.3 million and elected 20 MPs, and; the NDP spent approximately \$6 million and elected 21 MPs.

⁴¹¹ Elections Canada, "Election Expenses," and Heard, "Canadian Election Results," *supra* note 408. The NDP spent approximately \$12 million and elected 19 MPs; the Conservative Party spent approximately \$17.3 million and elected 99 MPs, and the Liberal Party spent approximately \$16.6 million and elected 135 MPs.

⁴¹² Elections Canada, "Election Expenses," and Heard, "Canadian Election Results," *supra* note 408.

⁴¹³ Elections Canada, "Election Expenses," and Heard, "Canadian Election Results," *supra* note 408. The NDP spent approximately \$20.3 million and elected 103 MPs; the Liberal Party spent approximately \$19.5 million and elected 34 MPs.

⁴¹⁴ Elections Canada, "Election Expenses," and Heard, "Canadian Election Results," *supra* note 408. The 2015 election spending totals were much higher than earlier elections because the election campaign period was much longer than usual. Federal Bill C-76 changed the CEA to limit the federal election campaign period to 50 days maximum. Bill C-76, *supra* note 210.

that the amount spent by a party is not directly tied to electoral success,⁴¹⁵ a much more detailed examination is needed before egalitarian, fair and accurate spending limits can be set (as recommended in Chapter 6).

Transfers of funds from a registered party to its candidates also do not count toward the spending limit under the *CEA*.⁴¹⁶ This is a significant, inequalitarian loophole in the *CEA* rules for two reasons. First, transfers to candidates are part of a party's election spending, and so should be counted as an expense. Secondly, when a party transfers funds to a candidate, unless the funds are made up of donations made to the party from voters in the candidate's district, the funds give the candidate an undemocratic boost of support from outside the district that violates the egalitarian principle of equality of participation by voters in the district.

One good requirement is that the candidate must disclose in their return how much the party transferred to them, so that at least transfers can be tracked. However, the disclosure is only required to be done months after the election, which doesn't inform voters before they vote. Voters need to be informed in advance so that they can take into account the information when deciding where to place their vote.

⁴¹⁵ Evidence from other jurisdictions shows the same pattern. For example, from the U.S.: Maggie Koerth-Baker, "How Money Affects Elections," (September 10, 2018), FiveThirtyEight.com, online: <<https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/>>. Bob Biersack, "The Big Spender Always Wins?" January 11, 2012, OpenSecrets.org, online: <<https://www.opensecrets.org/news/2012/01/big-spender-always-wins/>>.

⁴¹⁶ *CEA*, *supra* note 79, subsection 430(3). See also Elections Canada, Interpretation Note 2020-07, *supra* note 259.

3.18 Spending by political party leadership contestants

This area does not align with the Supreme Court's egalitarian model in that no statutory spending limit exists for political party leadership contestants as, again, parties are allowed to set the rules for their leadership contests.⁴¹⁷ This includes setting the spending limit even though, as noted above in section 3.15, spending limits based on the number of voters in an electoral district are set in the *CEA* for nomination contests that parties also run, and even though a leadership contest can choose a Prime Minister if it is held by the ruling party between election campaign periods.⁴¹⁸

A specific party's spending limit may match the egalitarian model. However, in recent federal party contests the parties' entry fees and spending limits have been far from egalitarian, both of which obviously disadvantage candidates who are not wealthy and/or not supported by wealthy donors who can afford to give the full maximum donation allowed to a contestant of \$1,500 to \$1,675 (the donation limits from 2015 to 2020). For example, as seen above in Charts 12 to 17 in section 3.13, in the party leadership contests for the federal political parties from 2013 to 2020, the candidates who won spent the most, and also received a significant amount of their funding from a relatively small proportion of their top donors.

According to my calculations from the figures in these charts from Elections Canada's database, the average amount spent by candidates in

⁴¹⁷ See an evaluation of this area, including a suggestion that spending limits could be established, in Cross and Crysler (2011), *supra* note 345, at 167-168.

⁴¹⁸ As, for example, occurred in 2003 when Paul Martin won the Liberal Party of Canada's leadership contest.

recent federal party leadership contests was: \$694,825 for candidates in the Liberal Party contest in 2013 (and the median was \$269,664); \$46,835 for candidates in the 2014 Bloc Québécois contest (and the median was the same as there were only two candidates); \$1,063,227 for candidates in the 2017 Conservative Party contest (and the median was \$908,642); \$486,151 for candidates in the NDP's 2017 contest (and the median was \$386,749); \$3,768,420 for the top three candidates in the 2020 Conservative Party contest (and the median was \$5,399,992). The averages and mean for candidates in the 2020 Green Party contest can't be calculated exactly as the amounts are not available because one of the top candidates has not submitted his campaign return.

The average amount spent by all 18 candidates in the three main national parties' leadership contests (Liberals, Conservatives and NDP) listed in four of the six charts set out above in section 3.13 was \$1.5 million, and the median was \$879,026. These amounts are high, but the median amount could be raised by a contestant who was supported by approximately 11,270 party members each donating \$75. This is not an excessive amount of voter support to require for someone wanting to be the leader of a national party.

However, the inequity is that, under the current donation limits, another contestant could raise the same amount from 1,000 party members who each donated \$879, or from 525 who each donated the maximum allowed in 2022 of \$1,675. Those contestants would have the same amount of money, but only 5-10 percent as many voters who supported them enough to contribute.

This violates the egalitarian requirement of equality of opportunity for equal participation based on the principle of one person, one vote.

Many of the same inequity concerns exist for leadership contestants as with nomination contestants and candidates. First, as set out in section 3.13 on donations to leadership contestants, even though it is illegal under the *CEA*, it is relatively easy for someone or some entity to give a fake job to a contestant, or for an employer to, in effect, give an employee who is a contestant a paid leave, as both free up time for them to campaign. Secondly, some people have a job that allows them to take an unpaid leave of absence, with or without permission, as it gives them the advantage of knowing that they have a job to return to if they lose the contest.

Third, MPs who are running have an advantage because they can essentially spend all of their paid work time campaigning. Fourth, some people are independently wealthy and don't have to work which also frees up time for them to campaign. Fifth, a contestant can start spending before the contest begins (and continue spending after the campaign ends), and some spending does not count toward the spending limit, including that contestants can be paid "reasonable compensation" if they raise enough money, which is an advantage to candidates who are supported by wealthy donors are likely to raise enough.⁴¹⁹

Sixth, as mentioned above in section 3.8 on donations, and above in section 3.14, a contestant's expenses for childcare, for care of anyone with a mental or physical incapacity, for additional expenses related to any personal

⁴¹⁹ Elections Canada, *Leadership Contestant Handbook*, *supra* note 279, at 78 and 92-95.

disability they may have, and for litigation, that are incurred because they are running in a contest do not count toward their spending limit, and anyone or any entity is allowed to pay an unlimited amount of these expenses for a candidate.⁴²⁰ This means any contestant who knows people or entities that can pay these expenses for them has an advantage.

A seventh area of concern, as discussed above in section 3.13, is that, unlike for nomination contestants, candidates and parties, there are no rules in the *CEA* prohibiting collusion between third parties and leadership contestants to exceed a contestant's spending limit, nor prohibiting sharing information with third parties in order to develop strategy for campaign activities. As a result, a third party (individual or interest group) can fully coordinate with and support a party leadership candidate in secret, as registration and disclosure by third parties is not required.

This loophole does not comply with the egalitarian model because it allows third parties to support a contestant more than average voters, including by paying the expenses listed in the paragraph above. This is a significant loophole, especially because party leadership contests choose the Prime Minister when the contest is held by the ruling party in between elections, as they were in 1993 and 2003. The support from a third party could be democratic and equitable if it is a citizen organization with many voters as members who decide democratically to support a contestant. However, it could also be undemocratic and inequitable if the third party is

⁴²⁰ *CEA*, *supra* note 79, clause 379.4(1)(a) to (c) and section 379.3. Elections Canada, *Leadership Contestant Handbook*, *supra* note 279, at 81-82 and 89.

one wealthy voter or a wealthy private corporation with only a few shareholders.

A related eighth area of concern, as mentioned above in section 3.13 and discussed further below in Chapter 4, sections 4.2 and 4.3, is that even if the leadership contestant that the third party supported was a sitting MP or Cabinet minister, it is unclear whether this support would be considered a gift or would create a conflict of interest that is prohibited by federal ethics laws. If it is considered a prohibited gift, then contestants who are not sitting MPs or ministers would have an advantage because they could accept support from, and collude with, a third party or parties during a contest.

3.19 Spending by parties and electoral district associations between elections

There are no spending limits or restrictions on spending the money that parties or electoral district associations (EDAs) raise through donations in between elections, with three exceptions. As noted above in section 3.11, parties and associations are required to provide goods or services, if any are provided, equally to all contestants in a nomination contest. Secondly, parties and EDAs are prohibited from transferring funds to a party leadership contestant, except funds that are donated to the party as a directed contribution to the contestant.⁴²¹ Thirdly, as detailed above in section 3.16, EDAs are only allowed to spend money on partisan advertising during a

⁴²¹ CEA, *supra* note 79, subsection 478.73.(3).

regulated pre-election period (i.e. when the election is being held on the every-four-years fixed date) if the ad runs locally.⁴²²

Each elected MP also receives an annual office budget funded by the public ranging from (in fiscal year 2022-2023) \$388,000 up to 481,710 depending on the size of their constituency in terms of number of voters and geography.⁴²³ This budget covers travel costs and the costs of an office and staff in the electoral district to provide services to voters, which can raise their profile and standing in the community. I am not evaluating as part of this dissertation whether Canada's voting system is inequalitarian in its effects, and I don't address voting system reforms in Chapters 5 to 7 below. However, at the same time I contend that it is important to note that vote splits due in part to Canada's first-past-the-post electoral system have resulted, according to my calculations, in the ruling federal party in the 13 federal elections from 1980 to 2021 inclusive obtaining on average 39.48 percent of the popular vote and 52.71 percent of the seats in the House of Commons (i.e. an average of 13.23 percent more seats than votes).⁴²⁴

This distortion has given each ruling party an extra subsidy worth millions of dollars annually compared to the party/ies that elect a lower percentage of MPs compared to their percentage of vote received. For example, if a proportional representation system was in place at the federal

⁴²² CEA, *supra* note 79, sections 449.1 and 449.2.

⁴²³ House of Commons, *Members' Allowances and Services*, Fiscal Year 2022-2023, Chapter 4: Budgets, Member's Office Budget 4-3, and; Appendix: Member's Office Budget and Financial Limits by Constituency 4-15, online: <<https://www.ourcommons.ca/Content/MAS/mas-e.pdf>> (hereinafter "House of Commons (2022-2023)").

⁴²⁴ Heard, "Canadian Election Results," *supra* note 408.

level in Canada, the ruling Liberals could be projected to have won approximately 144 seats in the 2015 federal election instead of the 184 seats they won, which would mean they would have 40 fewer MPs and \$17.5 million less in annual funding.⁴²⁵ That funding would be in the hands of opposition parties (and their MPs' constituency offices), making the overall financial spending power balance amongst all the parties more equitable and, therefore, more aligned with the egalitarian model. As a result, I make proposals in Chapter 6 for adjustments that could be made to public subsidies of political parties to balance out the inequitable amounts of public funding that federal parties receive due to Canada's voting system.

Given that parties more frequently than in the past now pay for campaign-style advertising concerning their messages to voters and performance, or against other parties' messages and performance (which has been termed the "permanent campaign"),⁴²⁶ the question to address is whether spending limits need to be applied to parties during policy-making processes between elections? I address this question more fully in Chapter 6, section 6.7. One aspect of this issue is, as detailed above in section 3.17, that the Liberal federal Cabinet did not fully keep a 2015 Liberal Party election promise to ban partisan government advertising. As a result, the governing

⁴²⁵ The Conservatives could be projected to have won approximately 105 seats instead of 99 (meaning \$2.6 million more funding); the NDP 65 seats instead of 44 (meaning \$9.2 million more); the Bloc Quebecois 14 seats instead of 10 (meaning \$1.75 million more) and the Green Party 10 seats instead of one (meaning \$3.9 million more).

⁴²⁶ Tom Flanagan, "Political Communication and the 'Permanent Campaign,'" in *How Canadians Communicate IV: Media and Politics*, ed. David Taras and Christopher Waddell (Edmonton: Athabaska Press, 2012). See also: Heather MacIvor, "Is Harper v. Canada Still Relevant," (Spring 2015), 2015 *Journal of Parliamentary and Political Law* 447 at 451-453 (hereinafter "MacIvor (Spring 2015)"), and; Pal, Permanent Campaign (2019), *supra* note 5.

party can use such advertising anytime, and especially leading up to an election, to give themselves an advantage over the other parties. I address this spending imbalance in Chapter 6, section 6.6, with proposals #60 and #61.

3.20 Public subsidies to political parties and candidates

Parties and candidates are subsidized in several ways. The first way is that donors receive tax credits for their donations. Given that the tax credit for a donation to a party or a candidate's campaign (or to an independent candidate) increases in amount but decreases in percentage of donation made as the donation increases to the annual maximum amount (for example \$1,700 in 2023), the credit is somewhat structured in an egalitarian way. Donors who donate less than \$400 receive a 75 percent (\$300) deduction in their taxes, while donors who donate from \$1,275 up to the maximum of \$1,700 receive a \$650 deduction (which is 38-50 percent of what they donated, depending on the size of their donation).

However, the more you give the more you get as a credit that reduces your taxes (which favours wealthy donors) and, as detailed above in section 3.9, the maximum donation is much higher than an average voter can afford.⁴²⁷ As well, you have to have the money to donate, and also have enough income to be required to pay taxes, in order to benefit from the credit

⁴²⁷ Finance Canada, IC75-2R9 Contributions to a Registered Party, a Registered Association or to a Candidate at a Federal Election, online: <<https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic75-2.html>>.

– which means the system is of no benefit to people with the lowest incomes (the most vulnerable in Rawlsian terms).

Reimbursements of 50 percent of election campaign costs are also given to parties whose candidates receive two percent or more of the national vote in an election (and/or five percent of the votes in the electoral districts they run in), and candidates who receive 10 percent or more of the vote in an electoral district receive a reimbursement of 60 percent of their election campaign expenses (and 90 percent of childcare, other care and accessibility expenses).⁴²⁸ Because they are based on votes received, as opposed to dollars received, these reimbursement subsidies are somewhat egalitarian. However, while it saves money, it is difficult to comprehend what is egalitarian about having thresholds for these reimbursements, as they disadvantage the capacity of parties that receive less than two percent, and candidates who receive less than 10 percent, of the vote from continuing on and contesting the next election.⁴²⁹

In the six federal elections from 2004 to 2019 inclusive, the five main parties were the only parties that received reimbursements and,⁴³⁰ other than three to six other candidates each election, only candidates from the five main parties received reimbursements.⁴³¹ After the 2015 federal election during

⁴²⁸ CEA, *supra* note 79, sections 444, and 477.73 to 477.76.

⁴²⁹ F. Leslie Seidle proposed reducing the reimbursement threshold for parties only to one percent, “Public Funding of Political Parties: The Case for Further Reform,” in Young and Jansen, eds., (2011), *supra* note 3, at 50.

⁴³⁰ Elections Canada, Elections Expenses and Reimbursements, by Registered Political Party, online:
<<http://www.elections.ca/content.aspx?section=fin&dir=oth/pol/remb&document=index&lang=e>>.

⁴³¹ Only four other candidates received reimbursements after the 2019 and 2015 federal elections; only five after the 2011 and 2008 elections; only three after the 2006 election, and;

which spending was extraordinarily high because the campaign period was extraordinarily long, the five main parties received a combined total of \$60.6 million in reimbursements⁴³² and their candidates received just over \$42.5 million (99.7%) of the reimbursements, with only four other independent candidates receiving reimbursements.⁴³³

After the more usual spending amounts and campaign period in the 2019 election, the five main parties received a combined total of \$34.3 million in reimbursements,⁴³⁴ and their candidates received \$28.7 million (99.4 percent) of the reimbursements granted, with only one candidate from one other party and three independents also receiving reimbursements.⁴³⁵ It should be noted that the candidate reimbursement system favours the Conservatives and Liberals most as in recent elections they have almost always had significantly more candidates who meet the threshold requirement than the other main parties (the 2011 election is the only exception, as the

only six after the 2004 election. Elections Canada, Reimbursements to Candidates, online: <<https://www.elections.ca/content.aspx?section=fin&document=index&dir=oth/can/rem&lang=e>> (hereinafter, "Elections Canada, Reimbursements to Candidates").

⁴³² Elections Canada, Total Paid Election Expenses and Reimbursements, by Registered Political Party – 2015 General Election, online: <https://www.elections.ca/content.aspx?section=fin&dir=oth/pol/rem&document=table1_15&lang=e>.

⁴³³ The five main parties' candidates received \$42,573,710 of the total \$42,696,289 in reimbursements granted, and only one candidate of one other party (Forces et Démocratie - Allier les forces) and three independent candidates received reimbursements. Elections Canada, 42nd General Election – October 19, 2015 – Reimbursements to Candidates, online: <https://www.elections.ca/content.aspx?section=fin&dir=oth/can/rem/rem_42ge&document=table&lang=e>.

⁴³⁴ Elections Canada, Total Paid Election and Accessibility Expenses and Reimbursements, by Registered Political Party – 2019 General Election, online: <https://www.elections.ca/content.aspx?section=fin&dir=oth/pol/rem&document=table1_19&lang=e>.

⁴³⁵ The five main parties received \$28,709,788 out of the total of \$28,879,390 paid in reimbursements. Elections Canada, Reimbursements of Candidate's Expenses by Political Affiliation – 43rd General Election – October 21, 2019, <https://www.elections.ca/content.aspx?section=fin&dir=oth/can/rem/rem_43ge&document=table&lang=e>.

Conservatives had 284 candidates qualify, the NDP 280 and the Liberals 217).

According to my calculations, in the six federal elections from 2004 to 2019 inclusive, the Conservatives had 292 candidates on average qualify to receive the reimbursement, the Liberals had 289 on average, the NDP 237, the Bloc 70 (which obviously also benefits them greatly given they only run candidates in districts in Quebec) and the Greens only 19.⁴³⁶ Combined with the amounts that MPs receive in annual budgets as noted above in section 3.19, the reimbursement and overall public funding system very much favours the main parties and their candidates and incumbents (especially the ruling party and its candidates), and disadvantages every other party and their candidates, in inegalitarian ways.

Removing the thresholds parties and candidates are required to meet in order to receive the reimbursement would be consistent with the main positions the majority of the Supreme Court of Canada expressed in its 2003 ruling in the *Figueroa* case. These positions were that selecting elected representatives is a right that citizens must have an equal opportunity to exercise⁴³⁷ and that political parties are a vehicle for the exercise of this right, no matter how small they are (i.e. no matter how many candidates they have in an election).⁴³⁸

⁴³⁶ Calculated from the statistics in the charts for each election 2004-2019 at Elections Canada, Reimbursements to Candidates, online: <<https://www.elections.ca/content.aspx?section=fin&document=index&dir=oth/can/rem&lang=e>>.

⁴³⁷ *Figueroa* (2003), *supra* note 133, para. 30.

⁴³⁸ *Figueroa* (2003), *supra* note 133 at para. 39.

MPs who run again also enjoy the advantage of being the incumbent, including the time and resources they and their office staff have spent providing services to the voters in their district all of which is paid for by the public.⁴³⁹ It is true, as noted above in section 3.8, that MPs are prohibited by various provisions and Elections Canada's enforcement policy from using the MP resources or staff time to contribute in support of their own campaign or during the pre-election period (if they are running for re-election) or to support nomination or party leadership contestants when those contests occur, and also that the House of Commons Committee that reviewed the ethics rules for MPs in 2022 recommended that the current rules be amended to make it even more clear that MPs cannot use their staff or office resources for partisan purposes (although there was disagreement amongst the members about how far to extend the prohibition).⁴⁴⁰

However, as the Committee members' disagreement reflected, it is difficult to draw the line between MP's regular functions as an MP and campaigning and, in any case, MPs who run again enjoy the direct subsidy of having the costs paid by the public for all their travel and activities during the pre-election period (which involve, in a way, unavoidably at least some

⁴³⁹ Marc Bosc and André Gagnon eds., *House of Commons Procedure and Practice* (Cowansville (Québec): Éditions Yvon Blais, 2017 (3rd edition)), Chapter 4, "Budgetary Entitlements" subsection, online: <https://www.ourcommons.ca/about/procedureandpractice3rdedition/ch_04_11-e.html#4-11-3> (hereinafter "*House of Commons Procedure and Practice* (2017)").

⁴⁴⁰ House of Commons Standing Committee on Procedure and House Affairs, *Review of the Conflict of Interest Code for Members of the House of Commons: Part 1*, (June 2022), online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/PROC/report-11/>>, Recommendation 8 at 39, and the dissent by Conservative Party MPs on the Committee at 55-56 (hereinafter "Procedure and House Affairs report (June 2022)"). As of February 3, 2023, the Committee's report had not been adopted by the House of Commons.

campaigning for re-election), as well as their costs paid for mailings to their constituents throughout their time in office including in the months leading up to an election campaign and including even during the 10 days after Parliament has been dissolved and an election campaign period has begun.⁴⁴¹

Another aspect that raises concerns about inequality in Canada's federal system is that the per-vote annual subsidy, which was the most egalitarian part of the system given it was explicitly based on the principle of one person-one vote, doesn't exist anymore. The subsidy was criticized as providing state support that maintains existing parties and thwarts competition by new parties,⁴⁴² but a counterpoint to that claim is that it was actually a very democratic, efficient way to provide financial support from voters who supported a party with their vote.

Finally, the federal public subsidy system for political parties includes a relatively egalitarian system of reserving and allocating free and paid time to parties for political broadcasts during elections.⁴⁴³ There is no set amount of free time that a broadcasting network is required to make available, other than

⁴⁴¹ *House of Commons Procedure and Practice* (2017), *supra* note 439. *Canada Post Corporation Act*, RSC 1985, c C-10, subsections 35(2), (3) and (5).

⁴⁴² The per-vote subsidy was in place from 2004 until 2015 – it was phased out by the Harper Conservative government over four years, from 2011 at \$2 per-vote then reduced by \$0.50 each year until 2015 when it was eliminated. Richard S. Katz, "Finance Reform and the Cartel Party Model in Canada," 60 at 68-73 (hereinafter "Katz (2011)"), and Lisa Young and Harold Jansen, "Cartels, Syndicates, and Coalitions: Canada's Political Parties after the 2004 Reforms," 82 at 85-102 (hereinafter "Young and Jansen, Cartels, Syndicates and Coalitions (2011)") in Young and Jansen, eds., (2011).

⁴⁴³ *CEA*, *supra* note 79, sections 332 to 348. Elections Canada, Allocation of Paid Broadcasting Time, online: <<http://www.elections.ca/content.aspx?section=abo&dir=bra/all&document=index&lang=e>>. See discussion of how the current system developed in: Feasby (2012), *supra* note 2, and; Peter S. Grant, "Broadcasting Arbitration," (Spring 2015), 2015 *Journal of Parliamentary and Political Law* 333 at 333-339 (hereinafter "Grant (Spring 2015)").

the requirement to provide at least as much time as during the previous election.⁴⁴⁴ This means that only three broadcast networks were required to provide free time during the 2019 election because they were the only networks that provided free time during the 2015 election.⁴⁴⁵

As well, the broadcasters choose the free-time slots, and this results in some ads airing at times when few voters are listening or watching. Each party, established and new, is given at least two minutes of free time on each of those networks,⁴⁴⁶ and the rest of the free time on those networks is allocated based on the criteria for the allocation of the 6.5 hours (390 minutes) of total paid prime time broadcast time that every broadcaster (or network of broadcasters) is required to make available to the parties.⁴⁴⁷ The key criteria are the number of seats in the House of Commons and percentage of votes obtained by each party in the last election (taking into account how many candidates each party ran).⁴⁴⁸ The representatives of the parties meet and attempt to agree unanimously on the paid broadcast time allocation, but if that doesn't happen the Broadcasting Arbitrator, who is chosen unanimously by all the parties, makes the allocation.⁴⁴⁹

⁴⁴⁴ CEA, *supra* note 79, subsections 345(1) and (2). Elections Canada, Allocation of Free Broadcasting Time, online:

<<http://www.elections.ca/content.aspx?section=abo&dir=bra/fre&document=index&lang=e>> (hereinafter, "Allocation of Free Broadcasting Time (2019)").

⁴⁴⁵ Allocation of Free Broadcasting Time (2019), *supra* note 444.

⁴⁴⁶ CEA, *supra* note 79, clause 345(2)(a).

⁴⁴⁷ CEA, *supra* note 79, sections 335 and 345.

⁴⁴⁸ CEA, *supra* note 79, subsection 338(1) and 345.

⁴⁴⁹ CEA, *supra* note 79, sections 332-334 and 337. Elections Canada, Broadcasting Arbitrator, online:

<<https://www.elections.ca/content.aspx?section=abo&dir=bra&document=index&lang=e>>.

It is prohibited for any party to be given more than 50 percent of the 6.5 hours of paid time, and the Arbitrator can also modify the paid-time allocation if necessary for fairness or the public interest.⁴⁵⁰ The possibility that a party has increased or decreased its voter support in the intervening years is not mentioned as part of the statutory allocation calculation but, given the discretion is based on fairness and the public interest, is one of the factors that the Arbitrator can consider in modifying the allocation. New parties that register and request paid broadcast time by the deadline are granted at least six minutes of paid time, and can be granted up to 39 minutes of paid time, taking into account whether their allocation of time is fair compared to other parties' time allocations.⁴⁵¹

The allocation scheme, and the prohibition on buying broadcast time outside of Canada, was challenged in the early 1990s (before the Supreme Court had established the egalitarian model first with its 1997 ruling in *Libman*) by the Reform Party on the basis that it entrenched incumbents and therefore breached the rights of new or smaller parties to freedom of expression and equality.⁴⁵² However, the allocation system was upheld by five-justice panel of the Alberta Court of Appeal as not being a violation of section 15 of the *Charter*, and as justified under section 1, given that ensuring access to broadcast media for parties so they could inform voters was a

⁴⁵⁰ CEA, *supra* note 79, section 345 and subsections 338(1) and (5); Feasby (2012), *supra* note 2 at 200.

⁴⁵¹ CEA, *supra* note 79, subsection 338(6) and section 339.

⁴⁵² *Reform Party of Canada v. Canada* (Attorney General), 1992 CanLII 6224 (AB QB) (hereinafter "*Reform Party* (1992)"); overturned in *Canada (Attorney General) v. Reform Party of Canada*, 1995 ABCA 107 (CanLII) (hereinafter "*Reform Party* (1995)").

pressing and substantial concern, granting time to parties based on their support in the last election was generally equitable, and the Broadcast Arbitrator having the discretion to allocate more or less time to a party based on more recent information about voter support of the party was enough to correct any unfairness or discrimination built into the allocation calculation.⁴⁵³

The Arbitrator subsequently adopted a practice of allocating one-third of the available time equally among all registered parties.⁴⁵⁴ The Court also held that the prohibition on purchasing broadcast time outside Canada (now in section 330 of the *CEA*) was necessary and proportionate, given that a Canadian enforcement official would lack jurisdiction and so would have difficulty verifying expenditures made by parties buying time at stations outside of Canada.⁴⁵⁵ The Court did, however, strike down the prohibition on the purchase of additional broadcasting time by political parties as an unjustifiable limit on freedom of expression because limits on spending by parties, based on the number of candidates running for each party, establish a relatively egalitarian system, and if a party wants to use its funds to focus its spending on broadcast advertising, then as long as it stays within the limits it should be free to make that choice.⁴⁵⁶

The dissenting judges argued that the broadcast allocation calculation and system amounted to “gerrymandering” that violated section 2(b) of the *Charter* (and was not justifiable under section 1) because it favoured the main

⁴⁵³ *Reform Party* (1995), *supra* note 452, paras. 55-65, 70 and 76. See also the history of the development of the statutory provisions in the dissent part of the ruling, at paras. 137-152.

⁴⁵⁴ Feasby (2012), *supra* note 2 at 213–14.

⁴⁵⁵ *Reform Party* (1995), *supra* note 452, paras. 81-82.

⁴⁵⁶ *Reform Party* (1995), *supra* note 452, paras. 83-90.

existing parties too much and, to be equitable, the allocation should give the same amount of free time to each party because any party could have as important information, perspective, ideas and proposals to convey as any other party, and because the incumbent main parties usually receive more media coverage, which amounts to free broadcast time.⁴⁵⁷ The dissenting judges were not convinced that just because the Arbitrator could allocate more time to a party on the basis of fairness, the system would be equitable, and concluded that the entire system and the other restrictions should all be struck down.⁴⁵⁸

In the list of suggested changes to the current system in Chapter 6, I propose with regard to the per-vote subsidy devising a method for denying a party a portion of the free time if its voter support clearly decreased since the previous election, and shifting it to another party if its support clearly increased (with the obvious difficulty being how to determine whether support has actually shifted). Dr. Frederick James Fletcher, a professor of political science at York University and affiant in the *Reform Party* case, suggested that this method also be applied to the allocation of free broadcast time.⁴⁵⁹ I concur, and also contend that including this method in the allocation system would be better than leaving it to the Arbitrator's discretion, especially given that there could be only a very short period of time between the Arbitrator's

⁴⁵⁷ *Reform Party* (1995), *supra* note 452, paras. 173-178, with section 1 analysis at paras. 199-219 (especially paras. 206-214).

⁴⁵⁸ *Reform Party* (1995), *supra* note 452, paras. 217-219 re: the Arbitrator, and paras. 220-226 re: striking down all the restrictions because they are interconnected.

⁴⁵⁹ *Reform Party* (1992), *supra* note 452, at paras. 86 and 93. *Reform Party* (1995), *supra* note 452, at para. 58. See also an analysis of the ruling that concludes that broadcast time should either be allocated equally to all parties or based on ongoing survey results in Feasby (2006), *supra* note 2, at 259-265.

allocation decision and election day which would make it very difficult for any party to challenge and the decision and obtain a court ruling before election day.

Other issues raised by the broadcast time system that I consider in Chapter 6 are whether, as with all general public subsidies, the free time broadcasting allocation needs to be given to the parties and, if it should be, whether the allocation calculation is as egalitarian as it could be. Also considered is whether broadcasters should be required to grant a definite amount of free time in total, and more free time than in the past, given the airwaves are owned by the public and just licensed to broadcasters, and given the cost of broadcast advertising and that lowering that cost for parties not supported by wealthy donors would increase those parties' equality of opportunity to participate.

I address more fully in Chapter 6 how a per-vote subsidy, and other public subsidies, can be designed to uphold the principles and fulfill the objectives of a more fully egalitarian model.

3.21 Public subsidies to nomination and party leadership contestants

Nomination and party leadership contestants only receive the public subsidy of the tax credit for donations mentioned in the section above, which has inequitable effects given it has greater benefits for wealthy donors and, therefore, for the contestants those donors support. I address in Chapter 6 how a public subsidy for contestants can be designed to align with a more fully egalitarian model.

3.22 Disclosure requirements for political parties

Registered parties are required to submit an election expenses return to the Chief Electoral Officer within eight months after a general election,

along with an auditor's report and a declaration by the party's chief agent that the return is complete and accurate.⁴⁶⁰ The return is required to set out all monetary election expenses incurred and non-monetary contributions of property or services that were used for election activities (but not loans taken out for the election campaign – as noted below loans are only disclosed annually).⁴⁶¹ However, the requirements are somewhat vague concerning the details of election spending, and they are even more vague for between election spending.

In addition, an obvious key problem is that the disclosure comes eight months after the election, long after voters need to be informed about who is bankrolling each campaign in order to consider that information when voting. Disclosure by EDAs, nomination contestants and candidates also comes long after voting has ended – see sections 3.23 and 3.24 below – as only party leadership contestants are required to disclose before voting happens (see section 3.25 below).⁴⁶² As well, while nomination contestants, election candidates and leadership contestants are all required to submit supporting documents to Elections Canada in their election expense reports,⁴⁶³ as described in the sections below, parties are not required to submit receipts thereby making spending by parties above the limits relatively easy to do without being caught.

⁴⁶⁰ *CEA*, *supra* note 79, subsections 437(1) and (3).

⁴⁶¹ *CEA*, *supra* note 79, subsection 437(2).

⁴⁶² See this point made in: MacIvor (March 2008), *supra* note 3, at 108-109 and 131, and; Beange (Spring 2015), *supra* note 5, at 270.

⁴⁶³ *CEA*, *supra* note 79, sections 437-438 re: parties; subsections 478.8(3) and (4) re: leadership contestants; subsection 476.75(3) re: nomination contestants; subsection 477.59(3) re: election candidates.

It should be noted though that, under a new provision added by Bill C-76 in 2018, if the Commissioner of Canada Elections initiates an investigation, which the Commissioner has the power to do for any reason, the Commissioner can require a party's chief agent to provide "documents evidencing any expense set out in the party's election expenses return, including bank statements, deposit slips and cancelled cheques."⁴⁶⁴ Concerning another area of election-related disclosure, parties are also required to disclose in or on any election advertising message that the message has been authorized by the official agent of the party.⁴⁶⁵

With regard to reporting between elections, each quarter, and annually (by July 1st of each year covering the previous calendar year), the party's chief agent is required to provide the Chief Electoral Officer with a financial transactions return, along with an auditor's report and a declaration by the chief agent that the return is complete and accurate.⁴⁶⁶ The financial transactions return is required to set out contributions received by the party during the quarter or year; the number of contributors; the name and address of contributors who gave more than \$200; the value of goods, services, or funds transferred by the registered party to a candidate or electoral district association (and vice versa); details concerning the status of any loans the party has outstanding, and; a statement of election expenses incurred in by-elections during the fiscal period, among other things.⁴⁶⁷

⁴⁶⁴ CEA, *supra* note 79, section 510.001.

⁴⁶⁵ CEA, *supra* note 79, section 320.

⁴⁶⁶ CEA, *supra* note 79, subsection 432(1).

⁴⁶⁷ CEA, *supra* note 79, subsection 432(2).

However, party auditors even admit in their reports to Elections Canada that they can't confirm expenses amounts themselves even with access to the receipts from the parties. For example, the reports sent after the 2015 election by the auditors for the Liberals, Conservatives and NDP all state the following:

Due to the inherent nature of the transactions of electoral campaigns, the completeness of General Election expenses is not susceptible to satisfactory audit verification. Accordingly, our verification of the [party name] compliance with the legal provisions referred to above was limited to the amounts recorded in the Chief Agent's accounting records.⁴⁶⁸

In Chapter 6 below, sections 6.9 and 6.10, I set out proposals for how the disclosure and auditing process could be improved not just for parties, but also for contestants and candidates, to ensure compliance with all the rules. Another significant flaw that does not align with the egalitarian model's objective of informing voters is that the disclosure of some donations to the party comes after voters vote, as an election date can easily fall within the time period between the deadlines for quarterly disclosure of donations by parties. For example, the fixed election date of the third Monday in October falls between two quarterly donation disclosure deadlines (September 30th and December 31st). No matter when election day occurs, voters have a right to know who is bankrolling each party before they vote.

⁴⁶⁸ Elections Canada, "Auditor's Reports on Registered Political Parties Returns in Respect of General Election Expenses – 2015 General Election, online: <<http://www.elections.ca/content.aspx?section=fin&document=index&dir=oth/pol/aud/exp2015&lang=e>>. See top of page 9 of auditor's letter for the Liberal Party; and 4th para of page 1 of auditor's letter for Conservatives, and; same line from NDP's auditor report. See past auditor's reports for elections from 2004 on at: <<http://www.elections.ca/content.aspx?section=fin&document=index&dir=oth/pol/aud&lang=e>>.

There is also an argument for requiring disclosure of the identities of all donors, not just those who donate of more than \$200, in order to inform voters and protect the integrity of the system. For example, if a party or candidate spent \$4,000 on media or social media advertising in an electoral district, which would allow it to reach a significant number of voters, only 20 voters each donating \$200 would be needed to pay for the advertising. None of their identities would be required to be disclosed in the party's donations report. As a result, the 20 voters could actually easily be four or five voters donating on behalf of themselves and four or five of their family members each. In addition, if a party, candidate, contestant or third party raised money through an online site like GoFundMe, Kickstarter or the many other such "crowdfunding" sites, and set a donation limit of \$200, individuals and businesses could easily set up accounts, and even multiple accounts, to donate \$200 at a time, and there would be no disclosure required.

Bill C-50 enacted in 2018 added a new disclosure requirement for parties between election periods. The requirement applies to a fundraising event that will be attended by a Cabinet minister or the leader, interim leader or leadership contestant of a registered party that is organized by a party or anyone or any entity to raise money for the party, an electoral district registered association, nomination contestant, candidate or leadership contestant of a registered party.⁴⁶⁹ However, the requirement does not apply to events that are held during an election period, or events at a party convention that have a ticket price that amounts to a contribution of less than

⁴⁶⁹ CEA, *supra* note 79, subsection 384.1(1).

\$200, or that are to “express appreciation” for individuals who have made a contribution to the party, or to events at a party leadership contest debate. These are significant loopholes that allow ministers, leaders and leadership contestants to meet behind closed doors, in the context of raising funds, with lobbyists and others seeking to influence their decisions, all without informing voters.⁴⁷⁰

For each event that is covered by the requirement, the party is required to publish “in a prominent location” on its website a few days before the event the date, time and location of the event, who or what entity it is benefitting, which leader and/or minister(s) are attending, the ticket price (and amount of the price that is a contribution), and the event contact person.⁴⁷¹ Within 30 days after the event, the party is required to file a report with the Chief Electoral Officer (CEO) containing all the same information, as well as the name and municipality of all attendees (with a few exceptions including for minors, support staff and media observers), and a list of every person or entity “that organized the event or any part of it” – and the CEO maintains a registry of the events on Elections Canada’s website.⁴⁷² For all such fundraising events that are held during an election period, a party is required, within 90 days after election day, to file with the CEO one report covering all the events and containing the required information listed above.⁴⁷³

⁴⁷⁰ CEA, *supra* note 79, subsections 384.1(2) to (4).

⁴⁷¹ CEA, *supra* note 79, section 384.2.

⁴⁷² CEA, *supra* note 79, subsections 384.3(1) to (7). See Elections Canada, Regulated Fundraising Events Registry, online:
<<https://www.elections.ca/content.aspx?section=fin&dir=reg&document=index&lang=e>>.

⁴⁷³ CEA, *supra* note 79, subsections 384.4(8) to (12).

Another significant flaw with the overall disclosure system is, I contend, that (as noted above in section 3.3), parties are allowed to choose their own chief agent and auditor.⁴⁷⁴ Under the *CEA* sections 425-443, the chief agent is responsible for deposits of donations and payment of expenses from the parties' account and for reporting them to the CEO within six months after the end of the party's fiscal year (under section 432 – the date for all the parties is by July 1st each year, as they all use the calendar year as their fiscal year), and within eight months after each election (under section 437). The auditor is responsible for submitting an audited report with the agent's report to the CEO annually under section 435, and after each election under section 438.

Allowing a party to choose its own chief agent is fine, as that is an internal accountant position, but allowing a party to choose its own auditor does not align with the objective of maintaining an appearance of integrity as the party has an incentive to choose people who are devoted to the party and will cover up wrongdoing. Some may contend that parties must be trusted to choose agents and auditors who will act with integrity and strictly and strongly ensure all rules are followed. However, I contend that this ignores all of the incentives and disincentives involved in the situation for parties to hide donations of money, property or the use of property and services (especially from prohibited donors such as businesses and unions, and also from lobbyists) and to spend more than the limits. Allowing parties to choose their own auditors also ignores the fact that accounting rules are general and

⁴⁷⁴ *CEA*, *supra* note 79, sections 397-401, and 403(2) and (3).

subject to interpretation, as cases concerning the expense claims of the Conservative Party of Canada and its candidates have made clear.⁴⁷⁵

To give two examples of questionable actions by agents and auditors that became public in the past decade, four executives at the Conservative Party's Conservative Fund, a non-profit which raises and spends funds on behalf of the Party, were charged in 2011 with filing false expense returns after the 2006 federal election, and the Party pled guilty and was fined while the executives were let off as part of the plea deal.⁴⁷⁶ And in 2013, after being contacted by then-Senator Irving Gerstein, who chaired the Conservative Fund at the time, Michael Runia, managing partner at Deloitte which was the auditor for the Fund, contacted the auditors reviewing the expenses of then-Conservative Senator Mike Duffy who was under investigation for improper expense claims, to determine if the audit could essentially exonerate Duffy.⁴⁷⁷ It is possible that these are the only examples of illegal and questionable self-dealings between federal party executives and their agents and auditors, but I contend that it is more probable that these are the only examples that have

⁴⁷⁵ *Conservative Fund Canada v. Canada (Elections)*, 2010 ONCA 882 (CanLII), <<https://canlii.ca/t/2f2fn>>. *Callaghan v. Canada (Chief Electoral Officer)*, 2010 FC 43 (CanLII), <<https://canlii.ca/t/27g67>>.

⁴⁷⁶ CBC News, "Tory party, 2 senators face election charges," (February 24, 2011), CBC.ca, online: <<https://www.cbc.ca/news/politics/tory-party-2-senators-face-election-charges-1.1070158>>. Laura Payton, "Conservative Party fined for breaking election law," November 10, 2011, CBC.ca, online: <<https://www.cbc.ca/news/politics/conservative-party-fined-for-breaking-election-laws-1.1076877>>.

⁴⁷⁷ Josh Wingrove and Gloria Galloway, "Deloitte official intervened in Duffy audit, but firm denies interference," (November 28, 2013) *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/firm-that-reviewed-duffys-expenses-says-audit-was-independent-rebutting-rcmp/article15648981/>>. Jennifer Ditchburn, "Harper shrugs off actions of key Conservative senators in spending scandal," (September 8, 2015), iPolitics.ca (publishing Canadian Press wire article), online: <<https://ipolitics.ca/2015/09/08/harper-shrugs-off-actions-of-key-conservative-senators-in-spending-scandal/>>.

become public in the past decade while many other examples remain hidden. Another example of the close ties between federal party leaders and their chief agents and auditors is that when Erin O'Toole became leader of the Conservative Party in August 2020, he nominated his two-time party leadership contest fundraising chair James Dodds, a Vice-President of the TD Bank Group, to replace Gerstein as chair of the Conservative Fund, and Deloitte is still the auditor for the Party.⁴⁷⁸

3.23 Disclosure requirements for electoral district associations

Electoral district associations are subject to annual reporting requirements, not election-specific reporting requirements (as they are prohibited from spending money during election periods other than transferring money to the campaign account of the association's registered candidate). Associations are required to submit a financial transactions return to the Chief Electoral Officer by June 1st of each year for transactions during the previous calendar year. The return is required to state contributions, the identity of donors who give more than \$200, expenses, loans, and other items.⁴⁷⁹ The report is required to be accompanied by an auditor's report and a declaration by the association's financial agent that the return is complete and accurate.⁴⁸⁰

⁴⁷⁸ Canadian Press staff, "O'Toole nominates campaign fundraiser to be chair of Conservative Fund," (September 4, 2020), CTVNews.ca, online: <<https://www.ctvnews.ca/politics/o-toole-nominates-campaign-fundraiser-to-be-chair-of-conservative-fund-1.5092744>>. Elections Canada, Registered Political Parties and Parties Eligible for Registration, <<https://www.elections.ca/content.aspx?section=pol&dir=par&document=index&lang=e#conservative>>.

⁴⁷⁹ CEA, *supra* note 79, subsection 475.2(1).

⁴⁸⁰ CEA, *supra* note 79, subsection 475.4(1).

As with parties, significant flaws are that the disclosure requirements mean that voters cannot find out who has donated to an association until months after they have voted. Given that associations can transfer to a candidate the entire amount that a candidate may use for their campaign, this denies voters their key right to know, and does not comply with informing voters, which is one of the objectives of the Supreme Court's egalitarian model.

As well, like parties, associations are allowed to choose their own agent and auditor, which does not align with the objective of maintaining an appearance of integrity given the incentives to cover up wrongdoing. Finally, with only the identities of donors who donate of more than \$200 disclosed, it is relatively easy for an individual, business or other organization to split a large donation into multiple donations of \$200 or less (including donations made through an online fundraising/crowdfunding site) and for the donor and the entity receiving the donation to hide the actual amount donated.

3.24 Disclosure requirements for nomination contestants and election candidates

At the time of registration, a nomination contestant is required to appoint a financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments,⁴⁸¹ and to appoint an auditor if they receive donations or spend more than \$10,000 during the

⁴⁸¹ CEA, *supra* note 79, sections 476.2 to 476.63.

contest.⁴⁸² If the contestant spends more than \$1,000, the agent files a report with the CEO within four months after the contest is over, including the auditor's report if applicable, that lists all campaign expenses (including personal expenses), loans, contributions, and the identity of contributors who gave more than \$200, among other things. The party or the district association is also required to file with the CEO within 30 days after the selection vote date a report setting out the date of the selection vote, the contestants' names and addresses, and the name of the winner.⁴⁸³

At the time of registering, an election candidate is required to appoint a financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments.⁴⁸⁴ If a candidate accepts or spends more than \$10,000 or wins in the election more than 10 percent of the votes in their district, they are also required to appoint an auditor,⁴⁸⁵ and candidates file reports with the CEO four months after the election.

These reporting requirements align generally with the egalitarian model's objective of ensuring the system has integrity. However, as with parties and

⁴⁸² *CEA*, *supra* note 79, sections 476.77 to 476.79. Under the *CEA*, sections 476.1, and 476.64 to 476.76, and 476.81 to 476.89, the official agent is responsible for deposits of donations and expenses from the contest account and for reporting them to the CEO (under section 476.75). Under section 476.8, the auditor is responsible for submitting a report to the agent that can be included in the agent's report to the CEO.

⁴⁸³ *CEA*, *supra* note 79, section 476.1.

⁴⁸⁴ *CEA*, *supra* note 79, sections 476.2 to 476.66, subsection 477.1(1), and sections 477.2, 477.4 to subsection 477.44(1).

⁴⁸⁵ *CEA*, *supra* note 79, clause 66(1)(a)(iv), subsection 477.1(2) and sections 477.3 to subsection 477.44(2). Under the *CEA*, *supra* note 79, sections 477.45 to 477.47, and 477.49 to 477.72, the official agent is responsible for deposits of donations and expenses from the campaign account and for reporting them to the CEO within four months after election day. Under section 477.62, the auditor is responsible for submitting a report to the agent that can be included in the agent's report to the CEO.

district associations, significant flaws are that the disclosure requirements mean that voters cannot find out who has donated to a contestant or candidate until up to four months after they have voted. Again, with only the identities of donors who donate of more than \$200 disclosed, it is relatively easy for an individual, business or other organization to split a large donation into multiple donations of \$200 or less (including donations made through an online fundraising/crowdfunding site) and for the donor and the entity receiving the donation to hide the actual amount donated. This denies voters their key right to know. As well, for the same reasons as set out in the previous sections, nomination contestants and candidates should not be allowed to choose their own auditors.

As mentioned above in sections 3.5 and 3.6, another area of concern is that if a person raises money from contributors to explore becoming a contestant, and then does not register, or wins a nomination contest and then decides not to register as a candidate, the contributors of the money are not required to be disclosed (if they donated directly to the candidate's campaign and not through the EDA or the party), and the person can keep the money (or other benefit offered, including accepting an offered job). This potentially allows contributions, gifts, benefits of any kind (including job offers) to be offered or given in secret to induce someone not to run in a contest or election.

As mentioned above in sections 3.11 and 3.12, contributing or offering or giving to induce someone not to run should be prohibited because it violates the egalitarian principles of integrity and equal opportunity to

participate. Even if this practice is prohibited, a requirement to disclose such a decision, and any contributions raised (and other money, property, use of property or services, or jobs offered or given) should be enacted to inform voters that such a decision has been made, and the offerings, gifts or benefits that may have induced the decision. This loophole is a special concern if the person exploring running, or deciding not to run, is a sitting MP and/or a Cabinet minister, and I address below in Chapter 4 when examining the gift and benefits rules whether such contributions, benefits or job offers fall within the definition of a bribe under the *Criminal Code* or offerings under federal ethics rules that are prohibited or, at least, required to be disclosed.

3.25 Disclosure requirements for political party leadership contestants

Party leadership contestants are required to register with the CEO as soon as they receive a contribution or incur a campaign expense, including appointing and identifying their financial agent for opening and maintaining a dedicated campaign bank account to accept contributions and make payments, and their auditor to audit the campaign account.⁴⁸⁶ However, unlike nomination contest and election candidates, leadership contestants are required to disclose when they register as a contestant a statement that provides the details of any contributions and loans received before the first

⁴⁸⁶ CEA, *supra* note 79, sections 478.2 to 478.3, 478.5 to 478.66, 478.71 to 478.73, 478.83 and 478.85.

day of the contest, and Elections Canada publishes the statements on its website.⁴⁸⁷

In addition, also unlike nomination contest, elections candidates, electoral district associations (EDAs) and political parties, leadership contestants who accept more than \$10,000 in contributions or spend more than \$10,000 on their campaign are required to file a return with the CEO covering the period from the start of their campaign up to four weeks before the leadership voting day, and a second return one week before voting day that covers the three-week period after the first report, with both reports listing loans, contributions, and the identity of contributors who gave more than \$200, among other things.⁴⁸⁸ These pre-vote requirements raise the question of why parties, EDAs, nomination contestants and candidates can't also disclose their donors before voting day?

Leadership contestants are also required to file with the CEO, within six months after the leadership voting day, an audited campaign return that lists all campaign expenses (including personal expenses), loans, contributions, and the identity of contributors who gave more than \$200, among other things.⁴⁸⁹ As with all the other political actors discussed above, there is an argument for disclosing all donations. Again, with only the identities of donors who donate more than \$200 disclosed, it is relatively easy for an individual,

⁴⁸⁷ CEA, *supra* note 79, clauses 478.3(2)(d) and 478.8(2)(d) to (g). Elections Canada publishes the statements under the heading "Leadership Contestants' Registration Reports" on the Other Reports page for Leadership Contestants, online:

<<https://www.elections.ca/content.aspx?section=fin&dir=oth/lea&document=index&lang=e>>.

⁴⁸⁸ CEA, *supra* note 79, section 478.81.

⁴⁸⁹ CEA, *supra* note 79, sections 478.8(1) to (9), and 478.86 to 478.93.

business or other organization to split a large donation into multiple donations of \$200 or less (including donations made through an online fundraising/crowdfunding site) and for the donor and the entity receiving the donation to hide the actual amount donated.

One additional note is that, as mentioned above in sections 3.13 and 3.18, if a contestant has an outstanding debt at the end of the contest, they have three years to raise funds to pay off that debt. However, while the contestant is required to disclose to the CEO payments of unpaid debts within 30 days after each payment, and also a statement with details about the status of unpaid debts 18 months after the end of the contest, and (if needed) also 36 months after the end of the contest,⁴⁹⁰ the contestant is not required to disclose contributors who have contributed after the contest to assist in paying down the debt. Those contributors are only disclosed in the “directed contributions” section of their party’s annual financial return.⁴⁹¹

As mentioned above in section 3.7, as with nomination contestants and candidates, another area of concern is that if a person raises money from contributors to explore becoming a contestant, and then does not register, the contributors of the money are not required to be disclosed, and the person can keep the money (or other benefit offered, including accepting an offered job). This potentially allows contributions, gifts, benefits of any kind (including job offers) to be offered or given in secret to induce someone not to run. As mentioned above in section 3.13, contributing or offering or giving to induce

⁴⁹⁰ CEA, *supra* note 79, subsections 478.8(10) to (15) and 478.86 to 478.93.

⁴⁹¹ CEA, *supra* note 79, clause 432(2)(h).

someone not to run should be prohibited because it violates the egalitarian principles of integrity and equal opportunity to participate.

Even if this practice is prohibited, a requirement to disclose such a decision, and any contributions raised (and other money, property, use of property or services, or jobs offered or given) should be enacted to inform voters that such a decision has been made, and the offerings, gifts or benefits that may have induced the decision. This loophole is a special concern if the person exploring running, or deciding not to run, is a sitting MP and/or a Cabinet minister, and I address below in Chapter 4 when examining the gift and benefits rules whether such contributions, benefits or job offers fall within the definition of a bribe under the *Criminal Code* or offerings under federal ethics rules that are prohibited or, at least, required to be disclosed.

3.26 Registration of third parties

There are some similarities between the regulatory regimes for parties, candidates and third parties. As the Supreme Court has articulated in several cases, registration and disclosure requirements, and spending limits, are required by all political actors in order to ensure fairness and integrity in the system. However, there are also differences. The basis of the federal campaign finance regime in Canada is essentially that political parties are the “principal vehicles for communal political organization and expression,” which is reflected in much more restrictive spending limits for third-party campaigners under the *CEA*.⁴⁹² The Supreme Court of Canada has echoed

⁴⁹² Feasby (2012), *supra* note 2 at 207.

this idea, stating in *Libman* that, although third parties have an important contribution to make, “it is the candidates and political parties that are running for election.”⁴⁹³ As noted above in section 2.10, I contend that this is one of the inconsistencies with the Court’s egalitarian model because, given that the model is based on equal opportunity for equal participation by voters (i.e. the principle of one person, one vote), and informing voters, the choices of voters in terms of whom they support and how they want to participate in political processes should not be overridden by the Court prioritizing parties and candidates over third parties. I address this point more fully in Chapter 5, and in Chapter 6, sections 6.11 to 6.13.

“Third party” is defined in section 349 of the *CEA* as “a person or a group, other than a candidate, registered party or electoral district association of a registered party.” Thus, a third-party campaigner can be any individual, corporation, or other organization that promotes or opposes a candidate or political party during a pre-election period or, during an election period, promotes an election-related issue or promotes or opposes a candidate or party.⁴⁹⁴ Provincial governments are not considered to be a “group” and are, therefore, not covered by the definition of third party.⁴⁹⁵ Third parties are

⁴⁹³ *Libman*, *supra* note 41, para. 50.

⁴⁹⁴ See Elections Canada, *Political Financing Handbook for Third Parties*, Financial Agents and Auditors (EC 20227, August 2019), Section 1. Reference Tables and Timelines, online: <https://www.elections.ca/content.aspx?section=pol&dir=thi/ec20227_old&document=index&lang=e> (hereinafter “*Third Party Handbook* (2019)”) and; Elections Canada, *Political Financing Handbook for Third Parties, Financial Agents and Auditors – June 2021*, online: <<https://www.elections.ca/content.aspx?section=pol&dir=thi/ec20227&document=index&lang=e>> (hereinafter “*Third Party Handbook* (2021)”).

⁴⁹⁵ Colin Hoult, “Inclusion of Provincial Governments as “Third Parties” in Federal Campaigns,” (July 2020) 14 *Journal of Parliamentary and Political Law* 345 (hereinafter “Hoult (July 2020)”).

required to register with the CEO as soon as they incur partisan advertising/activity and/or election survey expenses of a combined total of \$500 or more during the pre-election period⁴⁹⁶ or, if they are not active pre-election, a combined total of \$500 or more in election advertising, partisan activities and/or survey expenses during the election period.⁴⁹⁷ Individuals who are not citizens or permanent residents who do not reside in Canada, and corporations that do not carry on business in Canada are not permitted to spend on these activities during the pre-election period⁴⁹⁸ or the election period.⁴⁹⁹

If a third party is a union, corporation or other entity with a governing body, it is not permitted to undertake the above activities if they involve spending more than \$500 in either of the periods (the registration spending threshold) unless its governing body passes a resolution authorizing it to undertake the activities in either or both of the periods. A third party is required to include in the registration forms it submits to Elections Canada a copy of the resolution, whether it registers during the pre-election period or the election period.⁵⁰⁰ If required to register, the third party is also required to appoint a financial agent to accept contributions for activities during the pre-

⁴⁹⁶ CEA, *supra* note 79, section 349.6.

⁴⁹⁷ CEA, *supra* note 79, subsection 353(1).

⁴⁹⁸ CEA, *supra* note 79, section 349.4.

⁴⁹⁹ CEA, *supra* note 79, section 351.1.

⁵⁰⁰ CEA, *supra* note 79, subsection 349.6(5) re: pre-election period, and 352(5) re: election period.

election period⁵⁰¹ or, if they are not active pre-election period, for election period activities.⁵⁰²

A third party is also required to appoint an auditor, and provide the Chief Electoral Officer (CEO) the auditor's name and contact information, if it spends more than \$10,000 during the pre-election period or the election period.⁵⁰³ A registered third party is also required to set up a separate bank account to accept contributions and pay for the expenses for all of pre-election period and election period activities.⁵⁰⁴ As the Supreme Court ruled in *Harper*, the basic registration requirements align with the egalitarian model's goals of informing voters and ensuring the integrity of the system. However, the requirements to pass a resolution and set up a separate bank account for pre-election and election spending are questionable for third parties that are interest groups clearly dedicated to a specific cause or set of causes, whose donors know what they are supporting when they donate.

3.27 Spending by third parties during the pre-election and election campaign periods

If a third party engages in pre-election "partisan advertising" or "election advertising" or various activities or surveys, as defined in the *CEA*, it will be subject to the *CEA*'s requirements regarding spending limits, contributions

⁵⁰¹ *CEA*, *supra* note 79, subsections 349.6(3) and (4), and sections 349.7 and 349.9.

⁵⁰² *CEA*, *supra* note 79, subsections 354(1) and 357(1). The third party is required under subsection 353(2) to identify its financial agent in its application for registration, which is submitted to the Chief Electoral Officer.

⁵⁰³ *CEA*, *supra* note 79, section 349.8 re: the pre-election period, and section 355 re: the election period.

⁵⁰⁴ *CEA*, *supra* note 79, section 358.1.

received, and transparency. The components of the “election advertising” definition are as follows:

- transmission to the public by any means,
- during an election period,
- of an advertising message that promotes or opposes a registered party or the election of a candidate.⁵⁰⁵

The definition includes an advertising message “that takes a position on an issue with which a registered party or candidate is associated,” also known as issue advertising.⁵⁰⁶ The election period begins when the writ is issued and ends on polling day.⁵⁰⁷

Various communications are excluded. For example, “election advertising” does *not* include things like:

- news releases, editorials, debates, interviews, columns and a book that was going to be published even if an election was not held;
- the transmission of communications and documents by an organization to its members, employees, or shareholders;
- the transmission of an individual’s personal political views on a non-commercial basis on the Internet, and;
- the making of phone calls to encourage people to vote.⁵⁰⁸

An “election advertising expense” is incurred to produce an election advertising message during the election or to acquire the means of transmitting that message, and a “partisan advertising expense” has the same

⁵⁰⁵ CEA, *supra* note 79, definition of “election advertising” in s 2(1).

⁵⁰⁶ CEA, *supra* note 79, definition of “election advertising” in s 2(1).

⁵⁰⁷ CEA, *supra* note 79, definition of “election period” in s 2(1).

⁵⁰⁸ CEA, *supra* note 79, definition of “election advertising” in s 2(1).

meaning for such advertising during the pre-election period.⁵⁰⁹ “Partisan activity expense” is defined as an expense of a third party in undertaking a partisan activity, and “election survey expense” is defined as an expense incurred in conducting the survey.⁵¹⁰ “Expenses” are defined in section 349 of the *CEA* to include the commercial value of property or services that are donated or provided, other than volunteer labour.

Third parties are prohibited from attempting to circumvent their spending limits by splitting themselves into multiple third parties or by acting in collusion with other third parties or with parties, potential candidates/candidates or their agents or associates, during both the pre-election period⁵¹¹ and the election period.⁵¹² There is also a prohibition on any person or entity colluding with a foreign person or entity for the purpose of unduly influencing voters in an election.⁵¹³ Bill C-76 also added a new anti-collusion rule covering the pre-election and election periods – a prohibition on third parties, parties potential candidates/candidates or their agents or associates sharing information in order to influence a third party’s advertising surveys or activities, including in organizing events.⁵¹⁴

⁵⁰⁹ *CEA*, *supra* note 79, definition of “election advertising expense” and “partisan advertising expense” in s 2(1).

⁵¹⁰ *CEA*, *supra* note 79, definition of “partisan activity expense” and “election survey expense” in s 349.

⁵¹¹ *CEA*, *supra* note 79, section 349.2.

⁵¹² *CEA*, *supra* note 79, section 351.

⁵¹³ *CEA*, *supra* note 79, subsection 282.4(4).

⁵¹⁴ *CEA*, *supra* note 79, sections 349.3 (pre-election period) and 351.01 (election period).

See also Elections Canada, Interpretation Note: 2021-01 (May 2021), online:

<<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2021-01&document=index&lang=e>>.

However, as mentioned above in sections 3.11 and 3.15, while nomination contestants are prohibited from colluding with a person or entity in order to exceed their contest expense limit,⁵¹⁵ there is no prohibition in the *CEA* on a contestant colluding with a third party, including by sharing information, and no limit on third-party spending in support of a nomination contestant, and no registration or disclosure requirement for third-party activities in support of nomination contestants. Given that several nomination contests take place during the pre-election period, and some even during the election period if it is a snap election, this is a significant loophole that can allow third parties to have significant, undue influence over who becomes an election candidate.

Elections Canada has clarified that communications on the Internet will only be considered “election advertising” or “partisan advertising” if they have or normally would have a placement cost.⁵¹⁶ Elections Canada explains this requirement by pointing out that such communications give the well-resourced an unfair advantage, while communications without a placement cost do not. However, this means the cost of producing Internet material will only be considered an advertising expense if there is a placement cost for the material, even if production is costly and the communication meets all other criteria of advertising. This loophole gives well-resourced third parties an advantage.

⁵¹⁵ *CEA*, *supra* note 79, subsection 476.68(2).

⁵¹⁶ Elections Canada, “Interpretation Note: 2020-05” (November 2020), online: <<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2020-05&document=index&lang=e>>.

Before the 2019 federal election, the limits only applied to advertising during election campaign periods, and for a regular 36-day election campaign period were \$211,200 for national spending (\$150,000 multiplied by the inflation rate since 1992), and \$4,224 in each electoral district (\$3,000 multiplied by the inflation rate since 1992 – with any spending in a district counted toward the national total).⁵¹⁷ Federal Canadian Bill C-76, which was introduced in 2018 and came into force in June 2019, more than doubled the national spending limits in the *CEA* for third party interest groups and individuals during election campaigns, from \$150,000 multiplied by the annual inflation rate since 1992 to up to \$350,000 multiplied by that inflation rate for national expenses (the \$3,000 plus inflation limit per electoral district was maintained).⁵¹⁸ This increased the national ad spending limit in the 2019 federal election to \$511,700,⁵¹⁹ and to \$525,700 in the 2021 election (the inflation-adjusted electoral district limit in 2021 was \$4,506).⁵²⁰

The Government of Canada claimed this national limit increase was needed because the spending limit was extended to cover election surveys and “partisan activities” such as door-knocking, phone calls and rallies.

⁵¹⁷ Elections Canada, Third Party Election Spending Advertising Limits, May 23, 2019, online (archive page):

<<https://web.archive.org/web/20190524035232/https://www.elections.ca/content.aspx?section=pol&dir=thi/limits&document=index&lang=e>>. The inflation rate is set out in *CEA*, *supra* note 79, section 384. See the issue of the imposition of pre-election spending limits addressed in: Pal, Permanent Campaign (2019), *supra* note 5.

⁵¹⁸ *CEA*, *supra* note 79, section 350.

⁵¹⁹ Elections Canada, Limits on Election Advertising Expenses Incurred by Third Parties – 43rd General Election, online:

<<https://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/43ge/thilim&lang=e>>.

⁵²⁰ Elections Canada, Third Party Expenses Limits, (March 9, 2021), online:

<<https://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/limits&lang=e>>. Unlike for parties and candidates, there is no provision in the statute to increase the spending limit for third parties if the election period lasts longer than 36 days.

However, usually only citizen groups (including unions) do those kinds of activities while businesses usually only spending money on advertising. As a result, the limit should have been increased only for citizen groups (and only based on a formula that takes into account the number of members/supporters a third-party group has).⁵²¹ The increased limit more than doubled the amount of advertising businesses can do during a federal election campaign period, a change that does not align with the egalitarian model.⁵²²

Bill C-76 also established, for the first time, limits on some pre-election advertising and activity spending by third parties (and, as set out above in section 3.17, on some ad spending by parties) from June 30th on when an election is going to be held on the statutory fixed date of the third Monday in October four years after the last election. Given that an election period (the period between the day the election writ is issued and election day) is required to be between 36 and 50 days, this means such advertising and activity spending is limited from June 30th on for a 58- to 77-day period depending on what day exactly the election is called to begin the election campaign period and what exact day the third Monday in October is. It is

⁵²¹ Bill C-76, *supra* note 210. Democracy Watch, “News Release: More than 85,000 call for changes to Bill C-76 to stop the unethical influence of big money in federal politics,” (October 17, 2018), online: <<https://democracywatch.ca/more-than-85000-call-for-changes-to-bill-c-76-to-stop-the-unethical-influence-of-big-money-in-federal-politics/>> (hereinafter “Democracy Watch, News Release (October 17, 2018)”).

⁵²² It should be noted that, similar to parties and nomination contestants, election candidates and party leadership contestants (as described in sections 3.3 to 3.7), third parties are allowed to choose their own financial agent and auditor, and are only required to submit vague reports concerning their election spending -- although like all types of candidates, third parties are required to submit bills and receipts to Elections Canada proving expenses. *CEA*, *supra* note 79, subsections 353(4), and sections 354-355, and sections 359 (esp. subsection 359(9) and 360.

important to note that the limits only apply when an election is held on a fixed election date, as it would be unfair to apply the limits retroactively to a third-party's advertising activities when the third party was unaware that an election was about to be called (as, for example, in 2021 when a snap federal election was called).

As noted above, the pre-election spending limit applies to partisan advertising, partisan activities, and surveys. Bill C-76 set very high limits for this pre-election spending of \$700,000 for third parties nationally multiplied by the inflation rate since 1992 (which equalled just over \$1 million for the 2019 pre-election period, the only election so far for which the pre-election limits have applied), as well as \$7,000 multiplied by that inflation rate in a single electoral district (which equalled just over \$10,000 in 2019).⁵²³ The national limit is so high as to be almost meaningless because it is unlikely that any third party would want to spend \$1 million during July and August. This is unlikely not only because research shows that about half of Canadian voters consistently vote for the same parties (so pre-election ads won't change their vote), but also because in the undecided category about one-third of all voters do not make their decision about which party to vote for until the election campaign period has started, and an additional approximately 14 percent do not decide until election day.⁵²⁴ This data points third parties, especially third

⁵²³ Elections Canada, Limits on Expenses Incurred by Third Parties – 43rd General Election, online: <<https://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/43ge/thilim&lang=e>>. The exact amounts were \$1,023,400 nationally and \$10,234 within a district.

⁵²⁴ Robert M. J. McGregor, "When voters decide: Causes, correlates and effects of the time-of-voting-decision," (2012) Electronic Thesis and Dissertation Repository, online: <<https://ir.lib.uwo.ca/etd/466>>, pp. 11-14. See also: Ailsa Henderson, Steven D. Brown, David Docherty, Barry Kay, Kimberly Ellis-Hale, "Voter Dealignment or Campaign Effects?

parties with limited funding, in the direction of waiting to spend their funds until well into the election campaign period, in the run-up to election day.

As shown by the 2019 pre-election period, as set out below in Chart 18, only 51 (33.77 percent) of the 151 third parties that registered during that election (because they spent more than \$500) spent any money during the pre-election period. In total they spent \$3,190,112.97; on average they spent only \$62,551.23, and; the median amount was only \$4,809.⁵²⁵ As in the area of donations to parties, a few top spenders skew the total amounts and average significantly upwards. Only two-third party organizations spent more than \$500,000, and when the top six pre-election spenders that each spent more than \$150,000 are removed from the calculation, the total amount of pre-election spending by the remaining 45 third parties decreases to \$769,679.97, the average decreases to \$17,103.99, while the median remains approximately the same at \$4,056.⁵²⁶

Accounting for Political Preferences in Ontario,” (December 2006) 36(4) *American Review of Canadian Studies* 612 at 615 and 620-621 which showed that just 30 percent of voters switched parties they voted for in the 2003 Ontario election, with 80 percent of switchers deciding after the election campaign began, and just under 50 percent of all switchers deciding during the last week of the campaign or on election day.

⁵²⁵ Elections Canada, Third Party Financial Returns for the 43rd General Election, online: <<https://www.elections.ca/content.aspx?section=fin&dir=oth/thi/advert/tp43&document=index&lang=e>> (hereinafter “Third Party Returns: 43rd Election”).

⁵²⁶ My calculations using data from: Elections Canada, Third Party Returns: 43rd Election, *supra* note 525.

**Chart 18: Amounts Spent by Third Parties
Who Spent Funds During 2019 Pre-Election Period**
(in alphabetical order)

Third Party	Partisan Ad Amount Spent	Partisan Activity Amount Spent	Election Survey Amount Spent	Total Pre- Election Period Spending
350 Canada	0	\$18,448.55	0	\$18,448.55
Abortion Rights Coalition of Canada (ARCC- CDAC)	\$451	\$9,533	0	\$9,984
Amnesty International Canadian Section (English Speaking)	\$2,137.20	0	0	\$2,137.20
Canada Growth Council Inc	\$82,600.76	\$15,931.45	0	\$98,532.21
Canada: Powered by Women Inc.	0	\$83,057.68	\$9,413.25	\$92,470.93
Canada Proud	\$96,241.41			\$96,241.41
Canada Strong and Free	0	\$64	0	\$64
Canadian Association of Petroleum Producers	\$875	\$1,735.05	0	\$2,610.25
Canadian Federation of Nurses Unions	0	0	\$8,475.00	\$8,475.00
Canadian Medical Association	0	0	\$45,250.45	\$45,250.45

Canadian Psychological Association	0	\$740.66	0	\$740.66
Canadian Union of Postal Workers	\$26,355.47	\$136,093.11	0	\$162,448.58
Canadian Union of Public Employees	0	\$51,288.18	0	\$51,288.18
Canadians for Clean Prosperity	0	\$4,809.74	0	\$4,809.74
Canadians for Democracy and Prosperity	\$2,916.79	\$250	0	\$3,166.79
Canadians United for Change	0	\$19,750	\$31,807.25	\$51,557.25
Coalition of Concerned Manufacturers and Businesses of Canada	0	\$4,832.15	0	\$4,832.15
Conference for Advanced Life Underwriting	\$4,320	0	0	\$4,320
Dogwood	0	\$655.21	0	\$655.21
Ecology Ottawa	0	\$3,548.08	0	\$3,548.08
Fairness Works	\$183,290.48	\$2,826.64	\$93,225.00	\$279,342.12
Fair Vote Canada	\$76	\$1,781.04	\$1,130	\$2,987.04
Fight for \$15 & Fairness	0	\$1,484.50	0	\$1,484.50
Fire Fighters For Canada	0	\$8,857.24	0	\$8,857.24

Friends of Canadian Broadcasting	\$80,043.92	\$134,328.53	0	\$212,375.45
GreenPAC Future Fund	\$723	\$2,711	0	\$3,434
Helen Wang	\$4,046.91	0	0	\$4,046.91
Jacques Roy	\$2,713.20	0	0	\$2,713.20
Keep Canada Beautiful	\$173.50	\$7,066.02	0	\$7,239.52
Leadnow Society	\$1,772.05	\$20,564.16	0	\$22,336.21
Let's Build Canada	0	\$119.83	0	\$119.83
Migrant Rights Network	0	\$583	0	\$583
National Citizens Coalition	\$4,166.04	0	0	\$4,166.04
North99	\$12,962.12	\$7,498.83	0	\$20,460.95
Oi King Chan	\$4,056.36	0	0	\$4,056.36
Ontario Nurses' Association	\$254.25	0	0	\$254.25
OpenMedia Engagement Network	0	\$2,171.32	0	\$2,171.32
Protect Our Winters Canada (2019)	0	\$153.07	0	\$153.07
Proudly New Brunswick	0	\$22.50	0	\$22.50
Public Service Alliance of Canada	\$155,883.95	\$21,292.17	0	\$177,176.12
RightNow	0	\$5,260.27	0	\$5,260.27

The Saskatchewan Party	\$1,423.54	0	0	\$1,423.54
Seafarers' International Union of Canada	\$159	\$37.72	0	\$196.72
Society of United Professionals	\$42.26	\$97.03	0	\$139.28
Suits and Boots Corporation	0	\$9,212.30	0	\$9,212.30
True North Strong & Free Advertising Corp.	\$59,890	0	0	\$59,890
UCCO-SACC-CSN	\$20,645.64	0	0	\$20,645.64
UNIFOR	\$836,765	\$13,216.03	\$50,059	\$900,040.03
United Brotherhood of Carpenters and Joiners of America	\$131,970.69	\$7,509.97	0	\$139,480.66
USW	\$687,094.44	\$1,958	0	\$689,052.44
Vancouver Island Real Estate Board	0	\$500	0	\$500

Elections Canada's March 2022 report on third-party spending during the 2011, 2015 and 2019 election campaign periods provides further evidence of how the current limits are so high that they don't limit spending much at all. In the 2011 and 2015 elections, 84 percent of third parties spent 25 percent or less of the total amount allowed, with 16 percent in 2011 and 10 percent in 2015 registering but not spending any money. In the 2019 election, 86

percent spent 25 percent or less of the election period limit amount of \$511,700 (which was again, due to Bill C-76, more than double the 2015 limit), with 26 percent registering but not spending any money.

In 2011, only seven percent spent more than 50 percent of the limit (five percent in 2015, and nine percent in 2019), and only four percent spent more than 75 percent of the limit (four percent in 2015, and four percent in 2019).⁵²⁷ The report also documents how the number of third parties is increasing each election – in 2011 there were 55 registered; in 2015 there were 115, and in 2019 there were 151⁵²⁸ – which is a good reason, sooner than later, to ensure that the third-party spending rules are egalitarian. As well, the report revealed that, in the 2019 election when various types of spending were regulated and required to be disclosed, of the close to \$11.7 million spent by third parties during the pre-election and election periods, \$3.3 million (29 percent) was spent during the pre-election period and \$8.3 million (71 percent) was spent during the election, and of those amounts \$2.5 million (22 percent of total spending) was spent on partisan advertising during the pre-election period, and \$6.4 million (55 percent of total spending) on ads during the election period, for a total of 77 percent of total spending.⁵²⁹

These spending patterns show that, despite the options for spending on various activities under the blanket limits, advertising is by far the most

⁵²⁷ Elections Canada, *Third Party Report – A Comparative Look at Third Party Information from the 2011, 2015 and 2019 Federal General Elections*, (March 2022), online: <<https://www.elections.ca/content.aspx?section=res&dir=rep/oth/tp&document=index&lang=e>> at 29-30 (hereinafter “Elections Canada, *Third Party Report*”).

⁵²⁸ Elections Canada, *Third Party Report*, *supra* note 527 at 11.

⁵²⁹ Elections Canada, *Third Party Report*, *supra* note 527 at 33.

dominant spending category. Of the total amount spent on ads in the pre-election period, as far as Elections Canada could determine, 39 percent of that amount spent on TV ads, 12 percent on radio ads, nine percent on mailouts, eight percent on social media, 11 percent on other, 10 percent on design and placement (which instead could be counted as part of ad category spending), five percent on signs, four percent on content boosting and only two percent on print ads.⁵³⁰ During the election period, design, production and placement costs accounted for 45 percent of the total costs (likely a significant portion attributable to TV ads, but it is unclear from the third parties' reports), with all the other categories below 10 percent.⁵³¹

Again, when a snap election is called like the 2021 federal election, the pre-election spending rules do not apply and so pre-election spending by any third parties is not required to be disclosed. As well, as Chart 19 below shows, likely because a snap election call prevents third parties from planning spending, booking advertising slots etc., the number of registered third parties decreased to 97 in the 2021 election (seven of which were individuals, and two of those people didn't spend anything, nor did two of the organizations registered). As well during the 2021 snap election, total election campaign period spending by all third parties (when the national spending limit was \$543,200, and \$4,656 in any electoral district)⁵³² decreased also from the

⁵³⁰ Elections Canada, *Third Party Report*, *supra* note 527 at 34-35.

⁵³¹ Elections Canada, *Third Party Report*, *supra* note 527 at 36.

⁵³² Elections Canada, Third Party Expenses Limits, online:
<<https://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/limits&lang=e>>.

2019 total of \$8.3 million down to \$5.12 million, with 70.5 percent of the total spent on advertising.

The overall average spending in 2021 was \$52,834, and the median was \$17,856.52. If the top six spenders are removed from the calculation, the total spent decreases by almost half to \$2,526,053.62 and the overall average spending of the remaining 91 third parties also decreases by almost half to \$27,758.83. Only three third parties (three percent) spent more than 75 percent of the spending limit total, and only eight (eight percent) spent more than 50 percent of the limit.

As in 2019, some of the third parties in 2021 were fronts for businesses or other organizations. For example, Rights 4 Vapeurs, one of the higher spenders with a spending total of just over \$107,000, was funded entirely by a vaping company and two executives from two vaping companies, while Canada Strong and Proud, also a relatively big spender at just over \$108,000, received \$70,000 in funds and more than \$8,500 in in-kind donations from another non-profit organization called the Modern Miracle Network.

**Chart 19: Amounts Spent by Third Parties
Who Spent Funds During 2021 Election Periods⁵³³**
(in alphabetical order)

Third Party	Partisan Activity Spending	Partisan Advertising Spending	Election Survey Spending	Election Ad Spending	Total Election Period Spending
350 Canada	\$16,722.83	0	0	\$55,456.58	\$72,179.41
4 My Canada	\$1,080.63	0	0	0	\$1,080.63
Amnesty International Canadian Section (English Speaking)	0	\$3,793.65	0	0	\$3,793.65 ⁵³⁴
Animal Justice Canada Legislative Fund	0	0	0	\$14,794.09	\$14,794.09
Basic Income Network	0	0	0	\$970.40	\$970.40
BC Salmon Farmers Association	0	0	0	0	0
Canada Proud	0	0	0	\$228,409.98	\$228,409.98
Canada Strong and Proud	\$61,404.84	0	0	\$47,348.28	\$108,753.12
Canada's National Firearms Association (NFA)	0	0	0	\$275,855.36	\$275,855.36

⁵³³ Elections Canada, Third Party Financial Returns for the 44th General Election, online: <<https://www.elections.ca/content.aspx?section=fin&dir=oth/thi/advert/tp44&document=index&lang=e>>. The money totals in the chart are generally from Part 3C at the end of each third party's final spending report which contains the final spending totals, but in some cases the third party did not fill out the report correctly and so the figures come from earlier parts of the report.

⁵³⁴ Amnesty International (AI) listed its expense as pre-election spending. It is possible that the funds were spent during the pre-election period and AI mistakenly believed that it was required to register and disclose that spending. I count AI's spending in all of the totals and averages set out in the paragraphs above Chart 19.

Canadian Association of Petroleum Producers	0	0	0	\$327,627.90	\$327,627.90
Canadian Association of University Teachers	0	0	0	\$5,326.47	\$5,326.47
Canadian Chamber of Commerce	0	0	0	\$63,790.87	\$63,790.87
Canadian Federation of Nurses Unions	0	0	0	\$165,289.77	\$165,289.77
Canadian Coalition for Firearm Rights	\$4,235.36	0	0	\$239,990.53	\$244,225.89
Canadian Coastal Research Society	0	0	0	\$20,892.15	\$20,892.15
Canadian Life and Health Insurance Association	0	0	0	0	0
Canadian Medical Association	\$34,986.80	0	\$11,300	\$111,118.21	\$157,475.01
Canadian Nurses Association	0	0	0	\$7,578.95	\$7,578.95
Canadian Real Estate Association	0	0	0	\$135,600	\$135,600
Canadian Teachers Federation	0	0	0	\$33,323	\$33,323
Canadian Union of Postal Workers	\$51,917	0	0	\$17,141	\$68,248
Canadian Union of Public Employees	\$45,997.49	0	0	\$43,296.35	\$89,293.84

Canadian Urban Transit Association	\$2,590.79	0	\$216.90	\$15,278.10	\$18,085.79
Canadian Veterans ABC	\$1,639.32	0	\$1,159.27	0	\$2,798.59
Canadians for Justice and Peace in the Middle East	\$3,922.01	0	0	\$137.97	\$4,059.98
Canadians United for Change	\$20,659.26	0	\$38,481.64	\$421,813.04	\$480,953.94
CARE Canada	0	0	0	0	0
Chemistry Industry Association of Canada	0	0	0	\$17,715	\$17,715
Chicken Farmers of Canada	0	0	0	\$55,539.45	\$55,539.45
Child Care Advocacy Association of Canada	\$540	0	0	0	\$540
Christopher Roger Purton	0	0	0	0	0
Climate Action Network Canada	0	0	0	\$6,125.63	\$6,125.63
Climate Proof Canada	0	0	0	\$21,233.54	\$21,233.54
Coalition of Childcare Advocates of B.C.	0	0	0	\$1,348.75	\$1,348.75
Coalition of Concerned Manufacturers and Businesses of Canada	\$8,050.31	0	0	0	\$8,050.31
Competitive Network Operators of	\$20,595.16	0	0	\$58,717.31	\$79,312.47

Canada (CNOC)					
Conference for Advanced Life Underwriting	0	0	0	\$6,748.91	\$6,748.91
Conseil National des chômeurs et chômeuses	0	0	0	\$50,504.89	\$50,504.89
Conference for Advanced Life Underwriting	0	0	0	\$6,748.91	\$6,748.91
Cooperation Canada	\$3,800	0	\$1,500	\$33,601.89	\$38,901.89
Council of Canadians	0	0	0	\$17,856.52	\$17,856.52
David Suzuki Institute	\$3,247.47	0	0	0	\$3,247.47
Dogwood	0	0	0	\$2,921.28	\$2,921.28
Environmental Defence	0	0	0	\$45,626.73	\$45,626.73
Fairness Works	\$39,273.19	0	\$90,654.25	\$395,500	\$525,427.44
Fair Vote Canada	\$9,836.01	0	0	\$93,369.69	\$103,206
Federation of Canadian Municipalities	0	0	0	\$94,920	\$94,920
Fédération des travailleurs et travailleuses du Québec	0	0	0	\$8,568.28	\$8,568.28
Fire Fighters For Canada	\$40,183.74	0	0	\$82,666.26	\$122,850
Fred Ying Wah Kwok	\$2,759.04	0	0	0	\$2,759.04
Friends of Canadian Broadcasting	\$9,810.70	0	0	\$104,219.92	\$114,030.62

Generation Squeeze	0	0	0	\$9,960.27	\$9,960.27
Grain Farmers of Ontario	0	0	0	\$182,237.56	\$182,237.56
GreenPAC Future Fund	\$6,699.15	0	0	\$1,680.75	\$8,379.80
Greenpeace Canada	0	0	0	\$5,338.73	\$5,338.73
Heartwood Institute	0	0	\$1,130	0	\$1,130
Justice for Workers	\$1,205.98	0	0	\$522.19	\$1,728.17
Ka Man Tang	0	\$4,231.71	0	0	\$4,231.71
Lake Winnipeg Foundation	0	0	0	\$5,765.20	\$5,765.20
Leadnow Society	\$8,711.69	0	0	\$27,370.95	\$36,082.64
Let's Build Canada	0	0	\$25,425	\$323,365.47	\$348,790.47
Marlaina Danielle Smith	0	0	0	0	0
Migrant Rights Network	\$1,317.68	0	0	\$3,663.98	\$4,981.66
Murray Levine	0	0	0	\$60	\$60
National Association of Retirees	0	0	0	\$60,000	\$60,000
National Citizens Coalition	0	0	0	\$40,904.83	\$40,904.83
National Police Association	\$1,734.78	0	\$12,600	\$391,840.73	\$406,175.51
National Union of Public and General Employees (NUPGE)	0	0	\$7,571	\$116,578.01	\$124,149.01
Oi King Chan	0	\$3,483.10	0	0	\$3,483.10
One Earth, One Vote	0	0	0	\$132,532.58	\$132,532.58

Ontario Chamber of Commerce	0	0	0	\$1,190.72	\$1,190.72
Ontario Nurses' Association	0	0	0	\$114,679.32	\$114,679.32
OpenMedia Engagement Network	\$3,175	0	0	0	\$3,175
Ottawa Punjabi Association	0	0	0	\$2,452.10	\$2,452.10
Oxfam Canada	0	0	0	\$2,419.13	\$2,419.13
Protect Our Winters Canada	\$20,402.93	0	0	0	\$20,402.93
Public Fisheries Alliance Society	0	0	0	\$12,467.39	\$12,467.39
Public Service Alliance of Canada	\$207,534	0	0	\$56,153	\$263,687
Quebec Fier	\$4,558.11	0	0	\$8,781.71	\$13,339.82
Retired Teachers of Ontario	0	0	0	\$97,154.29	\$97,154.29
RightNow	\$6,616.44	0	0	0	\$6,616.44
Rights 4 Vapeurs	\$74,524.15	0	0	\$32,934.83	\$107,458.98
Saskatchewan Industrial and Mining Suppliers Association Inc.	0	0	0	\$38,887.31	\$38,887.31
Society of Albertans Against Equalization	0	0	0	\$6,668.67	\$6,668.67
Stand Environment Society	\$6,966.88	0	0	\$1,728.44	\$8,695.32

Team Climate 2021	0	0	0	\$1,344.70	\$1,344.70
Tek Savvy	\$282,921.91	0	0	\$1,257.56	\$284,179.47
UBI Works	0	0	0	\$4,895.02	\$4,895.02
UFCW National Council	\$706.22	0	0	\$21,890.51	\$22,596.73
UNIFOR	\$1,404.68	0	0	\$508,469.50	\$509,874.18
UNITE HERE Local 40	\$150	0	0	\$9,240.57	\$9,390.47
Up for Debate	0	0	0	\$1,442.20	\$1,442.20
USW	\$5,429.13	0	0	\$129,536.90	\$134,966.03
Vote Family	\$2,964.82	0	0	\$16,311.11	\$19,275.93
Vote For Our Future	\$4,024.86	0	0	0	\$4,024.86
Waterloo Citizens for PR	\$563.87	0	0	0	\$563.87
World Vision Canada	0	0	0	\$18,441.86	\$18,441.86
Zoe Leung	0	\$3,785.88	0	0	\$3,785.88
TOTALS	\$1307786.14	15,294.34	1,90038.06	\$3,611784.52	\$5,124903.06

Overall, the third-party spending limits in the pre-election and election campaign periods do not comply with the Supreme Court's egalitarian principles of one person-one vote, equality of opportunity to equal participation and "relative parity" of voter influence first because the limits are even more inegalitarian than federal donation limits. As noted above, the annual donation limit in 2023 is \$1,700 per person to each party, and that limit is not egalitarian because many people cannot afford that amount (especially given that it is legal to donate to more than one party each year) and the median average donation is only \$75 (as detailed above in section 3.9). However, the donation limit is much more egalitarian than the third-party spending limit, which allows a single third party to spend \$1 million during the

pre-election period nationally or \$10,000 in any district. Even the original national election campaign period limit of \$150,000, and the original district limit of \$3,000, were inequalitarian given how few people have the money available, free and clear above all of their other living expenses, to spend that amount on election ads or other election activities. Bill C-76 only increased the inequality by increasing the third-party election-period spending limit to more than \$500,000 nationally.

Secondly, the third-party limits are inconsistent with Canada's effective voting system which is, relatively, based on the principle of one person, one vote. In *Reference re Prov. Electoral Boundaries*, the Supreme Court ruled that the population totals of electoral districts can have variations of, at most, plus or minus 25 percent, which means some voters votes "count" more than others.⁵³⁵ However, if, for example, a voter with a low income could afford to spend \$100 on pre-election or election advertising, the third-party spending limits allow wealthy third parties to spend 100 times more than that in an electoral district, and 10,000 times more than that nationally, during the pre-election period, and the original limits for an election period allowed a wealthy third party to spend 30 times more than \$100 (3,000 percent more) in a district, and 1,500 times that amount (150,000 percent more) nationally. And those are the pre-inflation 2000-dollar limits, and the limits before the 2019 changes to the *CEA*. Again, Bill C-76 made the inequality inherent in the system even worse by more than doubling the national spending limit.

⁵³⁵ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, pp. 183-188 (subsection III.C) of PDF at: <<https://www.canlii.org/en/ca/scc/doc/1991/1991canlii61/1991canlii61.pdf>>.

Thirdly, the third-party limits violate these principles because they are the same for an individual and for a private corporation with only a few shareholders and for a citizen group that has hundreds, thousands or hundreds of thousands of members. It is consistent with the egalitarian model to allow citizen groups that represent voters to spend a similar or equal amount per voter they represent – similar to how parties and candidates are allowed to spend a specific amount per voter. However, a single limit for all third parties, no matter what size or type, does not align with the egalitarian model. In Chapter 6, I address more fully how the third-party spending limits could be changed to be more egalitarian.

Finally, another important issue to consider is whether private corporations, publicly traded corporations, unions and other organizations should even be allowed to spend on advertising as third parties during elections, based in part on the same principles that led to donations from entities being restricted in 2004, and then prohibited in 2007. For example, in the 2021 federal election, third party business TekSavvy Solutions Inc. spent \$284,179, and interest group Rights 4 Vapers spent \$107,459 but had only two businesses as donors (T Daawg Labs and Dvine Laboratories Inc. (which donated 87% of the funds spent)).⁵³⁶ These kind of entities and others don't vote, and do not necessarily make a democratic internal decision to spend funds on advocacy. As well, unlike a citizen group which has a clear political issue-oriented mandate that its members and supporters join the group to

⁵³⁶ Elections Canada, Third Party Financial Returns for the 44th General Election, online: <<https://www.elections.ca/content.aspx?section=fin&dir=oth/thi/advert/tp44&document=index&lang=e>> (hereinafter "Third Party Returns: 44th Election").

support, businesses don't clearly represent the political interests of their shareholders or employees.

As noted in the previous section, Bill C-76 included the new requirement that, in order to do advertising as a third party above the \$500 threshold, a third-party union, business or organization is required to file with the CEO a resolution passed by its governing body that approves the spending.⁵³⁷ This requirement does not mean spending by a business, or even a union, is clearly approved by shareholders or members who are voters – it just raises questions concerning whether the entity's governing body is legitimately representative of shareholders or members based on whether the entity's internal decision- and policy-making processes are democratic. I address this issue more fully in Chapter 6 when and suggesting proposed changes to make Canada's system more egalitarian, including considering the additional following questions:

- If entities are not prohibited from third-party spending, should more rigorous requirements be imposed concerning internal approval for political spending by any third-party?
- Even if private- and publicly held corporations are prohibited from third-party spending, should other business entities such as worker- or consumer-owned cooperatives be allowed to spend as third parties?

⁵³⁷ *CEA*, *supra* note 79, subsection 349.6(5) re: pre-election period, and 352(5) re: election period.

3.28 Spending by third parties between elections

The fact that third-party spending limits do not apply for the entire time period between elections contradicts the Supreme Court's own principles that voters should have a relatively equal opportunity to equal and meaningful participation and influence in all political processes, and that the public's confidence in the appearance of fairness and integrity in political processes must be ensured. If limits are needed during election periods to prevent wealthy interests from dominating election debates, then limits are needed in between elections to prevent wealthy interests from dominating policy debates. To put it in *Charter* test terms, election spending limits have "a valid and theoretical objective" and address a "pressing and substantial concern" just like the election period spending limits that were upheld in *Harper*.

Beyond fairness and integrity in policy-making processes, nomination contests often occur in between election campaign periods, often much earlier than the two- to three-month pre-election period now covered by the *CEA*, and those contests determine who runs as election candidates, which has an effect on election results. As noted above in sections 3.11, 3.15 and 3.27, nomination contestants are prohibited from colluding with a person or entity in order to exceed their contest expense limit.⁵³⁸ However, there is no prohibition in the *CEA* on a contestant colluding with a third party, including by sharing information, and no limit on third-party spending to support a contestant in secret (as there is no requirement that third parties register and disclose their activities during nomination contests). It would be consistent

⁵³⁸ *CEA*, *supra* note 79, subsection 476.68(2).

with the egalitarian model to extend limits to cover the period during which these contests occur.

As noted above in section 2.4, Ontario's election law,⁵³⁹ limits (and requires registration of) not only third-party ad spending during a much longer pre-election period of six months before the writ is dropped (and also during the campaign period – section 37.5 and subsection 37.10(2)) and also limits ad spending by political parties for six months before the writ is dropped (section 38.1). In Chapter 6, I address more fully why and how to apply limits between elections, and again also whether and how entities, businesses and organizations of various types should even be allowed to spend money on ad advocacy. I also set out proposals for making this area of Canada's political finance system more egalitarian.

3.29 Disclosure requirements for third parties

Third parties are subject to several disclosure requirements. First, they are required to identify themselves in any partisan advertising⁵⁴⁰ (during the pre-election period) or election advertising (during the election period)⁵⁴¹ that they produce and to indicate they have authorized the advertisement. Secondly, if a third party is required to register during the pre-election period (which, again, only applies when an election is held on a fixed date), and it has received contributions (donations or loans) of \$10,000 or more specifically for pre-election period activities since the date of the previous

⁵³⁹ *Election Finances Act*, R.S.O. 1990, c. E.7 (hereinafter "Ontario *Election Finances Act*").

⁵⁴⁰ *CEA*, *supra* note 79, section 349.5

⁵⁴¹ *CEA*, *supra* note 79, section 352.

election day, or spent \$10,000 or more on those activities since the last election, the third party is required to file with the CEO an interim return within five days of registering as a third party, with the return listing:

- Partisan activities expenses by date and location of activity;
- Partisan advertising expenses by date and where they were placed/transmitted;
- Election survey expenses by date each survey was conducted;
- The amount contributed since the previous election by class of contributor (individual, corporation, government, union, non-profit, citizen association) of donations and loans explicitly in support of the regulated pre-election and election activities;
- For each contributor who made contribution(s) or loan(s) totalling more than \$200 since the previous election explicitly in support of the regulated pre-election and election activities;, their name, address (including president or CEO of any numbered company) and class, and the amount and date of each contribution (if the third party cannot identify for sure the contributors who contributed more than \$200 in support of the regulated activities, then all of the third party's contributors of \$200 or more since the previous election must be identified);
- The amount of the third-party's own funds that were used to pay for the activities.⁵⁴²

A registered third party is also required to file with the CEO an interim return on September 15th if it receives contributions of \$10,000 or more specifically for pre-election period activities, or spends \$10,000 or more on those activities, since the date of the previous election day up to the earlier of

⁵⁴² CEA, *supra* note 79, sections 349.91 and 349.93. See also *Third Party Handbook* (2019), *supra* note 494 and *Third Party Handbook* (2021), *supra* note 494.

September 14th or the end of the pre-election period. The return is required to include the same list of information as the first return, but if the third party submitted a first interim return (i.e. registered earlier), then it is not required to include the information from that return in the second return.⁵⁴³

If not already registered during the pre-election period, when the election period begins a third party is required to register as soon as it spends \$500 on election period activities.⁵⁴⁴ Every registered third party is then required to file with the CEO another interim return for the election period (whether or not the election is held on a fixed date) 21 days before the general election day if it receives contributions of \$10,000 or more specifically for election period activities, or spends \$10,000 or more on those activities, since the date of the previous election day up to the 23rd day before election day. The return is required to include the same list of information as the first return (except election advertising expenses replace pre-election partisan advertising expenses), but if the third party submitted a first and/or second interim return, then it is not required to include the information from those returns in this return.⁵⁴⁵

Every registered third party is then required file with the CEO another interim return for the election period 7 days before the general election day if it receives contributions of \$10,000 or more specifically for election period activities, or spends \$10,000 or more on those activities, since the date of the previous election day up to the 9th day before election day. The return is

⁵⁴³ CEA, *supra* note 79, sections 349.92 and 349.93.

⁵⁴⁴ CEA, *supra* note 79, sections 353(1).

⁵⁴⁵ CEA, *supra* note 79, section 357.01.

required to include the same list of information as the first return described above, but if the third party submitted a first election period return already, then it is not required to include the information from that return in this return.⁵⁴⁶

As with the pre-vote disclosure requirements for party leadership contestants detailed in section 3.25 above, these pre-vote requirements raise the question of why parties, district associations, nomination contestants and candidates can't also disclose their donors before voting day? However, some of the same key flaws still exist with all of these disclosures as with other political actors, including that, with only the identities of donors who donate of more than \$200 disclosed, it is relatively easy for an individual, business or other organization to split a large donation into multiple donations of \$200 or less (including donations made through an online fundraising/crowdfunding site) and for the donor and the third party receiving the donation to hide the actual amount donated.

A registered third party is also required to file with the CEO within four months after election day a return that contains the same list of information as the first return described above and contains all the expenses information for all of the third party's pre-election period and election period activities.⁵⁴⁷ As mentioned above, third parties who incur pre-election period or election period expenses of \$10,000 or more are required to appoint an auditor, who is

⁵⁴⁶ CEA, *supra* note 79, section 357.02.

⁵⁴⁷ CEA, *supra* note 79, section 359.

required to confirm that the post-election return is a fair reflection of the third party's accounting records.⁵⁴⁸

Again, to be clear, for all of the above pre-election period, election period, and post-election returns, if the third party cannot identify which contributions (donations and loans) of more than \$200 each that it has received for the pre-election period activities, then it is required to identify in the return all of its contributors since the previous election day.⁵⁴⁹ However, there is a significant loophole in this and the other disclosure rules. As long as an organization never explicitly solicits contributions for the regulated pre-election and election ads, activities or surveys, and instead only solicits contributions in between elections to support its general activities, it can accumulate the funds it raises in its bank account and then, when an election happens, transfer them into its "third-party" campaign account as its "own funds" and use those funds to pay for pre-election and election activities, and never have to disclose the identities of the contributors of the funds.⁵⁵⁰

This as a significant loophole in the rules because many citizen advocacy organizations solicit contributions regularly for their general

⁵⁴⁸ *CEA*, *supra* note 79, sections 349.8, 355 and 360.

⁵⁴⁹ *CEA*, *supra* note 79, subsections 349.91(8), 349.92(2), 357.01(8), 357.02(2), 359(7).

⁵⁵⁰ *Third Party Handbook* (2021), *supra* note 494, pp. 21 and 24. The *CEA*, *supra* note 79, provisions for the first interim return required to be filed by third parties that define "contributions" are in clauses 349.91(1)(b) and (4)(a) to (c) and subsections 349.91(6) to (8) of the law, and the provision allowing spending of "own funds" is in 349.91(4)(d). The *CEA* provisions for the second interim return that define "contributions" are in clauses 357.01(1)(c) and (4)(a) to (c) and subsections 357.01(6) to (8) of the law, and the provision allowing spending of "own funds" is in 357.01(4)(d). The *CEA* provisions for the final third-party return that define "contributions" are in clauses 359(4)(a) to (b.1) and subsections 359(5) to (7) of the law, and the provision allowing spending of "own funds" is in 359(4)(c). Clauses 349.91(4)(d), 357.01(4)(d) and 359(4)(c) of the *CEA* all state that each third-party return is required to list: "the amount, other than an amount of a contribution referred to in paragraph (a), that was paid out of the third party's own funds for partisan activity expenses, partisan advertising expenses, election advertising expenses or election survey expenses."

advocacy activities. As a result, they have funds already in their bank accounts when the pre-election and election period begins and, therefore, have no need to solicit funds for pre-election or election activities, ads or surveys. As well, if a snap election is called, citizen organizations rarely have time to solicit donations for their election activities, ads or surveys -- they just use their "own funds" that they raised in the past for their general advocacy activities. As well, businesses receive payments for products/services and unions receive dues, and so they never have to solicit contributions in order to have their "own funds" in their bank account already for pre-election and election period activities, ads or surveys.

In other words, most third parties in any election, especially snap elections, will not be required to disclose the identity of donors who funded their pre-election or election activities, nor how much each donor contributed. As shown in Elections Canada's March 2022 report on third-party spending in the 2011, 2015 and 2019 elections, in the 2019 election 92 percent of the amount spent by unions, 46 percent of the amount spent by a group with a governing body (i.e. a citizen group), and 28 percent of the amount spent by a charity were from their "own funds".⁵⁵¹ Elections Canada's report also has figures concerning contributions to third-party citizen groups, but I consider them to be inaccurate overall because of the high percentage of "own funds" used by these groups that obscures both the number of contributors and amounts contributed.⁵⁵²

⁵⁵¹ Elections Canada, *Third Party Report* (March 2022), *supra* note 527 at 23-25.

⁵⁵² Elections Canada, *Third Party Report* (March 2022), *supra* note 527 at 15-23.

As well, a 2019 election situation revealed another loophole that allows donors to third parties to remain unidentified. In the 2019 federal election, the Manning Centre for Building Democracy (a non-profit citizen advocacy organization, which changed its name July 1, 2020 to the Canada Strong and Proud Network (CS&FN)) raised money from unknown donors solely to pass on to other third-party organizations to spend on election advertising, and the organizations disclosed the Manning Centre as the sole source of their funds.⁵⁵³ Democracy Watch filed a request for an investigation with the Commissioner of Canada Elections into whether the Manning Centre should either be required to register as a third party and disclose the donors of the funds, or the groups that received the donations should be required to disclose the donors.⁵⁵⁴ The Commissioner finally ruled on the scheme on April 27, 2022 stating that the *CEA* “requires third parties to identify certain contributors, but there is no legislative requirement for third parties to identify the sources of funds of their contributors, nor is there a requirement for contributors to third parties, such as Manning Centre, to identify their sources of funds.”⁵⁵⁵

⁵⁵³ James Keller and Kelly Cryderman, “Manning Centre won’t disclose source of donations to third parties for attack ads on Liberals,” (October 15, 2019) *Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-manning-centre-wont-disclose-source-of-donations-to-third-parties-for/>>.

⁵⁵⁴ Democracy Watch, “News Release: Democracy Watch calls on Commissioner of Canada Elections to investigate Manning Centre and five “Proud” groups it funded for possible third party election disclosure and collusion violations,” (October 17, 2019), online: <<https://democracywatch.ca/democracy-watch-calls-on-commissioner-of-canada-elections-to-investigate-manning-centre-and-five-proud-groups-it-funded-for-possible-third-party-election-disclosure-and-collusion-vio/>>.

⁵⁵⁵ Commissioner of Canada Elections, Letter to Duff Conacher, Democracy Watch, re: File 2019-1406, April 27, 2022.

In the 2021 election, CS&FN did not use the same scheme, and instead raised and spent just over \$94,000 itself on election advertising and activities. However, \$70,000 of that amount came from another citizen advocacy organization called the Modern Miracle Network, along with just over \$8,588 in non-monetary contributions.⁵⁵⁶ In other words, the Modern Miracle Network, which did not register as a third party for the 2021 election, contributed 83.6 percent of the amount that the CS&FN spent, but who donated those funds to the Modern Miracle Network was not disclosed. In Chapter 6, section 6.14, I address this disclosure gap that essentially allows for the funneling of anonymous contributions from one third party to another, in violation of the egalitarian principle of providing key information to voters.

The CEO is required to publish registered third parties' names and addresses as they are registered and, after a review period by the CEO to ensure they are correct,⁵⁵⁷ is required to publish all third parties' post-election returns within one year after the election period began.⁵⁵⁸ This delay undercuts the voter information and fairness and integrity goals of disclosure, as the potential for undue influence may not be discovered until after irrevocable decisions have been made by lawmakers during the time period that the third-party returns remain hidden. The public and the media could therefore be temporarily deprived of potentially relevant information in evaluating lawmakers' proposals and decisions.

⁵⁵⁶ Third Party Returns: 44th Election, *supra* note 536.

⁵⁵⁷ CEA, *supra* note 79, sections 361 to 361.3.

⁵⁵⁸ CEA, *supra* note 79, section 362.

3.30 Donations and loans to third parties

Contributions to third parties of money, property, use of property or services are subject to source restrictions but not limits. Third parties can accept contributions or loans of any amount for the purpose of partisan advertising, partisan activities or election surveys during the pre-election period (or for election advertising, partisan activities and surveys during the election period) from anyone or any entity. However, third parties are prohibited from accepting contributions for these activities from foreign nationals, corporations that do not carry on business in Canada, unions that do not have bargaining rights in Canada, foreign political parties or foreign governments or their agents,⁵⁵⁹ and from colluding with a person or entity to circumvent the prohibition.⁵⁶⁰ Further, third parties cannot use a contribution from an anonymous donor for the purpose of these activities.⁵⁶¹

The first area to assess in terms of compliance with the egalitarian model is the lack of a donation limit. This is somewhat egalitarian when compared to political party funding given that donors to third parties do not receive a tax credit (unless the third party is a charity), and third parties do not receive expense reimbursements or per-supporter subsidies like parties do. However, it is not egalitarian in relation to other third parties and individual voters, as a third party with a wealthy supporter or supporters will have more funding to participate in election and in-between election debates based on a few large donations instead of actual popular support. Similarly, a wealthy

⁵⁵⁹ CEA, *supra* note 79, sections 349.01 and 349.02.

⁵⁶⁰ CEA, *supra* note 79, section 349.03.

⁵⁶¹ CEA, *supra* note 79, sections 349.94 and 357.1.

individual who decides to advocate as a third party has an unequal opportunity to participate in public debates compared to an average-income or low-income voter.

This raises the question of whether donation limits should also be imposed on third parties, or whether spending limits alone (discussed above in sections 3.27 and 3.28, and below in chapters 5 and 6) are sufficient to ensure third parties, especially third parties that are only backed by one or a few wealthy donors, cannot dominate election debates or overwhelm candidates or (less likely) parties with advertising blitzes. Bill C-76, enacted in December 2018 (although many provisions came into effect June 30, 2019) amended the *CEA* to prohibit third parties from using foreign money for pre-election and election campaign spending, and to require them to establish a separate bank account for such spending, but does not set a limit on how much anyone, or any entity, can donate annually or during a campaign. As Elections Canada's March 2022 report on third parties in the 2011, 2015 and 2019 elections shows, it is difficult to determine the extent of financial support received by third parties through large donations because of the "own funds" loophole that allows third parties to hide donations by never explicitly soliciting contributions for regulated pre-election and election ads, activities or surveys.

If, instead, a third party just solicits general contributions in between elections to support its activities, it can accumulate the funds and then, when an election happens, transfer them into its campaign account and attribute the donor as its "own funds" (see the details below in section 3.29 concerning disclosure by third parties). It seems that third parties have realized this

loophole, as the report shows that “own funds” accounted for eight percent of third-party funding for the 2011 election, 26 percent in 2015 and 37 percent in 2019.⁵⁶² However, Elections Canada’s report does show that, while the average donations to third parties through the three elections is about \$200, contributions increased from about \$2 million to about \$7.2 million from 2011 to 2019, and that some significant donations are made of tens and hundreds of thousands of dollars, including the highest donation of \$704,000 by Walter Schroeder to his own business which was active as a third party in the 2019 election.⁵⁶³

Any limit should take into account that third-party citizen groups are often active in other ways, including conducting research, providing services to members (including union members), and responding to information requests. As a result, to uphold egalitarian political principles, a donation limit should apply only to donations made to a third party for the purpose of participation in public debates and elections. To also uphold these principles, the donation limit should, like the limit for parties, electoral district associations, nomination contestants, candidates and party leadership contestants, be set at a level that an average voter can afford.

The second concern in this area in terms of ensuring an egalitarian system is the lack of clarity in the prohibitions on third parties exceeding the spending limits on pre-election period and election period advertising and activities,⁵⁶⁴ and the related prohibition on using “funds for a partisan activity,

⁵⁶² Elections Canada, *Third Party Report*, *supra* note 527, at 15-16.

⁵⁶³ Elections Canada, *Third Party Report*, *supra* note 527, at 17 and 19-20.

⁵⁶⁴ CEA, *supra* note 79, sections 349.2 (pre-election period) and 351 (election period).

for advertising, for election advertising or for an election survey if the source of the funds is a foreign entity” and/or colluding to do this.⁵⁶⁵ The “loophole” in these prohibitions is that third parties contribute money to each other, and foreign entities contribute to third parties across Canada, and if those contributions go to activities other than those covered by the *CEA*, they free up funding that the third party already has to spend on the activities covered by the *CEA*. In other words, the contributions to other activities effectively make it possible for the third party to spend more on political activities. In Chapter 6, I address these two areas of concern more fully, and suggest proposals for changes to make the system more egalitarian.

3.31 Public subsidies to third parties

Third-party interest groups are disadvantaged in the area of donation subsidies when compared to parties and candidates because their donors do not receive any tax credit for their donations, unless the third party is a registered charity in which case their donors receive the 15 percent tax credit for their donations. This percentage rate is much lower than the tax credit for donations of up to the annual maximum to parties and candidates (which is \$1,700 in 2023). However, there is some balancing in the tax credit area for third parties that are charities because donors to charities receive a 29 percent tax credit for donations above \$200, while the credits for party donations of the maximum \$1,700 in 2022 are capped at \$650 (38 percent) annually.

⁵⁶⁵ *CEA*, *supra* note 79, sections 349.02 and 349.03.

Third parties do not receive any other public subsidies. I contend that there is an argument for changing the radio and TV broadcast time allocation system for parties described in section 3.20 above to give third parties access also to free and reserved paid broadcast time based on the number of supporters they have. While the airwaves are licensed for use by broadcasters, they are owned by the public, not by political parties, and so any entity that represents the public should be given access to the airwaves that equals its level of representation. In Chapter 5 I set out a framework for a more egalitarian system, and in Chapter 6 I examine this and various other proposals for subsidizing third parties in ways that align with an egalitarian model that is ethical in terms of preventing conflicts of interest.

3.32 Influence of media and social media

The final area of rules in the Canadian federal political finance system to be examined, the role and influence of media and social media within the egalitarian model, relates to many of the other areas discussed above in its structure, operation and issues raised. As Ronald Dworkin highlighted in 1987, limiting donations and spending by parties, candidates and third parties to provide equality of opportunity to participate in election and public policy debates does nothing to prevent a wealthy person or entity establishing and using a media outlet to have greater influence than an average voter, and/or to ignore or drown out other voices.⁵⁶⁶

⁵⁶⁶ Ronald Dworkin, "What is Equality? Part 4: Political Equality," (1987) 22 *U. San Francisco L. Rev.* 1 at 17, cited in Feasby (2005), *supra* note 10, at 13.

This phenomenon was rampant in Canada from the mid-1800s to the end of the century as many newspapers explicitly supported one political party in most if not all their news coverage and editorials.⁵⁶⁷ However, through the twentieth century newspapers became less and less explicitly partisan in their daily news coverage.⁵⁶⁸ However, some Canadian newspapers have consistently endorsed one political party over others at election time, such as the *Toronto Star* endorsing the Liberals in 32 of the 37 federal elections from 1896 to 2021, the *Toronto Sun* endorsing the Conservatives in 15 of 17 federal elections since it was established in 1972, and the *National Post* endorsing the Conservatives in seven of the eight federal elections that have been held since it was established in 2000.⁵⁶⁹

The Internet and crowd-funding have facilitated a new wave of partisan media, as websites can be established at a fairly low cost and can call themselves a “news outlet” even though they don’t comply with any of the journalistic standards that developed during the 20th century, in particular fairness, balance and accuracy.⁵⁷⁰ And these websites can also, at a fairly low cost, raise funds online from individual and organizational donors, and call them “subscribers” as another means of posing as a media outlet. In other

⁵⁶⁷ Brian P.N. Beaven, “Partisanship, Patronage, and the Press in Ontario, 1880–1914: Myths and Realities,” (September 1983) 64:3 *The Canadian Historical Review* 317. Minko Sotiron, *From Politics to Profit: The Commercialization of Canadian Daily Newspapers* (Montreal: McGill-Queen’s Press, 1997).

⁵⁶⁸ A. M. Osler, *News: The evolution of journalism in Canada* (Toronto: Copp Clark Pitman, 1993).

⁵⁶⁹ Jamie Bradburn, “A History of Newspaper Endorsements,” (October 16, 2015) Torontoist.com, online: <<https://torontoist.com/2015/10/a-history-of-newspaper-endorsements/>> and my own research for the 2019 and 2021 federal elections.

⁵⁷⁰ See for example: CBC, Journalistic Standards and Practices, online: <<https://cbc.radio-canada.ca/en/vision/governance/journalistic-standards-and-practices>>. *Globe and Mail*, Editorial Code of Conduct, online: <<https://www.theglobeandmail.com/about/editorial-code>>.

words, these outlets are actually third parties that are spending money on partisan activities (mainly outreach to voters that supports one party while criticizing one or more other parties or criticizing all parties except the party the site favours), while claiming to be news media outlets that are not subject to any of the third-party statutory spending limits. Another variation on this scheme are websites that advocate changes to laws, regulations and government programs, including through advertising, while claiming to be a “news” or “media” outlet that, again, is not subject to third-party regulations or spending limits.

Canadian election regulators, courts and governments have only begun to address this phenomenon, so far mainly in reaction to the actions of Ezra Levant and his Rebel News Network Ltd. website. The Canadian Parliamentary Press Gallery refused to grant Rebel News a membership because its approach is to become “active participants in their stories and taking partisan positions in relation to politicians or political parties” which violates the Gallery’s requirement that members comply with “generally accepted journalistic principles and practices.”⁵⁷¹ However, Rebel News has claimed to be a media outlet in situations involving election advocacy and third-party regulations.

In the first case, in late 2018 Rebel News placed a billboard advertisement criticizing Alberta’s NDP education minister David Eggen and calling for him to be fired. The provincial Election Commissioner investigated and found that Rebel News had violated the requirement in the provincial

⁵⁷¹ *Rebel News Network Ltd. v Gilmore*, 2021 ONSC 3490 (CanLII), para. 23.

election finances law to register as a third party before planning to spend \$1,000 or more on “political advertising” which is defined as any ad outside of the “election advertising period” that promotes or opposes a party, candidate, party leader, member of the legislature, nomination or leadership contestant, or takes a position on an issue associated with any of the above, with the same exceptions as the federal law for news releases and commentary, social media posts etc. When an election is held on the fixed election date in Alberta of the last Monday in May four years after the last election,⁵⁷² the regulated “election advertising period” includes the period from January 1st of the election year until election day and, otherwise, it includes only the election campaign period.⁵⁷³

Rebel News applied for judicial review, in part challenging the Commissioner for reaching a conclusion before giving Rebel News an opportunity to be heard, and in part challenging the interpretation and application of the registration requirement.⁵⁷⁴ The court ruled that the Commissioner had not reached a conclusion before hearing from Rebel News,⁵⁷⁵ and that the Commissioner was correct to find that the Rebel News billboard was “political advertising”⁵⁷⁶ that required registration because it cost

⁵⁷² *Election Act*, RSA 2000, Chapter E-1, subsection 38.1(1).

⁵⁷³ *Election Finances and Contributions Disclosure Act*, RSA 2000, Chapter E-2, clause 44.1(1)(d.1)(i) and (ii).

⁵⁷⁴ *Rebel News Network Ltd v Alberta (Election Commissioner)*, 2020 ABQB 682 (CanLII) (hereinafter “Rebel News (AB 2020)”). Rebel News appealed the ABQB ruling solely on the ground that the Commissioner had a “closed mind” because he reached a conclusion before the investigation was completed, but the appeal court rejected the appeal in *Rebel News Network Ltd v Alberta (Election Commissioner)*, 2021 ABCA 376 (hereinafter “Rebel News (AB 2021)”).

⁵⁷⁵ *Rebel News (AB 2020)*, *supra* note 574, paras. 7-11 and 55 (re: the facts), and paras. 12-33 and 42-46 (See also on related procedural issues paras. 34-41).

⁵⁷⁶ *Rebel News (AB 2020)*, *supra* note 574, paras. 88-92.

more than \$1,000 and clearly opposed a member of the legislature (even though the member was a Cabinet minister),⁵⁷⁷ and:

1. While the Rebel News' website was a source of news and opinion, the billboard was activism that did not qualify under the allowed statutory exceptions of "an editorial, a debate, a speech, an interview, a column, a letter, a commentary, or news";⁵⁷⁸
2. Rebel News itself stated that the billboard was an ad by Rebel News trying to draw "reader interest" to its website where "news, editorials and commentaries" could be viewed;⁵⁷⁹
3. To qualify under the "commentary" exception, an ad must have similar qualities as news articles, editorials, opinion pieces and columns found in newspapers and media outlet websites, and one line on a billboard with a website link does not qualify.⁵⁸⁰

In the second case involving Rebel News, during the election period of the 2019 federal election it distributed lawn signs with an image of the cover of a book that Rebel News head Ezra Levant had written, which was published by Rebel News, entitled *The Libranos: What the Media Won't Tell You About Justin Trudeau's Corruption*. The book was announced on the Rebel News website two days before the election period began, and the cover was an illustration of Liberal Party Leader Justin Trudeau and some Liberal Cabinet ministers. While the website address "Libranos.com" and the sentence "Rebel News telling the other side of the story" were on the lawn signs, they did not state that Rebel News had authorized the transmission of

⁵⁷⁷ *Rebel News* (AB 2020), *supra* note 574, paras. 82-87.

⁵⁷⁸ *Rebel News* (AB 2020), *supra* note 574, paras. 54-56 and 93-104.

⁵⁷⁹ *Rebel News* (AB 2020), *supra* note 574, paras. 60-69.

⁵⁸⁰ *Rebel News* (AB 2020), *supra* note 574, paras. 70-74.

the message on the signs.⁵⁸¹ As noted above in section 3.27, an exception for third parties to the *CEA* requirement to register and disclose contributions and spending during the pre-election and election periods is if the paid communication is:

“the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;”⁵⁸²

The Commissioner of Canada Elections concluded that there were reasonable grounds to believe that Rebel News had spent more than \$500 on the lawn signs and, therefore, was in violation of section 352 of the *CEA* for failing to register as a third party advertiser, and was also in violation of subsection 353(1) for failing to include a statement on the lawn signs that Rebel News had authorized the signs.⁵⁸³ Rebel contended that the lawn signs were a “journalism campaign” aimed at promoting the book, not an election advertising campaign aimed at opposing the Liberal Party or Justin Trudeau and, therefore the book publication exemption applies.⁵⁸⁴ The Commissioner concluded that the evidence (including statements by Ezra Levant to investigators admitting it) showed that Rebel News had planned the release of the book to coincide with the election – which was predictable

⁵⁸¹ Commissioner of Canada Elections, Letter to Rebel News, Rebel News, “Help fund our legal fight against the censorship of Canadian authors,” online: <https://www.rebelnews.com/libranos_elections_commissioner_conviction_donation> 1-2 (hereinafter “Commissioner of Canada Elections on Rebel News”).

⁵⁸² *CEA*, *supra* note 79, subsection 2(1) definition of “election advertising” and “election advertising expense”.

⁵⁸³ Commissioner of Canada Elections on Rebel News, *supra* note 581, 1-4. See also: Commissioner of Canada Elections, Publication of AMPs, (August 13, 2021) online: <<https://cef-cce.ca/content.asp?dir=pub&document=aug1321-rn&lang=e&section=amp>>.

⁵⁸⁴ Commissioner of Canada Elections on Rebel News, *supra* note 581, 3 (para. 14) and 5 (paras. 22-23).

because it was held on the fixed election date – therefore, the book exemption did not apply.⁵⁸⁵

Rebel News also contended that the Deputy Commissioner, who made the initial decision, had failed to balance the requirements to register and disclose as a third party, and the book exemption, in a manner that reasonably complied with the *Charter* right to freedom of expression, but the Commissioner concluded that the decision, on balance, was reasonable.⁵⁸⁶ In addition, Rebel News also contended that Ezra Levant was not cautioned before being interviewed, but the Commissioner concluded that given it was an administrative investigation not a prosecution, and given Rebel News was being investigated not Mr. Levant, there was no *Charter* right to a caution.⁵⁸⁷

While I do not address the issue of whether enforcement and penalties are effective at ensuring compliance with all of the political finance rules I am examining, as in some other areas I think it is significant to note that while the Alberta Election Commissioner considered imposing a \$5,500 fine on Rebel News,⁵⁸⁸ in the end the Commissioner's penalty was only a letter of reprimand.⁵⁸⁹ The penalty imposed on Rebel News by the federal Commissioner was only \$3,000 in fines total (\$1,500 each for both violations). It is difficult for me to conclude that such minor penalties (including, if it had

⁵⁸⁵ Commissioner of Canada Elections on Rebel News, *supra* note 581, 5-9 (paras. 22-29).

⁵⁸⁶ Commissioner of Canada Elections on Rebel News, *supra* note 581, 12-13 (paras. 42-47).

⁵⁸⁷ Commissioner of Canada Elections on Rebel News, *supra* note 581, 11-12 (paras. 39-41).

⁵⁸⁸ Jordan Omstead, "Alberta election commissioner considers fine for Rebel Media," (January 19, 2019), CBC.ca, online: <<https://www.cbc.ca/news/canada/edmonton/alberta-election-commissioner-fine-rebel-media-1.4985572>>.

⁵⁸⁹ Jonny Wakefield, "Rebel Media no longer facing \$5,500 fine over elections billboard," (March 15, 2019), Edmonton Journal, online: <<https://edmontonjournal.com/news/local-news/rebel-media-no-longer-facing-5500-elections-fine-over-billboard>>.

been imposed, a \$5,500 fine) will discourage Rebel News from violating the registration and disclosure requirements again. According to its website, Rebel News is refusing to pay the federal \$3,000 fine, and is instead fundraising for a case challenging the Commissioner's decision, including on the ground that the book exemption violates the *Charter* right to freedom of expression because it is too vague.⁵⁹⁰ According to a media report, the application was filed in the Federal Court of Canada in October 2021,⁵⁹¹ but I could find no information that the case had proceeded past that point.

While the penalties have been weak, and while one of the rulings may be subject to a court challenge, based on the above rulings concerning Rebel News the regulatory tribunals have made it clear that they will not allow an advocacy organization claim to be media or a publisher in order to do advocacy advertising without registering and disclosing as a third-party. However, these rulings do not address the second issue, and the main concern that Dworkin was raising, of a wealthy individual or organization starting a "media" outlet that advocates policy positions in every article published which, again, is easier than ever because of the low cost of setting up a "news" website on the Internet.

The issue of websites that appear to be "media" but are actually partisan or non-partisan advocacy organizations, with each article in effect

⁵⁹⁰ Commissioner of Canada Elections on Rebel News, *supra* note 581, and also at: <https://www.thelibranos.com/libranos_book_elections_canada_fines_ezra_levant_3000_for_book_comparing_trudeau_to_tony_soprano>.

⁵⁹¹ Joan Bryden, "Rebel News asks court to quash fines for violating election law on third-party ads," *Toronto Star* (October 20, 2021) online: <<https://www.thestar.com/politics/2021/10/20/rebel-news-asks-court-to-quash-fines-for-violating-election-law-on-third-party-ads.html>>.

being a partisan advertisement, runs across the political spectrum in Canada. For example, I examined 400 articles on the Canada page of Rebel News' website⁵⁹² and, as set out below in Chart 20, found that: almost half of the articles supported a libertarian policy position (most of which expressed views against COVID-19 vaccine mandates); four times as many articles criticized the Liberals compared to the Conservatives; no articles supported the Liberals, and; 29 articles supported the Conservatives, almost all of which supported two of the candidates (Pierre Poilievre and Leslyn Lewis) in the 2022 Conservative Party leadership race. The federal government undertook a similar study during 2021-2022 of 276 articles on the Rebel News' website and ruled that only one percent were "news" and that its content was "largely opinion-based and focused on the promotion of one particular perspective" – Rebel News' website states that it is challenging that ruling in court.⁵⁹³

Chart 20: Categorization of Rebel News Website Canada News Articles from March 2 to April 22, 2022

	Article criticizes Liberals	Article criticizes Conservatives	Article supports Conservatives	Article criticizes NDP	Article supports libertarian position(s)	Article covers another issue
Number of articles on Rebel News Canada News webpage	63	16 (7 of which criticized Patrick Brown and 3 of which criticized Jean Charest (both CPC leadership candidates))	29 (Almost all supported CPC leadership candidates Pierre Poilievre or Leslyn Lewis)	6	195 (Almost all were against anti-vaccine mandates)	83

⁵⁹² Rebel News, Canada, online: <<https://www.rebelnews.com/tags/canada>> (accessed April 22, 2022).

⁵⁹³ Rebel News, "Rebel News is suing Justin Trudeau," (April 7, 2022), online: <https://www.rebelnews.com/rebel_news_is_suing_justin_trudeau>.

I also examined 566 articles published from 2015 to 2022, which were all the articles in four sections of the website of PressProgress.ca, which was founded by, and is funded by, the Broadbent Institute⁵⁹⁴ which itself was founded by former NDP federal leader Ed Broadbent in 2011.⁵⁹⁵ The Broadbent Institute was launched in part with an initial fundraising drive promoted by the NDP as a memorial to NDP leader Jack Layton, in violation of the *CEA* prohibition on parties raising funds for any entity other than the party, a candidate, a leadership contestant or an EDA.⁵⁹⁶ As set out below in Chart 21, I found that almost all of the articles criticized the Conservative or Liberal parties or politicians, and almost none criticized the NDP.

Chart 21: Categorization of PressProgress.ca Articles from Website Sections from 2015 to 2022

	Alberta section of website (articles from December 23, 2015, to April 13, 2022)	British Columbia section of website (articles from February 17, 2015 to Nov. 25, 2021)	Prairies section of website (articles from Oct. 31, 2015 to April 20, 2022)	Articles produced by “Jagmeet Singh” search (articles from Aug. 13, 2018 to February 28, 2021)
Criticized Conservatives or Liberals	200	111	93 (only 2 criticized Liberals)	19
Cover an Issue Situation	38	59	25	4

⁵⁹⁴ PressProgress, About PressProgress, online: <<https://pressprogress.ca/about-pressprogress>>.

⁵⁹⁵ Broadbent Institution, About, online: <<https://www.broadbentinstitute.ca/about>>.

⁵⁹⁶ Canadian Press, “NDP’s Layton memorial fund violates Election’s Act: commissioner,” (November 14, 2011), GlobalNews.ca, online: <<https://globalnews.ca/news/177553/ndps-layton-memorial-fund-violates-elections-act-commissioner-2/>>.

Criticize NDP	0	6	0	0
Praise NDP	3	3	0	2
Criticize Bloc or Green	0	0	1	2
Total Articles by Category	241	179	119	27

Thirty years after Dworkin made his point, the power and role of social media accounts must also be taken into account in any discussion of equality of opportunity to participate in politics. Social media recently, and even email and websites from the mid-1990s on, have all levelled the playing field of political expression significantly. In the early 1990s, reaching a significant number of people exactly how and when you wanted to reach them (as opposed to relying on media coverage), was much more expensive than today. Paid advertising that cost \$40,000 for a national print ad run one-time, and mailings by third parties that cost on average \$1-1.50 per piece sent (so \$20,000 to \$30,000 to reach 20,000 people, with 90 percent of people usually throwing out the mailing without opening it) have been replaced by emails that cost \$10 to reach 50,000 people and link them to a stock footage, software-produced video ad that costs \$10 to produce and post on social media accounts. And those 50,000 people can share the video ad with hundreds of thousands or millions of people.⁵⁹⁷ Robocalls and mass texting also provide a relatively new, relatively inexpensive, ways to reach voters.

⁵⁹⁷ See 2014 statistics re: Canadians engagement with online political content in: Tamara A. Small, Harold Jansen, Harold, Frederick Bastien, Thierry Giasson and Royce Koop, "Online political activity in Canada: the hype and the facts," (2014), Vol. 37(4) *Canadian Parliamentary Review* 9.

This does not mean that third party spending limits are obsolete, as not every video goes viral, and developing and maintaining a high-level website that attracts viewers to find your videos, and doing more expensive productions with a more attractive production value, and advertising, can help attract more viewers who share a video.⁵⁹⁸ As well, to give one example, Facebook changed its algorithm over the past decade to require an increasing level of payment in order for posts to be seen by the friends and followers of any page.⁵⁹⁹ In other words, as Tamara Small has detailed,⁶⁰⁰ paying for placement of your post in people's social media feeds, like any TV, radio or print advertisement in the past, is essential to ensure many people see your viewpoint. As a result, a key egalitarian measure is to ensure that anyone paying to advertise a social media post can be monitored as closely as someone paying for more public TV, radio or print ads to ensure they don't exceed candidate, party or third-party spending limits. This can be done by requiring social media companies to disclose details about all election-related ads to the election agency.⁶⁰¹

It is democratic if someone or some entity can attract a significant number of followers on social media, and then speak to them and have them amplify the voice of that person through sharing posts, including posts about election or public policy issues. That is conceptually no different than

⁵⁹⁸ See a 2008 evaluation of Canadian federal party websites in: Tamara A. Small, "Equal Access, Unequal Success: Major and Minor Canadian Parties on the Net," (2008), Vol. 14(1) *Party Politics* 51.

⁵⁹⁹ Christina Newberry, "How the Facebook Algorithm Works in 2022 and How to Make it Work for You," (February 28, 2022), online: <<https://blog.hootsuite.com/facebook-algorithm/>>.

⁶⁰⁰ Small (2018), *supra* note 5. Small counters the arguments of others that social media is "virtually cost-free" – see for example: MacIvor (Spring 2015), *supra* note 426, at 454-455.

⁶⁰¹ Democracy Watch, News Release (October 17, 2018), *supra* note 521.

someone starting a citizen group and attracting supporters and sending out broadcasts in various forms to them to share. However, this phenomenon is not egalitarian if the person or entity starts up with significant funding and resources due to support from only one or a few wealthy individuals or entities, and gains support from others through promotions and advertising paid for by a few wealthy supporters that allows them to reach many more people than a person or entity that does not have such funding or resources. That situation does not comply with the key egalitarian principle of substantively equal opportunity for equal participation.⁶⁰² In Chapter 6, I set out proposals for ensuring more equal opportunities for equal participation.

As with social media, conducting surveys is also now much more accessible than in the past, either online or through robocalls. And through social media survey results, no matter how distorted, can be reported by anyone and reach many voters. Surveys are used by wealthy powerful interests to manipulate and dominate election debates and deceive voters.⁶⁰³ While spending on surveys during the federal pre-election and election periods is required to be disclosed and is counted toward the overall spending limit for third parties, as detailed above in sections 3.27 and 3.29, the ability to

⁶⁰² See these issues discussed in: Tamara Small, “Regulating Canadian Elections in the Digital Age: Approaches and Concerns,” (2009), Vol. 8, No. 3, *Election Law Journal* 189, esp. at 198-203, and; Small (2018), *supra* note 5, at 270-271.

⁶⁰³ Burdett Loomis, “From Hootie to Harry (and Louise): Polling and Interest Groups,” June 1, 2003, The Brookings Institution, online: <<https://www.brookings.edu/articles/from-hootie-to-harry-and-louise-polling-and-interest-groups/>>.

amplify and spread survey results raises the questions of whether stricter limits are needed on the sharing of survey results.⁶⁰⁴

This includes the question of whether the Supreme Court should update its ruling in *Thomson Newspapers*, in which the majority concluded that, other than the fact they sometimes contain random errors, surveys are a benign information source that cannot constitutionally be prohibited from being broadcast in the lead up to an election.⁶⁰⁵ I think the dissent in that ruling expressed a valid concern that has only grown with the reach of the Internet and social media, and reached a valid conclusion that protecting the right of voters not to be misled when voting is more important than preventing some voters from finding out the latest survey results before they vote.⁶⁰⁶ In Chapter 6, I also examine proposals and suggest rules on surveys that align with an egalitarian model that prevents conflicts of interest.

⁶⁰⁴ See a history of, and summary of concerns about, Canadian election surveys in: Christopher Adams, “Polling and Canadian Elections,” (Spring 2015) *Journal of Parliamentary and Political Law* 357.

⁶⁰⁵ Feasby (1988-1999), *supra* note 2 at 33, citing *Thomson Newspapers v. Canada (A.G.)* [1998] 1 S.C.R. 877 at 958 (hereinafter “*Thomson Newspapers*”).

⁶⁰⁶ *Thomson Newspapers*, *supra* note 605, at 884 (para. 60).

4 How the Gifts, Benefits, Favours and Lobbying Parts of Canada's Political Finance System Do Not Fulfill the Egalitarian Model

4.1 Extension of the egalitarian model to the gifts, benefits, favours and lobbying parts of Canada's political finance system

As set out above in section 2.9 of Chapter 2, the three key fundamental bases of the Supreme Court of Canada's egalitarian model are: the principle of one person, one vote (relative equality of opportunity for relatively equal, meaningful participation and influence not only during elections but also during all public policy-making and political processes); the objective of ensuring that the public perceives that the system is fair and integrity in terms of process, not outcomes, and; the objective of informing voters adequately so they can decide what position to take during elections and other processes. In Chapter 3, I evaluated whether the registration, donation, spending, public subsidies and disclosure parts of Canada's political finance system, all of which are regulated by the federal *Canada Elections Act*, uphold these three principles. In this chapter, I evaluate whether the gifts, favours and lobbying parts of the system, all of which are regulated by inter-related federal ethics laws, comply with these principles.

People and entities doing favours through fundraising and/or campaigning for parties, nomination race and party leadership contestants, election candidates, and politicians, and also giving gifts and hospitality ("winning and dining"), or property or the use of property, or job offers, referrals and other connections to politicians, their staff and government officials, are all forms of political finance support like donations and spending, and lobbying

is another form of participation and expression like spending during elections. As with political donations and spending, these actions all raise the same danger of violating the key principles of the egalitarian model if they allow those who have the resources, including lobbyists, to have greater influence through giving gifts and doing favours. In the context of this chapter, I evaluate whether the federal system ensure that the public perceives that the system is fair and has integrity based on whether an appearance of a conflict of interest, a perceived conflict, is caused by any gift or favour.

While giving gifts is linked to bribery, they are different. A gift may be offered in an attempt to influence a politician's decisions, but a bribe is a gift or other benefit explicitly offered in respect of a specific action or decision by a politician or other public official, and offered corruptly (i.e. in secret), and is prohibited under the *Criminal Code* of Canada.⁶⁰⁷ This chapter focuses instead on what could be called "implicit-bribes" – gifts and favours aimed at influencing decision-making by creating a sense of obligation to return the favour, without a specific explicit request by the person giving the gift or favour, or an explicit offer by the person accepting it, to do something (or not take any action) in return.

This is the first complete evaluation of the post-2004 federal laws and rules that apply to gift giving to federal Canadian politicians, and lobbying and

⁶⁰⁷ See, for example, the anti-bribery provisions that apply to MPs in the *Criminal Code* (R.S.C., 1985, c. C-46), online: <<http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html>> at sections 119, 121, 122, 124 and 125. Also see the anti-bribery provision that applies to MPs in section 41 of the *Parliament of Canada Act*, (R.S.C., 1985, c. P-1), online: <<http://laws-lois.justice.gc.ca/eng/acts/P-1/index.html>>. The difference between a gift and a bribe is explored in Graycar and Jancsics (2017), *supra* note 32.

conflicts of interest. Pre-1997 versions of federal politician ethics rules and enforcement systems,⁶⁰⁸ and lobbying rules and enforcement,⁶⁰⁹ have been examined, as have the public's largely negative attitudes at that time toward politicians' ethics, including concerning gifts.⁶¹⁰ Ethics rules for government employees, and their enforcement have also been extensively examined.⁶¹¹ And, of course, there have been many examinations of gift giving to politicians and public officials in other jurisdictions.⁶¹²

As well, several empirical studies of lobbying activities in Canada have been undertaken, along with examinations of theoretical frameworks that seek to explain the activities and, in some cases, comparisons with other

⁶⁰⁸ Ian Greene, "Conflict of Interest and the Canadian Constitution: An Analysis of Conflict of Interest Rules for Canadian Cabinet Ministers," online: (1990) 23:2 *Canadian Journal of Political Science* 233 <<https://doi-org.proxy.bib.uottawa.ca/10.1017/S0008423900012233>> (hereinafter "Greene (1990)"). Ian Greene and David P. Shugarman, *Honest Politics: Seeking Integrity in Canadian Political Life* (Toronto: James Lorimer and Company, 1997) at 155-158.

⁶⁰⁹ Greene, *Honest Politics*, *supra* note 608 at 60-62. A. Paul Pross, *The Lobbyists Registration Act: Its Application and Effectiveness*, (February 1, 2006) Commission of Inquiry into the Sponsorship Program and Advertising Activities, Phase 2 report, *Restoring Accountability: Recommendations*, Public Works and Government Services Canada, online: <http://dsp-psd.pwgsc.gc.ca/Collection/GomeryII/ResearchStudies2/CISPAA_Vol2_5.pdf> (hereinafter "Pross, 'The Lobbyists Registration Act: Its Application and Effectiveness'"). A. Paul Pross, "Chapter Six: Law and Innovation: The Incremental Development of Canadian Lobby Regulation," in O. P. Dwivedi, Byron M. Sheldrick and Timothy Mau, eds. *The evolving physiology of government: Canadian public administration in transition* (Ottawa: University of Ottawa Press, 2009) at 151 (hereinafter "Pross, 'Chapter Six: Law and Innovation'").

⁶¹⁰ Maureen Mancuso, Michael M. Atkinson, Andre Blais, Ian Greene and Neil Nevitte, *A Question of Ethics: Canadians Speak Out* (Toronto: Oxford University Press, 1998). Chapter Four addresses gifts and summarizes the results of the national survey on political ethics that is the focus of this book. Approximately 48 per cent felt it was unacceptable (including 25 per cent who felt it was totally unacceptable) for an MP to accept a gift of a bottle of wine from a constituent after the MP helped the constituent obtain a passport quickly (pp. 102-104).

⁶¹¹ J.I. Gow, "Between Ideals and Obedience: A Practical Basis for Public Service Ethics," in David Siegel and Ken Rasmussen, eds. *Professionalism and public service : essays in honour of Kenneth Kernaghan* (University of Toronto Press, Toronto [2008]) 99. Kenneth Kernaghan and John Langford, *The Responsible Public Servant* (Toronto: Institute of Public Administration of Canada, 2014) at 131.

⁶¹² See summary of laws and norms in some jurisdictions in Graycar, "Gift Giving," *supra* note 32. Also see summary of U.S. and some other jurisdictions' laws in Jessica Tillipman, "Gifts, Hospitality & the Government Contractor," online: (June 2014) GWU Law School Public Law Research Paper No. 2014-35, <<https://ssrn.com/abstract=2467247>>.

jurisdictions.⁶¹³ However, the implications and effects of post-1997 developments in Canadian federal gift-giving, political ethics and lobbying laws have only been examined in a summary way,⁶¹⁴ not to the level of detail I

⁶¹³ It should be noted that, while some these articles contain extensive statistics concerning the activities of lobbyists at the federal level in Canada, the data should be qualified by the caveat that those articles (as well as articles that do not contain statistics) summarize the registration and public disclosure requirements in the Canadian federal lobbying transparency law (the *Lobbying Act*) inaccurately by stating that the *Act* requires disclosure of all lobbying (and, therefore, post-employment restrictions prohibit all lobbying) and by inaccurately summarizing the requirements for disclosure of communications. In fact, several loopholes in the *Act*, which are detailed in this chapter, mean that it is legal to lobby in many ways without being required to register and disclose the lobbying (and, therefore, post-employment restrictions actually allow lobbying). Ludovic Rhéault, "Corporate Lobbying and Immigration Policies in Canada," (2013), Vol. 46(3) *Canadian Journal of Political Science* 691. Maxime Boucher, "Who you know in the PMO: Lobbying the Prime Minister's Office in Canada," (2018), Vol. 61(3) *Canadian Public Administration* 317 (hereinafter "Boucher (2018)"). Maxime Boucher and Christopher A. Cooper, "Consultant Lobbyists and Public Officials: Selling Policy Expertise or Personal Connections in Canada?" (2019), Vol. 17(4) *Political Science Review* 340. Maxime Boucher and Christopher A. Cooper, "Lobbying and uncertainty: Lobbying's varying response to different political events," (2019), Vol. 32(3) *Governance* 441. Raj S. Chari, John W. Hogan, Gary Murphy and Michele Crepaz, *Regulating Lobbying: A Global Comparison 2nd Edition* (Manchester: Manchester University Press, 2019) (hereinafter "Chari et al (2019)"). Gold (2020), *supra* note 11. Stéphanie Yates, "Lobbying 'from within': A new perspective on the revolving door and regulatory capture," (2021), Vol. 64(2) *Canadian Public Administration* 301. Noah Fry, "Lopsided lobbying? Regulatory opportunism and the Office of the Commissioner of Lobbying," (2022) Vol. 65(1) *Canadian Public Administration* 73.

⁶¹⁴ Ian Holland and Jenny Fleming, "Reforming Ministerial Ethics: Institutional Continuity and Change," online: *Public Integrity*, 5, no. 1 (2003) 67, <<http://dx.doi.org/10.1080/15580989.2003.11770934/>>. Ian Greene, "The Chretien Ethics Legacy," *Review of Constitutional Studies*, 9, no. 1 (2004) 241. Pross, "The Lobbyists Registration Act: Its Application and Effectiveness," *supra* note 609. Pross, "Chapter Six: Law and Innovation," *supra* note 609. Lori Turnbull, "Rules are Not Enough: How Can We Enforce Ethical Principles?" (March 2008), 1 *Journal of Parliamentary and Political Law* 351. Ned Franks, "Parliamentarians and Codes of Ethics," (March 2008), 2 *Journal of Parliamentary and Political Law* 283 (hereinafter "Franks (2009)"). Robert P. Shepherd, "**Error! Main Document Only.**Evaluating The Rationale Of The New Federal *Lobbying Act*: Making Lobbying Transparent Or Regulating The Industry?" in Allan Maslove (ed.), *How Ottawa Spends 2009/2010: Economic Upheaval and Political Dysfunction* (Montreal and Kingston: McGill-Queen's University Press, 2009) at 115. Ian Greene, "The Tension Among Three Ethics Regimes: Government, House of Commons and Senate," (December 2010), 4 *Journal of Parliamentary and Political Law* 361. Nancy Holmes and Dara Lithwick, "The Federal Lobbying System: 'The Lobbying Act and the Lobbyists' Code of Conduct,'" online: Library of Parliament Background Paper No. 2011-73-E (2011) <<http://www.lop.parl.gc.ca/content/lop/ResearchPublications/2011-73-e.htm/>>. Pierre B. Meunier et al, *Lobbying in Canada -- Ontario Edition* (Toronto: Carswell, 2012); Pierre B. Meunier et al, *Lobbying in Canada Quebec Edition: Le Lobbyisme Au Canada Edition Quebecoise* (Montreal: Renouf Publishing Company Limited, 2013). Ian Greene and David P. Shugarman, eds. *Honest Politics Now: What Ethical Conduct Means in Canadian Political Life* (Toronto: Lorimer, 2017), especially chapters 4 (on conflicts of interest), 6 (on money in politics) and 7 (on lobbying (by Robert Shepherd – it should be noted that the book does not acknowledge that Mr. Shepherd is the spouse of former federal Commissioner of Lobbying

provide in this chapter and/or not in ways focused on an evaluation of whether the gifts, favours and lobbying laws align with the egalitarian model (including in terms of whether the rules effectively require transparency/public disclosure) and prevent conflicts of interest.

I contend that, if the Supreme Court's fundamental egalitarian model principles are projected onto the conflict of interest, gifts/benefits/favours and lobbying parts of the political system, the following is an accurate list of the key rules that the system must have:

1. Overall, the rule that should apply to all political situations and processes is that public officials are prohibited from being in an apparent of conflict of interest (so that the public can have full confidence in the appearance of, and actual, fairness and integrity of all processes);
2. Limits on gifts and favours, including the combined total limit that applies to a business, union or other entity (including a lobbying firm or collective lobbying effort by more than one business or organization, or a family), at a level that an average low-income voter can afford (to uphold the principle of one person, one vote, prevent wealthy individuals and organizations from having undue, overwhelming influence that undermines relative equality of participation, to prevent even an appearance of a conflict of interest, and thereby ensure the public can have confidence in the appearance of, and actual, fairness and integrity of the system);
3. Comprehensive, loophole-free disclosure requirements for gifts, benefits, hospitality and favours, including the favour of a

Karen Shepherd)). A. Paul Pross and Robert Shepherd, "Innovation diffusion and networking: Canada's evolving approach to lobbying regulation," (June 2017) 60(2) *Canadian Public Administration* 153. Gold (2020), *supra* note 11. Gold (2021), *supra* note 11.

- promised future gift, benefit or job offer, and for conflicts of interest (in order to ensure adequate information is provided to voters to make informed choices in political processes), and;
4. Removing from party leaders the power to promote and demote MPs (to restrict the power of one person to offer or withhold promotions/demotions as a way of creating a conflict of interest and unduly influencing an MP's substantive equality of participation in representing voters in Parliament), and also regulate MP party-switching so that they do not have unrestricted power to overturn the results of the will of voters in their district (in order to ensure equality of opportunity for participation and influence of voters).

and, as the flipside to these rules concerning public officials receiving gifts and favours, I contend that the following rules for lobbyists who give the gifts or favours, and for the lobbying system overall, align with the key principles of the Supreme Court's egalitarian model:

1. Overall, the rule that should apply to all political situations and processes is that lobbyists are prohibited from doing or proposing anything that places any public official in an apparent of conflict of interest, and from lobbying in any way that is improper (so that the public can have full confidence in the appearance of, and actual, fairness and integrity of all processes);
2. Comprehensive, loophole-free requirements to require registration of, and public disclosure of, all lobbying and lobbying spending and sources of funding (to inform voters), and;
3. Relative, substantive equality of opportunity for relative equality of participation and influence in the government and political decision-making system, based on actual level of voter support

(with no more than a 5-10 percent variation in the equality of opportunity and influence).

As detailed below, I contend that the evidence clearly shows that the rules of the gift-giving, favour-trading (i.e. conflicts of interest) and lobbying parts of Canada's federal political finance system contain contradictions, and that the "egalitarian model" has not actually been adopted in any of these three parts of the system. In other words, in contrast to one assessment which concluded, as of the early 2000s, that a "culture of ethics" had been established in federal Canadian politics with "a high standard in terms of setting and enforcing ethical standards,"⁶¹⁵ I argue that the rules do not even come close to preventing conflicts of interest and unethical gifts and favours, let alone to creating an ethical, egalitarian culture. While some somewhat egalitarian-oriented changes have been made in the past 15 years, I conclude that these three parts of the federal Canadian political finance system are undermined by loopholes and are still very much skewed in favour of those with private wealth or connections to the wealthy.

For some of the parts of the system discussed below, I suggest initial changes to more closely align the system with the egalitarian model. In Chapter 5, I develop a theoretical framework for a more egalitarian model that more effectively prevents conflicts of interest. Then, in Chapter 7, I more fully explore and suggest proposals for changes to align the gifts, favours and

⁶¹⁵ Eleanor D. Glor and Ian Greene, "The Government of Canada's Approach to Ethics: The Evolution of Ethical Government," (2003) 5:1 *Public Integrity* 39 (hereinafter "Glor and Greene (2003)"). See similar claims made in Ian Greene, "Accountability for Ethical Governance: Canadian Advances over 150 Years," (2018) *Journal of Parliamentary and Political Law* 93.

lobbying parts of the system with a more egalitarian model that prevents even the appearance of a conflict of interest.

As in the evaluation in Chapter 3 of the political finance parts of the system, it should be noted that I only evaluate the rules below. Effective enforcement is needed to encourage violations and discourage violations, but my inquiry is limited only to an evaluation of the rules. However, as I do in Chapter 2 in critiquing the Supreme Court's rulings that established the egalitarian model, and in Chapter 3 with regard to some of the key donation and spending rules, I critique in this chapter some of the key rulings by the federal Conflict of Interest and Ethics Commissioner, and the federal Commissioner of Lobbying, as their interpretations of gifts, favours and lobbying rules have determined the current status and effect of those rules. The only other area in my evaluation that overlaps with enforcement is that I evaluate the rules that require politicians, their staff and appointees, and lobbyists, to disclose their gifts, favours and lobbying activities. As the Supreme Court decided in *Harper*,⁶¹⁶ disclosure requirements inform voters and assist in the enforcement of the rules and are, therefore, part of the egalitarian model.

4.2 How the rules on gifts, benefits and favours for MPs, Senators and their staff do not fulfill the egalitarian model

The standards for gift giving to federal Canadian members of the House of Commons (MPs) and Senators seem strong but are undermined by

⁶¹⁶ *Harper* (2004), *supra* note 10, paras. 136-146, and dissenters concurring in paras. 47-48.

loopholes or weak disclosure rules. These loopholes and weaknesses do not align with the egalitarian model because they allow for gifts and favours that wealthy voters and entities can afford more than average- and low-income voters and entities, and because they cause conflicts of interest that could undermine the public's confidence in the appearance of, and actual, fairness and integrity of the government and political decision-making. I acknowledge that I lack recent evidence on which to base the claim that the gifts could undermine the public's confidence, as there have not been any recent surveys on the issue. However, in a Canadian national survey on political ethics undertaken in the late 1990s, approximately 48 per cent felt it was unacceptable (including 25 per cent who felt it was totally unacceptable) for an MP to accept a gift of a bottle of wine from a constituent after the MP helped the constituent obtain a passport quickly.⁶¹⁷

A first area of concern is, as mentioned in section 3.12 above, that sections 477.89 and 477.9 of the *CEA* clarify that an election candidate is prohibited from accepting gifts (other than campaign donations, courtesy/hospitality gifts, or inheritances) that might reasonably be seen to be given to influence the candidate if they are elected. Under 477.9(3) to 477.95, all gifts received during the election period that are worth more than \$500 are required to be disclosed to the Chief Electoral Officer within four months after

⁶¹⁷ Maureen Mancuso, Michael M. Atkinson, Andre Blais, Ian Greene and Neil Nevitte, *A Question of Ethics: Canadians Speak Out* (Toronto: Oxford University Press, 1998), Chapter 4, pp. 102-104.

the election.⁶¹⁸ The disclosure is to the CEO only, who is required to keep the disclosure statement confidential.⁶¹⁹

This secrecy clearly violates the egalitarian model's principle of informing voters. As well, given that the CEO has no enforcement powers under the *Conflict of Interest Code for Members of the House of Commons*⁶²⁰ (*MP Code* – or under the *Conflict of Interest Act (COIA)* which applies to Cabinet ministers examined below in section 4.3), this secrecy raises the question of how a conflict of interest created by the gift can be addressed after an MP is elected if only the CEO knows about it?

A related second area of concern, as detailed in sections 3.11 and 3.15, and sections 3.13 and 3.18, is that there is no prohibition in the *CEA* on a nomination race or party leadership contestant colluding with a third party, including by sharing information, in order to influence the third party's activities during a nomination contest (and, for leadership contestants, also to exceed whatever spending limit their party sets for the leadership contest). As well, there is no limit in the *CEA* on the amount that a third party can spend supporting a nomination or leadership contestant, and no requirement for third parties to register and disclose their activities during a contest. It is unclear whether this support would be considered a prohibited gift under the *MP Code*. If it is considered a prohibited gift, then nomination or leadership

⁶¹⁸ *CEA*, *supra* note 79.

⁶¹⁹ *CEA*, *supra* note 79, subsection 477.94(2).

⁶²⁰ House of Commons, *Conflict of Interest Code for Members of the House of Commons*, House of Commons Standing Orders, Appendix I, online: <<https://www.ourcommons.ca/procedure/standing-orders/Appa1-e.html>> (hereinafter "*MP Code*").

contestants who are not a sitting MP would have an advantage because they could accept support from, and collude with, a third party or parties during their contest.

As mentioned above in sections 3.5 to 3.7, and 3.11 to 3.13, and 3.24 and 3.25, a third area of concern is that if person raises money to explore becoming a nomination contestant or party leadership contestant, and then does not register as a contestant, or if a person wins a nomination contest and then decides not to register as a candidate, the contributors of the money are not required to be disclosed, including if the person receives money, property, use of property, services or other benefits (including a job offer) to not run for whatever reason (such as to give someone else a better chance of winning). This is a problem particularly if the person exploring running or making the decision not to run is a sitting MP and/or a Cabinet minister, and it is unclear whether the *MP Code*'s gift rules cover such contributions, gifts or other offerings and prohibit or, at least, require them to be disclosed publicly. It is also unclear whether the section 119 prohibition on bribery in the *Criminal Code* would apply, as it only applies to actions of an MP "in their official capacity" and it is unclear in law whether an MP exploring running in a nomination or leadership contest, or deciding not to run as a candidate, is an action undertaken in their official capacity as an MP.

A fourth, related gap in Canadian law that opens MPs up to being bribed is that it is unclear exactly when a successful candidate becomes an MP or, in the term used in the *Criminal Code*, an "official" who holds an

office.⁶²¹ When Parliament is dissolved for an election, MPs cease being MPs and, if they are running for re-election again, become candidates soon after dissolution or, in the case of a fixed election date, will likely have been confirmed as the candidate for their electoral district association (EDA) some time before dissolution. After the election, candidates cease being candidates but, if they have won, are not yet MPs. While the *Parliament of Canada Act* specifies that they begin being paid as an MP from election day on, and the *CEA* specifies that the election results are confirmed when the writ for each returned by the returning officer for each EDA to the Chief Electoral Officer (CEO), and the *House of Commons Procedure and Practice* book states that the CEO provides the final, certified list of MPs to the Clerk of the House, and that MPs have a right to take their seat and vote in the House after they take their oath, none of these documents state plainly exactly when a person who won election becomes an MP.⁶²² The *Parliament of Canada Act* is silent on the definition of an MP.

Let's assume that there is, in law, at least some time period, perhaps between election day and the day the results are confirmed and certified by the CEO and sent to the Clerk of the House, during which everyone knows that a person has been elected as an MP but they have not yet taken office. During this period the person can be offered, and can accept, bribes that are not covered by the anti-bribery, anti-corruption provisions in sections 119, 121

⁶²¹ *Criminal Code*, *supra* note 607, section 118, definition of "official".

⁶²² Andre Barnes, *When Does an Elected Candidate Become a Member of the House of Commons?* (Ottawa: Library of Parliament, February 2010), online: <https://publications.gc.ca/collections/collection_2015/bdp-lop/eb/YM32-5-2010-07-eng.pdf>.

and 122 in the *Criminal Code*, nor by sections 41 to 41.5 of the *Parliament of Canada Act*, as those provisions only apply to people who have taken office. A similar gap exists for senators, as there is a time period between the announcement by the Prime Minister that s/he has appointed someone to the Senate and the Senator taking their oath of office and seat in the Senate, and it is unclear if the anti-bribery provisions in the *Criminal Code* and in section 16 of the *Parliament of Canada Act* apply during that time period.

These gaps do not comply with the egalitarian model because it allows for unlimited gifts and favours to someone who will likely be a public office holder. Whatever this time period is currently, it should be eliminated, and these laws changed, to make it clear that it is illegal to give any gift, benefit or advantage or do any favour to anyone who, based on the initial election results, could become an MP, and illegal for the potential MP to solicit or accept any gift, benefit, advantage or favour.

A fifth area of concern is that the rules in the MP Code and *Ethics and Conflict of Interest Code for Senators (Senate Code)*⁶²³ do not cover the staff of MPs or Senators. As a result, staff: are allowed to receive unlimited gifts and hospitality from lobbyists and others; are not required to disclose any private interests they or their family members or friends have; are allowed to further the private interests (even specific private interests) of themselves, their family and friends and lobbyists who have done favours for them and; overall are allowed to act unethically in secret. While MPs and Senators

⁶²³ Senate of Canada, *Ethics and Conflict of Interest Code for Senators*, (August 3, 2021), online: <<https://seo-cse.sencanada.ca/en/code/ethics-and-conflict-of-interest-code-for-senators/>>, (hereinafter “*Senate Code*”).

remain the ultimate decision-makers on positions they take on policies and other matters, it is not difficult to see how their decision-making could be distorted by their staff advocating positions that further their own or others' private interests. The simple solution is to extend the current ethics rules to cover MP and Senator staff.

A sixth area of concern is that the *MP Code* (which was enacted in 2004) seems to set a high standard in subsection 2(e) as it states MPs are expected "not to accept any gift or benefit connected with their position that might reasonably be seen to compromise their personal judgment or integrity..." However, that subsection goes on to say "except in accordance with the provisions of this Code" and section 3.1 makes it clear that every part of section 2 is only aspirational, not actually enforceable, as it says that the Ethics Commissioner may only "have regard to" the provisions of section 2 when enforcing "members' obligations under this code."

As a result, the actual gifts rule is set out in subsection 14(1) of the *MP Code* which begins by setting out a similar standard as subsection 2(e) by stating:

"Prohibition: gifts and other benefits. 14. (1) Neither a Member nor any member of a Member's family shall accept, directly or indirectly, any gift or other benefit, except compensation authorized by law, that might reasonably be seen to have been given to influence the Member in the exercise of a duty or function of his or her office."

This seemingly very strong rule is further clarified by subsection 14(1.1) which states that gifts/benefits (a) relating to charitable or political events or (b) received from a caucus of MPs from all parties established concerning any subject are both covered by the rule.

However, subsection 14(2) then sets out exceptions to the rule which allow a Member or their family to accept courtesy, protocol, or hospitality gifts that are normal for MPs to receive. As well, while subsection 3(1) of the *MP Code* defines “benefit” as including money if no obligation exists to repay it and “a service or property, or the use of property or money that is provided without charge or at less than its commercial value,” it also contains the loopholes of excluding “a service provided by a volunteer working on behalf of a Member” or “a benefit received from a riding association or a political party.” As a result of these loopholes in the general prohibitions on accepting gifts, MPs are allowed to accept: volunteer help from anyone (including lobbyists) in secret; a secret benefit from their electoral district association (EDA) or party such as payments for personal expenses or other favours that would increase their loyalty to their party leader (and, thereby, possibly undermine them representing and addressing the concerns of the voters in their district). As well, they and their family members (defined in subsection 3(4) of the *MP Code* as including any spouse or common-law partner and any of his/her or the MP’s dependents) are allowed to accept courtesy/hospitality and gifts/benefits that could also cause a conflict of interest for them. The *Senate Code* contains similar loopholes that allow for unethical gifts.⁶²⁴

A seventh area of concern is the section 15(0.1) exception to the subsection 14(1) general prohibition on accepting gifts, which states that MPs

⁶²⁴ *Senate Code*, *supra* note 623, sections 2, 7.1, 7.2, 8-10, 11(1) and 11(2), 17-19. See also Senate Ethics Officer, *Guideline on Gifts and Other Benefits (Section 17 of the Code)*, (June 28, 2021), online: <<https://seo-cse.sencanada.ca/en/guideline-on-gifts-and-other-benefits-section-17-of-the-code/>> (hereinafter “Senate Ethics Officer, *Gifts Guideline*”).

may accept the gift of “sponsored travel” from anyone, and take any guest(s) they want with them on the trip, as long as the trip “arises from or relates to his or her position” as MP. The same unlimited gift of travel is allowed to be given to Senators under the *Senate Code*.⁶²⁵ For general gifts/benefits as defined under the *MP Code*, MPs are required under subsections 14(3) and (4) – and under subsections 15(1) and (2) for sponsored travel – to disclose to the Ethics Commissioner within 60 days of receipt if gifts/benefits/travel received within a 12-month period from one source have a total value of more than \$200 (before October 20, 2015, the threshold was \$500).⁶²⁶ For Senators under the *Senate Code* the threshold is \$500.⁶²⁷

Under subsection 14(3), the disclosure statement for general gifts/benefits must detail their source, nature and circumstances, and the statement for sponsored travel must include several details about the trip. Under subsection 15(3), the Ethics Commissioner prepares an annual public report of sponsored travel accepted by MPs during the previous calendar year. I checked the rate of disclosed sponsored travel gifts from 2011 to 2019. I did not include 2020 or 2021 because the COVID-19 pandemic essentially cancelled almost all travel, and so those years are not comparable

⁶²⁵ *Senate Code*, *supra* note 623, section 18. See also Senate Ethics Officer, *Guideline on Sponsored Travel (Section 18 of the Code)*, (June 28, 2021), online: <<https://seo-cse.sencanada.ca/en/guideline-on-sponsored-travel-section-18-of-the-code/>> (hereinafter “Senate Ethics Officer, *Sponsored Travel Guideline*”).

⁶²⁶ House of Commons Standing Committee on Procedure and House Affairs, “Thirty-ninth Report,” online: (June 2015) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=8040054&Language=E&Mode=1&Parl=41&Ses=2>> (hereinafter “Standing Committee on Procedure and House Affairs, “Thirty-ninth Report”).

⁶²⁷ *Senate Code*, *supra* note 623, subsection 17(3).

to 2011 to 2019. The summary of the travel statistics is set out below in Chart 22.

Chart 22: Summary of Sponsored Travel Gifts to Federal Canadian MPs from 2011 to 2019 inclusive⁶²⁸

Year	Total number of trips taken	Approximate number of trips sponsored by lobby groups
2011	73 trips by Bloc Quebecois (only one MP), Conservative, Liberal and NDP MPs	50-60
2012	92 trips by Bloc Quebecois (only one MP), Conservative, Independent (only one MP), Liberal and NDP MPs	50-60
2013	110 trips by Bloc Quebecois (only one MP), Conservative, Independent (only one MP), Liberal and NDP MPs	50-60
2014	98 trips by Conservative, Independent (only one MP), Green (two MPs), Liberal and NDP MPs	50-60
2015	28 trips by Conservative, Liberal and NDP MPs	10
2016	84 trips by Conservative, Liberal and NDP MPs	40

⁶²⁸ Conflict of Interest and Ethics Commissioner, List of Sponsored Travel webpage, online: <<https://ciec-ccie.parl.gc.ca/en/publications/Pages/SponsoredTravel-DeplParraines.aspx>>.

2017	74 trips by Conservative, Liberal and NDP MPs	50
2018	76 trips by Conservative, Liberal and NDP MPs	60
2019	43 trips by Conservative, Liberal and NDP MPs	15

These totals do not match the number of MPs who accepted a sponsored travel trip as a few MPs take more than one trip each year. Approximately 60-80 MPs disclosed sponsored travel trips each year (other than in 2015 and 2019). As the above figures represent only the disclosed trips, likely MPs have failed to disclose other trips sponsored by lobbyists (deliberately or due to lack of awareness of the rules), and also likely other trips sponsored by parliamentary associations have been taken by MPs.

As well, not all of the trips raise conflicts of interest issues as some trips are simply invitations for MPs to speak at conferences with travel and accommodation costs covered. As Chart 21 shows, approximately 50-60 MPs each year from 2011 to 2014, and approximately 40 in 2016, 50 in 2017, 60 in 2018⁶²⁹ and 15 in 2019, took a trip paid for by an organization that lobbies (whether registered or not under the *Lobbying Act*) federal politicians or government officials, and the most prevalent organizations that have sponsored trips in recent years are the Centre for Jewish and Israel Affairs and the Chinese International Economic Cooperation Association (much more

⁶²⁹ Note: Two of the 2018 trips are reported at the end as an addendum in the Ethics Commissioner's 2019 Annual Report on sponsored travel, as the trips were not disclosed properly

than any others), the Canadian Foodgrains Bank, the Canadian Palestinian Foundation of Quebec, the Taipei Economic and Cultural Office (Canada), and RESULTS Canada. Sponsored travel trips often cost thousands of dollars and, as a result, the trips do not comply with the egalitarian model not only because they can undermine the public's confidence in the appearance of, and actual, fairness and integrity of political processes, they also allow groups and individuals who have enough money to sponsor trips to have an opportunity to influence MPs that an average voter cannot afford.

While 2015 and 2019 showed a significant decrease in the number of trips, unlike 2011-2014 or 2016-2018 both were election years with pre-election and election campaign periods from July through to election day the third week of October, during which time MPs do not usually travel.⁶³⁰ As well, in the October 2015 election 215 new MPs were elected, but not sworn in until mid-November, and likely few of them even knew before the end of 2015 that they could accept gifts of sponsored travel.⁶³¹ In the October 2019 election, 91 new MPs were elected,⁶³² and again not sworn in until mid-November, and again likely they didn't know they could take sponsored travel trips before the end of 2019. I believe these events explain the decrease in trips during both of those years.

⁶³⁰ Elizabeth Thompson, "Taiwan, Saudi Arabia top destinations for junkets by MPs," (March 24, 2016), iPolitics.ca, online: <<http://ipolitics.ca/2016/03/24/taiwan-saudi-arabia-top-destinations-for-free-trips-by-mps/>>.

⁶³¹ Donovan Vincent, "Facts and figures from Canada's 42nd election," (October 20, 2015), *Toronto Star*, online: <<https://www.thestar.com/news/federal-election/2015/10/20/facts-and-figures-from-canadas-42nd-general-election.html/>>.

⁶³² CBC News, "Canadian Parliament Primer," online: <<https://newsinteractives.cbc.ca/elections/federal/2019/commons/>>.

Given the loophole in the *MP Code* that allows MPs to accept the gift of sponsored travel, and the fact that about 20 per cent of MPs disclose sponsored travel trips paid for by lobbyists each year, I don't think it is surprising that evidence exists showing the federal political/social culture regime has essentially ignored the Ethics Commissioner's advisory opinions on gifts until very recently, and still ignores some aspects of her opinions. In her March 2012 and February 2015 submissions to the House of Commons committee reviewing the *MP Code*, then-Ethics Commissioner Mary Dawson expressed that "there are risks arising from sponsored travel" and she recommended in 2012 and 2015: that an "acceptability test" be added for such travel (as exists for other gifts); that the disclosure threshold requirement be decreased from \$500 to cover travel gifts worth more than \$200, and; that all sponsored travel be disclosed even if it is paid for by some sort of parliamentary association (i.e. not by a lobby group).⁶³³ As well, the Ethics Commissioner stated that since 2007, despite several speeches, caucus and committee presentations, and annual reports by her (in addition to the advisory opinions), "the misperception has persisted among some Members that a gift is automatically acceptable as long as it is valued at less than \$500"

⁶³³ Conflict of Interest and Ethics Commissioner, *The Conflict of Interest Code for Members of the House of Commons: Five-Year Review, Submission to the Standing Committee on Procedure and House Affairs*, (2012) online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Five-Year%20Review%20Code.pdf#search=Five%20Year%20Review>>. Conflict of Interest and Ethics Commissioner, *The 2015 Review of the Conflict of Interest Code for Members of the House of Commons: Submission to the Standing Committee on Procedure and House Affairs*, online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InternalReports/PROC%20submission%20re%202015%20review%20of%20Code%20-%20Feb2015.pdf#search=2015%20review>> at 6-7. NOTE: The Committee did not complete its review of the *MP Code* in 2012, and so unless noted below, the Ethics Commissioner's submission in 2015 made the exact same recommendations as were made in 2012.

(i.e. under the disclosure threshold). And, she added: “Some Members have indicated to me that they believe the gift rules are unnecessary, that they do not adhere to them as they are their own best arbiter of what is appropriate, and that they ‘cannot be bought.’”⁶³⁴

From November 2013 on to the end of her term, Ethics Commissioner Mary Dawson also issued six advisory opinions on the acceptance of gifts by MPs under the *MP Code*.⁶³⁵ Again and again the Ethics Commissioner reminded MPs that it is not the value of the gift that matters – anything more than a trinket can cause a conflict of interest if it appears to be given with the intent of influencing the MP. With regard to invitations to receptions where drinks and/or meals are provided, usually held by organizations lobbying MPs, the Ethics Commissioner noted in 2012 and 2015 that they are “commonly considered a regular part of a Member’s daily routine” and that some MPs believe these gifts should not be covered by the rules because it is “impossible” that they influence any MP.⁶³⁶

Given this attitude by MPs, in her 2012 submission the Ethics Commissioner had recommended “That Members consider whether they wish to make any amendment to the rules relating to invitations to occasions where meals or refreshments are offered.”⁶³⁷ As the attitude persisted over the next three years, however, the Ethics Commissioner essentially seemed to give in

⁶³⁴ Ethics Commissioner, *The 2015 Review*, *supra* note 633 at 3.

⁶³⁵ Conflict of Interest and Ethics Commissioner, Advisory Opinions (Code) webpage, online: <<https://web.archive.org/web/20171201173009/http://ciec-ccie.parl.gc.ca/EN/ReportsAndPublications/Pages/CommuniquesAndAdvisoryOpinions.aspx/>>.

⁶³⁶ Ethics Commissioner, *The 2015 Review*, *supra* note 633 at 4.

⁶³⁷ Ethics Commissioner, *The 2012 Review*, *supra* note 633 at 11.

to the MPs' culture. In her 2015 submission, the Ethics Commissioner recommended that MPs exclude from the *MP Code* all receptions/events to which all MPs are invited. That change was not made by the House of Commons – instead it only decreased the threshold requiring disclosure of gifts or sponsored travel received from one source in a year from \$500 down to \$200.⁶³⁸ As with the disclosure of donations, the disclosure alone does not eliminate the conflict of interest created by the gift, it only informs the public of the conflict.

In addition, in one of Ethics Commissioner Dawson's advisory opinions on gifts issued in March 2016, she stated the following:

What should I do if I have attended a reception that I shouldn't have?

If you have accepted an event invitation or ticket that you should not have accepted and have already attended the event, you must reimburse the donor for its market value, that is, the cost that someone else, such as a member of the public, would have had to pay to attend the event.⁶³⁹

This contradicted Ethics Commissioner Dawson's other statements on gifts as it suggests she is fine with MPs accepting gifts and that, in her mind, repaying the cost of the ticket undoes the wrong of accepting the ticket. Some leading lobbyists, who are actors in the federal political/social culture, complained publicly in September 2016 about one of the Ethics

⁶³⁸ Standing Committee on Procedure and House Affairs, "Thirty-ninth Report," *supra* note 626 at 13 (NOTE: the rule change was implemented in October 2015).

⁶³⁹ Conflict of Interest and Ethics Commissioner, *Invitations and Receptions: Advisory Opinion*, online: <<https://web.archive.org/web/20180110210919/http://ciec-ccie.parl.gc.ca/EN/ReportsAndPublications/Pages/AdvisoryOpinionInvitationsReceptions.aspx>>.

Commissioner's gift rulings, dismissing it in the same way that some MPs have dismissed the gift rules by claiming that it is a non-issue and that small gifts can't influence policy-makers.⁶⁴⁰ Given these conflicting rulings by the commissioners, and the loopholes in the rules, including the fact that donations of up to \$1,700 annually (in 2023) are allowed to parties and electoral district associations, it is not surprising that MPs would continue to accept gifts that violate the rules. The contradictory statements and rulings by the Ethics Commissioner, and the disregard for the rules by many MPs, seem to have created a social norm⁶⁴¹ that approves of, if not encourages, unethical gifts within the federal political/social culture.

An eighth area of concern is a gift that also straddles the political donation/regular gift divide that MPs are prohibited from accepting under the *Parliament of Canada Act*⁶⁴² – namely a transfer of money from a trust fund. The brief history of this prohibition is that when then-Liberal MP Tony Ianno was asked by the media in 2003, he disclosed that he maintained a trust fund with his Liberal Party electoral district association (EDA) and had obtained about \$200,000 in donations to the fund. This disclosure touched off a storm

⁶⁴⁰ Marco Vignolitti, "This is not exactly the Pentagon Papers," (June 21, 2016), *Hill Times*, online: <<https://www.hilltimes.com/2016/09/21/this-is-not-exactly-the-pentagon-papers-lobbyists-voice-concern-over-ethics-commissioners-ruling-on-gifts/80778/>>.

⁶⁴¹ I believe that the evidence presented shows that both the federal political/social culture fit within the framework of how legal consciousness operates within social networks to define how the law actually governs actions by people and organizations, as articulated in: Susan S. Silbey, "After Legal Consciousness" (2005) *Annu. Rev. Law Soc. Sci.* 1: 323 at 324. See also: Daron Acemoglu and Matthew O. Jackson, "Social Norms and the Enforcement of Laws," online: (January 1, 2016) MIT Department of Economics Working Paper No. 14-16 <<https://ssrn.com/abstract=2475920> or <http://dx.doi.org/10.2139/ssrn.2475920>> at 1-4 and 27.

⁶⁴² *Parliament of Canada Act*, *supra* note 329, sections 41.1 to 41.5.

of media coverage including queries to many other MPs about whether they also had trust funds.

At the time, EDAs were just about to be required, for the first time, to disclose political donations they received. As a result, the possibility that any MP or riding association would continue to maintain a secret trust fund caused a high level of concern, as they could take donations into the fund in secret, and use money from the fund to make donations to community groups and others in the riding to, in effect, “buy goodwill” that would help them win the next election.⁶⁴³ However, the Liberal governments headed by Jean Chrétien and Paul Martin resisted closing the secret trust fund loophole. It was not closed until June 12, 2007 when the section in the Conservatives’ “Federal Accountability Act” that added the new fund-prohibition sections to the *Parliament of Canada Act* came into force.⁶⁴⁴

Heather MacIvor maintains that there is a danger that parties and EDAs can still have secret trust funds as they are not explicitly prohibited under the *CEA* (contestants and candidates are required to have only one bank account for all their contributions and spending, but that requirement

⁶⁴³ Democracy Watch, Media Release: Democracy Watch issues “search warrant” for secret political funds, changes to Bill C-24, (April 24, 2003) online: <<http://www.dwatch.ca/camp/RelsApr2403.html>>. Democracy Watch, and the Democracy Watch board of directors, were sued for libel for \$2 million by Tony Ianno when a representative of Democracy Watch used the word “corruption” in relation to Mr. Ianno’s secret trust fund during appearances on TVO’s Studio 2 program with host Steve Paikin, and on CBC-TV’s Sunday morning program with host Evan Solomon. TVO issued an apology, but CBC-TV did not, and two years later Mr. Ianno withdrew the lawsuit.

⁶⁴⁴ Democracy Watch, Media Release: Democracy Watch details changes in 15 key areas that must be made to the Federal Accountability Act, (May 30, 2006) online: <<http://www.dwatch.ca/camp/RelsMay3006.html>>. Democracy Watch, Media Release: Six months after Parliament passed it, half of so-called “Federal Accountability Act” still not in force, (June 13, 2007) online: <<http://www.dwatch.ca/camp/RelsJun1307.html>>.

does not apply to parties or EDAs).⁶⁴⁵ As well, subsection 364(4) states that only funds “other than trust funds” may be transferred from a party or EDA to a candidate, which indicates that the *CEA* allows parties and EDAs to maintain secret trust funds. However, as detailed in Chapter 6, the *CEA* requirements make it clear that all funds donated or loaned to a party or EDA are subject to the contribution limits (other than funds given to pay for the personal and litigation expenses, which are exempted), and all expenses must be accounted for in the annual and election disclosure reports that parties and EDAs are required to file with the CEO and make public (including personal and litigation expenses), and that it is prohibited to use funds or any other benefit: to induce the CEO to vote; to offer a bribe to anyone to influence them to vote for or against a candidate or party or not vote; to vote outside of their district or vote if they are not qualified to vote or; to make a false declaration, including in order to register to vote.⁶⁴⁶ According to Elections Canada, this influence includes giving grants to community groups.⁶⁴⁷ As a result, the purposes that such a fund could be used for that would endanger the integrity of an election are prohibited.

⁶⁴⁵ MacIvor (March 2008), *supra* note 3, at 135-138.

⁶⁴⁶ See the inducement prohibitions in *CEA*, *supra* note 79, sections 281.2 and 282.7 and subsections 281.3(b), 281.4(b), 549(4), 169(4.1)(d), 161(5.1)(d) and 111(d.1).

⁶⁴⁷ In an email to the author on May 9, 2022, the Political Financing division of Elections Canada stated that: “If the political entity in question uses funds to give grants to groups or individuals without the suggestion that they are given on the condition of support for the political entity, it is highly likely that such expenditures would be regulated in all cases. In the case of parties and EDAs, all expenses must be recorded in the relevant return or financial statements. In the case of candidates or contestants, all expenses that are incurred “as an incidence of” an election or a contest must be reported as an electoral, nomination or leadership campaign expense as the case may be. All such expenses must also be paid out of the regulated funds of such an entity. In the case of a candidate or contestant the relevant question is whether the expense is an “incidence” of the election or contest. This is a question of fact, but in general, payments made by a candidate or contestant to community members for “good works” are an incidence of their attempt at election or selection (in that they are

It's true that the accounting of party and EDA spending (and spending by candidates and contestants) is not required to be detailed enough to determine if they have a secret trust fund, nor to determine the use(s) of the funds in any fund, nor to determine whether any funds (whether in a trust fund or the central bank account) are being used for a purpose that donors would question. A recent example revealed in 2019 is that then-Conservative Party leader Andrew Scheer received money from the Party for clothes, a minivan and private school tuition for his children but this was not disclosed in the Party's financial statements, and even senior Party officials claimed that they were not informed about the funds.⁶⁴⁸ I make several proposals to increase disclosure, and make auditing more effective, in Chapter 6, sections 6.9 and 6.10.

A ninth area of concern is the offer of a future job or benefit to an MP by an individual, business or other entity because such an offer can create a conflict of interest for an MP. Clause 119(1)(a) and (b) of the *Criminal Code* prohibit offering an MP and an MP accepting, directly or indirectly, an "office, place or employment" or "valuable consideration" but the prohibition only applies if the offer is conditional on the MP doing or not doing something. The

intended to raise the positive profile of such a candidate or contestant in the election or contest). I should note that there is also a question of bribery in the case of such payments in relation to an election, but I presume that goes beyond the scope of what you are asking. However, such direct payments would raise that concern and if Elections Canada were asked by an entity about such a proposed activity, we would raise this concern directly with the entity. In summary, such funds and payments would be treated in the same way as any other funds or payments held by political entities under the *CEA*. In most cases this means that the transactions are regulated as opposed to the method of holding funds being prohibited."

⁶⁴⁸ Stephanie Levitz, "Internal audit of Scheer's spending reveals party money spent on school, clothes, minivan," (April 2, 2020), The Canadian Press, online: <<https://globalnews.ca/news/6769964/andrew-scheer-internal-audit-conservatives/>>.

prohibition on gifts in section 14 of the *MP Code* does not cover such offers at all. As a result, it is legal for an MP to have a clear offer of a future job or other benefit, and not disclose it, and not recuse themselves from any discussion, vote or decision-making process.

In addition, under section 7 of the *MP Code*, MPs are allowed, without disclosing it to the Ethics Commissioner or publicly, to have another job or profession, carry on a business, be a director of corporation, association, trade union or non-profit organization or a partner in a partnership “as long as they are able to fulfill their obligations” required by the *Code*. This allows secret “contributions” to be made to an MP through a constituent or lobbyist employing them or being their customer. As well, MPs are allowed to have investments in businesses, including through open-ended mutual funds that are not required to be disclosed to the public, and to hold them in a so-called “blind” trust which doesn’t really distance them from the MP as the MP knows what they put into the trust, chooses the trustee and the trustee can inform the MP of an “extraordinary event” that “is likely to materially affect” an investment in the trust, and also about tax requirements due to the investments.⁶⁴⁹ All of this amounts to the rules essentially allowing MPs to profit personally, or plan to profit in the future, using the resources, connections and relations they develop as an MP.

This is all made more possible by the tenth area of concern, which is that the *MP Code* has another, very significant loophole. While MPs are prohibited from hiring staff and using the office and other resources they are

⁶⁴⁹ *MP Code*, *supra* note 620, section 17, 19, and clause 24(3)(j).

given through the House of Commons in ways that further their or their family's interests,⁶⁵⁰ the loophole allows an MP to be in a significant financial conflict of interest, and take part in decisions that advance their own, their family's, friends' or associates' financial interests, and still be considered to be fulfilling their obligations required by the *Code*. The loophole is in the definition of "private interest" in subsection 3(3) of the *MP Code* which says an MP cannot have a private interest when deciding or acting on a matter that applies generally or affects them in a similar way as a broad class of the public is affected.⁶⁵¹

This means when participating in a discussion, debate, vote or decision-making process to change any of the federal government's laws, policies, taxes or subsidies, or spending, granting or service programs, that apply generally or affect a broad class of the public (which almost all of them do), MPs are allowed to have a financial, social or political conflict of interest and still participate in the decision-making process. In other words, the *MP Code* only applies to decision-making processes that make very specific decisions, such as handing out a government contract, and MPs do not usually participate in such decisions. This loophole may be even broader, as the House Committee that reviewed the *MP Code* in 2022 decided that, even though the Ethics Commissioner recommended it, the rules in subsections

⁶⁵⁰ House of Commons Board of Internal Economy, *Member's By-Law*, (June 16, 2022), online: <<https://www.ourcommons.ca/DocumentViewer/en/boie/by-law/10000>>, sections 4-9, 62(1), 65(1), 66(1), 95 (and, for House Officers, also 89(1), 92(1) and 93(1)) and several other sections concerning office use and expenses, travel and accommodation expenses, (hereinafter "*Member's By-law*").

⁶⁵¹ See also *MP Code*, *supra* note 620, section 13.1.

3(2) and 3(3) of the *Code* should not specify that furthering the interests of a “person” includes legal persons (i.e. businesses, interest groups and other entities).⁶⁵² As a result, it is possible that the Ethics Commissioner could decide that the *MP Code* does not apply at all when an MP is participating in a decision-making process that involves furthering the interests of a business, interest group or entity to which they, their family or friends are connected. If a rare situation arises in which an MP has a conflict and is participating in a specific decision-making process, the MP is required to disclose it publicly and recuse themselves from the process.⁶⁵³

The *Senate Code* has very similar loopholes that allow senators who are not Cabinet ministers to engage in outside activities (section 5), although other Senate rules prohibit using Senate resources for personal, business or party purposes,⁶⁵⁴ and loopholes that only apply the *Code* rules to senators’ financial interests (subsection 11(1)), and that allow senators to have investments (sections 21-26 and 28), and that also say that a senator cannot have a private interest when deciding or acting on a matter that applies generally or affects them in a similar way as a broad class of the public is affected.⁶⁵⁵

⁶⁵² Procedure and House Affairs report (June 2022), *supra* note 440, at 40.

⁶⁵³ *MP Code*, *supra* note 620, sections 12-13.

⁶⁵⁴ Senate of Canada, *Senate Administrative Rules*, (June 23, 2022), online: <https://sencanada.ca/media/szhn5ciq/sars_complete_b.pdf>, Division 1:00 Interpretation, Chapter 1:02 Principles, subsections 3(b) and 4(b) and clause 4(c)(ii); Division 1: Interpretation, Chapter 1:03 Definitions, section 1 definition of “parliamentary functions” and “public business” and; Division 3:00 Senate Resources, Chapter 3:01 Allocation and Use of Senate Resources, sections 1 and 5 (hereinafter “*Senate Rules*”).

⁶⁵⁵ *Senate Code*, *supra* note 623, subsection 11(2) and 16.

However, in contrast to the *MP Code*, Senators added in June 2014 three binding rules to the *Senate Code* that at least somewhat override these loopholes -- subsection 2(1) which requires senators to give precedence to fulfilling their duties and functions as a Senator over any other activity; section 7.1 which requires Senators to act at all times, on the job and in every other action, in ways that uphold highest standard of dignity (subsection 7.1(1), and prohibits them from acting in ways that reflect adversely on position of Senator or the Senate (subsection 7.1(2)) and; section 7.2 which requires Senators to perform their duties and functions as a senator with dignity, honour and integrity.⁶⁵⁶

It is unclear exactly how much these rules override the conflict of interest loopholes in the *Code*. The Senate Ethics Officer stated clearly in his annual report issued in June 2022 that, because of rules 2(1), 7.1 and 7.2, combined with expectations set out in the original version of the *Code* that Senators will avoid even the appearance of a conflict of interest (subsections 2(2)(b) and (c)), he is advising senators (if they ask) that they cannot take part in decisions if they have outside interests that cause even an appearance of a conflict of interest.⁶⁵⁷ However as of May 20, 2023 he had not issued a ruling on such a situation.

⁶⁵⁶ *Senate Code*, *supra* note 623. See also on section 7.1: Standing Committee on Ethics and Conflict of Interest for Senators, *Ethics and Conflict of Interest Code for Senators Directive 2015-02*, (July 27, 2015), online: <<https://seo-cse.sencanada.ca/media/yf4biy0c/directive-2015-02-rules-of-general-conduct.pdf>>.

⁶⁵⁷ Senate Ethics Officer, *2020-2021 Annual Report*, (June 22, 2021), online: <<https://seo-cse.sencanada.ca/media/fmkldmms/annual-report-2020-2021.pdf>> at 16-18. Senate Ethics Officer, *2021-2022 Annual Report*, (June 22, 2022), online: <<https://seo-cse.sencanada.ca/media/lz4ooi2r/annual-report-2021-2022.pdf>> at 19-21.

This change in enforcement policy by the Senate Ethics Officer comes much too late, eight years after these three rules were added to the *Senate Code*. However, at least it establishes a new standard that may, depending on how the Ethics Officer actually rules on situations, prohibit Senators from being a shareholder and/or board member of a big business while also being on Senate committees that review laws that apply to that big business. Senator Larry Campbell did this for several years⁶⁵⁸ and, as of October 2021, more than 60 Senators were board members of businesses or organizations and/or had stock market or mutual fund investments (but did not disclose which companies they were invested in) and/or did other paid outside work.⁶⁵⁹ Another indication of how this new standard is changing decision-making in the Senate will be whether more Senators start recusing themselves from decision-making processes, as Senators are required to disclose conflicts publicly when they recuse themselves.⁶⁶⁰

The tenth area of concern is a series of other technical loopholes in the *MP Code* and *Senate Code* that further allow MPs and Senators to participate in decision-making and policy-making when they have an appearance of a conflict of interest. It should be noted that these other loopholes may be

⁶⁵⁸ Democracy Watch, News Release, (September 27, 2018), online: <<https://democracywatch.ca/dwatch-calls-on-senate-ethics-officer-to-rule-senator-campbells-corporate-board-position-and-investments-violate-ethics-code/>>. Sam Cooper, "Sen. Larry Campbell refuses to answer questions about board role for B.C. casino company," (September 18, 2018), GlobalNews.ca, online: <<https://globalnews.ca/news/4461524/larry-campbell-refuses-answer-questions-great-canadian-gaming/>>.

⁶⁵⁹ Democracy Watch, "List of Senators Who Hold or Have Recently Held Business/Organization Board Positions and/or Employee Positions and/or Who Have Stock Market Investments," (October 18, 2021), online: <<https://democracywatch.ca/list-of-senators/>>.

⁶⁶⁰ *Senate Code*, supra note 623, sections 12-14.

overridden by a rule in both codes that says that MPs and Senators cannot participate in policy-making if it would “improperly further another person's or entity's private interests.”⁶⁶¹ However, it is unclear, and relies on the Ethics Commissioner or Senate Ethics Officer ruling that the action was “improper” and, I contend, they likely would not issue such a ruling if the action is allowed due to a loophole in the codes.

The first other technical loophole is that section 5 of the *MP Code* states that as long as an MP's activity “is one in which members normally and properly engage on behalf of constituents” the MP cannot violate any rule in the *Code*. Since 2004 when the *MP Code* was enacted, the Ethics Commissioner has never defined a list of activities that qualify under the section 5 exemption, and the Commissioner's summary of the rules in the *MP Code* does not even mention section 5.⁶⁶² In contrast, subsection 2(2)(a) of the *Senate Code* does not exempt all senator's activities on behalf of their community as it still requires them to serve “the public interest” and, again, subsections 2(1), 7.1 and 7.2. also require them to always act with dignity and integrity.

The second technical loophole is that, unlike for Cabinet MPs and their staff and appointees, the *MP Code* and the *Senate Code* only cover financial conflicts of interest, not political or social conflicts.⁶⁶³ Thirdly, the definition of

⁶⁶¹ *MP Code*, *supra* note 620, sections 4, 6, 8-11. *Senate Code*, *supra* note 623, sections 8-10.

⁶⁶² Conflict of Interest and Ethics Commissioner, *Compliance with the Code – Summary of Your Obligations as a Member of the House of Commons*, (October 24, 2019), online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/Summary-MPs-Resume-deputes.aspx>>.

⁶⁶³ *MP Code*, *supra* note 620, subsection 3(2). *Senate Code*, *supra* note 623, subsection 11(1)

“family” members (whose interests are not allowed to be advanced by an MP or Senator) in both codes is limited to their spouse and dependents.⁶⁶⁴ In contrast, in the rules that restrict spending by an MP or Senator, the definition of family also includes parents, grandparents and siblings, and for MPs also their nephews and nieces.⁶⁶⁵ Given how close these relations are to an MP or Senator, the ethics rules should also prohibit them from furthering their interests.

The fourth technical loophole is that the *MP Code* and *Senate Code* do not prohibit furthering the interests of friends. In contrast, as detailed below in section 4.3, the *Conflict of Interest Act* (the “*COIA*”) that applies to Cabinet ministers, their staff and top government officials does prohibit this⁶⁶⁶ but doesn’t define “friend” – the Ethics Commissioner expanded the definition in his most recent ruling to mean close personal friends and professional and business colleagues.⁶⁶⁷ It would be better to define “friend” directly in the *COIA* and the codes so that the Commissioner does not have the discretion to change the definition from ruling to ruling.

The fifth technical loophole is that, as detailed below in section 4.3, the *COIA* only prohibits Cabinet MP and their staff and appointees from giving

⁶⁶⁴ *MP Code*, *supra* note 620, subsections 3(1) definitions of “common-law partner” and “spouse” and 3(4). *Senate Code*, *supra* note 623, subsections 3(1) definitions of “common-law partner” and “spouse” and 3(2).

⁶⁶⁵ *Member’s By-Law*, *supra* note 650, subsection 1(1) definition of “immediate family”. *Senate Rules*, *supra* note 654, Division 1:00 Interpretation, Chapter 1:03 Definitions, section 1 definition of “family member”.

⁶⁶⁶ *Conflict of Interest Act*, (S.C. 2006, c. 9 s. 2), sections 4, 6, 8 and 9 (hereinafter “*COIA*”).

⁶⁶⁷ Conflict of Interest and Ethics Commissioner, *The Trudeau Report*, (December 20, 2017), online: <<https://ciiec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/TrudeauReport.aspx>> and also at: <<https://ciiec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Trudeau%20Report.pdf>> at 36-39 (hereinafter “Ethics Commissioner: *The Trudeau Report*”).

preferential treatment to a person or entity on the basis of “the identity of the person or organization that represents” the person or entity. The *MP Code* and *Senate Code* do not prohibit preferential treatment at all.⁶⁶⁸ In contrast, as detailed below in section 4.4, the rules for government employees prohibit giving preferential treatment to any person or entity. While this is a difficult area, as politicians and public officials make decisions and the decision usually favours some people or entities more than others, I contend that the rule could be fashioned to prohibit preferential treatment to anyone in the process of policy-making, which would essentially require meaningful public consultation and relatively equal communication with all stakeholders before making a final decision.

The sixth technical loophole is that, as noted above, while MPs and Senators are required to disclose conflicts of interest and to recuse themselves from policy-making processes when in a conflict (despite the many loopholes detailed above that exempt them from most conflicts), they are only required to disclose, for themselves and their family members, assets, liabilities worth more than \$10,000 (including, for MPs, a credit card balance of more than \$10,000 if it has been outstanding for more than six months), although Senators are not required to disclose cash on hand or on deposit at a financial institution, guaranteed investment certificates or financial instruments issued by any Canadian government or agency (and it is unclear

⁶⁶⁸ *COIA*, *supra* note 666, section 7.

whether MPs or Senators are required to disclose holdings of cryptocurrency or other digital/intangible assets).⁶⁶⁹

In contrast, the disclosure threshold for income earned in the previous 12 months (or expected to be earned in the next 12 months) is \$1,000 for MPs and their family members (disclosed to the Ethics Commissioner only – the public disclosure threshold is \$10,000) and \$2,000 for Senators and their family members.⁶⁷⁰ Lowering the disclosure threshold for assets and liabilities to \$1,000 would add another legal measure that helps make it clear that giving a valuable gift to an MPs and Senators is prohibited, as they would be required to disclose a gift worth \$1,000 or more as a new asset by notifying the Ethics Commissioner within 60 days (MPs) or the Ethics Officer within 30 days (Senators).⁶⁷¹

An eleventh technical loophole that raises concerns about fulfilling the egalitarian model is a gift given to an MP that is similar to the favour done by a party leader or executive appointing an election candidate in an electoral district, evaluated above in sections 3.5 and 3.6. The gift is a job promotion or demotion given by a party leader to an MP. This type of gift that is not mentioned in the *MP Code* or the *COIA* (as discussed below in subsection 4.3) but it is clearly legal under the *Parliament of Canada Act*.

⁶⁶⁹ *MP Code*, *supra* note 620, sections 20-24, with the exemptions set out in subsections 21(1)(a) and 24(3)(a). *Senate Code*, *supra* note 623, sections 27-33, with the exemptions set out in clause 28(1)(h), subsection 28(4) and clause 31(1)(h). See also Standing Committee on Ethics and Conflict of Interest for Senators, *Ethics and Conflict of Interest Code for Senators Directive 2015-01*, (June 29, 2015), online: <<https://seo-cse.sencanada.ca/media/4ask2utu/directive-2015-01-failure-of-the-duty-to-disclose.pdf>>.

⁶⁷⁰ *MP Code*, *supra* note 620, subsections 21(1)(b) and 24(3)(b). *Senate Code*, *supra* note 623, clauses 28(1)(d) and 31(1)(d).

⁶⁷¹ *MP Code*, *supra* note 620, subsection 21(3). *Senate Code*, *supra* note 623, subsection 28(6).

The benefit of such a promotion is not only the job title and extra power but also financial – MPs appointed as Cabinet ministers or parliamentary secretaries are paid more as are chairs and vice chairs of parliamentary committees, party whips, house leaders and caucus chairs.⁶⁷² And while MPs who are members of standing committees of the House of Commons are not paid more, other than members of the specially constituted National Security and Intelligence Committee of Parliamentarians⁶⁷³ (which has members appointed by the Prime Minister in consultation with party leaders),⁶⁷⁴ these positions allow MPs to participate more in the review of bills and government actions.

As well, party leaders generally control the decision of removing an MP from the party caucus and re-admitting an MP back into caucus. These promotions and demotions raise concerns because they give a party leader, as one person, more influence over MPs' opportunity to participate in debates than an average voter has, creating a conflict of interest for the MP between representing voters' concerns and supporting the party leader's position on any issue.

A twelfth technical area of concern is the gift of promotion for leaving one political party caucus and joining another, or leaving one's job as a federal MP to be promoted as a provincial politician or appointed to another

⁶⁷² *Parliament of Canada Act*, *supra* note 329: sections 61 and 62.2 re: extra pay for parliamentary secretaries; clause 62.1(1)(g) and (h) re: extra pay for chairs and vice-chairs of committees, and; subsections 62.3(1) and (2) re: extra pay for the other positions.

⁶⁷³ *Parliament of Canada Act*, *supra* note 329, subsections 62.3(3) and (4).

⁶⁷⁴ Under the *National Security and Intelligence Committee of Parliamentarians Act* (S.C. 2017, c. 15).

government position, an action that is not so clearly legal. No specific rule in federal law prohibits “crossing the floor” (as it is commonly known, referring to the floor of the House of Commons). Complaints were filed in 2006 alleging that federal Canadian MPs who switched parties violated the *MP Code* principle in subsection 2(b) that requires them to be honest with voters. Those complaints were rejected by then-Conflict of Interest and Ethics Commissioner Bernard Shapiro on the highly questionable basis that the principle was vague and unenforceable.⁶⁷⁵

However, it is arguable that offering such a promotion or another government position is a violation of the anti-bribery provisions in the *Criminal Code*, specifically section 119.⁶⁷⁶ An unprecedented prosecution initiated in September 2015 involving then-Ontario Liberal Cabinet minister Glenn Thibault somewhat tested that premise, as the Liberal Premier’s Chief of Staff Pat Sorbara and another Liberal Party official named Gerry Lougheed were charged with offering bribes under the provincial elections law and, initially, the *Criminal Code*. Ms. Sorbara allegedly offered campaign jobs to two of Mr. Thibault’s staff if he would leave his position as a federal NDP MP and run as a candidate for the Ontario Liberals in a by-election in Sudbury, and she and

⁶⁷⁵ Democracy Watch, News Release: Democracy Watch sends letters to Ethics Commissioner requesting details on when he will rule on complaints against party-switchers Stronach and Emerson, and Prime Ministers Martin and Harper, (April 27, 2006) online: <<http://www.dwatch.ca/camp/RelsApr2706.html>>. Democracy Watch, News Release: Ethics Commissioner refuses to deal with complaint about MP Wajid Khan switching parties and keeping report secret, (March 14, 2007) online:

<<http://www.dwatch.ca/camp/RelsMar1407.html>>. See also David Gussow, “Crossing the Floor, Conflict of Interest and the Parliament of Canada Act,” (Summer 2006), Vol. 29:2

Canadian Parliamentary Review, online:

<<http://www.revparl.ca/english/issue.asp?param=174&art=1187>>.

⁶⁷⁶ *Criminal Code*, *supra* note 607.

Lougheed allegedly offered prospective Liberal nomination race candidate Andrew Olivier jobs or posts if he would not contest Mr. Thibeault's appointment as a Liberal's by-election candidate.⁶⁷⁷

Mr. Thibeault was not charged with accepting a bribe, and the *Criminal Code* bribery charge against Lougheed was stayed in April 2016, and the case was dismissed in October 2017 before any defence witnesses were called through a rare directed ruling by Judge Howard Borenstein in which he concluded that offering to employ "two entrusted staff" of Thibault's in a campaign "does not amount to bribery" and that the law applies only to election candidates, not to nomination race candidates, and so the offers made to Olivier are not covered by the law.⁶⁷⁸ Crown prosecutors did not appeal the directed ruling, and so the line drawn by Ontario's election law, and the similar provision in section 119 of the *Criminal Code*, remains untested at the higher court level. As well, how the law applies to a situation involving an offer of a gift that benefits an MP directly, to entice them to switch parties or leave their seat, remains to be tested in the courts.

⁶⁷⁷ Under clause 96.1(e) of Ontario's *Election Act*, R.S.O. 1990, c. E.6, online: <<https://www.ontario.ca/laws/statute/90e06/>>. Allison Jones, "Two Ontario Liberals charged with bribery under Election Act," (November 1, 2016) online: CTVNews.ca <<http://toronto.ctvnews.ca/two-ontario-liberals-charged-with-bribery-under-election-act-1.3141083/>>.

⁶⁷⁸ Ainslie Cruickshank, "Thibeault 'should face charges,' says Democracy Watch co-founder," (November 23, 2016) online: iPolitics.ca <<http://ipolitics.ca/2016/11/23/thibeault-should-face-charges-says-democracy-watch-co-founder/>>. Rob Ferguson, "Criminal charges stayed against Gerry Lougheed in Sudbury byelection affair," (April 27, 2016) online: *Toronto Star* <<https://www.thestar.com/news/queenspark/2016/04/27/crown-drops-charges-against-gerry-lougheed-for-now-in-sudbury-byelection-scandal.html/>>. Rob Ferguson, "Judge dismisses charges in Sudbury byelection trial," (October 24, 2017) online: *Toronto Star* <<https://www.thestar.com/news/queenspark/2017/10/24/charges-dismissed-by-judge-in-sudbury-byelection-trial.html/>>.

In summary, the *MP Code* and *Senate Code* rules do not align with the egalitarian model because they allow MPs and Senators to accept gifts, benefits and favours (including expensive sponsored travel and volunteer labour) from third parties and lobbyists, and the *MP Code* also allows party leaders to give MP job promotions (or demotions) and allows MPs to consider and accept offers of current or future outside jobs in secret. All of these gifts and favours are either more costly than an average voter can afford or not possible for an average voter to give, which means allowing them does not comply with the egalitarian model.

The rules also allow for means of influence by some people and entities, and personal investments, that create conflicts of interest. However, because of the loophole mentioned above and other loopholes, MPs and their staff, and the staff of Senators (and possibly Senators), are all still allowed to participate in almost all votes and decisions even when they have a direct, financial conflict of interest. All of these loopholes could undermine the public's confidence in the appearance of integrity of political processes, which also does not comply with the egalitarian model.

4.3 How the rules on gifts, benefits and favours for Cabinet ministers, their staff and Cabinet appointees do not fulfill the egalitarian model

The *Conflict of Interest Act* (the “COIA”) governs the receipt of gifts for an MP who is “Cabinet MP” – a minister in the Cabinet (the executive branch of Canada's government structure) or a Parliamentary Secretary (a position that involves acting as a liaison between one minister and the ruling party's

caucus of MPs, and sometimes representing that minister at events or in Parliament). The *COIA* applies not only to Cabinet MPs but also to almost all their staff, and also to Cabinet appointees including deputy ministers, heads of federal government institutions, but not to judges or ambassadors.⁶⁷⁹

The *COIA* rules match the *MP Code* rules in a few ways: subsection 11(1) matches the blanket prohibition in subsection 14(1) of the *MP Code* on gifts or other benefits to an office holder or member of their family that might reasonably be seen to be given to influence; the definition of family members is essentially the same (in subsection 2(1) of the *COIA*), and; the exemption for courtesy and hospitality gifts is the same (in clause 11(2) of the *COIA*). However, a first area of concern is that the *COIA* rules are weaker than the *MP Code* rules concerning public disclosure of gifts. Subsection 14(3) of the *MP Code* requires disclosure within 60 days to the Ethics Commissioner, and publicly sometime afterwards in the Public Registry, of gifts received by the MP or member of their family during any 12-month period from any one person or entity that have a total value of \$200 or more.

While section 23 of the *COIA* requires disclosure to the Ethics Commissioner within 30 days of receiving a combined total of \$200 in gifts from any one source over a 12-month period, subsection 25(5) of the *COIA* only requires disclosure within 30 days publicly (through the Ethics Commissioner) when a Cabinet minister or other office holder covered by the

⁶⁷⁹ *COIA*, *supra* note 666, subsection 2(1) definition of “public office holder” (i.e. minister’s staff and advisers, deputy ministers, and the heads and board members of federal agencies, boards and tribunals (other than lieutenant governors, senior diplomats, judges and military judges, people who work for the Senate, House of Commons and Library of Parliament, and deputy commissioners of the Royal Canadian Mounted Police (RCMP)).

COIA, or member of their family, receives a gift or other advantage that itself is worth more than \$200. In other words, it is legal to give a minister, their staff, and senior government officials, and their family members, multiple gifts or other advantages that will not be disclosed publicly as long as each gift or advantage is worth less than \$200. The *COIA* gift rules are stronger though in another way than the *MP Code* rules, as under subsection 11(3) of the *COIA*, if a courtesy gift is worth more than \$1,000, “the gift or other advantage is, unless otherwise determined by the [Ethics] Commissioner, forfeited to Her Majesty in right of Canada”).⁶⁸⁰

While, again, I am focused on these gift rules, another cross-over with Canada’s bribery rules, and a second area of concern, is that under clause 121(1)(b) of the *Criminal Code* it is legal for the head of a government institution to approve in writing a person or entity that has “dealings of any kind with the government” giving, with respect to those dealings, a commission, reward, benefit or advantage directly or indirectly to a government official or employee, or to a member of their family, or to anyone else for the benefit of the official or employee, and clause 121(1)(c) allows the head to approve in writing the official or employee etc. receiving the commission etc.⁶⁸¹ This exception does not exist in the *COIA* or the *MP Code* or the *Senate Code*, although, as detailed below in section 4.4, it does exist in a similar form in the rules for federal government employees.

⁶⁸⁰ *COIA*, *supra* note 666.

⁶⁸¹ *Criminal Code*, *supra* note 607.

Interestingly, this exception was cited by the RCMP as the reason that Prime Minister Justin Trudeau was not prosecuted for accepting the gift of an all-expenses-paid trip for him and his family to the Aga Khan's private island in the Bahamas, even though the Aga Khan's foundation applied for and received federal government grants annually. The RCMP surmised that the Prime Minister would produce a written statement by himself as the head of the government approving himself and his family accepting that gift.⁶⁸² However, when the RCMP documents were revealed in late April 2022 in response to an *Access to Information Act* request, the Prime Minister responded to a question from the then-interim Conservative Party leader by saying that he had not approved the gift for himself and his family.⁶⁸³ Given this admission, the Conservative Party then called on the RCMP to re-open its investigation.⁶⁸⁴

A third area of concern is that the rules in the *COIA* have another exemption, which does not exist in the *MP Code* or the *Criminal Code*, that says Cabinet MPs and their family members are allowed to accept a gift or other advantage from a relative or friend (clause 11(2)(b)). With regard to travel, the *COIA*'s rule is stronger than the *MP Code* – Cabinet and

⁶⁸² Robert Fife and Joy Spearchief-Morris, "Trudeau faces backlash in House over inquiry into Aga Khan trip," (April 25, 2022) *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-newly-released-documents-show-rcmp-considered-whether-to-charge-justin/>>.

⁶⁸³ Robert Fife and Joy Spearchief-Morris, "Trudeau says he didn't authorize himself to take free Aga Khan trip in 2016," (April 26, 2022) *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-trudeau-says-he-didnt-authorize-himself-to-take-free-vacation/>>.

⁶⁸⁴ Joy Spearchief-Morris and Robert Fife, "Conservatives ask RCMP to reopen probe into Justin Trudeau's 2016 Aga Khan trip," (April 27, 2022) *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-aga-khan-trudeau-investigation/>>.

Parliamentary Secretary MPs (“Cabinet MPs”) and family members are not permitted to accept travel on private aircraft unless required or approved by the Ethics Commissioner (section 12 – with public disclosure of any such travel required within 30 days under subsection 25(6)).

Under clause 11(2)(a) of the *COIA*, Cabinet MPs are also allowed to accept a gift or other advantage that is permitted under the *Canada Elections Act* (“*CEA*”), such as a contribution/political donation made in compliance with that law. As the *MP Code* is silent on this matter, and as the *Code* does not apply after Parliament has been dissolved for an election, which ends all MPs term in office, MPs who become a candidate for re-election are clearly also allowed to accept this gift. This provision connects the gift-giving regime with the political donations regime.

Given that, unlike MPs, Cabinet ministers remain ministers after Parliament is dissolved for an election, the gift rules in the *COIA* continue to apply to ministers through the election period. As a result, the measures in sections 477.89 and 477.9 of the *CEA* that prohibit an election candidate from accepting gifts (other than campaign donations, courtesy/hospitality gifts, or inheritances) that might reasonably be seen to be given to influence the candidate if they are elected are redundant for ministers. Despite the redundancy, it seems that ministers are required to comply with both the measures in 477.9(3) to 477.95 of the *CEA* that require a candidate to disclose to the Chief Electoral Officer (confidentially) all gifts received during the election period that are worth more than \$500 within four months after the

election,⁶⁸⁵ and the measures in the *COIA* requiring disclosure to the Ethics Commissioner, and in the Public Registry, of all gifts worth more than \$200. The disclosure under the *CEA* is to the CEO only, who is required to keep the disclosure statement confidential.⁶⁸⁶

As detailed above in section 4.2, a fourth, related gap in Canadian law that opens MPs up to being bribed is that it is unclear exactly when a successful candidate becomes an MP or, in the term used in the *Criminal Code*, an “official” who holds an office.⁶⁸⁷ While, as noted above, ministers remain ministers during elections, if a new party is elected to power in an election, it is unclear under the *Parliament of Canada Act*, the *Criminal Code*, the *CEA*, and the *House of Commons Procedure and Practice* book exactly when a person who won election becomes an MP. As a result, during this period the person, who may end up being appointed as a minister, can be offered, and can accept, bribes that are not prohibited by the anti-bribery, anti-corruption provisions in sections 119, 121 and 122 in the *Criminal Code*, and in sections 41 to 41.5 of the *Parliament of Canada Act*, as those provisions only apply to people who have taken office.

As with MPs, for people who become Cabinet ministers this gap does not comply with the egalitarian model because it allows for unlimited gifts and favours to someone who will be a public office holder. As a result, as proposed above in section 4.2, these laws should be changed to make it clear that it is illegal to give any gift, benefit or advantage, or do any favour to

⁶⁸⁵ *CEA*, *supra* note 79.

⁶⁸⁶ *CEA*, *supra* note 79, subsection 477.94(2).

⁶⁸⁷ *Criminal Code*, *supra* note 607, section 118, definition of “official”.

anyone who, based on the initial election results, could become an MP (and then a minister), and illegal for the potential MP to solicit or accept any gift, benefit, advantage or favour.

A fifth area of concern is, as mentioned above in section 3.7, that if person raises money to explore becoming a party leadership contestant, and then does not register as a contestant, the contributors of the money are not required to be disclosed. This is a problem if the person exploring running is a sitting MP and/or a Cabinet minister, and it is unclear whether the *COIA* gift provisions cover such contributions and prohibit or, at least, require them to be disclosed publicly.

A sixth related area of concern, as detailed above in sections 3.11 and 3.15, and sections 3.13 and 3.18, and mentioned also above in section 4.2, is that there is no prohibition in the *CEA* on a nomination race or party leadership contestant colluding with a third party, including by sharing information, in order to influence the third party's activities during a nomination contest (and, for leadership contestants, also to exceed whatever spending limit their party sets for the leadership contest). As well, there is no limit in the *CEA* on the amount that a third party can spend supporting a nomination or leadership contestant in secret (as third parties are not required to register and disclose their activities during contests). It is unclear whether this support would be considered a prohibited gift under the *COIA*. If it is considered a prohibited gift, then nomination or leadership contestants who are not a sitting minister would have an advantage because they could accept support from, and collude with, a third party or parties during their contest.

An seventh type of gift that raises concerns in terms of adherence with the egalitarian model, which is permitted under the *CEA* (and, therefore, Cabinet MPs are also allowed to accept it under clause 11(2)(a) of the *COIA*), is support from one's political party or electoral district association, such as a transfer of money to an MP's election campaign fund. As noted above in section 4.2, MPs are also allowed to receive this gift under the definition of "benefit" in subsection 3(1) of the *MP Code*. Allowing such a gift gives the party leader or party executive the ability to, in effect, buy the loyalty of a Cabinet MP through providing this support, which gives them more influence over a Cabinet MP than an average voter.

A eighth area of concern is the offer of a future job or benefit to a Cabinet MP by an individual, business or other entity because such an offer can create a conflict of interest. As noted above in section 4.2, clause 119(1)(a) and (b) of the *Criminal Code* prohibit offering an MP and an MP accepting, directly or indirectly, a job or other benefit, but the prohibition only applies if the offer is conditional on the MP doing or not doing something. Section 10 of the *COIA* states that a Cabinet MP (or their staff or appointees) shall not "allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment."

However, subsection 24(1) of the *COIA* only requires them to disclose a "firm" offer of outside employment within seven days to the Ethics Commissioner, and "firm" is not defined. As a result, it is essentially legal for a Cabinet MP and other office holders to have a fairly clear offer of a future job or other benefit, and not disclose it. As well, while Cabinet MPs and their

staff and appointees are, unlike MPs, prohibited by subsection 15(1) of the *COIA* from having an outside job or operating a business, under subsections 15(2) and (3) an exception can be made by the Ethics Commissioner to allow these people to be a member of a board of directors for a financial or commercial corporation, or charitable, philanthropic or non-profit organization, if “it is not incompatible with his or her public duties as a public office holder.”

At least, unlike the *MP Code*, the *COIA* requires under subsection 25(4) that becoming such a board member be disclosed publicly within 120 days (which is too long a time period). Under 15(1.1) of the *COIA*, these people are also allowed to practise a profession each year enough to stay qualified by their professional association to continue in their profession after they leave government, an exception that makes sense given many people serve in politics and government for only a small part of their overall career.

In terms of political activities, Cabinet MPs and the other officials covered by the *COIA* are allowed to be involved in them but, unlike MPs and Senators, cannot “personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest.”⁶⁸⁸ Strangely though, a ninth area of concern is that, unlike in the codes for MPs and Senators, there is no provision in the *COIA* that prohibits Cabinet MPs from using government resources or property for their outside activities. As well, like MPs, Cabinet MPs are allowed to do anything that they would normally do on behalf of their constituents.⁶⁸⁹

⁶⁸⁸ *COIA*, *supra* note 666, section 16.

⁶⁸⁹ *COIA*, *supra* note 666, subsection 64(1).

The tenth area of concern is that Cabinet MPs and their staff and Cabinet appointees are allowed to invest directly in stocks/shares of businesses and other securities that are publicly traded on the stock market. All they are required to do is put them in a so-called “blind” trust which doesn’t prevent them from knowing which stocks they own because they are allowed to choose the trustee and give them initial instructions about what to do with whatever is put into the trust.⁶⁹⁰ Their spouses and dependents are also allowed to have these investments, with no requirement to put them in a trust. Public disclosure of the existence of the trust is required, but not what is in the trust.⁶⁹¹ As well, a Cabinet MP and their staff and Cabinet appointees are allowed to have investments in businesses through open-ended mutual funds that are not required to be disclosed to the public.⁶⁹² All of these provisions do not comply with the egalitarian model because they allow for secret financial interests that create real conflicts of interest.

In his August 2019 report about the SNC-Lavalin scandal involving the Prime Minister and other top government officials, Commissioner Dion broadened former Commissioner Dawson’s definition of “private interest” under the *COIA* to include not only the financial interests of a Cabinet minister or other government official or their relatives or friends, but also their “social or

⁶⁹⁰ *COIA*, *supra* note 666, section 20 definition of “controlled asset” and subsections 27(1) to (9). See also Conflict of Interest and Ethics Commissioner, *Categories of Assets*, (January 2020) online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/CategoriesAssets-CategoriesBiens.aspx>>, and; Conflict of Interest and Ethics Commissioner, *Divestment of Assets and Blind Trusts*, (June 2020) online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/INDivestmentBlindTrust-AIDessaisissementFiducies.aspx>>.

⁶⁹¹ *COIA*, *supra* note 666, subsections 25(2) and 27(8), and clause 26(2)(a).

⁶⁹² *COIA*, *supra* note 666, section 20 definition of “exempt asset” (clause (h)) and subsection 25(2).

political interests”.⁶⁹³ However, an eleventh area of concern is that in the *COIA*, like the *MP Code* (as detailed above in section 4.2), the definition of “private interest”⁶⁹⁴ contains a loophole that means the *COIA* does not apply to almost all of the decisions and actions of Cabinet MPs and their staff and appointees, as they cannot have a private interest when deciding or acting on a matter that applies generally or affects them in a similar way as a broad class of the public is affected (which almost all matters that they address do – such as a decision to change any of the federal government’s laws, policies, taxes or subsidies, or spending, granting or service programs).

This loophole essentially allows Cabinet MPs and other office holders covered by the *COIA* to be in a direct financial conflict of interest and still participate in almost all decisions that affect that interest. In other words, a Cabinet MP and their staff and Cabinet appointees (and/or their family members) can be a director of an outside business or organization and/or have an investment in a business, and the loophole makes that situation entirely compatible with the requirements of the *COIA*. As a result, the Cabinet MP or other official would not be required to recuse themselves from any decision that affected the business or organization.

In other words, the Cabinet MP can participate in decisions in which they personally profit, either financially, politically or socially as the *COIA* only

⁶⁹³ Conflict of Interest and Ethics Commissioner, *The Trudeau II Report*, (August 14, 2019) online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf>>, pp. 45-46 (paras. 288-292) – hereinafter “Ethics Commissioner: *Trudeau II Report*”. Note that the *MP Code*’s definition of private interest specifically limits the *Code*’s application to only financial interests, *MP Code*, *supra* note 620, subsection 3(2).

⁶⁹⁴ *COIA*, *supra* note 666, subsection 2(1), definition of “private interest”.

applies to decision-making processes that make very specific decisions, such as handing out a government contract. For example, former Minister of Finance Bill Morneau introduced a bill in 2017 that changed rules that applied generally to the pension management industry in a way that would assist his family's pension management company, and the Ethics Commissioner ruled in 2018 that, because of this loophole, the *COIA* did not apply to Minister Morneau's participation in the development and introduction of the bill.⁶⁹⁵

The twelfth area of concern is a series of other technical loopholes in the *COIA* that further allow Cabinet MPs and their staff and appointees to participate in decision-making and policy-making when they have an appearance of a conflict of interest. It should be noted that these other loopholes may be overridden by a rule in the *COIA* that says these politicians and public officials cannot participate in policy-making if it would "improperly further another person's or entity's private interests."⁶⁹⁶ However, it is unclear, and relies on the Ethics Commissioner ruling that the action was "improper" and, I contend as with MPs, the Commissioner is not likely to issue such a ruling if the action is allowed due to the loophole in the law.

As well, the list of five purposes set out in section 3 of the *COIA* include to "encourage experienced and competent persons to seek and accept public office" and "facilitate interchange between the private and public sector" – neither of which have anything to do with preventing apparent conflicts of

⁶⁹⁵ Conflict of Interest and Ethics Commissioner, *Morneau Report*, (June 18, 2018) online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Morneau%20Report.pdf>>.

⁶⁹⁶ *MP Code*, *supra* note 620, sections 4, 6, 8-10. *Senate Code*, *supra* note 623, sections 8-10.

interest. These purposes could be cited by the Commissioner or the courts as reasons not to interpret “improperly” to prohibit actions by office holders that encourage such people to seek public office and facilitate such interchanges, even if the actions are clearly unethical. For this reason, and because these two purposes generally undermine the interpretation of the *COIA* by confusing the objective of preventing conflicts of interest, these two purposes should be removed from the *COIA*, and the word “improperly” should be defined more clearly on its own and/or through closing all the blatant and technical loopholes in the rules.

The first technical loophole, as mentioned above in section 4.2, is that while the *COIA* prohibits furthering the interests of a friend, it doesn’t define “friend”⁶⁹⁷ – the Ethics Commissioner expanded the definition in his most recent ruling to mean close personal friends and professional and business colleagues.⁶⁹⁸ It would be better to define “friend” directly in the *COIA* so that the Commissioner does not have the discretion to change the definition from ruling to ruling. Secondly, also as mentioned in section 4.2, the *COIA* only prohibits Cabinet MPs and their staff and appointees from giving preferential treatment to a person or entity on the basis of “the identity of the person or organization that represents” the person or entity.⁶⁹⁹ While any decision by a

⁶⁹⁷ *COIA*, *supra* note 666, sections 4, 6, 8 and 9.

⁶⁹⁸ Conflict of Interest and Ethics Commissioner, *The Trudeau Report*, (December 20, 2017), online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/TrudeauReport.aspx>> and also at: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Trudeau%20Report.pdf>> at 36-39 (hereinafter “Ethics Commissioner: *The Trudeau Report*”). See also Conflict of Interest and Ethics Commissioner, *Managing a Conflict of Interest: Why Disclosing a Friendship Matters*, (October 2021), online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/INFriendship-Ami.aspx>>.

⁶⁹⁹ *COIA*, *supra* note 666, section 7.

politician or public official usually favours some people or entities more than others, I contend that the rule could be designed to prohibit preferential treatment to anyone in the process of policy-making.

The third technical loophole is that, while the *COIA* states clearly that Cabinet ministers and their staff and appointees are required to disclose conflicts of interest and to issue a public statement recusing themselves from policy-making processes when in a conflict (although the many loopholes detailed above exempt them from most conflicts), with the statement providing the details of why and from what process they are recusing themselves,⁷⁰⁰ in fact the courts have allowed the Ethics Commissioner to establish a process that effectively negates these requirements.⁷⁰¹ The process is that the Cabinet MP or official instead has a so-called “conflict of interest screen” through which they are supposedly not informed by their staff (one of which maintains the screen) about any matter in which they have a conflict (again, many loopholes exempt them from most conflicts). As a result, they are supposedly not recusing themselves even though they are removing themselves from a policy-making process because of a conflict, which is the dictionary definition of recusal.⁷⁰²

Therefore, in such situations they do not have to issue the required public declaration containing the details about their recusal. The effect of the

⁷⁰⁰ *COIA*, *supra* note 666, section 21 and subsection 25(1).

⁷⁰¹ *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194 (CanLII), <<https://canlii.ca/t/hvrbc>>, paras. 37-49.

⁷⁰² Conflict of Interest and Ethics Commissioner, *Conflict of Interest Screens*, (January 2020), online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/ColScreens-FiltresAntiCl.aspx>>.

screens is that the public is not informed about whether Cabinet MPs and other officials covered by the *COIA* are actually recusing themselves when they have a conflict, which goes against the egalitarian model in two ways – voters are not informed, and it is justifiable to be suspicious that the secretive screens process does not actually prevent any office holder from participating in decisions when they have a conflict.

A fourth technical loophole is that, while the *COIA* requires Cabinet ministers and the other officials to disclose to the Ethics Commissioner confidentially essentially all income, assets and liabilities (including for members of their family), and to update any changes within 30 days,⁷⁰³ it only requires public disclosure of liabilities worth \$10,000 or more.⁷⁰⁴ Lowering the disclosure threshold for liabilities to \$1,000 would add another legal measure that helps make it clear that if these people owe a significant amount to anyone or any entity it must be disclosed.

In addition to the *Conflict of Interest Act* (“*COIA*”), Cabinet ministers and parliamentary secretaries (“Cabinet MPs”) are also subject to the Prime Minister’s Open and Accountable Government code (“*PM Code*”) which is enforced solely by the Prime Minister (with the support of the Privy Council

⁷⁰³ *COIA*, supra note 666, section 22.

⁷⁰⁴ *MP Code*, supra note 620, sections 20-24, with the exemptions set out in subsections 21(1)(a) and 24(3)(a). *Senate Code*, supra note 623, sections 27-33, with the exemptions set out in clause 28(1)(h), subsection 28(4) and clause 31(1)(h). See also Standing Committee on Ethics and Conflict of Interest for Senators, *Ethics and Conflict of Interest Code for Senators Directive 2015-01*, (June 29, 2015), online: <<https://seo-cse.sencanada.ca/media/4ask2utu/directive-2015-01-failure-of-the-duty-to-disclose.pdf>>. Merriam Webster Dictionary, “recuse,” online: <<https://www.merriam-webster.com/dictionary/recuse>>.

Office).⁷⁰⁵ Section IV.2 of the *PM Code* summarizes the requirements Cabinet MPs must comply with under the *COIA* while section IV.4 clarifies that Cabinet MPs are not allowed to accept sponsored travel.

Some of the rules in Annex B of the *PM Code*, like some rules in the *COIA*, connect political donations made under the *Canada Elections Act* to the gift-giving regime. Under the heading “Specific Best Practices,” the rules state that a Cabinet MP should not have any “departmental stakeholder” (essentially anyone associated with any lobbying effort aimed at the Cabinet MP or his/her department) involved in, or targeted by, fundraising efforts in which the Cabinet MP is involved. These specific rules are underlined with general rules in Part I of Annex A that require Cabinet MPs (and their staff) to “act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced” and to “perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law.”

In addition, fundraising is listed in Annex A’s “Part II Guidelines for the Political Activities of Public Office Holders” and, in that part under the heading “General Principle” it prohibits Cabinet MPs from any activity that is, or “reasonably seen to impair his or her ability to discharge his or her public

⁷⁰⁵ Prime Minister of Canada, “Open and Accountable Government,” (2015), online: <<http://www.pm.gc.ca/eng/news/2015/11/27/open-and-accountable-government/>> and in PDF format at: <https://pm.gc.ca/sites/pm/files/inline-files/oag_2015_english.pdf> (hereinafter “*PM Code*”). The *PM Code* has been public in various forms since 1985, with the modern version remaining essentially the same since 2006, other than the addition of some appendices.

duties in a politically impartial fashion, or would cast doubt on the integrity or impartiality of the office.” As well, the first line in Annex B sets out a general rule requiring Cabinet MPs to “avoid conflict of interest, the appearance of conflict of interest and situations that have the potential to involve conflicts of interest.” In other words, Cabinet MPs are required by the *PM Code* (to the extent it is enforced by the Prime Minister) not only to avoid the gift of unethical donations but also, in doing so, to avoid even the appearance of bias in their relationships with everyone.

While the rules in the *PM Code* set a high standard, it should be noted that the Prime Minister enforces the rules, and there are no cases since 1993 of the Prime Minister penalizing any Cabinet Minister for violating the rules, and since 1993 only one minister has admitted to violating the rules and resigned from Cabinet⁷⁰⁶ while only one other minister resigned while claiming (along with the Prime Minister) that the Ethics Counsellor at the time had incorrectly concluded that he had violated the rules.⁷⁰⁷

As the PM has done with the *PM Code*, and as former Ethics Commissioner Mary Dawson did with rules in the *MP Code* as summarized above in section 4.2, Commissioner Dawson also interpreted and applied the rules in the *COIA* in contradictory and confusing way. For example, in May 2010, Commissioner Dawson issued a ruling that included a complicated, contradictory rationale for allowing a Cabinet MP to have a lobbyist who is

⁷⁰⁶ CBC News, “Aboriginal Affairs Minister John Duncan resigns from cabinet,” (February 15, 2013), online: <<https://www.cbc.ca/news/politics/aboriginal-affairs-minister-john-duncan-resigns-from-cabinet-1.1301619>>.

⁷⁰⁷ CBC News, “MacAulay resigns, insisting he’s innocent,” (October 23, 2002), online: <<https://www.cbc.ca/news/canada/macaulay-resigns-insisting-he-s-innocent-1.314361>>.

lobbying him/her give the gift/favour of fundraising for his/her riding association without violating section 11 of the *COIA* (or related section 16 that prohibits personally soliciting donations from anyone or any organization if it would place the Cabinet MP in a conflict of interest).⁷⁰⁸

One can argue this is not a problem because the *Lobbyists' Code of Conduct* rules clearly prohibit a lobbyist from doing this favour for anyone s/he is lobbying (as discussed below in section 4.5). However, Ethics Commissioner Dawson compounded the contradictions in standards by concluding in that May 2010 ruling, and another ruling in September 2010,⁷⁰⁹ and in submissions to House Committees, that the *COIA* did not apply to any political activities of Cabinet MPs⁷¹⁰ but that the *COIA should* include measures that prohibit Cabinet MPs from having lobbyists fundraise or campaign for them.⁷¹¹ In 2011, those prohibition measures were added by Prime Minister Harper to the *PM Code* for Cabinet MPs, but the *COIA* still has not been amended to add those measures.

Ethics Commissioner Dawson then directly contradicted her May 2010 and September 2010 rulings in a July 2011 Guideline on the acceptance of gifts by Cabinet MPs under the *COIA*. The Guideline upheld fully the spirit of the standard in section 11 of the *COIA* that a Cabinet MP must refuse any gift that a reasonable person might view as being given to influence him/her. It

⁷⁰⁸ Conflict of Interest and Ethics Commissioner, *The Raitt Report* [May 2010], online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/RaittReport.aspx>> .

⁷⁰⁹ After *The Raitt Report* [May 2010], *supra* note 708, the Ethics Commissioner issued *The Dykstra Report* [September 2010], online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/DykstraReport.aspx>>.

⁷¹⁰ Conflict of Interest and Ethics Commissioner, *The 2015 Review*, *supra* note 633 at 17.

⁷¹¹ Conflict of Interest and Ethics Commissioner, *The Raitt Report* [May 2010], *supra* note 708 at 26-29.

even says with regard to trinkets such as pens, notepads, keychains etc. that, depending on the situation, “it may still be inadvisable [for a Cabinet MP] to possess an article that clearly advertises a particular donor.”⁷¹² Despite this, Ethics Commissioner Dawson then went on to issue another ruling in 2014 that again allowed lobbyists to fundraise for a Cabinet minister.⁷¹³

In addition to her several advisory opinions on gifts issued after February 2015, Ethics Commissioner Dawson then issued three rulings finding people in violation of the gift-giving section 11 of the *COIA*, the first such rulings issued since 2007. The three people found guilty were all Cabinet staff or appointees but the publicity received by the rulings nonetheless sent a message to MPs and Cabinet MPs about the standards Ethics Commissioner Dawson maintained given that the same rules apply to them.⁷¹⁴ Each of the three situations involved gifts worth only \$100-\$300, but Ethics Commissioner Dawson still found the gifts crossed the line because they were given by people who were seeking decisions from the person or the person’s superiors.

⁷¹² Conflict of Interest and Ethics Commissioner, *Gifts (including Invitations, Fundraisers and Business Lunches)*, online: <<https://web.archive.org/web/20180221231713/http://ciec-ccie.parl.gc.ca/EN/ReportsAndPublications/Pages/GiftsGuideline.aspx?PageView=Shared&InitialTabId=Ribbon.WebPartPage&VisibilityContext=WSSWebPartPage&>>, in the section entitled “When a gift is prohibited” (hereinafter “Ethics Commissioner: Gifts Guideline (July 2011)”).

⁷¹³ Conflict of Interest and Ethics Commissioner, *The Glover Report* {November 2014}, online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/GloverReport.aspx>> both of which allowed for gifts to be given by lobbyists to MPs.

⁷¹⁴ Conflict of Interest and Ethics Commissioner, *Referral from the Public Sector Integrity Commissioner: The Bonner Report*, (February 26, 2015) online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/BonnerReport.aspx>>; *The Vennard Report*, (September 13, 2016) online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/VennardReport.aspx>>, and; *Referral from the Public Sector Integrity Commissioner: The Bennett Report*, (November 17, 2016) online: <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/BennettReport.aspx>>.

In December 2017, just before her term as Ethics Commissioner ended, Ms. Dawson issued her report on the gift to Prime Minister Trudeau and his family and friends of trips to the Aga Khan's private island in the Bahamas.⁷¹⁵ The report found Prime Minister Trudeau guilty of violating the *COIA* for accepting the trip gifts and aligned with Commissioner Dawson's July 2011 Guideline which, again, itself had conflicted with the gift measures in the *COIA*. The Guideline stated that, despite clause 11(2)(b) of the *COIA* allowing, without any exception, gifts "given by a relative or friend":

If a friend is offering a gift in a context not normally associated with gift-giving and the friend is also doing or likely to do business directly or indirectly with the public service entity of the public office holder, then the gift should not be accepted.⁷¹⁶

In the report, Ethics Commissioner Dawson considered whether the exemption for gifts from friends allowed Prime Minister Trudeau to accept the gifts from the Aga Khan and then made it clear in a statement similar to the above quoted statement from her Guideline that, even if they were friends, the Prime Minister was prohibited from accepting the gifts because the Aga Khan's Foundation did business with the federal government through applying for and receiving grants from the government.⁷¹⁷

After taking office in December 2017, new Ethics Commissioner Mario Dion arguably made the rules in the *MP Code* and *COIA* even more confusing by changing four of the standards that had been established by former

⁷¹⁵ Ethics Commissioner: *The Trudeau Report*, *supra* note 698.

⁷¹⁶ "Ethics Commissioner: Gifts Guideline (July 2011), *supra* note 712, section 3.

⁷¹⁷ Ethics Commissioner: *The Trudeau Report*, *supra* note 698, at 36-39, especially the third paragraph on p. 38.

Commissioner Dawson. First, in October 2018 he revised the guideline on gifts and other advantages under the *COIA* in a way that directly contradicted Commissioner Dawson's earlier guideline by stating that:

Promotional items of low value, such as pens, notepads, keychains, T-shirts or inexpensive carrying cases provided to attendees at conventions or similar events, would generally not reasonably be seen to have been given to influence you and would therefore be acceptable.⁷¹⁸

Secondly, Commissioner Dion's new guideline reversed Commissioner Dawson's standard that gifts from relatives and friends who are lobbying you must be refused, and reverted to the rule as it is stated in clause 11(2)(b) of the *COIA* that gifts or other advantages from relatives or friends can be accepted without any exceptions.⁷¹⁹ Thirdly, despite following Commissioner Dawson's definition of "friend" in a June 2018 ruling as only being people with whom a public office holder had a "close bond" and a "feeling of affection or a special kinship" and excluding any business associates,⁷²⁰ Commissioner Dion then issued a ruling in May 2021 that broadened the definition of "friend" by stating:

[250] ...this Office has traditionally favoured a narrow interpretation of the term "friend" to include only the public office holder's closest

⁷¹⁸ Conflict of Interest and Ethics Commissioner, *Gifts or Other Advantages*, (October 2018) online: < <https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/INGifts-AICadeaux.aspx>>, section 2 (hereinafter: "Ethics Commissioner, Gifts Guideline (October 2018)").

⁷¹⁹ Ethics Commissioner, Gifts Guideline (October 2018), *supra* note 698, section 5(b).

⁷²⁰ Conflict of Interest and Ethics Commissioner, *Chapman Report: Referral from the Public Sector Integrity Commissioner*, (June 22, 2018) online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Chapman%20Report.pdf>>, p. 12. Former Commissioner Dawson set out her definition of "friend" in *The Watson Report*, (June 25, 2009), online: <[https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Watson%20Report.p](https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Watson%20Report.pdf)df>, pp. 14-15.

personal friends. Colleagues, associates or members of a broad social circle were generally excluded from its application. I believe it is necessary to broaden the scope of the term to capture relationships where personal and professional interactions become intertwined to such an extent that it becomes difficult to draw the line between the two. In such cases, the public office holder's judgment in the exercise of their official powers and duties can also reasonably be impaired.

[251] While the "close bond" descriptor outlined in the Watson Report is helpful, an assessment of friendship should also be measured against more objective indicators. In my determination of whether Mr. Morneau and Mr. Kielburger are friends within the meaning of the Act, I examined, among other factors, the duration of and motive for the relationship; the nature, frequency and exclusivity of interactions; the sharing of meals and gifts in a personal setting; and mutual displays of trust, respect, affection or admiration.⁷²¹

Ethics Commissioner Dion's expanded definition of "friend" broadens the group of people whose interests cannot be furthered by someone covered by the *COIA*, as section 4 of the *COIA* prohibits furthering not only one's own interests but also the interests of relatives and friends (as detailed above, there are systemic loopholes in this prohibition). But the Commissioner's expanded definition of "friend" also broadens the group of people who can give any gift or other advantage to a public office holder covered by the *COIA*, even if the person giving the gift or advantage is lobbying the office holder, because of the Commissioner's new standard (which, again, is based on what

⁷²¹ Conflict of Interest and Ethics Commissioner, *Morneau II Report*, (May 13, 2021) online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Morneau%20II%20Report.pdf>>, pp. 39-40 (paras. 246-251).

it actually says in clause 11(2)(b) of the *COIA*) is that all gifts from a friend (or relative) can be accepted.

In summary, as with the *MP Code* rules, the rules in the *COIA* for Cabinet ministers, their staff and other top government officials do not align with the egalitarian model because they allow them to accept gifts and favours and general offers of future jobs or benefits, including from lobbyists, that are more costly than an average voter can afford and/or are things that the average voter can't give and that create conflicts of interest. As well, because of the significant loophole mentioned above, Cabinet MPs and other office holders are still allowed to participate in almost all votes and decisions even when they have a direct financial conflict of interest. As a result, all of these loopholes and the overall system allow for situations of unequal opportunity to participate in and influence politicians, which does not comply with the key principle of the egalitarian model of equal participation, and unethical situations that undermine the public's confidence in the appearance of integrity of political and government processes, which also does not comply with the egalitarian model.

4.4 How the rules on gifts, benefits and favours for government employees do not fulfill the egalitarian model

Despite establishing and maintaining loopholes in their rules concerning accepting gifts and favours, federal politicians have imposed stronger rules on federal government employees, rules that apply even to employees who have little decision-making power compared to the Prime

Minister, Cabinet ministers and many Cabinet appointees. Every Government of Canada employee is required by the *Directive on Conflict of Interest*⁷²² (the “*Directive*”) and *Values and Ethics Code for the Public Sector*⁷²³ (the “*Public Sector Code*”) to carry out their duties in “an impartial manner” and to avoid even the appearance of a conflict of interest.⁷²⁴ There are no exceptions like in the other sets of rules that allow employees to participate in decisions when they have an appearance of a conflict of interest because the decision will apply generally or to a broad class of people or entities. In addition, unlike all federal politicians, their staff and appointees, government employees are prohibited from giving preferential treatment to any person or entity.⁷²⁵

The *Directive* and the *Public Sector Code* have the force of law, with investigations of violations by the superior of any employee or by the Public Sector Integrity Commissioner under the *Public Servants Disclosure Protection Act*.⁷²⁶ Violations of the *Directive*, under subsection 7.1, are “subject to disciplinary measures, up to and including termination of employment.”

⁷²² Government of Canada, *Directive on Conflict of Interest*, online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32627>> (hereinafter “*Directive*”). See also: Government of Canada, Conflict of Interest and Post-Employment, (Date modified: 2021-02-05), online: <<https://www.canada.ca/en/treasury-board-secretariat/topics/values-ethics/code/conflict-interest-post-employment.html>>.

⁷²³ Government of Canada, *Values and Ethics Code for the Public Sector*, online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049>> (hereinafter “*Public Sector Code*”).

⁷²⁴ *Public Sector Code*, *supra* note 723, “Expected Behaviours” section, subsections 1.1 and 3.1 to 3.4 (especially 3.1 and 3.3). *Directive*, *supra* note 722, clauses 3.2.2, 4.2.1 to 4.2.7 and 4.2.16. See also: Government of Canada, Apparent Conflict of Interest, (Date modified: 2015-07-23), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/conflict-interest-post-employment/apparent-conflict-interest.html>> (hereinafter “Government of Canada, Apparent Conflict of Interest”).

⁷²⁵ *Directive*, *supra* note 722, clause 4.2.11.

⁷²⁶ *Public Sector Code*, *supra* note 723, “Avenues for Resolution” section and Appendix section. *Public Servants Disclosure Protection Act* (S.C. 2005, c. 46), sections 12, 13 and 15.1. See the Integrity Commissioner’s website at: <<https://www.psic-isp.gc.ca/en>>.

Going back 50 years, Canadian courts, and the federal Public Service Staff Relations Board, have issued several rulings highlighting the high standards set out in these rules,⁷²⁷ including that:

- a) while the government employee must knowingly undertake the action or decision, their state of mind in every other way is irrelevant;⁷²⁸
- b) the requirement is to avoid any appearance of a conflict that creates even the “slightest doubt” that the impartiality of the employee has been compromised;⁷²⁹
- c) the onus is on the employee to avoid even the appearance of a conflict and to disclose any interests that appear to create such a conflict;⁷³⁰
- d) the appearance of the situation to the public is key, not the government employee’s integrity or good faith;⁷³¹
- e) the apparent conflict of interest must be resolved in the public interest, no matter how innocent the government employee feels their actions were, and;⁷³²
- f) the consequences of being in an apparent conflict are the same as a real or potential conflict.⁷³³

⁷²⁷ See details concerning the cases cited in the six footnotes that follow in: Government of Canada, Apparent Conflict of Interest, *supra* note 724, especially the section entitled “Distinguishing apparent conflicts of interest from real and potential ones”.

⁷²⁸ *Canada (Treasury Board) v. Spinks (F.C.A)*, (1987) 79 N.R. 375.

⁷²⁹ *Ennis and Treasury Board (Canada Employment and Immigration Commission)*, PSSRB file 166-2-8773, 1980) at para. 13 (hereinafter “Ennis (1980)”).

⁷³⁰ Government of Canada, Apparent Conflict of Interest, *supra* note 724, subsection entitled “8. The onus is on the public servant to detect the apparent conflict of interest, and to take steps to comply with the rules”.

⁷³¹ *McKendry and Treasury Board (Department of Regional Economic Expansion)*, Board file: 166-2-674, 1973. *Lalla and Treasury Board (Industry, Science and Technology)*, [1994] C.P.S.S.R.B. No. 4 at 22.

⁷³² *Ennis (1980)*, *supra* note 729.

⁷³³ *Cottingham and Treasury Board (Transport Canada)*, [1986] C.P.S.S.R.P. No. 10, para. 86.

Under rules in subsection 4.2 of the *Directive*, employees are prohibited from accepting any gift, hospitality or benefit that “may have a real, apparent or potential influence on the objectivity of the person employed in carrying out their official duties and responsibilities or may place the person employed under obligation to the donor.”⁷³⁴ As with MPs and Senators (and their staff, and Cabinet MPs (and their staff and appointees), there are exceptions for infrequent, minimal value, normal courtesy or protocol gifts, hospitality of benefits that “Arise out of activities or events related to the official duties and responsibilities of the person employed.”⁷³⁵ However, unlike MPs and Cabinet MPs their staff and appointees, even those kind of gifts must be refused if they “compromise or appear to compromise the integrity of the person employed or the organization.”⁷³⁶

A problem area, though, as noted above in section 4.3, is that it is legal under clause 121(1)(b) of the *Criminal Code* for the head of a government institution to approve in writing a person or entity that has “dealings of any kind with the government” giving, with respect to those dealings, a commission, reward, benefit or advantage directly or indirectly to a government official or employee, or to a member of their family, or to anyone else for the benefit of the official or employee, and clause 121(1)(c) allows the head to approve in writing the official or employee etc. receiving the commission etc.⁷³⁷ These loopholes are mirrored in two loopholes in the

⁷³⁴ *Directive*, *supra* note 722, clause 4.2.13.

⁷³⁵ *Directive*, *supra* note 722, clause 4.2.14, subclauses 4.2.14.1 to 4.2.14.3.

⁷³⁶ *Directive*, *supra* note 722, clause 4.2.14, subclause 4.2.14.4.

⁷³⁷ *Criminal Code*, *supra* note 607.

Directive that, like the loopholes in the *MP Code* and *COIA*, undermine the strong standard that is established by the *Directive*'s other rules. The loopholes are that when a federal government employee cannot decline a gift, hospitality or benefit that violates the rules, or "where it is believed that their acceptance would bring sufficient benefit to the organization" then, it seems, the employee can accept it if their deputy head approves it in writing.⁷³⁸

As well, a government employee can receive written approval from their deputy head to solicit "gifts, hospitality, other benefits or transfers of economic value from outside entities or individuals that have had or may have dealings with the organization."⁷³⁹ Beyond allowing for activities that do not ensure the integrity of the system, there is no requirement that these written approvals be disclosed to the public. In these ways, the system does not comply with the egalitarian model's objective of informing voters. This inconsistency should be resolved in favour of prohibiting the acceptance of all gifts beyond a very low-value gift given infrequently, and requiring disclosure of all gifts, as that would accord with the egalitarian model's objective of ensuring public confidence in the integrity of political processes, and informing voters.

Like the gift etc. rules, the rules for federal government employees in the *Directive* that apply to outside activities including work and jobs, and investments, and disclosing their investments and other private interests, are generally stronger than for MPs and Senators and their staff, and Cabinet

⁷³⁸ *Directive*, *supra* note 722, clause 4.2.15.

⁷³⁹ *Directive*, *supra* note 722, clause 4.2.17.

MPs and their staff and appointees, again even though most government employees have less decision-making power and influence. However, the *Directive* contains some of the same flaws and loopholes as the other sets of rules. First, employees are prohibited from taking part in outside activities (including political activities) or having investments if there is any real, apparent or potential conflict of interest with their official duties⁷⁴⁰ and, like politicians and other public officials, they are prohibited from using government property for outside activities.⁷⁴¹ If they have investments, they are required to report them to their deputy head⁷⁴² and divest them or put them in a so-called blind trust or blind management agreement (which have all the flaws as the trusts allowed by the rules for politicians and other public officials, as the employee continues to know what they own in the trust/management agreement, chooses the trustee/manager, gives them initial instructions etc.).⁷⁴³

One final area is of concern for MPs and their staff, Cabinet MPs (ministers, ministers of state and parliamentary secretaries), Cabinet appointees (Cabinet staff, deputy ministers, associate deputy ministers and heads of government institutions) and government employees. The area is the rules that apply to these people concerning interactions with federal politicians and officials after they leave their position in federal politics or the federal government. Although the rules are contained in the *MP Code* and

⁷⁴⁰ *Directive*, *supra* note 722, clauses 4.2.9 to 4.2.12, and Appendix A, clauses A.2.2.1 to A.2.2.3.

⁷⁴¹ *Directive*, *supra* note 722, clause 4.2.18.

⁷⁴² *Directive*, *supra* note 722, clauses 4.2.3 to 4.2.6

⁷⁴³ *Directive*, *supra* note 722, clauses 4.2.7 and 4.2.8, and Appendix B.

Senate Code (both of which actually contain no rules), and the *COIA* and *Conflict of Interest Directive* and *Public Sector Code*, I address this area below in section 4.5 as there are coinciding rules in the *Lobbying Act*, and the problems with these rules are most acute when a former politician or official is lobbying the federal government or assisting with a lobbying effort in some way.

4.5 How the lobbying rules do not fulfill the egalitarian model

Lobbying public office holders (meaning not only politicians but also political staff and appointees, and government employees) is based on the historical right granted to barons by the English King John in the *Magna Carta* of 1215 – which at the time was a limited right to petition the King for redress.⁷⁴⁴ Over the next 450 years, the right expanded to become, in chapter 5 of the English *Bill of Rights* of 1689 which states: “Right to petition: That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegal (*sic*).”⁷⁴⁵

⁷⁴⁴ “English Translation of Magna Carta” British Library, online: <<http://www.bl.uk/magna-carta/articles/magna-carta-english-translation#sthash.tOfR7yfx.dpuf>> as cited in “Rights of Assembly and Petition” online: *CRS Annotated Constitution*, Legal Information Institute, Cornell University School of Law <https://www.law.cornell.edu/anncon/html/amdt1efrag7_user.html#amdt1e_hd17>. Clause 61 of the original Magna Carta, 1215 version, stated: “If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress [English translation of Latin original].” While this clause only gave the right to petition to 25 barons, it was the first written expression of the right.

⁷⁴⁵ *Bill of Rights [1688]* online: The National Archives <<http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>> as cited in “Rights of Assembly and Petition” online: *CRS Annotated Constitution*, Legal Information Institute, Cornell University School of Law <https://www.law.cornell.edu/anncon/html/amdt1efrag7_user.html#amdt1e_hd17>.

Canadian courts have ruled that the *Magna Carta* and the *Bill of Rights* are not Canadian constitutional documents,⁷⁴⁶ including in the context of a challenge to a prosecution under the federal *Lobbying Act*.⁷⁴⁷ However, the fact that the preamble to Canada's *Constitution Act, 1867* states that Canada was established "with a Constitution similar in Principle to that of the United Kingdom" means the rights set out in these documents were inherited into Canadian law.⁷⁴⁸ As well, several Canadian statutes have explicitly enacted many of these historical rights into Canadian law. For example, the Preamble in the federal Canadian *Lobbying Act* states that "free and open access to government is an important matter of public interest" and that "lobbying public office holders is a legitimate activity."⁷⁴⁹

The initial legal restrictions on lobbying were only aimed at preventing outright bribery – criminal prohibitions on corruptly giving a benefit of any kind in respect of an action or decision by a public office holder – and, as noted above in Chapter 1, these restrictions date back to the oldest known ethics codes.⁷⁵⁰ The enactment of disclosure requirements for lobbyists, and ethics codes that restrict ways lobbyists have used to gain favour from public office holders, has only happened in the past few decades in Canada and elsewhere. Beyond the disclosure requirements, these rules purport to

⁷⁴⁶ For an example of a Canadian court ruling on the *Magna Carta* and *Bill of Rights*, see *R. v. Jebbett*, 2003 BCCA 69 (CanLII).

⁷⁴⁷ *R. v. Carroll*, 2016 ONCJ 213 (CanLII), <<https://canlii.ca/t/gpjb9>>, paras. 2-8 (hereinafter "*R. v. Carroll* (2016)"), affirmed in *R. v. Carroll*, 2017 ONSC 2261 (CanLII), <<https://canlii.ca/t/h36jj>>, paras. 2, 6, 10-15 (hereinafter "*R. v. Carroll* (2017)").

⁷⁴⁸ *Constitution Act, 1867* 30 & 31 Victoria, c.3 (U.K.).

⁷⁴⁹ *Lobbying Act* R.S.C., (1985) c.44 (4th Suppl.).

⁷⁵⁰ Nichols and Robertson, *Thinking About Bribery*, supra note 16.

prohibit gifts or favours of any kind from lobbyists that create a conflict of interest for the office holder.

The federal Canadian *Lobbying Act* states in its preamble that “it is desirable that public office holders and the public be able to know who is engaged in lobbying activities”⁷⁵¹ while the preamble to the 2015 version of the *Lobbyists’ Code of Conduct* that was enacted pursuant to the *Act* states:

The purpose of the Code is to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making.⁷⁵²

While the Supreme Court of Canada has not ruled on the issue, the Ontario Superior Court has held that a statutory requirement to disclose lobbying activities does not violate the section 2(b) Canadian *Charter* right to freedom of expression, as it “is intended to ensure transparency and openness, allowing the public to know the identity of the paid lobbyists who are communicating with public office holders and which interests these lobbyists represent.”⁷⁵³ In other words, the statutes and codes, and courts interpreting them in rulings, draw a line between legitimate lobbying which is covered by the rights to free expression and free association (when done transparently and ethically) and illegitimate lobbying which is done secretly and includes gifts and/or favours that cause conflicts of interest.

⁷⁵¹ *Lobbying Act*, *supra* note 749.

⁷⁵² Commissioner of Lobbying, *Lobbyists’ Code of Conduct*, online: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct>> (hereinafter “*Lobbyists’ Code*”).

⁷⁵³ *R v. Carroll* (2016), *supra* note 747, paras. 2, 9-40 (esp. 39), affirmed in *R v. Carroll* (2017), *supra* note 747, paras. 2 and 16-19.

These legal lines, and the principles upon which they are based, align with the three key facets of the proposed extension of the Supreme Court's egalitarian model into the area of lobbying regulation that I set out above in section 4.1, which again are as follows: 1. that lobbyists be required to disclose all lobbying and lobbying spending (to inform voters); 2. that lobbyists only lobby in ways that ensure the public's confidence in the appearance of, and actual, fairness and integrity of the government and political decision-making system, and; 3. that there is relative equality of opportunity for relative equality of participation and influence in the government and political decision-making system.

As noted above, federal Canadian lobbyists are regulated by the *Lobbying Act*⁷⁵⁴ in terms of disclosure of their activities and, in terms of the integrity of their activities, the *Lobbyists' Code*⁷⁵⁵ which was first enacted in 1997,⁷⁵⁶ while the current version came into force on December 1, 2015. The federal Commissioner of Lobbying is the sole enforcer of the *Lobbyists' Code*, while the Commissioner is the front-line enforcer of the *Act*, and then refers cases of probable violations to the police.⁷⁵⁷

⁷⁵⁴ *Lobbying Act*, *supra* note 749.

⁷⁵⁵ *Lobbyists' Code*, *supra* note 752. The Commissioner of Lobbying conducted a public consultation on amending the *Code* in November-December 2020, and a second phase consultation from December 2021 to February 2022 – see information online at: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/>>.

⁷⁵⁶ Registrar of Lobbying, *Lobbyists' Code of Conduct*, (1997), online: <<https://web.archive.org/web/20170823151218/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01195.html/>>.

⁷⁵⁷ *Lobbying Act*, *supra* note 749, sections 10.4 and 10.5.

4.5.1 Secret lobbying loopholes mean voters not informed

The federal lobbying rules do not comply in several ways in all three areas of the extended egalitarian model summarized above. The first general area of concern is the *Lobbying Act* does not comply with the egalitarian model's objective of informing voters because it does not require all lobbying to be registered and disclosed. Generally, the *Act* requires registration by anyone paid as a consultant on contract by any entity to communicate with a public office holder⁷⁵⁸ in respect of their decisions concerning making, developing or amending of federal legislative proposals, bills or resolutions, regulations, policies or programs; the awarding of federal grants, contributions or other financial benefits, and; (for consultant lobbyists only) the awarding of a federal government contract and arranging meetings for others to lobby,⁷⁵⁹ including by appealing to the public to contact the office holder.⁷⁶⁰ The requirement to register and disclose lobbying activities applies unless the communication is in an open forum that is publicly recorded with the identities of all the participants and details of the discussions publicly disclosed, such as

⁷⁵⁸ Including staff of MPs and Senators who, as noted above in section 4.2, are not covered by any of the ethics rules that cover other office holders. See the *Lobbying Act*, *supra* note 749, subsection 2(1) definition of "public office holder" clause (a).

⁷⁵⁹ Commissioner of Lobbying "Frequently Asked Questions," (May 30, 2022), question 1. What is Lobbying?, online: <<https://lobbycanada.gc.ca/en/registration-and-compliance/frequently-asked-questions/>>. Commissioner of Lobbying, "Communicating with federal public office holders," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/communicating-with-federal-public-office-holders/>> (hereinafter "Commissioner re: Communicating").

⁷⁶⁰ *Lobbying Act*, *supra* note 749, sections 5 and 7, and clauses 5(2)(j) and 7(3)(k) re: grass-roots communications. See also: Commissioner of Lobbying, "Applicability of the Lobbying Act to Grass-roots Communications," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/applicability-of-the-lobbying-act-to-grass-roots-communications/>>.

testimony before a parliamentary committee or a public consultation meeting.⁷⁶¹

Also covered is anyone paid as an employee of any type of organization (except a Crown or Departmental corporation or shared governance organization)⁷⁶² who spends a significant amount of their work time lobbying; any officer of any organization who spends any of their time lobbying; any director on the board of a business or organization who is paid more than their expenses and lobbies,⁷⁶³ and; the senior officer of any business or organization whose employees collectively lobby more than 20 percent of total work time.⁷⁶⁴ Given they are intergovernmental communications as opposed to lobbying as it is usually defined, the Act does not require registration or disclosure of communications by members of a provincial legislature, municipal council, *Indian Act* band council or indigenous

⁷⁶¹ Commissioner re: Communicating, *supra* note 759. Commissioner of Lobbying, “Disclosure requirements related to advisory and stakeholder consultations,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/disclosure-requirements-related-to-advisory-and-stakeholder-consultations/>>.

⁷⁶² Commissioner of Lobbying, “Crown corporations and registrable activities under the Lobbying Act,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/crown-corporations-and-registrable-activities-under-the-lobbying-act/>>. Commissioner of Lobbying, “Departmental corporations and registrable activities under the Lobbying Act,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/departamental-corporations-and-registrable-activities-under-the-lobbying-act/>>. Commissioner of Lobbying, “Shared governance organizations and registrable activities under the Lobbying Act,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/shared-governance-organizations-and-registrable-activities-under-the-lobbying-act/>>. Commissioner of Lobbying, “Registration requirements related to the academic sector,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/registration-requirements-related-to-the-academic-sector/>>.

⁷⁶³ Commissioner of Lobbying, “Boards of directors: Application of the Act to outside chairpersons and members,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/boards-of-directors-application-of-the-act-to-outside-chairpersons-and-members/>>.

⁷⁶⁴ *Lobbying Act*, *supra* note 749, section 10.3, and subsections 2(1) “organization” and “public office holder”, 4(2), 5(1), 5(6), 7(1) and 7(6).

people's government or their staff, or by provincial, municipal, band council or indigenous government employees, or by diplomatic representatives of foreign governments or United Nations agencies or other international organizations recognized by Parliament.⁷⁶⁵

The definition of "public office holder" in the *Lobbying Act* is fairly comprehensive as it includes all federal MPs and senators, their staff, Cabinet ministers and their staff and appointees, and all government employees.⁷⁶⁶ As well, the office of the Commissioner of Lobbying has concluded that the definition of public office holder does include employees of the caucus research bureaus for officially recognized parties in the House of Commons. In effect, staff of these bureaus are working for a party as Parliament defines and recognizes parties (i.e. only parties with 12 or more MPs are recognized and received funding for a research bureau).

However, there is one significant loophole in the definition though – political party officials are definitely not included.⁷⁶⁷ As a result, lobbying of these people is not required to be disclosed. This is significant because these people are in regular contact with senior politicians and staff in each party, and so they can easily and regularly pass on communications they have received from lobbyists.⁷⁶⁸

⁷⁶⁵ *Lobbying Act*, *supra* note 749, section 4(1).

⁷⁶⁶ *Lobbying Act*, *supra* note 749, subsection 2(1) "public office holder".

⁷⁶⁷ Commissioner of Lobbying, "Application of the Lobbying Act to political parties," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/application-of-the-lobbying-act-to-political-parties/>>.

⁷⁶⁸ R. Paul Wilson, "The work of Canadian political staffers in parliamentary caucus research offices," (July 5, 2020) Vol. 63-3 *Canadian Public Administration* 498.

The *Act* also does not require several other significant lobbying activities to be registered and disclosed. First, as noted above, a person is only required to register as a lobbyist if they are paid for their lobbying. This loophole allows a lobbyist to arrange with a client to be paid for strategic advice, while lobbying for their client for free, unregistered. This loophole also allows retired executives of businesses, unions and other organizations, who may have extensive, good relations with government officials or other public office holders, and who may still be receiving a pension or other retirement benefits from their former employer, to lobby for their former employer without registering.

Secondly, lobbying by any person or entity of an enforcement agency concerning the enforcement of a law that applies to the person or entity is not required to be registered.⁷⁶⁹ This allows for secret lobbying by, for example, businesses concerning inspections, audits and other enforcement actions by regulatory agencies. Thirdly, even though tax credits are a financial benefit, the Commissioner of Lobbying decided in 2009 to designate them as not a financial benefit and, as a result, lobbying for tax credits does not have to be registered, so another area of lobbying in which mostly businesses engage remains hidden from public view.⁷⁷⁰

Fourth, lobbying for a federal government contract by the officers or employees of a business or organization does not have to be disclosed (only

⁷⁶⁹ *Lobbying Act*, *supra* note 749, clause 4(2)(b).

⁷⁷⁰ Commissioner of Lobbying, "Registration requirements related to tax credits," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/registration-requirements-related-to-tax-credits/>>.

if the business or organization hires a consultant lobbyist on contract would the consultant be required to register and disclose the lobbying).⁷⁷¹ Fifth, only consultant lobbyists are required to register for time spent arranging meetings for others to lobby an office holder.⁷⁷²

Sixth, an employee who is lobbying for a business is not required to be listed in the Registry of Lobbyists⁷⁷³ if they lobby less than 20 percent of their work time (including time spent researching and preparing to lobby, but not time spent arranging meetings with office holders).⁷⁷⁴ The business is required to register if the collective time spent lobbying by its employees adds up to 20 percent of work time if they were one individual – for example, if a business had five employees who lobby who each spend 4.1 percent of their work time lobbying, then $5 \times 4.1 = 20.5$ percent and the business would be required to register. However, the only person required to be listed in the business' registration would be the senior officer, as none of the five employees spend more than 20 percent of their work time lobbying. As a result, the public cannot access key information concerning the extent and nature of the business' lobbying.

Seventh, in contrast, for citizen organizations like unions and non-profit advocacy groups, if their employees' collective lobbying time crosses the 20 percent threshold, then not only is the organization required to register, but

⁷⁷¹ *Lobbying Act*, *supra* note 749, clauses 5(1)(a)(vi) and 7(1)(a).

⁷⁷² *Lobbying Act*, *supra* note 749, clause 5(1)(b).

⁷⁷³ Commissioner of Lobbying, Registry of Lobbyists, online:
<<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/guest?lang=eng>>.

⁷⁷⁴ *Lobbying Act*, *supra* note 749, clause 7(1)(b). See also: Commissioner of Lobbying, "A significant part of duties ("The 20% rule")," (May 11, 2022), online:
<<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/a-significant-part-of-duties-the-20-rule/>>.

also all the employees involved in lobbying are required to be identified in the organization's registration.⁷⁷⁵ In other words, more full disclosure is required of the lobbying activities of often cash-strapped citizen groups than of the lobbying by the biggest, wealthiest businesses in Canada. In addition to failing to inform voters of the extent of big business lobbying, these contrasting provisions also do not comply with the egalitarian model's principle of equal opportunity for equal participation in political processes.

Eighth, not all lobbying communications are required to be disclosed in the Registry. Lobbyists are only required to disclose each month in the Registry their communications with "designated public office holders" that are oral, pre-arranged and (with one exception for communications concerning financial benefits) initiated by the lobbyist.⁷⁷⁶ This means that almost all communications initiated by a public office holder do not have to be disclosed publicly.⁷⁷⁷ As well, for a business, industry association, union or other type of organization, only the senior officer registers and is listed in those monthly

⁷⁷⁵ *Lobbying Act*, *supra* note 749, clause 7(3)(f).

⁷⁷⁶ *Lobbying Act*, *supra* note 749, subsections 5(3) to 5(4.3), and 7(4) to 7(4.4). *Lobbyists Registration Regulations* (SOR/2008-116), sections 6-7 and 9-10. See also: Commissioner of Lobbying, "Communicating with designated federal public office holders," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/communicating-with-designated-public-office-holders/>>. Commissioner of Lobbying, "Interpretation of "Comparable rank" for designated public offices," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/interpretation-of-comparable-rank-for-designated-public-offices/>> (hereinafter "Commissioner of Lobbying, "Comparable rank" bulletin (May 11, 2022)"). Commissioner of Lobbying, "Acting appointments in designated public office holder positions," (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/acting-appointments-in-designated-public-office-holder-positions/>> (hereinafter "Commissioner of Lobbying, "Acting DPOH" bulletin (May 11, 2022)").

⁷⁷⁷ *Lobbyists Registration Regulations* (SOR/2008-116), sections 6 and 9.

communications registrations, even if the senior officer does not even participate in the communication.⁷⁷⁸

Ninth, how cash-strapped citizen groups are compared to the lobbying efforts of big businesses cannot be determined because, unlike the requirements that require disclosure of third-party (individual and interest group) spending on advertising and other activities in the pre-election and election periods (as detailed above in section 3.27), lobbyists are not required to disclose the amount they spend on lobbying, including on fees for consultant lobbyists, for or against any specific change to government decision-making. As well, consultant lobbyists are not required to disclose how much they make in fees for any lobbying effort, and overall annually, and so the public cannot determine how valuable lobbyists are perceived to be by their clients, especially lobbyists who are former ministers, top government officials or their staff.

4.5.2 Unethical lobbying loopholes undermine public confidence

The second general area of the federal Canadian lobbying system that does not comply with the egalitarian model is that the ethics rules for lobbyists allow for influence that could undermine the public's confidence in the integrity of public processes. As mentioned above at the end of section 4.4, loopholes, weaknesses and inconsistencies in the rules that apply to politicians and government officials after they leave their public position raise the first

⁷⁷⁸ *Lobbying Act*, *supra* note 749, subsections 7(4) to 7(4.4). *Lobbyists Registration Regulations* (SOR/2008-116), sections 9-10.

concerns in this area. First, the *MP Code* and *Senate Code* do not include a cooling-off period for MPs, Senators or their staff that restricts their activities after they leave office.

However, the requirements in the *COIA* that apply to Cabinet MPs (ministers, ministers of state and parliamentary secretaries) and almost all Cabinet appointees (deputy ministers, associate deputy ministers and most appointed heads of government institutions, and Cabinet staff except people who work on average less than 15 hours per week)⁷⁷⁹ state that a Cabinet minister and a minister of state for two years, and everyone else for one year, cannot:

- i. “enter into a contract of service with, accept an appointment to a board of directors of, or accept an offer of employment with” an entity; or
- ii. “make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal”

if they had direct and significant official dealings during the period of one year immediately before their last day in office.⁷⁸⁰ The rules for the one-year cooling-off period for government employees after they leave their position are the same, as well as a provision that they not share secret information about programs and policies of their former government institution and others they

⁷⁷⁹ The people who are not required to comply with the one-year cooling-off period are ministerial staff who work on average less than 15 hours per week, and; reporting public office holders (i.e. heads of some government institutions and others) that are not Cabinet or minister-appointed in some way covered by the definition of “reporting public office holder” in the *COIA*, *supra* note 666, subsection 2(1), and are not designated under subsections 62.1(2) and 62.2(2) of the *COIA*. For the list of office holders designated under subsections 62.1(2) and 62.2(2) see the *Order Designating Public Office Holders and Reporting Public Office Holders under Section 62.2 of the Conflict of Interest Act* (SOR/2014-200).

⁷⁸⁰ *COIA*, *supra* note 666, subsections 35(1) and (2), and section 36.

were connected to in a direct and substantial way, and they can apply for an exemption.⁷⁸¹ Cabinet ministers and ministers of state are also prohibited for two years from making representations to ministers and ministers of state who were in Cabinet with them.⁷⁸²

Any of these people can request that the Ethics Commissioner grant a waiver or reduction of their cooling-off period for various reasons, including the circumstances of them leaving office, their job prospects, their degree of power while in office, and how that may give an advantage to their new employer and the “facilitation of interchange between the private and public sector” – and the Commissioner must publish any waivers granted.⁷⁸³ Also, a former ministerial staff person who worked less than 15 hours per week in essentially a low-level administrative position that “did not include the handling of files of a political or sensitive nature, such as confidential cabinet documents” can request that the Ethics Commissioner grant a waiver of their one-year cooling-off period, and the Commissioner must publish any waivers granted.⁷⁸⁴

The questions that these rules raise are: Why do they not apply to all heads and deputy heads of all government institutions (including ambassadors and other senior diplomats)? Why do they only apply to people and entities that the office holder has had direct, significant and official dealings during their last year in office? Why do the cooling-off periods only

⁷⁸¹ *Directive*, *supra* note 722, clauses 4.2.19, 4.2.20 and Appendix A, clause A.2.2.4.

⁷⁸² *COIA*, *supra* note 666, subsections 35(3) and 36(2).

⁷⁸³ *COIA*, *supra* note 666, sections 39 and 42.

⁷⁸⁴ *COIA*, *supra* note 666, sections 38 and 42.

last for one to two years? and; Why can exemptions be granted for such broad and varying reasons that contradict the purpose of the *COIA* of preventing conflicts of interest?

There are other rules set out below that apply to the relationships and interactions between registered lobbyists and politicians and public officials, but as described in previous sections lobbying is legal without registering and so those rules do not apply to all lobbyists. Any decision concerning what to set as the length of a cooling-off time period after someone leaves a public office is somewhat arbitrary because it is difficult to determine in some cases whether a relationship or connection has created an appearance of a conflict of interest. However, it seems particularly arbitrary to say that only relationships and connections developed through direct, significant, official dealings during the last 12 months on the job create an advantage for a former public office holder and/or conflict of interest for the office holders who remain in government, and also that the conflict somehow disappears only 12 to 24 months afterwards.

Three other very broad rules in the *COIA* apply to Cabinet MPs and a longer list of Cabinet appointees⁷⁸⁵ and they seem to say that these people can never advocate or advise individuals, businesses or other entities in their dealings with the federal government as long as any of their former

⁷⁸⁵ The people exempt from these three rules include heads of diplomatic missions (embassies etc.), a deputy commissioner of the RCMP, lieutenant governors, judges or military judges, and public office holders (i.e. heads of some government institutions and others) that are not covered by the definition of “public office holder” in the *COIA*, *supra* note 666, subsection 2(1), and are not designated under subsections 62.1(1) and 62.2(1) of the *COIA*. For the list of office holders designated under subsections 62.1(1) and 62.2(1), see the *Order Designating Public Office Holders and Reporting Public Office Holders under Section 62.2 of the Conflict of Interest Act* (SOR/2014-200).

colleagues or officials they interacted with are in the government. However, the rules have not been enforced that way by the Ethics Commissioner. The rules are that these office holders cannot ever “take improper advantage” of their former public office; “act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party” and the office holder acted for or provided advice to the Crown, or; “give advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public.”⁷⁸⁶ The first rule has been interpreted by the current Ethics Commissioner essentially to mean that, as long as the office holder complies with the other rules of their cooling-off period, anything they do after leaving their position will be deemed as not taking improper advantage of their former position.⁷⁸⁷

With regard to the third broad rule, given it is not possible to unlearn what you have learned, it seems that the rule would prohibit any former office holder from advising anyone or any entity, given that their advice would always be based on (i.e. “using”) secret information they learned while on the job. However, former Ethics Commissioner Mary Dawson ruled in January 2014 on a situation involving former Cabinet minister Chuck Strahl (who left politics in spring 2011) lobbying the B.C. government for Enbridge concerning their approval of Enbridge’s proposed Northern Gateway Alberta-B.C.

⁷⁸⁶ COIA, *supra* note 666, sections 33-34.

⁷⁸⁷ Conflict of Interest and Ethics Commissioner, Letter dated January 17, 2022, online: <<https://democracywatch.ca/wp-content/uploads/EthicsCommRulingOnBartonJan172022.pdf>>, fourth and fifth paragraphs (hereinafter “Ethics Commissioner (Jan. 17, 2022)”).

pipeline, which also required some federal government approvals and had been considered by the federal Cabinet when Mr. Strahl was a minister. Commissioner Dawson's ruling stated that, for her even to investigate, she would have to be presented with "specific information" proving that a former office holder actually gave advice using secret information they learned while in office.⁷⁸⁸ Current Ethics Commissioner Mario Dion essentially echoed that requirement in a ruling in January 2022.⁷⁸⁹

These rulings essentially mean that it is effectively legal to violate this third broad rule, for three reasons. First, such specific information would likely never be disclosed unless someone inside the client business or organization of a former office holder blew the whistle and disclosed the documents giving the advice. Secondly, if a former public office holder gave the advice without citing the secret information it was based on, even if the advice was disclosed it would be impossible to prove that it was based on the secret information. Thirdly, if the office holder gives the advice only verbally, and no one records it, it would be impossible to prove that the advice was even given.

For example, one of the key things that anyone or any entity wants to know is who is the actual decision-maker concerning whatever statutory, code, tax, subsidy, program or other change is the focus of the lobbying effort. This information is often not known to the public – the Cabinet minister whose mandate includes the policy area may not actually have any decision-making

⁷⁸⁸ Conflict of Interest and Ethics Commissioner, Letter dated January 23, 2014, online: <https://democracywatch.ca/wp-content/uploads/StrahlLetter-to-D.-Conacher_January-23-2014.pdf>, fourth paragraph.

⁷⁸⁹ Ethics Commissioner (Jan. 17, 2022), *supra* note 787, fifth paragraph.

power, as the Prime Minister may actually make all the decisions in the area, and may rely entirely on one of her/his advisers to actually make any decisions. Knowing that this adviser is the actual decision-maker is valuable information for any lobbying effort, and a former public office holder can easily pass on this information verbally without leaving any provable trace.

With regard to making representations to federal politicians, political staff or government institutions in ways that would require registering as a lobbyist under the *Lobbying Act*, the *Act* and a regulation under the *Act* state that all MPs, Cabinet staff, the staff of the Leader of the Official Opposition, and Cabinet appointees (“designated public office holders” – essentially deputy ministers, heads of government institutions, associate deputy ministers, assistant deputy ministers and other comparable top government officials) are all prohibited from doing registered lobbying for five years after they leave office.⁷⁹⁰ However, as detailed in the previous subsection, the loopholes in the lobbying registration requirements in the *Act* make it very easy to lobby without registering. In fact, the Prime Minister could resign and legally lobby the government the very next day as an employee of a business, without registering or disclosing their lobbying, as long as the former PM was careful about which business they lobbied for, and about whom they lobbied.

An additional disclosure loophole is that a former designated public office holder is not required under the *Lobbying Act* to report to the

⁷⁹⁰ *Lobbying Act*, *supra* note 749, section 10.11, and *Designated Public Office Holder Regulations* (SOR/2008-117). See also: Commissioner of Lobbying, “Comparable rank” bulletin (May 11, 2022), *supra* note 776; Commissioner of Lobbying, “Acting DPOH” bulletin (May 11, 2022), *supra* note 776.

Commissioner of Lobbying whenever they are lobbying during the five-year cooling-off period. But under the *COIA*, the former office holder is required to file a return, during their one- to two-year cooling-off period, to the Ethics Commissioner if they communicate with or arrange a meeting with (i.e. lobby) any federal office holder as defined by the *Lobbying Act*.⁷⁹¹ It is not fully clear, but it seems from a provision in the *COIA*⁷⁹² that the Ethics Commissioner would be prohibited from sharing the information about the lobbying with the Commissioner of Lobbying.

In addition, the five-year prohibition does not apply to a former designated public office holder who worked for the federal government under its employee exchange program Interchange Canada, which allows people from business and other sectors to go and work for the government for up to three years and then return to their private sector position (public officials can also go and work in the private sector and then return to their federal government position).⁷⁹³ As well, no matter what their connections or relationships with top political decision-makers or government officials, the five-year prohibition does not apply to other public office holders who are not “designated” – including the staff of MPs and senators, caucus research office staff, government employees below the rank of assistant deputy minister or a comparable position, and it also does not apply to staff of political parties even

⁷⁹¹ *COIA*, *supra* note 666, sections 37 and 40.

⁷⁹² *COIA*, *supra* note 666, sections 40 and 43.

⁷⁹³ Commissioner of Lobbying, “Disclosure of previous public offices,” (May 11, 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/disclosure-of-previous-public-offices/>>. Government of Canada, Interchange Canada, (September 2, 2016), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/professional-development/interchange-canada.html>>.

if they regularly communicate with or have a close relationship with Cabinet ministers and their staff, or with any party's leader and their staff.⁷⁹⁴

Beyond these loophole-riddled cooling-off periods under the *COIA* and the *Lobbying Act* that apply to former politicians, Cabinet staff and other appointed federal public officials (to varying degrees), and the rules that apply to government employees, the federal *Lobbyists' Code* sets out ethics rules that apply to all federal registered lobbyists that are essentially the flipside of the rules that address giving gifts/benefits/advantages to MPs and Cabinet MPs.⁷⁹⁵ While not a statute, the *Lobbyists' Code* is legally binding and applies to anyone who should be⁷⁹⁶ or is registered as a lobbyist under the federal *Lobbying Act*. It is important to note this because, as summarized above, loopholes allow for lobbying without registering, which means that lobbyists whose activities fit within those loopholes are exempt from the *Code's* rules⁷⁹⁷ and can lobby unethically in secret.

Under general Rule 6 of the *Lobbyists' Code*, a lobbyist is prohibited from proposing or undertaking any action "that would place a public office holder in a real or apparent conflict of interest." Rule 10 specifically prohibits a lobbyist from providing or promising "a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept." Rules 7 and 8 prohibit a lobbyist from

⁷⁹⁴ *Lobbying Act*, *supra* note 749, subsection 2(1) definition of "public office holder".

⁷⁹⁵ *Lobbyists' Code*, *supra* note 752.

⁷⁹⁶ *Makhija v Canada (Attorney General)*, 2010 FC 141 at paragraph 18.

⁷⁹⁷ *Lobbying Act*, *supra* note 749. See a summary of the loopholes in Democracy Watch, *Op-ed: Before making any other changes, make the 5-year ban on federal lobbying an actual ban, and make it fair, and strengthen enforcement*, (May 6, 2016), online: <<http://democracywatch.ca/before-making-any-other-changes-make-the-5-year-ban-on-federal-lobbying-an-actual-ban-and-make-it-fair-and-strengthen-enforcement/>>.

any lobbying activity with a public office holder who has a sense of obligation to the lobbyist, and specifically Rule 9 prohibits a lobbyist who has assisted a public office holder with political activities (for example, campaigning or fundraising (but not including making a political donation)) from lobbying that public office holder or the office holder's staff for "a specified period of time" until the sense of obligation created by the assistance no longer exists.⁷⁹⁸

Like Cabinet MPs under the *PM Code*, lobbyists are also required under the "Principles" section of the *Lobbyists' Code* to "observe the highest professional and ethical standards" and "conform fully with the letter and the spirit" of all laws, and "conduct with integrity and honesty all relations with public office holders" and "act in a manner that demonstrates respect for democratic institutions, including the duty of public office holders to serve the public interest." So again, another actor in federal Canadian politics is, at least in principle, required to ensure that integrity in politics is not just done but is seen to be done.

However, contradictions in the rules for federal Canadian lobbyists and MPs have been created by the interpretations the courts and the Commissioner of Lobbying have applied to the *Lobbyists' Code* rules, along with the Ethics Commissioner's interpretations of some sections of the *MP Code* and *COIA*. These interpretations, and many other enforcement issues and political culture characteristics, combine to create a variety of conflicts that, I contend, mean key federal Canadian political actors are not actually required to meet the public's expectations of integrity in politics. As well, the

⁷⁹⁸ *Lobbyists' Code*, *supra* note 752.

system far from guarantees relative equality of participation and influence based on the one person, one vote principle.

Because of different interpretations, currently a gap exists between two *Lobbyists' Code* rules (enforced by the Commissioner of Lobbying) and two sections of the *MP Code* (enforced by the Ethics Commissioner) that creates a conflict of laws situation that should be resolved. As with Canada's Ethics Commissioners, successive Commissioners of Lobbying have changed their interpretations of some of the lobbying rules in ways that conflict with each other, or remain unclear and raise ongoing, unanswered questions.

The first gap/conflict is caused by the commissioners' interpretations of general Rule 6 of the *Lobbyists' Code* that prohibits proposing or doing anything that would create a real or apparent conflict of interest for the public office holder. Former Commissioner of Lobbying Karen Shepherd published a guideline on Rule 6 that set out a test for determining whether a real or apparent conflict of interest has been created for the public office holder by the lobbyist's actions.⁷⁹⁹ The test was based on a unanimous 2009 Federal Court of Appeal ruling (cited above in Chapter 1) that interpreted a similar rule in an earlier version of the *Lobbyists' Code* that was in force from 1997 to 2015⁸⁰⁰ combined with the definition of what an appearance of a conflict of interest is, based on several past precedents, as set out by Justice Oliphant in

⁷⁹⁹ Commissioner of Lobbying, *Commissioner's guidance for lobbyists regarding the application of Rule 6 of the Lobbyists' Code of Conduct – Conflict of Interest*, online: <<https://web.archive.org/web/20170823202736/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01180.html>> (hereinafter "*Commissioner's Guidance [Rule 6]*")

⁸⁰⁰ *Democracy Watch v. Campbell*, *supra* note 39, paras. 52-53.

his public inquiry report on business and financial dealings between Karlheinz Schreiber and former Prime Minister Brian Mulroney.⁸⁰¹

The Canadian Bar Association issued an opinion in June 2010 concerning the initial guidance on former Rule 8 (current Rule 6, at least until the Commissioner finalizes her draft of the new *Code* and it is enacted), arguing that while lobbying regulations are needed to prevent improper influence, the inclusion of “political activity” as a very vaguely defined category in the list of activities that can create a conflict of interest violates subsection 2(b) *Charter* rights and is not reasonable and justified under section 1.⁸⁰² The CBA’s main argument was that including all political activities gave no guidance to lobbyists concerning which specific activities would cause a problem.⁸⁰³ In two other reports issued in January 2014 when the Commissioner was consulting on a new draft of the *Code* and January 2015 after the new *Code* came into force, the CBA again highlighted vague provisions in the proposed new *Code*.⁸⁰⁴ However, it should be noted that the Commissioner issued initial guidance documents in August 2010 that listed activities split into high-risk, medium-risk and low-risk categories,⁸⁰⁵ and later

⁸⁰¹ Honourable J. Oliphant, Commissioner, *Report of the Commission of Inquiry into Certain Allegations respecting Business and Financial Dealings between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, (2010), p. 531, as cited in *Commissioner’s Guidance [Rule 6]*, (hereinafter “*Oliphant Inquiry Report*”).

⁸⁰² Canadian Bar Association: National Constitutional and Human Rights Law Section, *Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists’ Code of Conduct* (Ottawa: CBA, June 2010) (hereinafter “CBA (2010)”).

⁸⁰³ CBA (2010), *supra* note 802, at 2-3, 6-7, 10-12. See also: Kerri A. Froc and Graeme G. Mitchell, “Kafka and the Lobbying Commissioner’s Policy Against Political Participation by Lobbyists,” (September 2011), 5 *Journal of Parliamentary and Political Law* 497.

⁸⁰⁴ Canadian Bar Association: National Administrative Law Section, *Lobbyists’ Code of Conduct Consultation* (Ottawa: CBA, January 2014) at 5. Canadian Bar Association: National Administrative Law Section, *Revised Lobbyists’ Code of Conduct* (Ottawa: CBA, January 2015) at 7-20 (hereinafter “CBA (2015)”).

⁸⁰⁵ CBA (2015), *supra* note 804, at 502-504.

added more details to the documents, thereby providing enough precision, I contend, to meet the section 1 test of a reasonable limit lobbyists' right to freedom of expression if the *Code* rules were ever challenged in court.

Unfortunately, when new Commissioner of Lobbying Nancy Bélanger took office in January 2018, she deleted former Commissioner Shepherd's Rule 6 guideline from the Commissioner's website,⁸⁰⁶ leaving only a general statement that, while it does not mention Rule 6, sets out the same test for whether conflict of interest has been created for the office holder by the lobbyist's actions that was used by Commissioner Shepherd, as follows:

A conflict of interest is created when there is a perception that a public office holder's private interests may influence their performance when carrying out their official duties.

...

Would an informed person, viewing the matter realistically and practically and having thought the matter through, think that an action taken by a lobbyist has created a sense of obligation on the part of the public office holder, or a tension between the public office holder's private interests and the duty of the public office holder to serve the public interest? – *Oliphant Inquiry*⁸⁰⁷

However, Commissioner Bélanger then essentially ignored the test in her first two rulings on Rule 6 issued in July 2020. The rulings were one each about Benjamin Bergen and Dana O'Born, both involved in a situation where

⁸⁰⁶ Commissioner of Lobbying, *Annual Report 2018-2019*, online: <<https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2018-19/>>, p. 13 of PDF version of the report (hereinafter "*Commissioner's Annual Report 2018-2019*").

⁸⁰⁷ Commissioner of Lobbying, "Guidance – Lobbyists' Code of Conduct," online: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/>>. The reference is to the *Oliphant Inquiry Report*, *supra* note 801.

they worked as co-managers for Chrystia Freeland when she was a Liberal Party candidate during the 2015 election, then served on the executive of her electoral district association for two years after that election and, during this time period when Ms. Freeland was a Cabinet minister, also lobbied as in-house organization lobbyists Freeland's Parliamentary Secretary (who, at the time, was David Lametti), her Cabinet office staff, and top officials in her department.⁸⁰⁸ In the rulings, Commissioner Bélanger sets out a correct summary of the legal test for what a "real" and "apparent" conflict of interest is,⁸⁰⁹ but then incorrectly and unreasonably concludes that the lobbyists' actions did not create even the appearance of a conflict of interest for Minister Freeland. Commissioner Bélanger reaches this unreasonable conclusion by requiring Minister Freeland to know about Bergen's and O'Born's lobbying, and to have exercised a power, duty or function that favoured their organization, in order for Freeland to have been in an apparent conflict of interest.⁸¹⁰

This is unreasonable because *Lobbyists' Code* rules are aimed at preventing the lobbyist from doing anything that creates even an apparent

⁸⁰⁸ Commissioner of Lobbying, *Investigation Report: Benjamin Bergen, Council of Canadian Innovators*, (March 2020) online: <<https://lobbycanada.gc.ca/media/dfrhap4m/investigation-report-benjamin-bergen-en.pdf>> and also at: <<https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/benjamin-bergen-council-of-canadian-innovators/>> (hereinafter "Commissioner of Lobbying: *Bergen Report*"). Commissioner of Lobbying, *Investigation Report: Dana O'Born, Council of Canadian Innovators*, (March 2020) online: <<https://lobbycanada.gc.ca/media/cfnhpeio/investigation-report-dana-oborn-en.pdf>> and also at: <<https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/dana-o-born-council-of-canadian-innovators/>> (hereinafter "Commissioner of Lobbying: *O'Born Report*").

⁸⁰⁹ Commissioner of Lobbying: *Bergen Report*, *supra* note 808, pp. 23-27. Commissioner of Lobbying: *O'Born Report*, *supra* note 808, pp. 23-27.

⁸¹⁰ Commissioner of Lobbying: *Bergen Report*, *supra* note 808, pp. 26 and 28-31. Commissioner of Lobbying: *O'Born Report*, *supra* note 808, pp. 26 and 29-31.

conflict of interest for a public office holder – the public office holder’s actions are irrelevant – and the Commissioner used the test for a real conflict of interest, not for an apparent conflict. As the Commissioner’s own webpage says, the test is whether there is a “perception” that an office holder’s private interests “may” influence their decisions and actions. By lobbying Minister Freeland’s senior officials concerning matters about which she had decision-making power and responsibility as minister,⁸¹¹ which Bergen and O’Born did by lobbying her Parliamentary Secretary and staff and senior departmental officials about the Canada Export Program, they placed her in an appearance of a conflict of interest, whether or not she knew they were lobbying.

As Justice Parker set out in his 1987 commission report (in what is generally acknowledged as the first delineation of different types of conflict of interest, although it also draws upon earlier sources), to be in a real conflict of interest a politician or public official: must know about the private interest that causes the conflict; and the interest must be connected to an exercise of their duties, functions or powers (meaning connected not only to participating in decision-making, but also being involved in any discussion, communication or situation, or being in a state of “conscious inaction” in a situation) and; the interest be significant enough to create a conflict.⁸¹²

⁸¹¹ Ministerial responsibility is defined in *The Queen v. Harrison*, 1976 CanLII 3 (SCC), [1977] 1 SCR 238, pp. 245-246.

⁸¹² The Hon. W. D. Parker, *Report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, (Ottawa: Supply and Services Canada, 1987), online: <<https://publications.gc.ca/site/eng/9.818247/publication.html>>, at 25-29 (hereinafter “Parker Commission report (1987)”). If the politician or public official knows about the private interest but does not exercise powers that affect the interest, but could do so in the future, then it is a potential conflict of interest, *supra* at 29-30. As summarized above in sections 4.2 to 4.4

However, whether an apparent conflict of interest exists is based solely on whether a situation (“the surrounding circumstances”) appears to a reasonably informed person to be a situation in which the politician or public official would know about their private interest, and that it would create a conflict – the person perceiving the situation only has to be reasonably informed, they do not have to have “a complete understanding of all the facts” and the official does not have to know that they have a private interest that creates a conflict.⁸¹³

The reason for the distinction is somewhat obvious – if the official knew of their private interest then they would have a real conflict of interest, and if the outside person knew that they knew then it wouldn’t be an appearance of a conflict, it would be a confirmed conflict. As well, as Justice Parker highlighted, it is always almost impossible for an outside person to know or obtain all the facts, including determining whether a politician or public official knew about their private interest, without “conducting his or her own commission of inquiry” – so in order to be an effective rule at all, an apparent conflict of interest is only required to be based on reasonably well-informed appearances.⁸¹⁴

As well, given a lobbyist does not know what any government official will do in any minister’s department with the communications the lobbyist has

concerning Canada’s federal ethics rules for ministers vs. MPs vs. senators vs. government employees, what exactly constitutes a private interest may be defined in different ways.

⁸¹³ Parker Commission report (1987), *supra* note 812, at 32-33. See this distinction also discussed in: Valerie Jepson, “Apparent conflicts of interest, elected officials and codes of conduct,” (May 2018), Vol. 61(1) *Canadian Public Administration* 36 at 39-41 (hereinafter “Jepson (May 2018)”).

⁸¹⁴ Parker Commission report (1987), *supra* note 812, at 33-35.

with that the official, in order for Rule 6 to be at all effective at preventing a lobbyist from putting office holders in an apparent conflict of interest, the assumption must be that whatever a lobbyist communicates to any government official in the minister's department will be passed on to the minister in some form, especially communications with regard to a matter for which the minister has legal authority and responsibility. If Rule 6 is not interpreted and applied in this way, it would open a huge loophole that would allow lobbyists to lobby everyone in a government department or institution who reports to a public office holder, and have all their lobbying communications passed on to the office holder, even if they have a "sense of obligation" relationship with the office holder.

Further, if Minister Freeland had taken part in discussions, decisions or votes or other actions that affected Bergen's and O'Born's organization, she would not only have been in an appearance of a conflict of interest, should have violated sections 4 and 6 (and possibly also sections 7, 8 or 9) of the *COIA* which, as noted above, prohibit even attempting to further the interests of friends or improperly to further the interests of anyone or any entity. The courts will rule on these issues as the Commissioner's rulings on the Bergen/O'Born/Freeland situation are the subject of two judicial review applications that have been consolidated into one case that the Federal Court heard in early December 2022.⁸¹⁵ As of May 20, 2023, the Federal Court

⁸¹⁵ See Federal Court ruling on a motion to strike the application filed by the Respondent Attorney General (Canada) at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613 (CanLii). See Federal Court ruling on a motion for a record confidentiality order filed by the federal Commissioner of Lobbying at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 1417 (CanLii). Democracy Watch, News Release: Democracy Watch in court today vs.

justice had not issued a ruling in the case, but likely will issue a ruling before the end of 2023.

The second gap/conflict between the Commissioner of Lobbying's interpretation of the rules and the Ethics Commissioner's decisions concerning the rules is caused by Rule 10 of the *Lobbyists' Code* which says a lobbyist is prohibited from even proposing to provide a "gift, favour or other benefit" to a public office holder s/he is lobbying but then qualifies the prohibition by saying it only applies to gifts the official "is not allowed to accept." As summarized above in sections 4.2 and 4.3, MPs and Cabinet MPs are allowed to accept some gifts and other advantages under the *MP Code* and the *Conflict of Interest Act* ("COIA"). Former Commissioner of Lobbying Karen Shepherd's guideline on Rule 10 seemed to ignore this. Her guideline instead interpreted Rule 10 within the umbrella of her guideline on general Rule 6 that prevented lobbyists from doing anything to create even the appearance of a conflict of interest.⁸¹⁶ At the same time, in the "When is a gift allowed?" section of her guideline, Commissioner Shepherd only cited courtesy/hospitality gifts – things a politician would receive as part of their job (such as tickets to an event where they are giving a speech, along with a meal

Lobbying Commissioner rulings letting off lobbyists who helped Chrystia Freeland win election, then lobbied her officials and staff, (December 6, 2023), online: <<https://democracywatch.ca/democracy-watch-in-court-today-vs-lobbying-commissioner-rulings-letting-off-lobbyists-who-helped-chrystia-freeland-win-election-then-lobbied-her-officials-and-staff/>>.

⁸¹⁶ Commissioner of Lobbying, *Commissioner's Guidance for lobbyists regarding the application of Rule 10 of the Lobbyists' Code of Conduct – Gifts*, online: <<https://web.archive.org/web/20170823181004/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01183.html/>> (hereinafter "*Commissioner's Guidance [Rule 10]*"). *Commissioner's Guidance [Rule 6]*, *supra* note 799.

and token gift at the event) – while ignoring other forms of advantages that a lobbyist could provide to an office holder.

Commissioner Shepherd's Rule 10 guideline also raised questions because it did not publicly define "favour" or "benefit" – instead it focused solely on defining "gift" as "anything of value, given for free or at a reduced rate, when there is no obligation to repay." That description and the word "favour" suggested that Rule 10 covers not only giving something but also doing something (i.e. "doing a favour"). It seems unlikely that the Commissioner Shepherd, who drafted the current rules in the *Lobbyists' Code*, intended the word "favour" to mean only giving a "party favour." The word "benefit" also suggests both giving something or doing something.

All of this pointed to a conclusion that Commissioner Shepherd interpreted Rule 10 as meaning a lobbyist can't do anything for a politician s/he is lobbying except provide nominal gifts, even though Rule 10 says any gift/favour is allowed if the politician is permitted, under his/her rules, to accept the gift). When Commissioner Bélanger began her term of office, she changed the guideline on Rule 10 to set out a slightly different list of acceptable gifts,⁸¹⁷ but still did not deal with the question of what the broader terms "benefit" and "other advantage" mean in terms of acceptable gifts, nor with the issue of Cabinet MPs and other top government officials being allowed to accept gifts from "friends" under clause 11(2)(b) of the *COIA*.

There was a similar contradiction with the rule that allows an MP to accept the gift of sponsored travel from a lobbyist who is lobbying them under

⁸¹⁷ Commissioner's *Annual Report 2018-2019*, *supra* note 806.

section 15 of the *MP Code*, while again Rules 6 and 10 of the *Lobbyists' Code* (as former Commissioner Shepherd interpreted them) seemed clearly to prohibit a lobbyist from giving any significant gift, including sponsored travel. Democracy Watch filed a complaint in May 2016 alleging that 21 organizations that lobby federal MPs have violated the *Lobbyists' Code* by giving MPs sponsored travel gifts (some of the organizations had been sponsoring MP trips for years).⁸¹⁸ It took three years, but in April 2019 Commissioner Bélanger finally issued a ruling on the complaint, concluding that the *MP Code*'s exemption overrides the *Lobbyists' Code* rules, and so it is legal for lobbyists to give the gift of sponsored travel to politicians they are lobbying.⁸¹⁹ Overall, as with MPs being allowed to accept gifts from lobbyists and friends due to these loopholes, lobbyists giving these gifts do not align with the egalitarian model as it allows those who can afford it to give significant gifts to MPs they are lobbying.

The third gap/conflict between the Commissioner of Lobbying's decisions and the Ethics Commissioner's decisions is that former Commissioner Shepherd's guideline on Rule 9 prohibited lobbyists from lobbying for five years after undertaking significant political activities for an MP or other official, including volunteering in various ways with the MP or his/her

⁸¹⁸ Democracy Watch, News Release: Group files ethics complaint with federal Lobbying Commissioner about travel junkets lobbyists have given to MPs and senators for years, (May 26, 2016), online: <<http://democracywatch.ca/20160526-group-files-ethics-complaint-with-federal-lobbying-commissioner-about-travel-junkets/>>.

⁸¹⁹ Commissioner of Lobbying, *Sponsored travel by lobbyists*, (April 2019), online: <<https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/sponsored-travel-provided-by-lobbyists/>>.

electoral district association.⁸²⁰ However, Commissioner Shepherd also did not set out any time period during which a lobbyist would be prohibited from lobbying after creating a “sense of obligation” by giving a gift/benefit or doing a favour under Rule 10 – stating only that the sense of obligation “decreases with time.”⁸²¹ When Commissioner Bélanger took office, she changed both guidelines, but did not resolve the contradiction.⁸²²

As of May 20, 2023, the Rule 9 guideline now states that the conflict of interest created by significant activities continues “for a period equivalent to a full election cycle”⁸²³ but does not specify exactly what that means given that election cycles differ in length. For example, the period between the completion dates of the 2015 and 2019 elections was just over four years, from October 19, 2015 to October 21, 2019, while the period between the completion dates of the 2019 election and the September 20, 2021 election was only 19 months. The guideline also does not clarify how long the conflict continues for less significant activities, and it continues to say that the sense of obligation “diminishes with time.” The Rule 10 guideline also still does not

⁸²⁰ Commissioner of Lobbying, *Commissioner’s Guidance for lobbyists regarding the application of Rule 9 of the Lobbyists’ Code of Conduct – Political Activities*, (November 6, 2015) online: <<https://web.archive.org/web/20170823202750/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html>>, section entitled “Activities that carry risk” and (hereinafter “*Commissioner’s Guidance [Rule 9]*”).

⁸²¹ *Commissioner’s Guidance [Rule 9]*, *supra* note 820, in the section entitled “The risk diminishes with time.”

⁸²² Commissioner’s *Annual Report 2018-2019*, *supra* note 806.

⁸²³ Commissioner of Lobbying, *Guidance to mitigate conflicts of interest resulting from political activities*, (July 13, 2020) online: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/guidance-to-mitigate-conflicts-of-interest-resulting-from-political-activities/>> (hereinafter: “Commissioner of Lobbying: Guidance re: political activities”).

set out for what time period the conflict created by giving a gift continues to exist.⁸²⁴

As well, the new Rule 9 guideline allows for more activities by lobbyists that assist candidates and politicians, which complies less with the egalitarian model. In Commissioner Shepherd's version of the guideline, the only activities that would not create a conflict of interest were: voting; having a lawn sign; scrutineering the vote count; speaking on a panel and expressing support; purchasing a ticket for a fundraising event and/or making a donation that is legal under the *CEA*.⁸²⁵ The new guideline also allows for "occasional involvement" in volunteering or canvassing (meaning knocking on doors or approaching people in the street) for a party, candidate or EDA.⁸²⁶

In addition, neither the Commissioner of Lobbying nor the Ethics Commissioner have issued rulings (as of May 20, 2023) that square these interpretations of Rules 6, 9 and 10 of the *Lobbyists' Code* with the fact that, under the gifts/benefit section 14 of the *MP Code*, an MP is allowed to accept the benefit of *unlimited* volunteer services from a lobbyist who is lobbying the MP. As noted above in subsection 4.2, the section 3(1) definition of "benefit" in the *MP Code* does not include "a service provided by a volunteer working on behalf of" an MP.

⁸²⁴ Commissioner of Lobbying, *Guidance to mitigate conflicts of interest with respect to gifts*, (July 13, 2020) online: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/guidance-to-mitigate-conflicts-of-interest-with-respect-to-gifts/>>.

⁸²⁵ Commissioner of Lobbying, *Commissioner's Guidance [Rule 9]*, *supra* note 820, section entitled "Activities that carry no risk."

⁸²⁶ Commissioner of Lobbying: Guidance re: political activities, *supra* note 820, section entitled "Political activities less likely to create a sense of obligation".

Another conflict of laws existed for several years due to, as noted above in section 4.3, former Ethics Commissioner Mary Dawson's interpretation of the gifts/benefits section 11 of the *COIA*. Despite the fact that the main purpose of the *COIA* is to prevent conflicts of interest and resolve any that arise in the public interest (section 3), and despite the fact that the "gift/advantage" definition in section 2 of the *COIA* includes any service (as well as money or property), former Commissioner Dawson interpreted the section 11 gift rule to exempt any "political" services provided to an MP or an MP's riding association. Section 11 allows the electoral district association of any MP to accept a gift that is permitted under the *Canada Elections Act* (in 2022, that *Act* permits an annual donation of money, property or services worth up to \$1,700 per party, and another \$1,700 combined total to the riding associations of each party (in 2023, with both amounts increasing automatically annually by \$25)).⁸²⁷

Commissioner Dawson's interpretation led her to issue a ruling first in May 2010 that, without considering the value of the services provided by the lobbyist, stated a Cabinet MP does not violate the *COIA* when s/he has lobbyists (who are lobbying him/her) assist with fundraising, campaigning or other political activities, even when the Cabinet MP clearly benefits from the lobbyist's assistance.⁸²⁸ In direct contrast, the Commissioner of Lobbying, forced by the unanimous 2009 Federal Court of Appeal ruling,⁸²⁹ issued a

⁸²⁷ *CEA*, *supra* note 79, section 367. The donation limit increases by \$25 annually.

⁸²⁸ Conflict of Interest and Ethics Commissioner, *The Raitt Report* [May 2010], *supra* note 708 at 20-23.

⁸²⁹ *Democracy Watch v. Campbell*, *supra* note 39.

ruling about the same situation finding that the lobbyists involved in providing such assistance to the Cabinet MP they were lobbying were guilty of violating the *Lobbyists' Code*.⁸³⁰ Also as noted above in section 4.3, this conflict of laws was resolved in 2020 when the new Ethics Commissioner expanded the definition of “private interest” under the *MP Code* and the *COIA* to include political interests.⁸³¹ As a result, as of May 20, 2023, it was more clear that an MP or Cabinet MP cannot accept the gift of significant fundraising or other significant political assistance from a lobbyist who is lobbying them.

A final conflict of laws involving the *Lobbyists' Code* as defined by the current Commissioner of Lobbying relates back to the discussion above of the interpretation and application of current Rule 6, and is also raised by rules 9 and 10, and also current Rule 8 which states that “A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.” All of these rules contain words that raise the issue of what it means to lobby a public office holder. Commissioner Bélanger ruled in her Bergen and O’Born rulings that a lobbyist has to directly communicate with a public office holder in order to be lobbying them.⁸³²

However, the definition of ministerial responsibility in Canada’s Westminster system of parliamentary democracy has multiple facets: (i)

⁸³⁰ Commissioner of Lobbying, *Report on Investigation: The Lobbying Activities of Will Stewart*, (February 2011), online: <<https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/the-lobbying-activities-of-will-stewart/>>. Commissioner of Lobbying, *Report on Investigation: The Lobbying Activities of Michael McSweeney*, (February 2011), online: <<https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/the-lobbying-activities-of-michael-mcsweeney/>>.

⁸³¹ Ethics Commissioner, *Trudeau II Report*, *supra* note 693.

⁸³² Commissioner of Lobbying: *Bergen Report*, *supra* note 808, p. 20. Commissioner of Lobbying: *O’Born Report*, *supra* note 808, p. 20.

collective responsibility; (ii) individual responsibility; (iii) responsibility for actions of officials in a minister's department and portfolio, and; (iv) responsibility and legal authority for decision-making concerning the creation of, and changes to, a law, regulation, policy, or program of the government, or the approval of an appointment or the awarding of a grant, contribution, contract, or other financial benefit.⁸³³ The *PM Code* states the following concerning the fourth part of the definition of ministerial responsibility:

I.1 Individual Ministerial Responsibility

Most ministerial responsibilities are conferred on Ministers by Parliament through statutes that set out the powers, duties and functions for which the Minister is individually accountable. In addition, Ministers may also have other authorities in common law. They may also have responsibilities assigned to them by the Prime Minister.

...

I.2. Collective Ministerial Responsibility

...Policies presented to Parliament and to the public must be the agreed policies of the Cabinet.... Ministers also have responsibilities for representing the different perspectives and interests of their regions, and these inevitably cut across departments.

...

I.3. Ministerial Accountability

Ministers are accountable to Parliament for the exercise of the powers, duties and functions vested in them by statute or otherwise.

...

⁸³³ *PM Code*, supra note 705.

It is critical to the principle of responsible government that all organizations within the executive be the responsibility of a Minister who is accountable to Parliament for the organization.

...

II.1. Powers, Duties and Functions

Under departmental statutes, it is the presiding Minister who is vested with *powers, duties and functions*....

As set out in the federal Guidance for Deputy Ministers,⁸³⁴ various statutes empower deputy ministers, and others who have been formally delegated by a minister, the power to act for a minister. For example, subsection 24(2) of the *Interpretation Act*, (R.S.C., 1985, c. I-21) states that statutory provisions that direct or empower a minister to do any act or thing cover the actions of the minister, the minister's deputy minister, and anyone appointed "in a capacity appropriate to the doing of the act or thing."

However, subsection 24(3) states that nothing in 24(2) "shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the *Statutory Instruments Act*."⁸³⁵ As well, the federal government's *Guide for Parliamentary Secretaries*⁸³⁶ states in section II on page 1:

While parliamentary secretaries may explain their minister's policies, they cannot be delegated their minister's statutory "powers, duties and

⁸³⁴ Privy Council Office, *Guidance for Deputy Ministers* (2017), online: <<https://www.canada.ca/en/privy-council/services/publications/guidance-deputy-ministers.html>> (hereinafter "Guidance for Deputy Ministers").

⁸³⁵ *Guidance for Deputy Ministers*, Statutory and other authorities, subsection II.2(a).

⁸³⁶ Prime Minister of Canada, *Guide for Parliamentary Secretaries* (2016), online: <<https://pm.gc.ca/en/news/backgrounders/2016/01/05/guide-parliamentary-secretaries>> and in PDF format: <https://pm.gc.ca/sites/pm/files/inline-files/Guide_for_Parl_Sec_2015_Eng_3.pdf>

functions.” Overall responsibility and accountability remains with the minister.

In other words, as also established by the Supreme Court of Canada in its 1976 ruling in *The Queen v. Harrison*,⁸³⁷ while ministerial authority is exercised by government officials on behalf of ministers, the legal authority and responsibility remains with the Minister unless it can be, and is, formally delegated by the Minister in accordance with the provisions of a statute. Most importantly, the power to propose or change legislation and regulations and, therefore, to change government policies and programs that operate under legislation and regulations, always remains with the minister.

This may seem like an obscure, technical point. However, it has the very broad, significant effect of determining that the words “to lobby a public office holder” who is a minister means to lobby anyone who works for that minister, as only the minister has decision-making authority (unless it has been formally delegated) and so any lobbying communications must be assumed to flow up to the minister in some form as part of the minister’s decision-making process. If it was assumed that people who work for a minister do not pass on lobbying communications (in other words, summaries of what stakeholders want from a minister’s decisions), it would essentially render Rules 6, 8, 9 and 10 of the *Lobbyists’ Code* meaningless, as it would mean that everyone serving a minister in top roles (including deputy minister, associate deputy minister, and ministerial staff) could be lobbied and given gifts by a lobbyist even when the minister has an appearance of a conflict of

⁸³⁷ *The Queen v. Harrison*, 1976 CanLII 3 (SCC), [1977] 1 SCR 238, pp. 245-246.

interest and/or sense of obligation to the lobbyist. Given the Commissioner of Lobbying has essentially interpreted the *Code* in this way, the rules need to be changed to make it clear that lobbying a minister (or other top government official) means to lobby anyone who is acting under the authority of that minister or official.

4.5.3 Unequal lobbying resources undermine equal participation

The third general area of federal Canadian lobbying that does not comply with the egalitarian model is that, also unlike the restrictions on spending on ads and other activities by third parties during the pre-election and election periods (inegalitarian as those limits are, as detailed in Chapter 3, section 3.27), third parties are not limited in how much they spend on lobbying at any time. As mentioned above in subsection 4.5.1, lobbyists are not required to disclose the amount they spend on lobbying, which makes it difficult to determine exactly how unequal lobbying resources are.

There is evidence that businesses have more resources for lobbying than citizen organizations. Businesses in Canada, especially in the many sectors that are essentially oligopolies (banking, insurance, telecommunications, airlines, fossil fuels, forestry, mining and utilities) can relatively easily increase the price of their products and services in order to have funds for lobbying (and lawyers and advertising that also advocates their agenda concerning laws and law enforcement as it applies to them). Their customers, individuals, thereby pay for the advocacy of the businesses, even when that advocacy is for changes that will hurt the interests of customers. In

addition, businesses are allowed under Canada's *Income Tax Act* to deduct expenses for advertising (including any advertising that advocates a position on government policy) and for lobbying from their income, thereby reducing the total income tax they pay annually.⁸³⁸

In contrast, organizations that represent citizens have a relatively more difficult time raising funding from individuals through fundraising efforts. It's true that part of a donation to a registered charity⁸³⁹ is tax deductible which encourages individuals to donate, but the charity also has to pay the costs of reaching out and convincing individuals to donate. Citizen organizations that are not charities cannot offer any tax deductions as an incentive to individuals to donate.

It's also true that several government programs and foundations offer grants to charities and other citizen organizations, but many of these grants go to organizations providing social services, not to organizations that advocate in policy-making processes. It's also true that unions have a relatively easier time funding advocacy efforts, given that their members are required to pay dues. However, to collect dues a union must first be organized and certified and, again, the business that is the target of the

⁸³⁸ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Advertising expenses are allowed to be deducted from business income under sections 19, 19.01 and 19.1. See also: Canada Revenue Agency, Line 8521: Advertising, online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/completing-form-t2125/line-8521-advertising.html>>. Lobbying expenses are allowed to be deducted under clause 20(1)(cc).

⁸³⁹ Canada Revenue Agency, How do I calculate my charitable tax credits, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/giving-charity-information-donors/claiming-charitable-tax-credits/calculate-charitable-tax-credits.html>>.

organizing can relatively easily devote significant resources to thwarting the formation of a union.

A study of federal government lobbying by fossil fuel companies and industry associations from 2011 to 2018 somewhat indicates the greater lobbying resources available to businesses, especially big businesses, as it found 46 companies and associations registered 11,452 communications with federal public office holders while only 16 environmental citizen organizations registered only 2,399 communications during the same time period.⁸⁴⁰ The study also found that the 10 fossil fuel businesses that had the highest revenue did approximately 70 percent of the lobbying for the sector.⁸⁴¹ Another study of registrations and disclosure of monthly communications in the federal Registry of Lobbyists from July 2008 to July 2013 found that businesses and business trade associations had 64 percent of the communications, and that 70 percent of the organizations represented by consultant lobbyists were businesses or trade associations, and that approximately 70 percent of lobbying communications with the four central federal government institutions of the Prime Minister's Office, the Privy Council Office, Finance Canada and the Treasury Board Secretariat were by businesses and trade associations.⁸⁴²

However, despite these in-depth studies that involved a significant amount of research time and effort, the results don't clearly indicate greater

⁸⁴⁰ Corporate Mapping Project, *Big Oil's Political Reach: Mapping fossil fuel lobbying from Harper to Trudeau* (November 2019), online: <<https://www.corporatemapping.ca/lobbying/>>, pp. 20-25 (hereinafter "*Big Oil's Political Reach*").

⁸⁴¹ *Big Oil's Political Reach*, *supra* note 840, p. 33.

⁸⁴² Boucher (2018), *supra* note 613, at 325-327.

resources for business lobbying, as it is possible that the reasons for the higher number of lobbying communications were due to politicians and public officials opening their doors more to business lobbyists, or citizen organizations devoting less time and effort to communicating with politicians and officials. It is difficult to determine easily from the federal Commissioner of Lobbying's annual reports,⁸⁴³ and the federal Registry of Lobbyists,⁸⁴⁴ exactly how many more lobbyists lobby the Canadian government on any issue for businesses compared to for citizen organizations.

First, as detailed above, businesses are only required by the *Lobbying Act* to register employees who each lobby more than 20 percent of their work time, while citizen organizations are required to register every employee who lobbies any part of their work time. This skews the Registry's numbers to exaggerate the number of citizen organization lobbyists compared to business lobbyists. Secondly, the lobbyist category of "in-house organization" in the *Act* and the Registry includes both citizen organizations and business associations in every industry sector.⁸⁴⁵ Thirdly, the number of active registered lobbyists fluctuates as lobbyists register when lobbying and de-register when their lobbying activities are completed. Fourth, there is no easy way to search the Registry to determine how many consultant lobbyists (who work on contract) work for citizen organizations compared to businesses. Finally, as mentioned above in subsection 4.5.1, lobbyists are not required to

⁸⁴³ Commissioner of Lobbying, Reports and Publications, Annual Reports, online: <<https://lobbycanada.gc.ca/en/reports-and-publications/>>.

⁸⁴⁴ Commissioner of Lobbying, Registry of Lobbyists, online: <<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/guest?lang=eng>>.

⁸⁴⁵ *Lobbying Act*, *supra* note 749, section 7.

disclose how much they are spending on lobbying for each issue about which they lobby.

Beyond closing the disclosure loopholes that allow for lobbying without registering, another needed measure is to change the *Act* to require details to be disclosed in the registry so that, when combined with a simple search function in the Registry, detailed statistical information about who is lobbying and who is being lobbied can be easily obtained. These changes are needed to ensure that key information is easily available at any time showing the relative resources of lobbying by various stakeholders in any policy-making process. This information is also needed to determine whether corrective measures are needed, and what corrective measures may work, to ensure that the federal lobbying process complies with the egalitarian model principle of relatively equal opportunity for relatively equal participation, and influence, in policy-making processes. To give some indication of the number of federal Canadian lobbyists, set out below in Chart 23 is a summary list of the average number of lobbyists of each type registered in the Registry in fiscal years 2019-2020, 2020-2021 and 2021-2022.

Chart 23: Average Number of Active Canadian Federal Registered Lobbyists by Type from 2019-2022⁸⁴⁶

Fiscal Year	Average Number of Registered In-House	Average Number of Registered In-House	Average Number of Registered Consultant Lobbyists	Total Average Number of Active Registered Lobbyists

⁸⁴⁶ Commissioner of Lobbying, *Annual Report 2020-2021*, online: <<https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2020-21/>>, p. 7.

	Corporate Lobbyists	Organization Lobbyists		
2019-2020	2,089	2,993	1,020	6,102
2020-2021	2,127	3,091	1,060	6,279
2021-2022 ⁸⁴⁷	2,686	3,930	1,453	6,592
Averages over 3 years	2,301	3,338	1,178	6,324

While generally indicative of the level of lobbying of the federal government over this three-year period, again the information in Chart 23 does not disclose the extent of business lobbying compared to the extent of citizen group lobbying overall, or for any specific policy-making process. It is possible that the resources of citizen group lobbyists match business lobbyists in some policy areas. We know that, as of 2020, there were about 77,000 active registered charities in Canada.⁸⁴⁸ As well, at the end of December 2018 the limits on the amount of a charity's annual revenue that it can spend on policy advocacy were removed as long as the advocacy is non-partisan.⁸⁴⁹

⁸⁴⁷ Calculated from figures (rounded to nearest round number) in Commissioner of Lobbying, *Annual Report 2021-2022*, online: <<https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2021-22>>, pp. 3 and 5.

⁸⁴⁸ Mark Blumberg and Henri Pasha, "Blumberg's Snapshot of the Canadian Charitable Sector," (August 6, 2022), online: <<https://www.canadiancharitylaw.ca/wp-content/uploads/2022/08/Blumbergs-Canadian-Charity-Sector-Snapshot-2020.pdf>>.

⁸⁴⁹ Canada Revenue Agency, Resources for charities about political activities, online: <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/resources-charities-donors/resources-charities-about-political-activities.html>>.

However, we don't even know how many other citizen organizations there are that are not charities and, for both types of citizen organizations, as with businesses, again the lobbying disclosure loopholes mean we don't know how many are lobbying, nor how much they are spending on lobbying, nor the relative funding and lobbying resources and activities devoted by businesses and citizen organizations in any policy-making process.

In conclusion, Chapter 5 develops and sets out a framework for a more egalitarian model of lobbying, and Chapter 7 suggests proposals: for closing loopholes that allow for secret lobbying, gifts and favours in order to inform voters; and for clearing up the conflicting messages and rulings on lobbying ethics with clear rules to ensure no one can give gifts or do favours at a level that an average voter can't afford, or that create even an appearance of a conflict of interest that undermines public confidence in the fairness and integrity of any political process, and; for making the funding and resources available to citizen lobbyists more equitable with the resources available to business lobbyists.

Chapter 7 also details the many inegalitarian loopholes that will be created in the ethical lobbying rules summarized above if the changes to the federal *Lobbyists' Code* that the Commissioner of Lobbying proposed in November 2022, and that House of Commons Ethics Committee proposed in March 2023, are enacted. As of May 20, 2023, those proposed changes had not been enacted, but were expected to be enacted in the summer of 2023.

5. Toward a More Egalitarian Framework for a Political Finance, Gifts, Favours and Lobbying System

5.1. The Rawlsian approach as a starting point for a more egalitarian model

As in the discussion in Chapter 1 of a general theoretical framework for the evaluation of the Supreme Court's egalitarian model and the Canadian federal political finance system, as a starting point for a proposed framework and suggestions that could make the egalitarian model, and Canada's political finance system, more egalitarian, I again propose to use an approach based on Rawls theory of justice, but modified and expanded to incorporate other approaches, including those that critique Rawls' approach.

I am choosing to start with a combination of the approach of a Rawlsian "veil of ignorance" thought-experiment⁸⁵⁰ concerning political decision-making, again modified and expanded to incorporate the principles and approaches of other theorists, because I contend that this framework yields a strong combination and balance of principles of liberty, equality, democracy, justice and ethics for political decision-making processes, and upholds the one person, one vote principle, and addresses inequalities due to race, ethnicity, age, gender, income, wealth, natural endowments and abilities etc. and the political, class structure, economic system and level of development of society. For example, I accept the ethical concerns that various scholars propose to add to the Rawlsian model's main focus on concerns about equality of basic political liberties. I accept these additional

⁸⁵⁰ Rawls (1999), *supra* note 14.

concerns not only because I think they strengthen the basis of the arguments for a democratic political finance model, but also because Rawls' acknowledged that ethical concerns (i.e. concerns about anti-corruption) are valid.

Rawls concludes one would want a justice system that has the greatest likelihood of making decisions that give the most benefit to you for your entire life, and to your children, no matter what your position in society. Rawls' construction of this system focuses in part on the goal of having a system that includes as part of a "public conception of justice" basic institutional structures and processes that fulfill or aim to fulfill the goal of justice in ways that are clear to all,⁸⁵¹ and by extension this also applies to what one would want a political ethics process system to guarantee. To ensure the greatest likelihood that such decisions would be made consistently, such a process, I contend, would have to fulfill the following requirements: 1. decisions based on the highest level of popular support within society (to provide the highest level of protection to everyone affected by decisions, no matter what their position in society); 2. decisions based on reality and expertise – rationality and reasonableness as Rawls terms them⁸⁵² – (to ensure that decisions provide actual benefits), and; 3. fulfillment of the two previous requirements not being thwarted by decision-makers' conflicts of interest.

Everyone making decisions all together would, if consensus or near consensus was required, satisfy the first requirement but not necessarily the

⁸⁵¹ Rawls (2001), *supra* note 14, at 7.

⁸⁵² Rawls (2001), *supra* note 14, at 18-19.

second as there may be no experts in a particular society. One person making all decisions could fulfill the two requirements of popular support for decisions and honest, expert decision-making if that one person could also be required to base all decisions on the honest consensus of experts concerning what would be the best decision for the most people. Groups of experts for each area of decision-making who are required to make the best decision for the most people would also fulfill the requirements. However, a system would still be needed to choose that one person or those groups of experts.

Why are democratic elections a viable model for selecting decision-makers? First, as Rawls proposes, key benefits ("primary social goods") that one would choose to have distributed by the decision-making process "are rights, liberties, and opportunities, and income and wealth."⁸⁵³ Rawls also proposes two principles for an ideal justice system: 1. "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all"⁸⁵⁴ (which has primacy over the second principle); 2. "Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to positions and offices open to all under conditions of fair equality of opportunity."⁸⁵⁵

The "basic liberties" under the first principle include political liberty (the right to vote and to hold public office) and freedom of speech and assembly,

⁸⁵³ Rawls (1999), *supra* note 14 at 79.

⁸⁵⁴ Rawls (1999), *supra* note 14 at 220.

⁸⁵⁵ Rawls (1999), *supra* note 14 at 72.

and; liberty of conscience and freedom of thought.⁸⁵⁶ It follows logically that a truly democratic election is a model process to use to select societal decision-makers because such an election upholds these principles by allowing for free debate, the right to vote, and equal access to public office. With the broadest, most equal right to vote and right to become a candidate, such an election should also result in decision-makers being elected who have the broadest level of support, and who therefore theoretically would be most likely to provide social goods to the greatest benefit of the least advantaged.

However, it must be a truly democratic election, as only a truly democratic election will result in a group of more representative and more ethical decision-makers (not tied to any specific private interest) who are most likely to make the most just and fair decisions. Rawls based his proposals concerning elections (both the campaigning and voting processes) and politics generally not mainly on an ethical framework, but instead on the principle that the “fair value” of basic liberties for all must be guaranteed so that all have an actually equal, fair opportunity “to take part in and influence the political process.”⁸⁵⁷ This entails not just ensuring freedom of thought, conscience, expression and assembly, but also on ensuring equality of participation, including in informing oneself about political issues and the effects of policy proposals, in having the opportunity to make alternative proposals, and in participating in “deliberative democracy and “the exercise of public reason”⁸⁵⁸ because:

⁸⁵⁶ Rawls (1999), *supra* note 14 at 53.

⁸⁵⁷ Rawls (1999), *supra* note 14 at 197.

⁸⁵⁸ Rawls (2001), *supra* note 14, at 150.

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation.⁸⁵⁹

As noted in Chapter 2, Colin Feasby first pointed out that these kind of statements by Rawls formed the theoretical basis of the egalitarian model for political finance that the Supreme Court of Canada developed. Note, for example, the similarity between Rawls' principle set out above and the principles expressed by the Court in its ruling in *Libman*:

Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices.⁸⁶⁰

and in its ruling in *Harper*:

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. This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote.⁸⁶¹

It is important to note that Rawls stated that, to achieve actual equality of political participation "in a society allowing private ownership of the means

⁸⁵⁹ Rawls (1999), *supra* note 14 at 198.

⁸⁶⁰ *Libman*, *supra* note 41, para. 84.

⁸⁶¹ *Harper* (2004), *supra* note 10, para. 72.

of production, property and wealth must be kept widely distributed” and, more directly related to the area of political finance, there must be “government monies provided on a regular basis to encourage free public discussion.”⁸⁶²

As well, even more explicitly addressing the area of political finance, he wrote:

What is necessary is that political parties be autonomous with respect to private demands, that is, demands not expressed in the public forum and argued for openly by reference to a conception of the public good. If society does not bear the costs of organization, and party funds need to be solicited from the more advantaged social and economic interests, the pleadings of these groups are bound to receive excessive attention. And this is all the more likely when the less favored members of society, having been effectively prevented by their lack of means from exercising their fair degree of influence, withdraw into apathy and resentment.⁸⁶³

And Rawls made it clear that his position was that measures to ensure equal, fair opportunities to participate in and influence politics “cannot be rejected simply because they infringe on the freedoms of speech and of the press; these liberties are no more absolute than the political liberties with their guaranteed fair value”⁸⁶⁴ and “political speech, even though it falls under the basic liberty of freedom of thought, must be regulated to insure the fair-value of the political liberties.”⁸⁶⁵ As noted in Chapter 2, Rawls suggested “devices” to ensure “political parties are to be made independent from private economic interests” such as “allotting them sufficient tax revenues...based by some rule

⁸⁶² Rawls (1999), *supra* note 14 at 198.

⁸⁶³ Rawls (1999), *supra* note 14 at 198.

⁸⁶⁴ Rawls (2001), *supra* note 14, at 149.

⁸⁶⁵ Rawls (1981), *supra* note 14 at 74.

on the number of votes received in the last several elections, and the like” so that they don’t rely at all on “private contributions”⁸⁶⁶ as well as: restrictions on political advertising,⁸⁶⁷ and; public funding of elections; restrictions on campaign contributions; substantially equal access to the media, and; “certain regulations of freedom of speech and of the press (but not restrictions affecting the content of speech).”⁸⁶⁸ He also proposed that:

“While it would be too strong to say that they must be the least restrictive regulations required to achieve this end - for who knows what the least restrictive among the equally effective regulations might be - nevertheless, these regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available.”⁸⁶⁹

Rawls also directly criticized the U.S. Supreme Court’s rulings in *Buckley* and *First National Bank*, in which spending limits by third party interest groups during elections (*Buckley*) and referendums (*First National Bank*) were rejected as being unconstitutional restrictions on the right to free speech.⁸⁷⁰ He calls the rulings “profoundly dismaying”⁸⁷¹ because the majority of the “Court fails to recognize the essential point that the fair-value of the political liberties is required for a just political procedure, and that to insure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from

⁸⁶⁶ Rawls (1999), *supra* note 14 at 198-199.

⁸⁶⁷ Rawls (1981), *supra* note 14 at 79.

⁸⁶⁸ Rawls (2001), *supra* note 14, at 149.

⁸⁶⁹ Rawls (1981), *supra* note 14 at 74.

⁸⁷⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First National Bank v. Bellotti*, 435 U.S. 765 (1978).

⁸⁷¹ Rawls (1981), *supra* note 14 at 75.

controlling the electoral process to their advantage.”⁸⁷² Rawls also considered that the rulings ignored past rulings in which the Court “affirmed the principle of one person, one vote”⁸⁷³ and failed to recognize Congress’ possibly ineffective but nevertheless reasonable “attempts to achieve the aim of a fair scheme of representation in which all citizens could have a more full and effective voice.”⁸⁷⁴ As Samuel Issacharoff ably summarizes, the dissenting justices based their dissent on similar concerns.⁸⁷⁵

However, beyond these general suggestions and critiques, Rawls did not set out extensive, comprehensive proposals that take into account political and legal rights, or socio-economic realities, for realizing his stated objective that equal, fair opportunities to exercise political liberties are offered to all. As he stated, he was setting out a theory of justice and an “ideal arrangement” and not a “theory of the political system”⁸⁷⁶ or “practicable institutional ways”⁸⁷⁷ of achieving his stated goal.

For Rawls, the threat of unlimited spending undermining fair-value of political liberty “...is more fundamental than avoiding corruption and the appearance of corruption; for without the public recognition that background justice is maintained, citizens tend to become resentful, cynical, and

⁸⁷² Rawls (1981), *supra* note 14 at 76.

⁸⁷³ Rawls (1981), *supra* note 14 at 77.

⁸⁷⁴ Rawls (1981), *supra* note 14 at 77. A similar set of criticisms of the *Buckley* ruling is made in Joshua Cohen, “Money, Politics, Political Equality,” in *Fact and Value: Essays on Ethics and Metaphysics for Judith Jarvis Thomson*, eds. Alex Byrne, Robert Stalnaker, and Ralph Wedgwood (Cambridge, MA: MIT, 2001) 47, and; in Eric Freedman, “Campaign Finance and the First Amendment: A Rawlsian Analysis,” (March 2000) Vol. 85(3) *Iowa Law Review* 1065.

⁸⁷⁵ Samuel Issacharoff, “On Political Corruption,” (Nov. 2010) Vol.124(1) *Harvard Law Review* 118 at 122-124.

⁸⁷⁶ Rawls (1999), *supra* note 14 at 199.

⁸⁷⁷ Rawls (2001), *supra* note 14, at 149.

apathetic. It is this state of mind that leads to corruption as a serious problem, and indeed makes it uncontrollable.”⁸⁷⁸ Here, I think Rawls’ strays unnecessarily from philosophy addressing voter rights into psychology concerning voters’ motivations. I see no reason to try to determine whether ethics or equality take precedence over the other when developing a model democratic political finance system, as I think both principles, along with the principle of democratic participation, have value and intersect and intertwine in fundamental ways.

Taking all of these principles into account, a first, key reason based on political theory for a egalitarian political finance system is to stop the undermining of fair, democratic elections, including the “basic liberty” of equal participation of voters and candidates in elections. A related second key reason is to stop the undermining of democratic participation and representation in between elections, including again undermining of the “basic liberty” of equal participation in politics. And a related third key reason is to stop the undermining of good government that upholds the public interest and the rule of law, which can also be stated as preventing corruption, ensuring ethical politics, and ensuring government integrity.

Extending from Rawls’ model, all voters are “lobbyists” in that they are interested in having government make decisions to address issues and solve problems about which they are concerned in the ways they wish them to be solved. They are, as defined by the approach of liberalism, “equal citizens”

⁸⁷⁸ Rawls (1981), *supra* note 14, at 78.

with different, irreconcilable conceptions of what is a good solution.⁸⁷⁹ On any election day, a fundamental democratic principle, and procedure, is “one person, one vote” and upholding this principle is considered key to holding a fair, democratic election.⁸⁸⁰

Therefore, I propose that Rawls’ model supports the one-person, one-vote principle as a central animating principle for an egalitarian political process ethics system. I propose this acknowledging the fact that Rawls responded to John Stuart Mill’s argument that persons with greater intelligence and education should have extra votes so that their opinions may have a greater influence by concluding that such a system “may be perfectly just” because it may produce decisions that provide greater benefit to all. However, Rawls makes it clear that “An inequality in the basic structure must always be justified to those in the disadvantaged position” (in other words, they would have to consent to giving others more votes).⁸⁸¹

⁸⁷⁹ Rawls (1981), *supra* note 14, at 16-17.

⁸⁸⁰ Robert A. Dahl, “What Political Institutions Does Large-Scale Democracy Require?” *Political Science Quarterly*, (2005) 120(2) 187 at 195 (hereinafter “Dahl (2005)”). While significant variations in the number of voters in each electoral district were ruled constitutional by the Supreme Court of Canada in *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, as discussed in Chapter 2, the basis of that ruling was not that any one voter should have more votes than another but instead that other democratic reasons can override the need to have each politician serve the exact same number of voters as long as each voter is effectively represented. The U.S. Supreme Court ruled in *Baker v. Carr*, 369 U.S. 186 (1962) initially, and then in *Reynolds v. Sims*, 377 U.S. 533 (1964) and following cases that the total population (not the number of eligible voters, as that is very difficult to determine) in each state legislature district must be as equal as possible, a ruling that was upheld by the Court in *Evenwel v. Abbott*, No. 14-940, 578 U.S. ___, slip op. (2016).

⁸⁸¹ Rawls (1999), *supra* note 14 at 203-205.

5.2. Incorporating critiques of the Rawlsian approach, and related frameworks

As is summarized below, I accept some and reject other critiques of the Rawlsian approach. The analytical approach I am developing in this chapter of my thesis suggesting frameworks and proposals for a more egalitarian model is a modified, expanded Rawlsian approach that incorporates other approaches I consider valid.⁸⁸² Seven of the main critiques I address and incorporate into this framework or reject for not complying with egalitarian principles, some directly and others more obliquely, are summarized below.

5.2.1. Idealism vs. realism?

Again, as I point out in Chapter 1 and above, I am not defending Rawls' entire concept of justice, but instead deploying part of his framework to the issue of political finance (which, again, he did in very general terms). I also acknowledge not only that other ideal concepts of justice compete with Rawls' concept (for example, the libertarian concept as discussed below in sub-section 5.2.3). And I acknowledge that Rawls' "veil of ignorance" thought experiment as the basis of his ideal theory is a construct based on many assumptions.

Amartya Sen posits a counterpoint to Rawls' ideal theory approach, arguing that a reality-based approach leads to the conclusion not only that a universal ideal theory of justice is impossible because of the multi-varied

⁸⁸² See a similar exploration of the theoretical bases of political finance systems in: Beange (2012), *supra* note 3, at 4-33, and; Gold (2020), *supra* note 11, at 337-342 and

issues, situations and contexts that exist in the world that all raise questions of justice, but also that it is undesirable because in any situation or with any issue there can be valid, reasonable arguments for a variety of just solutions.⁸⁸³ Better to “address questions of enhancing justice and removing injustice, rather than to offer resolutions of questions about the nature of perfect justice”⁸⁸⁴ and better to address how to make specific situations more just by comparing possible specific solutions rather than trying to establish an ideal ranking of alternatives of institutions and policies that would apply worldwide.⁸⁸⁵ I agree with the part of Sen’s approach that emphasizes connecting with reality when developing solutions to social problems, both the reality of the problem and also the real effects of any proposed solution.

However, as others have pointed out, despite arguing for a situational, comparative, reality-based approach to determining what is just, Sen offers his own set of constructed principles on which he bases his approach (for example, he uses the “impartial spectator” construct used by Adam Smith⁸⁸⁶ as an analytical tool). Sen also does not acknowledge fully that Rawls set out comparisons and attempted to address real situations (if not in detail). In other words, both of their approaches are really “conglomerate” theories (Sen’s term) that combine principles with comparisons of real situations.⁸⁸⁷

⁸⁸³ Amartya Sen, *The Idea of Justice* (Cambridge: The Belknap Press of Harvard University Press, 2009), 10-12, and 98-102 (hereinafter “Sen, *The Idea of Justice*”).

⁸⁸⁴ Sen, *The Idea of Justice*, *supra* note 883 at ix, 144-145 and 241-242.

⁸⁸⁵ Sen, *The Idea of Justice*, *supra* note 883 at 5-19, 398.

⁸⁸⁶ Adam Smith, *The Theory of Moral Sentiments* (London: Penguin Classics, 2009), part III, chapter 1.

⁸⁸⁷ Francesco Biundo, “Comparative vs. Transcendental Approaches to Justice: A Misleading Dichotomy in Sen’s *The Idea of Justice*” (2012) 25:4 *Ratio Juris* 555 (hereinafter “Biundo”). Wilfred Hinsch, “Ideal Justice and Rational Dissent. A Critique of Amartya Sen’s *The Idea of Justice*,” (2016) Vol. 33(2) *Analyse und Kritik* 371 (hereinafter “Hinsch (2016)”).

As one of these commentators points out, Rawls stated in 2001 in *Justice as Fairness. A Restatement* that:

“...the current conflict in democratic thought is in good part a conflict about what conception of justice is most appropriate for a democratic society... Nevertheless, the idea of a well-ordered society should also provide some guidance in thinking about nonideal theory, and so about difficult cases of how to deal with existing injustices. It should also help to clarify the goal of reform and to identify which wrongs are more grievous and hence more urgent to correct.”⁸⁸⁸

As well, Sen’s approach is a combination of idealism and reality, as it is based in part on the theoretical framework of social choice theory, and in part on his “capability approach” to economics which focuses on the freedoms and capabilities that people actually enjoy. In a 2015 article responding to a symposium on his 2009 book, Sen acknowledged more fully that the difference between his approach and Rawls’ approach is more a matter of their focal points than that Rawls is all theory and Sen is all empiricism, as he described them both as follows:

“Rawls is focusing on means in the form of primary goods whereas Sen’s theory focuses on people’s respective capabilities to achieve what they have reason to value (taking into account the means they have, but also their personal and social circumstances). Substantive freedoms depend on means like primary goods, but also on a lot else, varying from personal features (like disability, old age, or conditions like pregnancy) and social circumstances of a different kind from primary

⁸⁸⁸ Rawls (2001), *supra* note 14 at 13, as quoted in Biundo, *supra* note 887 at 566.

goods (such as the epidemiological surrounding to which a person is confined, and the social climate in which a person lives...)”⁸⁸⁹

I agree with what scholars who have critiqued Sen’s approach propose,⁸⁹⁰ that in analyzing factual evidence of any situation and drawing conclusions as to what just solution should be applied to the situation (or, as I am doing in this chapter of my thesis, drawing conclusions about would be a more egalitarian model in the area of political finance): 1. the choosing of the solution will be informed by some framework of principles or ideal criteria, and; 2. the choosing will be at best an argument, stronger or weaker depending on how one chooses to measure stronger or weaker arguments (as even insisting on logic, evidence and consistent, general applicability as the basis for a solution is a choice – the opposite choice being a form of moral subjectivism, of choosing the solution that feels right for the specific situation one is confronting.

As one commentator puts it: “the question of whether something is an advancement of justice is an empirical question once we have identified the (ideally) just state of affairs at which we are aiming”⁸⁹¹ and “An ideal theory that by itself does not determine our choices between non-ideal alternatives, may do so when combined with further information and evaluative input.”⁸⁹² As Sen himself writes:

⁸⁸⁹ Amartya Sen, “The idea of justice: a response,” (2015) *Philosophy and Social Criticism* 4(1) 77 at 83 (hereinafter “Sen (2015)”).

⁸⁹⁰ Biundo, *supra* note 887 at 574-576. Hinsch, *supra* note 887 at 374.

⁸⁹¹ Hinsch, *supra* note 887 at 374.

⁸⁹² Hinsch, *supra* note 887 at 375.

“It is worth remembering that all applications of any theory with some generality must depend on the specification of particular circumstances. This parametric dependence does not in any way undermine the relevance of a general framework that can accommodate many alternative particular cases. The application of any theory must invariably depend on the context, and the theory must allow variations of the contexts in different situations.”⁸⁹³

To this combination of empiricism and idealism I would add also the point from the field of behavioural psychology that the defining of the problem and choosing of the solution will be influenced by the biases of the person making the choice no matter how seemingly objectively they present their reasons for their choices.⁸⁹⁴

Sen’s call to base decisions about what is just in reality, as opposed to relying on abstract ideal theoretical constructs, is of course not a new proposition. From the Legal Realism school on to intersectionality, legal and political science theorists have been aiming more, and more diversely, to connect theories with reality, and to develop actual solutions to real problems, including explicitly through research methodologies such as grounded theory and participatory action research.⁸⁹⁵ And, like Sen’s critique of Rawls’

⁸⁹³ Sen (2015), *supra* note 889 at 86.

⁸⁹⁴ For a long version of the evidence of how biases shape our decisions, see Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011). For a short version, see the two articles in Appendix A and B at the end of that book. Biundo also mentions this problem, *supra* note 887 at 575.

⁸⁹⁵ See, for an overview of this progression: Marin Roger Scordato, “Reflections on the Nature of Legal Scholarship in the Post-Realist Era,” (2008) 48 *Santa Clara Law Review* 353. And see for summaries of various theoretical schools and methodologies: Brian Z. Tamanaha, “Understanding Legal Realism,” (2008-2009) 87 *Texas Law Review* 731. Robert Gordon, “Unfreezing Legal Reality: Critical Approaches to Law,” (1987) 15 *Florida State University Law Review* 195. John C. Reitz, “How to Do Comparative Law,” (1998) 46 *American Journal of Comparative Law* 617. Katharine T. Bartlett, “Feminist Legal Methods,” (1990) 103 *Harvard Law Review* 829. Michael Trebilcock, “An Introduction to Law and Economics,”

idealistic approach, the debate between inductive, Platonic philosophical idealism and deductive Aristotelian philosophical empiricism has played out through history in many fields of scholarship, and many aspects will continue into the future to be reasonably disputed both at a theoretical and applied level.⁸⁹⁶

However, again, I agree with Sen's point (as Rawls did) that real evidence should be taken into account when choosing the solution to a problem, not just ideal principles. As a result, while I am in this chapter of my thesis attempting to begin to develop suggestions of frameworks and proposals for a more ideal model political finance system in a democratic society with a mixed market economy, based on democratic, egalitarian and ethical principles, I am also attempting to make that system realistic. In no small part, I am attempting to begin to fill in the reality-based details that Rawls left out of his very general overview of what he saw as an ideal political finance system.

My use of doctrinal research methodology has, like any methodology, limitations in terms of connecting to actual reality. In no small part that is why I am also incorporating evidence of what, in reality, would be a more egalitarian political finance system that I have gathered from my research and

(1997) 23 *Monash University Law Review* 123. Christine Jolls, Cass R. Sunstein, and Richard Thaler, "A Behavioral Approach to Law and Economics," (1998) 50 *Stanford Law Review* 1471. Imani Perry, "Cultural Studies, Critical Race Theory and Some Reflections on Methods," (2005) 50 *Villanova Law Review* 915. Juliet Corbin and Anselm Strauss, "Grounded Theory Research: Procedures, Canons and Evaluative Criteria," (1990) 19 *Zeitschrift für Soziologie* 418-427. Cathy MacDonald, "Understanding Participatory Action Research: A Qualitative Research Methodology Option," (2012) 13 *Canadian Journal of Action Research* 34.

⁸⁹⁶ Biuondo, *supra* note 887 at 555 and 576.

advocacy work since 1993 with Democracy Watch on political finance issues, and my experience with parties, candidates and third parties, and enforcement agencies and tribunals and courts, along with other evidence I have gathered from federal and provincial jurisdictions in Canada, and other jurisdictions. For example, above in Chapter 2, subsection 2.2.9 of this dissertation, I attempted to gather evidence of the actual financial position of all Canadians – not averages as those can obscure the reality many people are experiencing but more detailed measures such as income deciles – as part of the basis of making a suggestion concerning what an egalitarian donation limit would be in Canada.

Indeed, the main contention of my thesis is that while aspects of Canada's political finance system may arguably be based on the theoretical principle of egalitarianism (as several scholars have claimed), many aspects of the system are, in reality, not egalitarian. In this and other ways, I am very much in this chapter attempting to propose both a theoretical framework for a more egalitarian model for a political finance system, and also to suggest realistic, evidence-based, practical proposals for rules that would comply with the model.

5.2.2. Epistocracy better than democracy?

As mentioned in the above subsection, I acknowledge that the liberal argument for equality is a construct. There is clear scientific evidence that

people across the world are more than 90 percent the same genetically,⁸⁹⁷ and a broad agreement that there is no difference in the capacity of humans from all around the world to be intelligent.⁸⁹⁸ However, there is also evidence that some individuals have a natural ability in one area or another of human activity that is better than everyone else. Should these individuals who have a greater natural ability for intellectual pursuits therefore, as Mill argued in a way, have more votes than others (which Rawls acknowledged could be just if the least advantaged people agreed to it, as it could produce better decisions for all)?⁸⁹⁹

Jason Brennan has re-stated Mill's argument that epistocracy should be established by either prohibiting uneducated people from voting (if they can't pass a civics test) or giving more educated people more votes (through a weighting system) or some variation on those options, which he argues will result in better outcomes from governments, including better incomes for all (or, at least, overall).⁹⁰⁰ Brennan argues that many countries already restrict voting based on education levels by prohibiting voting until you turn 18 years of age. Ignoring the practical difficulties (which Brennan acknowledges) of determining who is "educated" enough to vote or to receive weighted votes,

⁸⁹⁷ A. Auton, G. Abecasis, D. Altshuler, et al., "A global reference for human genetic variation," (2015) *Nature* 526, online: <<https://doi.org/10.1038/nature15393>> 68 at 68-74. Amalio Telenti, Levi C. T. Pierce, William H. Biggs, "Deep sequencing of 10,000 human genomes," (October 18, 2016) *PNAS* 113 (42) 11901-11906, online: <<https://doi.org/10.1073/pnas.1613365113>>.

⁸⁹⁸ Michael Balter, "Geneticists decry book on race and evolution," (August 8, 2014) *Science*, online: <<https://www.sciencemag.org/news/2014/08/geneticists-decry-book-race-and-evolution>>.

⁸⁹⁹ Rawls (1999), *supra* note 14.

⁹⁰⁰ Jason Brennan, *Against Democracy* (Princeton University Press, 2016). See also David M. Estlund, *Democratic Authority: A Philosophical Framework*, (Princeton; Oxford: Princeton University Press, 2008).

his proposal contests Rawls' notion of "basic liberties" on the basis that the liberty of more educated voters is oppressed by the influence on election outcomes of less educated voters.

However, Brennan does not fully address the difficulties of determining what policy decisions produce a better outcome, nor that many democratic jurisdictions with universal suffrage may already be producing the best outcomes.⁹⁰¹ Given his arguments are based on the premise that better outcomes will result from the change he calls for, this is a significant gap, especially since there is ample evidence from the past, when universal suffrage did not exist in many jurisdictions, that "educated" voters and governments run by "educated" people did not make decisions that resulted in good outcomes but instead proved to be fallible, as humans are, and/or made decisions, as humans tend to, based on cognitive biases that lead to rationalizations that are often not rational.⁹⁰²

While my thesis does not address voting, by analogy the questions Brennan's proposal raises are whether more educated people should be permitted to donate or give more to parties, candidates, politicians and other public officials in order to have more influence over their decisions, and/or should less educated people be prohibited from donating or other financial means of influencing politicians? Brennan, by allowing certain voters to have

⁹⁰¹ See a discussion of the difficulties of even determining whether election rules are in the overall "public interest" in: Andrea Rounce, "'Electioneering' and the Public Interest," (Spring 2015), 2015 *Journal of Parliamentary and Political Law* 17 (hereinafter "Rounce (Spring 2015)").

⁹⁰² Christopher H. Achen and Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton; Oxford: Princeton University Press, 2017).

more votes, is accepting that the system would be corrupted in favour of whatever issues and problems those voters were most concerned about, and in favour of whatever solutions those voters supported. He directly mentions that the political finance system in many countries allows people with wealth (who, he presumes, are also better educated) to have more influence, and concludes that this is good for government policy outcomes. He reaches this conclusion because he assumes that those voters are public-interest minded (however that is defined) in what they call for and support in terms of government actions, and so “better” outcomes result. Again, however, he leaves the gaps of failing to prove that those wealthy voters/donors are currently advocating better policies, and would do so if given more influence, and of failing to prove what a better outcome would be.

My thesis does not address this question directly from the same angle as Brennan because I am not arguing for a particular political finance system based on such a system producing better decisions by governments. Instead, my argument is based solely on the liberal democratic principles of equality of all people, and equality of opportunity to participate in policy-making processes, and legal and political principles concerning government integrity and the prevention of corruption. As a result, I do not fully address Brennan’s proposal in the framework or proposals that I set out in this chapter.

To argue that the more egalitarian political finance system I am proposing would produce better policy decisions, I would be required to evaluate the substantive effects of every policy decision made by the Government of Canada under the current political finance system (that I

contend is not egalitarian) to determine to what extent the effects are in the public interest (again, based on whatever definition of “public interest” I would develop),⁹⁰³ and then compare those effects to the effects of every policy decision made by a government that has what I would contend is a more egalitarian political finance system (such as the Government of Quebec). Not only is this not the focus of this thesis, as I have expressed above I doubt that such a comparison is possible other than on the basis of proposing a definition of what a “public interest” outcome is for policy decisions in every area of public policy. Of course, anyone could easily disagree with that definition simply by arguing that a different outcome is actually more in the public interest. As well, I doubt that it would be possible to isolate differences in the political finance system as a definitive causal factor of any specific public policy outcome.⁹⁰⁴

In addition, I agree with Rawls that, while such a system could produce better outcomes, the just way of allowing some people to have more influence through greater voting or donating power would be to allow the least advantaged in society to make the choice of whether that change should be made, given especially how much the change violates principles of democratic equality and government integrity. Unless the least advantaged are given the choice, their liberty of equal participation and influence in

⁹⁰³ See an attempt to develop a definition of “public interest” elections in: Rounce (Spring 2015), *supra* note 901.

⁹⁰⁴ Again, see this point re: separating the process from the outcome, and the difficulties of predicting what ends will be reached by what means in political finance systems, discussed in: Dawood, Corruption (2014), *supra* note 21, at 110; Beange (2012), *supra* note 3, at 319-351, esp. 336-351, and; Young (2012), *supra* note 22.

elections should not be diluted based on perceived (but far from proven) claims that they would benefit if it was diluted, or based on perceived claims that some others' liberty to vote is currently being oppressed. However, to be clear, I do not address in the sections below how to allow the least advantaged to make that choice, other than by addressing how the political finance part of the government decision-making system should work for making that kind of decision, and all other policy decisions.

5.2.3. Freedom is democracy is freedom?

Another main counterpoint to restricting political donations and spending and lobbying is articulated both on the basis of libertarian and freedom of expression principles. The libertarian model is based on the premise that “a regulated marketplace of ideas may result in the entrenchment of the powerful,” in contrast to the egalitarian model which contends that “an unregulated marketplace of ideas may result in the entrenchment of the wealthy.”⁹⁰⁵ The libertarian position has been put forward in U.S. Supreme Court rulings and by some scholars who argue that restrictions on political spending are fully undemocratic,⁹⁰⁶ and in three Canadian jurisdictions (Newfoundland and Labrador, Saskatchewan and

⁹⁰⁵ Dawood (2006), *supra* note 2 at 290. See also: Hiebert (2006), *supra* note 2, at 275-281.

⁹⁰⁶ As articulated in, for example: *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) (hereinafter *Citizens United* (2010)); Martin H. Redish and Elana Nightingale Dawson, “Worse than the Disease: The Anti-Corruption Principle, Free Expression, and the Democratic Process,” (2012) 20:4 *Wm & Mary Bill Rts J* 1053, and; Bradley Smith, “Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,” (1996) 105 *Yale Law Journal* 1049.

Yukon Territory) that have no limits on donations or spending by third parties during provincial elections.

Others have argued for a middle position that balances freedom and equality along a spectrum.⁹⁰⁷ Others, such as Lawrence Lessig, and the U.S. Supreme Court in *Buckley* and other rulings, argue that restrictions on donations and other means of influence are the main concern, and that viewing spending as political free speech and not limiting spending is appropriate as long as the source of funds for the spending is at least somewhat egalitarian.⁹⁰⁸

I concur with the extensive criticism levelled at the U.S. Supreme Court's majority rulings in *Buckley* and *Citizens United* that, beyond Rawls' concerns about the *Buckley* ruling ignoring equality principles, the rulings are incoherent because they uphold limits on donations but not on spending⁹⁰⁹ even though spending in support of a candidate or party is, in effect, a donation to them. I also concur with the approach of Cass Sunstein who proposes that a fundamental goal is to ensure Madisonian "deliberative democracy" which means the system must be premised on "the commitment

⁹⁰⁷ Dawood (2012), *supra* note 2. Feasby (2005), *supra* note 10.

⁹⁰⁸ Lawrence Lessig, *Republic, Lost: The Corruption of Equality and the Steps to End It* (New York: Twelve, 2016) at 93, 198-199. *Buckley*, *supra* note 870.

⁹⁰⁹ This criticism is summarized in Issacharoff (2010) *supra* note 875 at 119-120, and at 125-126 and 133-134. *Buckley*, *supra* note 870. *Citizens United* (2010), *supra* note 906. See also a comparison of the U.S. Supreme Court's and the UK Supreme Court's divergent approaches to spending limits in Jacob Eisler, "Campaign speech and the universal dilemma in the common law of elections: a lesson from the Anglo-American divide," in James A. Gardner, ed., *Comparative Election Law* (Northampton, Mass.: Edwin Elgar Publishing Inc., 2022) at 369. See another comparison of U.S., U.K. and Canadian laws in Madeline Reid and Duff Conacher, "Campaign Finance Laws: Controlling the Risks of Corruption and Public Cynicism," in Gerry Ferguson, ed., *Global Corruption: Its Regulation Under International Conventions, US, UK and Canadian Law and Practice* (4th edition: University of Victoria, 2022), online: <<https://dspace.library.uvic.ca/handle/1828/13759>>, at 1103-1172.

to political equality” which, in a jurisdiction with universal suffrage, is based on the principle of one person, one vote.⁹¹⁰ On that Rawlsian basis, but also on the basis that government actions provide the basis for individuals and businesses to create wealth, and therefore government is completely justified in restricting uses of that wealth, Sunstein proposes that campaign spending must be limited.⁹¹¹ Further, Owen Fiss has argued that restrictions on spending and fundraising, for example, can actually enhance free speech values by preventing the wealthy from drowning out other speakers which facilitates the dissemination of a wider range of perspectives.⁹¹²

In terms of restricting lobbying, the question is whether bounds can be put on the historic right to petition government (summarized above at the beginning of section 4.5)? Some have argued that limitations can be placed on lobbying by businesses because only individuals enjoy the right to petition.⁹¹³ Canadian courts have upheld some free expression rights for businesses although, again as summarized in section 4.5, one ruling found that requirements to register disclose lobbying activities do not impede expression.

There have not been any court rulings on whether ethics rules for lobbyists such as those found in the *Lobbyists’ Code* that prohibit lobbying after undertaking activities that create conflicts of interest for politicians and other public officials (again, see summary in section 4.5) are unconstitutional

⁹¹⁰ Sunstein (1993), *supra* note 201 at 20.

⁹¹¹ Sunstein (1993), *supra* note 201 at 36-37 and 98-101.

⁹¹² Owen M Fiss, *The Irony of Free Speech* (Harvard University Press, 1996) at 83.

⁹¹³ See a detailed discussion of these issues in Gold (2020), *supra* note 11, at 416-464.

restrictions on free speech. However, based on the Supreme Court of Canada rulings summarized below in section 5.9 on government integrity, I contend that the goal of preserving the appearance of integrity (and, in the Court's view, democracy) would be upheld by the Court even in a case pleading that the lobbying restrictions violate the *Charter* rights of lobbyists to expression and association. As set out in Chapter 1, section 1.1, and in section 4.1, given that lobbying is like participating in an election debate, and is explicitly participating in a policy debate, and given that assisting a politician with fundraising or a campaign or giving gifts or benefits or doing favours for a politician or public official is like donating or spending in a campaign, the egalitarian model can be extended to cover lobbying, and the same set of questions arise for regulating lobbying and gifts as for regulating political finance. And, as set out above, part of the argument underlying the more egalitarian model I develop in this Chapter is that restrictions on the freedoms of lobbyists (like the restrictions on donors and spenders) combined with lobbying transparency requirements, enhance the freedom of all voters to have substantively equal opportunity for substantively equal participation.

5.2.4. Equality or corruption – or both?

Although Rawls acknowledges that preventing corruption is a valid reason to restrict the influence of money on political decision-making processes, he focuses instead on protecting the fair-value of political liberties and participation as the basis for his argument. Richard Hasen and other

scholars have also argued in favour of using equality as the basis.⁹¹⁴ Other scholars such as Lawrence Lessig have argued that the basis should be both egalitarian goals and a broader definition of “corruption” that includes, as I outlined above, concern not only about donations but also about gift giving and favours as means of influence that “corrupt” decision-making processes by creating a “dependence” (as Lessig calls it)⁹¹⁵ and/or a “sense of obligation” on the part of the public office holder (as both behavioural psychologists and Canada’s Federal Court of Appeal have termed it, as noted above in subsection 1.4.3). Lessig also emphasizes that these means of influence have a “corrupting” effect that undermines, diverts and/or weakens not only the decision-making of individual office holders but also the political institutions overall, thereby making the system unequal as those with money have greater access to being both a candidate, and greater access to candidates.⁹¹⁶

Zephyr Teachout articulates a different basis of concern about these means of influence corrupting the system, namely that they undermine the capacity of public office holders to serve the public good.⁹¹⁷ As I mentioned above, I agree with the overall point of both of Lessig’s and Teachout’s frameworks as I also do not see any reason to place only equality or

⁹¹⁴ Richard L. Hasen, “Is “Dependence Corruption” Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig,” (2013) 12 *Election Law Journal* 305. Bruce E. Cain, “Moralism and Realism in Campaign Finance Reform,” (1995) *University of Chicago Legal Forum* III 122. David A. Strauss, “Corruption, Equality, and Campaign Finance Reform,” (1994) 94 *Columbia Law Review* 1369.

⁹¹⁵ Lawrence Lessig, “Corrupt and Unequal, Both,” (2015) 84:2 *Fordham L Rev* 445.

⁹¹⁶ Lawrence Lessig, “Institutional Corruption Defined,” (2013) 41:3 *JL Med & Ethics* 553.

⁹¹⁷ Zephyr Teachout, “Quid Pro Con,” (April 2015) (Issue 36 *Democracy: A Journal of Ideas* 79. Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuffbox to Citizens United* (Boston: Harvard University Press, 2016) at 276-290.

corruption as priority reasons for restricting these means of influence. As others have pointed out, the arguments for equality and against corruption in the area of political finance are two sides of the same coin.⁹¹⁸

However, I am more in agreement with Lessig's framework as I think focusing on the democratic and ethical reasons for ensuring the egalitarian nature of the process of political decision-making is more potently clear than Teachout's argument that ensuring that equality will produce decisions that uphold the public good. I am more in agreement with Lessig's framework because I don't contend that equality will definitely produce decisions that uphold the public good, and I don't believe (as Teachout acknowledges) that it is completely clear in any issue area what a public good decision is. This is not to say that I agree with everything that Lessig posits concerning the processes of political decision-making, as I contend that he often downplays some of the corrupting effects of large donations.⁹¹⁹

The counterpoint to these points has been articulated in several U.S. Supreme Court rulings that emphasize the right to freedom of expression through political spending and downplay the corruption concerns. The Court has defined corruption narrowly to include only direct *quid pro quo* exchanges, not undue influence and access. For example, in *McCormick v. United States* the Court overturned an elected official's conviction for corruption and struck down the law criminalizing his conduct. While the defendant accepted money

⁹¹⁸ Kathleen M. Sullivan, "Political Money and Freedom of Speech," (1997) 30(3) *U.C. Davis L. Rev.* 663 at 678-679 (hereinafter "Sullivan (1997)"). Julian N. Eule, "Promoting Speaker Diversity: Austin and Metro Broadcasting," [1990] *Sup Ct Rev* 105 at 109-110.

⁹¹⁹ Lawrence Lessig, *Republic, Lost* (2016), *supra* note 908 at 200-201.

from foreign doctors for his election campaign and subsequently sponsored legislation favourable to them, he had a long-standing reputation for favouring legislation beneficial to foreign doctors and, therefore, the Court concluded it was not a clear *quid pro quo* situation.⁹²⁰ I contend that the Court's reasoning fails to take into account the fact that a politician or public official can assist an interest group through inaction – for example by not introducing a change to the law or a regulation that would hurt the interests of the group – and the resulting impossibility (unless it is admitted publicly) of ever proving that the politician or official is intentionally doing nothing to assist the group.

As a result, as others have argued, to effectively prevent corruption even the appearance of corruption caused by such a situation must be prevented.⁹²¹ I would contend that, rather than criminalizing the situation, it is better to do this through strict donation and spending limits⁹²² or, if donations are not restricted in a jurisdiction, through conflict-of-interest provisions that require recusal if donations are accepted or spending has caused an appearance of conflict. As the dissenting judges of the US Supreme Court in *Citizens United v. Federal Election Commission* argued concerning third-party spending, corruption should be viewed as a “spectrum” and that “the difference between selling a vote and selling access is a matter of degree, not kind”⁹²³ and “corporate independent expenditures ... had become essentially

⁹²⁰ *McCormick v United States*, 500 US 257 (1991).

⁹²¹ Vladyslav Dembitskiy, “Where Else is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws after *Citizens United* and *McCutcheon*” (2016) 43 *Hastings Constitutional L Quarterly* 885 at 886.

⁹²² As argued by Issacharoff (2010), *supra* note 875 at 118, 137.

⁹²³ *Citizens United* (2010), *supra* note 906, at 448.

interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements”⁹²⁴ as the record filed in the case showed that disclosure requirements make candidates aware of who is behind independent advertisements on the candidates’ behalf, and also that advertising sponsors “were routinely granted special access after the campaign was over.”⁹²⁵

5.2.5. Outcome-focused framework vs. process-focused framework

Like Brennan and Teachout, Samuel Issacharoff proposes an approach that is somewhat a critique of Rawls’ approach because it primarily focuses on outcomes as opposed to adherence to a set of principles for policy-making processes. As Issacharoff contends, “the corruption concern is really a concern with ensuring public – rather than private – outputs from the policymaking process.”⁹²⁶ To be clear, he is careful not to denigrate the democratic equality or ethical government approaches, and essentially proposes the same conclusion as Lessig – that measures to ensure politicians rely on a large base of small donors “may actually be more effective at diminishing the distortive effects of money on public policy than those that seek to limit the amount of money in the system.”⁹²⁷ However, Issacharoff’s main focus is expanding on the political science literature on clientelism and patronage – in which politicians develop relationships with, and reward, specific organized constituencies in order to remain in public office – in order

⁹²⁴ *Citizens United* (2010), *supra* note 906, at 455.

⁹²⁵ *Citizens United* (2010), *supra* note 906, at 455.

⁹²⁶ Issacharoff (2010), *supra* note 875 at 121.

⁹²⁷ Issacharoff (2010), *supra* note 875 at 127 and 137-138.

to propose that reforms that limit political donations and spending have a greater chance of surviving scrutiny by the U.S. courts if they restrict any entity that is regulated by or contracts with government, and are thereby aimed at stopping patronage, as opposed to being aimed at ensuring fair and democratic electoral processes.⁹²⁸

While I understand Issacharoff's point of arguing from this starting point that is different from Rawls and others, especially given how the U.S. Supreme Court has constructed its doctrine on political finance issues, I think that the political cycle of a candidate becoming a politician and then a candidate again and then a politician again (if re-elected) means that the issues, incentives, disincentives, relationships and influences of political decision-making are all intertwined through campaign periods and in-between campaign periods, through inputs and outputs, and processes and outcomes. As a result, I contend that all means of undue influence must therefore be determined, considered and addressed, not just influences in government contracting and spending processes, in order to ensure a more egalitarian system overall.

5.2.6. International standards and requirements

The reasons to regulate donations and gift giving to politicians, and ensure transparency in any donations, gift giving and lobbying that occurs,, and the legal principles and theories upon which they are based, are reflected in international good governance standards to varying degrees. The bases

⁹²⁸ Issacharoff (2010), *supra* note 875 at 126-130 and 138-142.

for these standards (and requirements established in international law by some treaties and conventions) are the 1948 *UN Universal Declaration of Human Rights* (UDHR – Articles 2, 5-7, 19-21, 29-30)⁹²⁹ and, more specifically, the 1966 *UN International Covenant on Civil and Political Rights* (ICCPR). The ICCPR requires states to ensure that everyone “without distinction of any kind” has the rights set out in the *Covenant* (Article 2.1), including women as much as men (Article 3), and the rights “To take part in the conduct of public affairs, directly or through freely chosen representatives” (Article 25(a)) and “to vote and be elected at genuine periodic elections...guaranteeing the free expression of the will of electors” (Article 25(b)) and “have access, on general terms of equality, to public service” (Article 25(c)).⁹³⁰

As the Supreme Court has answered in several rulings, and this thesis critiques and also attempts to answer, the question is what provisions exactly uphold or violate these general rights? As summarized below for the areas of political finance, political ethics, lobbying and political participation, more specific conventions, agreements and standards that have been developed since the ICCPR came into force, and that have been ratified by countries around the world (including Canada) and by committees of the UN and by other standard-setting international organizations, have also provided more

⁹²⁹ United Nations, *Universal Declaration of Human Rights*, (1948), online: <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> (hereinafter “UN UDHR”).

⁹³⁰ United Nations, *International Covenant on Civil and Political Rights*, (December 1966), online: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> (hereinafter “UN, ICCPR (1966)”).

specific answers concerning the specific provisions that countries should enact, or again in some cases are required to enact, to fulfill their obligations under international law.

5.2.6.1. Political ethics, political finance and lobbying standards and requirements

International standards have developed since 1966 setting out specific provisions in the policy areas upon which this thesis focuses – anti-corruption, public integrity, lobbying and, of course, political finance.⁹³¹ Initial standards were set through negotiations from 1994 to 1996 that resulted in first the Organization of American States (OAS) enacting the *Inter-American Convention Against Corruption*.⁹³² The *Convention* included the standard prohibitions on criminal activities that undermine ethical decision-making by political decision-makers: soliciting or accepting bribes (article VI.1(a)); breach of trust (VI.1(c), and; fraudulent use of government property/embezzlement (VI.1(d)), as well as conflict of interest measures.

Based in part on the *Convention*, the General Assembly of the United Nations enacted in 1996 a brief, 11-point “International Code of Conduct for Public Officials” that focused on best-practice conflict of interest standards and required public office holders to “act in the public interest” (Annex, clause I.1) and “at no time to afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual” (clause

⁹³¹ For a similar overview of international standards in these areas, see: Joo-Cheong Tham, “Regulating money in politics: from electoral integrity to democratic integrity,” in James A. Gardner, ed., *Comparative Election Law* (Northampton, Mass.: Edwin Elgar Publishing Inc., 2022) 410 at 415-428.

⁹³² Organization of American States, *Inter-American Convention Against Corruption*, online: <<http://www.oas.org/juridico/english/treaties/b-58.html>>.

I.3); not to make decisions when in “situations of possible or perceived conflict of interest” (clause II.5) and; “not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties or their judgement (*sic*)” (clause IV.9).⁹³³ The *United Nations Convention Against Corruption (UNCAC)*, negotiated from 2000 until it was adopted by the General Assembly on October 31, 2003, came into force on December 14, 2005, and like the *Inter-America Convention* it includes the standard prohibitions on criminal activities related to political decision-making (articles 15(b), 16.2, 17-20) and that harm the administration of justice (such as money laundering, concealment, obstruction of justice – articles 23-25, and 27).⁹³⁴

However, it is important to note that the generally libertarian approach in the U.S. and some other countries to political spending rules, both in statutes and court rulings, means that the provisions in agreements such as the *UNCAC*, which was developed with the intent of having enough countries ratify it that it would become the only legally binding universal anti-corruption instrument in international law, generally establish only vague, bottom-line principles and standards, and beyond prohibiting bribery mainly emphasize disclosure and other transparency measures. Such agreements also generally leave each country to implement specific measures that, from the

⁹³³ United Nations General Assembly, “Action against corruption” (December 12, 1996) (A/RES/51/59: 82nd plenary meeting), online: <<http://www.un.org/documents/ga/res/51/a51r059.htm>>.

⁹³⁴ *UNCAC* (2004), *supra* note 20.

perspective of the government of each country, uphold those general standards.

For example, while the *UNCAC* states that countries should enact “codes or standards of conduct for the correct, honourable and proper performance of public functions” (Article 8.2 – and see also articles 8.1 and 8.3), unlike the previous *International Code* it does not contain any specific prohibitions on gifts, preferential treatment or conflicts of interest, and instead only requires disclosure by officials of outside activities, assets, liabilities, gifts and benefits “from which a conflict of interest may result with respect to their functions...” (Article 8.5).⁹³⁵ The legal principle underlying such disclosure provisions, as famously articulated by U.S. Supreme Court Justice Louis D. Brandeis, is that “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁹³⁶ There is no analysis in the *UNCAC* of whether prohibitions on such gifts may be a better enforcement mechanism.

The *UNCAC* addresses other areas as well with similarly general, bottom-line standards, for example by requiring disclosure of the funding of candidates and parties (Article 7.3) and general transparency (Article 7.4), and to protect people who report wrongdoing (Articles 8.4, 33 and 37 – generally referred to as “whistleblowers”). As for the disclosure of lobbying or

⁹³⁵ See an analysis of how these international law standards apply to, but don’t fully require, regular disclosure of political donations and other financing in: Joo-Cheong Tham, “My Vote Counts, International Standards and Transparency of Political Party Funding: Does the State Have a Duty to Provide for Continuous and Systematic Disclosure,” (2016) 8 *Const Ct Rev* 74 at 78-94.

⁹³⁶ Louis D. Brandeis, “What Publicity Can Do,” online: (1913) *Harper’s Weekly* <<http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v/>>.

other restrictions, the *Convention* suggests enhancing transparency, including concerning “decision-making processes” of government (Articles 10 and 13), and enacting general anti-corruption measures for the private sector (Article 12) as well as specific criminal prohibitions on bribery, etc. (Articles 14-29) and related prosecution processes and penalties (Articles 30-32, 34-42, 51-59). The need for every jurisdiction to implement these broad, multi-pronged enforcement measures, including the importance of raising public awareness of corruption through education and public promotion initiatives and support of civil society anti-corruption organizations, have been highlighted, and emphasized, in the communiqués of bi-annual United Nations anti-corruption conferences.⁹³⁷

Through such bottom-line, initial provisions that focus on transparency measures and not prohibitions, the *UNCAC* has obtained a high level of formal approval – as of November 18, 2021, 181 of the 193 countries that are members of the UN as well as 8 other entities (the European Union, the Holy See, the State of Palestine etc.) had signed and ratified it.⁹³⁸ However, a review released in 2017 of the implementation of some parts of the *UNCAC* in 156 countries found that, even given the relatively basic requirements of the convention, “in many countries there are considerable outstanding issues.”⁹³⁹

⁹³⁷ Conference of the States Parties to the United Nations Convention against Corruption, United Nations Office on Drugs and Crime online: <<http://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html>>. See, for example, *Resolutions and Decisions of the 5th Conference of the States Parties to the United Nations Convention against Corruption*, online: United Nations Office on Drugs and Crime <<http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session5-resolutions.html>>.

⁹³⁸ United Nations Office on Drugs and Crime, Signature and Ratification Status, online: <<https://www.unodc.org/unodc/en/corruption/ratification-status.html>>.

⁹³⁹ United Nations Office on Drugs and Crime, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International*

Other international standard-setting entities that are not made up of as many different countries as negotiated the *UNCAC* have established standards that go beyond disclosure and call for restrictions on influence, reflecting more directly than the *UNCAC* the fundamental liberal democracy principle of one-person, one-vote that means no person should have greater influence than any other in the determination of who will represent a jurisdiction in government⁹⁴⁰ or on representatives as they participate in policy-making decisions.⁹⁴¹ The strength and comprehensiveness of this call for restrictions has been increasing since the mid-1990s. For example, the 34 member countries of the Organization for Economic Co-operation and Development (OECD – including Canada, and the U.S.) have enacted several suggestions concerning political ethics, beginning with the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*⁹⁴² which was signed in 1997 and came into force in 1999. Notably, the *Convention* was only aimed at preventing bribery of other countries' officials, not at preventing bribery within any country.

In 2009, the OECD approved a Recommendation for measures to further combat bribery of foreign officials⁹⁴³ which is a non-binding “legal

Cooperation (New York: United Nations, 2017), online: <https://www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html> at viii.

⁹⁴⁰ Dahl (2005), *supra* note 880 at 195.

⁹⁴¹ Robert A. Dahl, *On Political Equality* (Princeton, NJ: Yale University Press, 2006) at 9 and 34-36.

⁹⁴² Organisation for Economic Co-operation and Development (OECD), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (1999), online: <<https://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>> and <https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> (hereinafter “OECD, *Convention on Bribery* (1999)”).

⁹⁴³ Organisation for Economic Co-operation and Development (OECD), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business*

instrument” of the OECD, but the OECD still audits whether member countries have implemented it.⁹⁴⁴ Among many other actions, the Recommendation calls for measures relevant to the focus of this thesis, namely that countries should have fully independent external auditing and internal controls and, as added in a 2021 amendment, rules on gifts, hospitality, entertainment and expenses of public officials set out on a public website.⁹⁴⁵ Annex II “Good Practice Guidance” for internal controls in businesses expands on these overall rules to recommend in subsection A.(5) “ethics and compliance programmes or measures designed to prevent and detect” bribery in the form of gifts, hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments, and; solicitation and extortion, as well as prevention measures in the areas of conflicts of interest, hiring processes, use of intermediaries in other countries, and contract tendering processes including financial and accounting procedures and a system of internal controls.⁹⁴⁶

In 1998, the *OECD Principles for Managing Ethics in the Public Service* were published,⁹⁴⁷ establishing its initial framework in this issue area. The 12

Transactions, (2009), online: <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>> and also <<https://legalinstruments.oecd.org/api/print?id=258&lang=en>> (hereinafter “OECD, *Recommendation on Combatting Bribery* (2009)”).

⁹⁴⁴ OECD Legal Instruments, online: OECD <<http://www.oecd.org/legal/legal-instruments.htm>>.

⁹⁴⁵ OECD, *Recommendation on Combatting Bribery* (2009), *supra* note 943, subsection XXIII.B, clauses XXIII.C(i) and (ii), and subsection XIII(ii), at 8 and 15.

⁹⁴⁶ OECD, *Recommendation on Combatting Bribery* (2009), *supra* note 943, Annex II, “Good practice guidance on internal controls, ethics, and compliance,” subsections A.5 and A.7 at 21-22.

⁹⁴⁷ Organisation for Economic Co-operation and Development (OECD), 1998 *Recommendation of the OECD Council on Improving Ethical Conduct in the Public Service, Including Principles for Managing Ethics in the Public Service*, (1998), online: <<https://www.oecd.org/gov/oecdprinciplesformanagingethicsinthepublicservice.htm>>

Principles cover both rules and the enforcement system, and concerning rules state that: ethics rules need to be clear; political decision-making processes must be transparent, and; “Clear rules defining ethical standards should guide the behaviour of public servants in dealing with the private sector”. Based on these general principles, in 2003 the OECD published the first *Guidelines* for managing conflicts of interest in the public service.⁹⁴⁸ The *Guidelines* stated that, to be effective at preventing the “weakening adherence by public officials to the ideals of legitimacy, impartiality, and fairness in public decision-making,” the term “conflict of interest” must be defined as covering “private interests”:

not limited to financial or pecuniary interests, or those interests which generate a direct personal benefit to the public official. A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official’s performance of their duties. A special case is constituted by the matter of post-public office employment for a public official: the negotiation of future employment by a public official prior to leaving public office is widely regarded as a conflict-of-interest situation.⁹⁴⁹

And the *Guidelines* also state that:

Public officials should dispose of, or restrict the operation of, private interests that could compromise official decisions in which they participate. Where this is not feasible, a public official should abstain

and at: <<https://legalinstruments.oecd.org/public/doc/129/129.en.pdf>> (hereinafter “OECD, *Public Service Ethics Principles* (1998)”).

⁹⁴⁸ Organisation for Economic Co-operation and Development (OECD), *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*, (2003) online: <<http://www.oecd.org/gov/ethics/oecdguidelinesformanagingconflictsofinterestinthepublicservice.htm/>> (hereinafter “OECD, *Conflict of Interest Guidelines* (2003)”).

⁹⁴⁹ OECD, *Conflict of Interest Guidelines* (2003), supra note 948, at 25.

from involvement in official decisions which could be compromised by their private-capacity interests and affiliations.

...

Public officials should not seek or accept any form of improper benefit in expectation of influencing the performance or non-performance of official duties or functions.⁹⁵⁰

The *Guidelines* go on to: prohibit involvement in private-sector activity using secret information; require disclosure of conflicts and openness in resolving them in the public interest; require “acting in a manner that will bear the closest public scrutiny” and respecting “broader public service values such as disinterestedness, impartiality and integrity” and; requiring arranging their private affairs to prevent conflicts.⁹⁵¹ Among the situations the *Guidelines* list that cause conflicts of interest that are relevant to the political finance, gifts, favours and lobbying system addressed in this thesis, outside activities such as working with businesses, other organizations or individuals in addition to one’s position work in government, and including offers of work after one will leave the public service, are “considered as a major potential for conflicts of interest.”⁹⁵² The *Guidelines* also recommend ensuring a policy on gifts (and other benefits) that recognizes they can create conflicts.⁹⁵³ However, the *Guidelines* do not discuss or directly connect “benefits” to prohibiting or restricting political donations and loans. As a result, in both underlying principles, and substantive rules, the *Guidelines* reflect two of the three

⁹⁵⁰ OECD, *Conflict of Interest Guidelines* (2003), *supra* note 948, at 25-26.

⁹⁵¹ OECD, *Conflict of Interest Guidelines* (2003), *supra* note 948, at 26.

⁹⁵² OECD, *Conflict of Interest Guidelines* (2003), *supra* note 948, at 33 and 64-65.

⁹⁵³ OECD, *Conflict of Interest Guidelines* (2003), *supra* note 948, at 33.

fundamental principles of the Supreme Court of Canada's egalitarian model – transparency (to inform voters) and ensuring the appearance of integrity to a standard “that bears the closest public scrutiny.”

On January 26, 2017, the OECD published its *Recommendation of the Council on Public Integrity*, which replaces the 1998 *Principles* with a new set of proposed rules and enforcement measures, and is also a non-binding legal instrument for which the OECD audits compliance.⁹⁵⁴ Among other factors, the *Recommendation* begins by recognizing “that integrity risks exist in the various interactions between the public sector, and the private sector, civil society and individuals at all stages of the political and policy process, therefore this interconnectedness requires an integrative whole-of-society approach to enhancing public integrity and reducing corruption in the public sector.” As a result, the *Recommendation* focuses largely on several integrative organizational culture and enforcement measures.

With regard to rules in the areas addressed in this thesis, the *Recommendation* states in section 4 that “high standards of conduct for public officials” that “go beyond minimum requirements” must be established in law, and in subsection 13(a) that the public sector must promote “transparency and an open government, including ensuring access to information and open data, along with timely responses to requests for information” and; “(b) granting all stakeholders – including the private sector, civil society and

⁹⁵⁴ Organisation for Economic Co-operation and Development (OECD), *Recommendation of the Council on Public Integrity*, (2017), online: <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0435>> and at: <<https://www.oecd.org/gov/ethics/recommendation-public-integrity/>> (hereinafter “OECD, *Public Integrity Recommendation* (2017)”).

individuals – access in the development and implementation of public policies;” and “(c) averting the capture of public policies by narrow interest groups through managing conflict-of-interest situations, and instilling transparency in lobbying activities and in the financing of political parties and election campaigns”. All three of the key principles of the Supreme Court’s egalitarian model are reflected in these standards – equality of participation, informing voters and ensuring integrity in political processes.

Also in 2017, the OECD published a report providing guidance to governments to prevent “undue influence and safeguard the public interest in policy making” by preventing “policy capture” by private interests.⁹⁵⁵ Chapter 2 of the report summarizes how policy capture happens,⁹⁵⁶ and then addresses those phenomena in the report’s Chapter 3 recommendations for how to prevent policy capture. The recommendations are also based on all three of the principles that underlie the Supreme Court’s egalitarian model, and the OECD’s previously published standards on ethics, lobbying and political finance, as they call for: ensuring the “inclusive and fair participation of different interests in public decision-making processes” that “grant all stakeholders fair and equitable access”; “promoting integrity and transparency in lobbying and political financing” and “Effective provisions against illicit

⁹⁵⁵ Organisation for Economic Co-operation and Development (OECD), *Preventing Policy Capture: Integrity in Public Decision-making* (2017), online: <https://www.oecd-ilibrary.org/governance/preventing-policy-capture_9789264065239-en> (hereinafter “OECD, *Preventing Policy Capture* (2017)”) at 4.

⁹⁵⁶ OECD, *Preventing Policy Capture* (2017), *supra* note 955, at 33-52.

influencing”; “Require disclosures”; and ensuring “access to reliable, timely and relevant information.”⁹⁵⁷

The report also highlights the barriers faced by individuals with common interests in forming “a group to make their voices heard in the policy arena” compared to the resources and capacity of business executives to make their voices heard as a major challenge to ensuring inclusive policy-making and preventing capture.⁹⁵⁸ The report continues in a section on public consultation to state that government should conduct targeted outreach, support and capacity-building, and allow adequate time, in consultation processes to ensure they are actually inclusive enough to hear “willing but unable” and “able but unwilling” individuals and groups and so that “no group is inadvertently excluded” from these processes.⁹⁵⁹ Among many other proposals, I make suggestions in chapters 6 and 7 for how to lower these barriers to “collective action” by individuals in political processes during, and between, elections.

In 2010, OECD approved the only recommendations for restricting lobbyists that have been made by an international entity – the *Recommendation on Principles for Transparency and Integrity in Lobbying*⁹⁶⁰

⁹⁵⁷ OECD, *Preventing Policy Capture* (2017), *supra* note 955, at 4, and 53-59.

⁹⁵⁸ OECD, *Preventing Policy Capture* (2017), *supra* note 955, at 14-17.

⁹⁵⁹ OECD, *Preventing Policy Capture* (2017), *supra* note 955, at 60-63.

⁹⁶⁰ OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, (2010) online: <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0379#backgroundInformation>> and also <<http://www.oecd.org/gov/ethics/oecdprinciplesfortransparencyandintegrityinlobbying.htm>> and also: <<https://www.oecd.org/corruption-integrity/explore/oecd-standards/lobbying-principles/>> and in PDF format at: <<https://legalinstruments.oecd.org/public/doc/256/256.en.pdf>> (hereinafter “OECD, *Recommendation on Lobbying* (2010)”).

– which is also a non-binding legal instrument for which the OECD audits compliance. Importantly, the document not only recommends “Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of public policies” in order to “protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests” (under Principle 1) but also calls for restrictions on lobbyists to be one part of a “wider policy and regulatory framework that sets the standards for good public governance” including access to information, political finance, ethics, accountability for watchdog agencies and “effective provisions against illicit influencing” (under Principle 3). These recommendations echo the concerns expressed in the OECD’s recommendations for combating bribery (referred to above) concerning the undue influence lobbyists can have over public office holders, and the concerns expressed in the list of theoretical reasons for restricting lobbyists set out in earlier sections in this chapter.

According to the 2010 *Recommendation* on lobbying, the legal definition of “lobbying” should be “comprehensive and sufficiently explicit to avoid misinterpretation and to prevent loopholes” and while it can be focused on paid lobbying it should also cover unpaid lobbying (under Principle 4). Disclosure requirements for lobbyists should be detailed and the information easily accessible (under Principle 5), and governments should also disclose “who has sought to influence legislative or policy-making processes” (under Principle 6). Ethics rules for public office holders should require, among other things: avoiding conflicts of interest; recusal from a decision-making process

when in a conflict; a “cooling-off period” after leaving office before becoming a lobbyist (and a cooling-off period for lobbyists to prevent them from becoming a public office holder who watches over their past clients), and; overall acting in way that “bears the closest public scrutiny” (under Principle 7).

Ethics rules should also apply to lobbyists and require them to act with honesty and integrity, and avoid conflicts of interest with public office holders (under Principle 8). Enforcement should be by well-resourced monitoring agencies, and include required training, public education and audits “to foster a culture of integrity and openness” – and penalties for violations should “balance risks with incentives for both public officials and lobbyists to create a culture of compliance” and should include public reporting of violations, financial and administrative penalties, and prosecutions (under Principle 9). Finally, not only public office holders, lobbyists and watchdog agencies should be involved in developing, implementing and regularly reviewing restrictions on lobbyists but also civil society (non-profit, citizen organizations, media, etc. – under Principle 10).

In 2020, the OECD conducted a survey of its member countries on lobbying issues, and published a report in 2021 on the state of lobbying laws and enforcement systems and priority issues. The report begins by noting that “limited transparency” of lobbying activities, the risks of foreign influence which are largely not addressed in many countries’ laws, and the lack of “integrity standards tailored to the specific risks of lobbying” all mean that the “risks of undue influence and monopoly of influence are high.” As detailed

above in Chapter 4, and summarized in the OECD's report, Canada's laws and codes have all of these flaws.

The report also calls overall for “effective inclusion, transparency and integrity in the policy-making process” which means “lobbying needs to be understood and addressed in a broader sense, to avoid all current loopholes, opaque practices and most importantly, to change public perceptions and increase trust in the policy-making process.”⁹⁶¹ While I could argue that this wording somewhat suggests that OECD's position is that changing public perceptions and increasing trust is more important than closing loopholes to increase transparency and integrity in lobbying, the more important point is that this statement reflects all three of the key principles of the Supreme Court of Canada's egalitarian model by prioritizing “inclusion” in policy-making (i.e. equality of opportunity for equal participation”), full transparency (to inform voters), and integrity (so that the public can have confidence in political processes).

Given the risks of undue influence identified in the OECD's 2021 report due to flaws in laws, and given the objective of addressing lobbying in a broader sense, combined with the growing use by lobbyists of digital technologies and social media, the report committed to updating the 2010 Principles by 2023, and in late 2022 the OECD issued for public consultation a draft revised *Recommendation* that included all the same standards as in

⁹⁶¹ Organisation for Economic Co-operation and Development (OECD), *Lobbying in the 21st Century: Transparency, Integrity and Access*, (2021), online: <<https://www.oecd.org/corruption/ethics/lobbying-21-century.htm>> at 3 and 19, (hereinafter “OECD, *Lobbying* (2021)”).

the past but also requirements to disclose more details about who controls lobbying businesses and other entities, and about lobby groups' funding, lobbying and influence activities and partnerships (Section VI), and a stronger call for the enactment of ethical lobbying rules (Section VII) and ethical policy-making and post-employment rules and training (Sections VIII and IX), and stronger enforcement and penalties (Section X).⁹⁶² As of May 2023, the proposed new Recommendation had not been finalized, but the OECD's stated objective was to have it completed and published before the end of 2023.

Specifically concerning political financing, the OECD released in February 2016 a report containing a Framework on Financing Democracy that sets out model rules and enforcement practices, and penalties.⁹⁶³ An overall notable development is that the OECD situated the Framework as being based on "democracy" not just "integrity" or "ethics". Despite the fact that the U.S. is a member state of the OECD that (again) generally has a libertarian approach to political finance, the document begins with the statement that:

Understanding and addressing the role of money and its influence in politics can no longer be a taboo subject. When public policy making is captured by private interests, the "rules of the game" for markets and

⁹⁶² OECD, *Lobbying* (2021), *supra* note 961, at 13-14. Organisation for Economic Co-operation and Development (OECD), *Draft revised Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, (2022), online: <<https://www.oecd.org/gov/ethics/lobbying/public-consultation-lobbying-influence.htm>> and in PDF <<https://www.oecd.org/gov/ethics/lobbying/OECD-draft-revised-Recommendation-of-the-Council-on-Transparency-and-Integrity-in-Lobbying-and-Influence.pdf>> (hereinafter "OECD, *Lobbying* (2022)").

⁹⁶³ Organisation for Economic Co-operation and Development (OECD), *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*, (2016) online: <<http://www.oecd.org/gov/ethics/financing-democracy-9789264249455-en.htm>> and <<https://www.oecd.org/governance/ethics/political-finance/>> (hereinafter "OECD, *Financing Democracy* (2016)") at 30-31.

opportunities may be bent to favour the few and violate the interest of the many. The consequences include the erosion of democratic governance, social cohesion, and equal opportunities for all, as well as the decline of trust in democracy itself.⁹⁶⁴

The Framework sets out several policy options to prevent “policy capture” by private interests that, like the OECD’s statements concerning public integrity and lobbying summarized above, reflect all three of key principles of the Supreme Court of Canada’s egalitarian model if it was consistently and comprehensively applied across the political finance system (as this thesis attempts to do). The Framework also includes similar recommendations as in those other OECD reports covering the areas of conflicts of interest and lobbying, as follows:

- a) public funding provided on the basis of “clear and equitable criteria such as equal access and proportionality”;
- b) banning corporate and trade union donations and limiting anonymous donations;
- c) spending limits based on a “certain amount per citizen”;
- d) banning the use of state resources for political purposes;
- e) before and during campaigns, banning disproportionate government spending on advertising, hiring new public servants and signing large public contracts;
- f) establishing ethics rules for public officials and lobbyists, and;
- g) requiring comprehensive, “timely, reliable, accessible and intelligible” disclosure of all public and private funding (donations) to parties, EDAs, candidates and third parties,

⁹⁶⁴ OECD, *Financing Democracy* (2016), *supra* note 963, at 3.

spending, assets and liabilities, conflicts of interest and outside activities of public officials, gifts, and lobbying.

The Framework also recommends that the rules must be only one part of an integrity framework that also includes whistleblower protection, all enforced by watchdog agencies that are independently appointed and funded, fully resourced and expert, with training and support to encourage compliance, and strong, effective penalties.⁹⁶⁵

Another example of an international entity using “democracy” as the basis for its principles and rules concerning political finance, gifts, favours and lobbying is the International Institute for Democracy and Electoral Assistance (International IDEA), which is an intergovernmental organization but has only 35 member states (including Canada but, unlike the UN and OECD, not including the United States).⁹⁶⁶ The two core principles that form the basis of the evaluations that IDEA does to produce its Global State of Democracy Indices and reports⁹⁶⁷ are that democracy means “popular control over public decision making and decision makers” and equality of respect and voice between citizens in the exercise of that control” – echoing Rawls’ theoretical position, and the “equality of opportunity for equality of participation” part of the Supreme Court of Canada’s egalitarian model.

⁹⁶⁵ OECD: *Financing Democracy* (2016), *supra* note 963, at 30-31 and 85. See a similar framework and set of recommendations in Organization for Security and Co-operation in Europe (OSCE), *Handbook for the Observation of Campaign Finance* (Vienna: OSCE, 2015), online: <<https://www.osce.org/odihr/elections/135516>>.

⁹⁶⁶ International IDEA, About Us, online: <<https://www.idea.int/about-us>>.

⁹⁶⁷ International IDEA, Global State of Democracy Indices, online: <<https://www.idea.int/data-tools/tools/global-state-democracy-indices>> and <<https://www.idea.int/gsod-indices/about>>.

International IDEA's guide for assessing the state of democracy in various countries⁹⁶⁸ include questions that point to requiring restrictions on donations and spending, gifts, favours and lobbying, such as, in subsection 2.2 The democratic role of political parties, the following question:

2.2.4. How far does the system of party financing prevent the subordination of parties to special interests?

And in subsection 2.3 Effective and responsive government, the following question:

2.3.3. How open and systematic are the procedures for public consultation on government policy and legislation, and how equal is the access for relevant interests to government?

And the following set of sections in subsection 2.6:

2.6 Integrity in public life

Overarching question: Is the integrity of conduct in public life assured?

2.6.1. How effective is the separation of public office from the personal business and family interests of office holders?

2.6.2. How effective are the arrangements for protecting office holders and the public from involvement in bribery?

2.6.3. How far do the rules and procedures for financing elections, candidates and elected representatives prevent their subordination to sectional interests?

2.6.4. How far is the influence of powerful corporations and business interests over public policy kept in check, and how free are they from involvement in corruption, including overseas?

2.6.5. How much confidence do people have that public officials and public services are free from corruption?

⁹⁶⁸ International IDEA, *Assessing the State of Democracy: A Practical Guide* (Stockholm: International IDEA, 2008), online: <<https://www.idea.int/publications/catalogue/assessing-quality-democracy-practical-guide>> (hereinafter "IDEA's *Practical Guide* (2008)").

And, finally, the following question in subsection 3.2 Political participation (see further details in the next subsection on anti-discrimination measures):

3.2.4 How equal is access for all social groups to public office, and how fairly are they represented?⁹⁶⁹

In 2003, International IDEA published a handbook entitled *Funding of Political Parties and Election Campaigns*, and then issued an updated version in 2014.⁹⁷⁰ As in some of the OECD reports summarized above, the handbook is based on the following contention that reflects the three key principles underlying the Supreme Court's egalitarian model, as highlighted below:

"The flows of money through the political sphere can threaten key democratic values. Politicians become **less responsive and accountable** to voters if they are too closely tied to financiers, and the **equality of political competition** is skewed if access to funds becomes a determining factor. The desire of various actors to hide how they raise and spend money on political activities can seriously hurt the **transparency** of the political process."⁹⁷¹ [emphasis added]

The handbook goes on to summarize the usual sets of rules for addressing these concerns as a combination of: donation bans and limits; public funding; spending bans and limits, and; disclosure requirements.⁹⁷² Also in 2014, International IDEA published updated guidelines for election

⁹⁶⁹ IDEA's *Practical Guide* (2008), *supra* note 968, at 71-78.

⁹⁷⁰ International IDEA, *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance*, (2014), online: <<https://www.idea.int/publications/catalogue/funding-political-parties-and-election-campaigns-handbook-political-finance?lang=en>> (hereinafter "IDEA *Funding* (2014)").

⁹⁷¹ IDEA *Funding* (2014), *supra* note 970, at 2. See also a similar statement at iii.

⁹⁷² IDEA *Funding* (2014), *supra* note 970, at 21-34.

rules⁹⁷³ which include a summary of the basis for the guidelines in other international standards historically such as the *UDHR* and the *ICCPR*.⁹⁷⁴ The document also sets out a detailed list of obligations, including:

1.1 Does the legal framework incorporate applicable international obligations into national law?⁹⁷⁵

2.5 Does the electoral system promote equal representation?⁹⁷⁶

Chapter 5: Political Finance again contains specific recommendations that reflect the three key principles of the Supreme Court's egalitarian model

(NOTE: I have not included guidelines 5.7 to 5.9 as they relate to enforcement measures):

5.1 Does the legal framework require the transparency of political party and candidate contributions and expenditures?

5.2 Are there reasonable caps on financial contributions to, or spending by and on behalf of, political parties and candidates?

5.3 If public funding to political parties is provided, is it distributed equitably?

5.4 Is the abuse of state resources regulated?

5.5 Does the legal framework define and sanction the concealment of illicit campaign funds?

5.6 Are donations by non-national persons or entities regulated? ...

5.10 Do candidates have to declare their assets before and after their term of office?⁹⁷⁷

⁹⁷³ International IDEA, *International Obligations for Elections: Guidelines for Legal Frameworks*, (2014), online: <<https://www.idea.int/publications/catalogue/international-obligations-elections-guidelines-legal-frameworks>> (hereinafter "IDEA, *International Obligations* (2014)").

⁹⁷⁴ IDEA, *International Obligations* (2014), *supra* note 973 at 37 to 51. See also details about each obligation set out at 59-282, and also the Checklists concerning each obligation set out at 284-329.

⁹⁷⁵ IDEA, *International Obligations* (2014), *supra* note 973 at 60.

⁹⁷⁶ IDEA, *International Obligations* (2014), *supra* note 973 at 74.

⁹⁷⁷ IDEA, *International Obligations* (2014), *supra* note 973 at 91-99.

Specifically concerning transparency, in 2017 International IDEA published a guide suggesting that an online disclosure system is best-practice because “reports filed electronically can be published in real time” and the data can be published on a “website in the form of a disclosure database” that is searchable and can be “concretely linked to other systems” such as a database of lobbying activities.⁹⁷⁸ It also “allows the oversight agency to easily categorize, sort and store the data, which in turn helps it carry out compliance checks” and “a public disclosure database can also create public or media pressure on political parties to improve their reporting habits” and it empowers voters to monitor and hold “parties and candidates to account” as “part of a wider societal effort to protect and enhance the integrity of politics.”⁹⁷⁹ While there are initial and ongoing maintenance and security costs for an online disclosure database, and the system must be designed and maintained to present the information impartially, the conclusion is that the benefits of easier, more accessible filing of information for contestants, candidates and parties, and greater public accessibility to comprehensive, timely information outweigh the costs.⁹⁸⁰

The Electoral Integrity Project is an academic study started in 2012 that uses surveys of experts to rank country elections in 11 areas and a total of 49

⁹⁷⁸ International IDEA, *Digital Solutions for Political Finance Reporting and Disclosure: A Practical Guide*, (2017), online: <<https://www.idea.int/publications/catalogue/digital-solutions-for-political-finance-reporting-and-disclosure>> at 5 (hereinafter “IDEA, *Digital Solutions* (2017)”).

⁹⁷⁹ IDEA, *Digital Solutions* (2017), *supra* note 978 at 5-6.

⁹⁸⁰ IDEA, *Digital Solutions* (2017), *supra* note 978 at 7-9.

variables (the Perceptions of Electoral Integrity Index (PEI)).⁹⁸¹ The seventh of the PEI's evaluation categories is "Campaign Finance" which has the following criteria that, as with some of the sets of other international standards I have summarized above, reflect the three key principles of the Supreme Court of Canada's egalitarian model of equitable access, transparency to inform voters and integrity to give the public confidence:

- 7-1 Parties/candidates had equitable access to public subsidies
- 7-2 Parties/candidates had equitable access to political donations
- 7-3 Parties/candidates publish transparent financial accounts
- 7.4 Rich people buy elections
- 7-5 Some state resources were improperly used for campaigning.⁹⁸²

The ACE Electoral Knowledge Network, which is a partnership of eight UN organizations, multilateral organizations (including International IDEA) and electoral agencies (including Elections Canada),⁹⁸³ sets out similar evaluation criteria on its Campaign Finance resource page.⁹⁸⁴ The 2003 Recommendation by the Council of Europe's Committee of Ministers "on common rules against corruption in the funding of political parties and electoral campaigns"⁹⁸⁵ also sets out similar recommendations for best-

⁹⁸¹ Pippa Norris, Richard W. Frank and Farren Martinez I Coma, "Measuring Electoral Integrity around the World: A New Dataset," (2014) 47:4 *Political Science and Politics* 789 (hereinafter "Norris et al (2014)").

⁹⁸² Holly Ann Garnett, Toby S. James and Madison Macgregor (The Electoral Integrity Project), *Electoral Global Integrity Report 2019-2021* (May 2022) online: <<https://www.electoralintegrityproject.com/globalreport2019-2021>> (hereinafter "EIP, Global Electoral Report (2019-2021)"), at 37.

⁹⁸³ ACE Electoral Knowledge Network, ACE Partners, online: <<https://aceproject.org/about-en/ace-partners/>>. See also, About ACE, online: <<https://aceproject.org/about-en/>>.

⁹⁸⁴ The ACE Electoral Knowledge Network, Campaign Finance, online: <<https://aceproject.org/ace-en/focus/campaign-finance>> (hereinafter "ACE, Campaign Finance").

⁹⁸⁵ Council of Europe, *Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns* (2003), online: <<https://rm.coe.int/16806cc1f1>> (hereinafter "COE,

practice political finance standards. And a review of nine country case studies and international standards published in 2016 concluded that:

a balanced mix of regulatory policies appears to be most effective to control political finance, so that regulations blend a combination of disclosure and transparency requirements, limits on spending and contributions, and public subsidies to political parties. No single policy instrument is sufficient by itself to control money in politics.⁹⁸⁶

Another review of some national, and mostly international standards, published in 2016 found the following points of general consensus on political finance rules that echo many of the elements developed by the standard-setting organizations summarize above and, as can be seen below, allow for some variations in systems:

- Appropriate regulatory mechanisms include caps on donations, limits on expenditure, and bans on foreign donations.
- States may restrict parties' income and expenditure, but such restrictions should be reasonable and apply equally to all parties.
- States may provide financial and in-kind support for political parties but there is no general obligation to do so.
- Where provided, state support should be consistent with the principles of equality (outcome and/or access).
- Political parties should regularly declare details of assets, income, and expenditure to an independent agency. This information should be publicly accessible.

Recommendation (2003)"). The COE is Europe's intergovernmental human rights organization, made up of 46 states (27 of which are European Union members) that have signed the *European Convention on Human Rights*, and the Committee of Ministers is made up of the foreign affairs ministers of all the member states. Sources: Council of Europe, The Council of Europe in brief, online: <<https://www.coe.int/en/web/about-us/who-we-are>> and <<https://www.coe.int/en/web/about-us/structure>>.

⁹⁸⁶ Pippa Norris and Andrea Abel van Es, eds., *Checkbook Elections?: Political Finance in Comparative Perspective* (New York: Oxford University Press, 2016) at 260 (hereinafter "Norris and Abel van Es, eds., *Checkbook Elections?* (2016)").

- Political parties should be supported through appropriate regulatory measures to facilitate gender parity in candidate selection and equal access to public office.⁹⁸⁷

Beyond the areas of disagreement built into the above general areas of agreement (i.e. whether public funding should be provided?; how much public funding should be provided, and based on what criteria? and; how restrictive limits on donations and expenditures should be?), and other areas of disagreement (i.e. whether disclosure of donors violates privacy rights?),⁹⁸⁸ this review also summarized the following ongoing main areas of disagreement on party and political finance regulation:

1. Whether governments should restrict the formation of political parties in any way (for example, to prevent parties that advocate hate or other extremist views, or to require parties to have a specific level of public support/number of candidates)?
2. Whether parties should be required to be internally democratic and transparent or left to govern themselves as private organizations?
3. Whether a political finance system should strive to level the playing field or should allow for disproportionate funding levels for parties based on freedom of expression rights for contributors and supporters?⁹⁸⁹

⁹⁸⁷ Anika Gauja, “The Legal Regulation of Political Parties: Is There a Global Normative Standard?” (March 2016) 15:1 *Election Law Journal: Rules, Politics, and Policy* 4 at 10-11 (hereinafter “Gauja, *Legal Regulation of Parties* (2016)”). Please note that I have listed the elements in the order in which this thesis addresses them, not in the order in which they are presented in the article.

⁹⁸⁸ Diana Dwyre, “Campaign Finance Deregulation in the United States: What Has Changed and Why Does It Matter?” in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) 61 at 62.

⁹⁸⁹ Gauja, *Legal Regulation of Parties* (2016), *supra* note 987 at 12-17.

I have proposed general answers to some of these questions in the above subsections in this chapter, and set out below in section 5.3 are overall summary of arguments, and the list of principles and general provisions of a more egalitarian model which also answers these questions. Then, in Chapter 6 and Chapter 7, more specific answers and provisions are suggested. In brief, I contend that fulfilling a more egalitarian model requires, as the above international standards generally establish: restrictions on contributions and spending by all political actors; full and timely disclosure of all contributions, spending, lobbying, private interests and conflicts of interest; public funding and subsidies based on actual voter support and mainly to provide substantive equality of opportunity and, as also summarized in the next subsection; requirements for internal party democracy and oversight to ensure equality of opportunity for participation in elections, and requirements for consultation and engagement to ensure equality of opportunity for participation in policy-making processes.

5.2.6.2. Political participation anti-discrimination and equality of opportunity standards and requirements

Equality of opportunity to participate in political processes raises questions related to political finance, and also concerning barriers to running for office that may be built into the nomination contest, leadership contest and election candidate registration processes, and also barriers to participating and being heard in policy-making processes. International IDEA's 2014 election guidelines set out the general obligations in international treaties, covenants and conventions concerning candidacy qualifications, which reflect

the equal opportunity and integrity principles of the Supreme Court's egalitarian model:

- 14.1 Is the right to stand restricted only in a reasonable, objective and non-discriminatory manner?
- 14.2 Can independent candidates stand for all levels of election?
- 14.3 Does the law protect candidates from discrimination or disadvantage?
- 14.4 Do registration procedures guarantee equal treatment for all candidates?
- 14.5 Are procedures and timelines for candidate registration reasonable and defined by law?
- 14.6 Do candidacy criteria address conflicts of interest? (NOTE: with regard to certain people, such as judges, military officers, running for office);
- 14.7 Are signature requirements reasonable?
- 14.8 Does the legal framework provide for timely appeals against party or candidate rejection?
- 14.9 Does the legal framework regulate the withdrawal and removal of candidates?⁹⁹⁰

The UN High Commissioner for Human Rights' 2021 handbook on human rights in elections also summarizes the overall obligations of states to ensure that political parties do not use arbitrary barriers in the registration of candidates, and highlights that any disqualifications "should be subject to effective and independent complaints and appeals procedures" and "Candidates should be able to challenge a refusal to accept their nominations before a competent tribunal."⁹⁹¹ As well, International IDEA's 2014 guidelines

⁹⁹⁰ IDEA, *International Obligations* (2014), *supra* note 973, at 192-200.

⁹⁹¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights and Elections: A Handbook on International Human Rights Standards on Elections*

also set out the following general requirements that apply to candidates and parties registering and campaigning that illustrate the balancing of freedom and reasonable restrictions that is at the heart of the debate concerning the regulation of political participation:

- 16.1 Is there freedom to engage in political campaigning?
- 16.2 Are campaign restrictions prescribed by law and subject to judicial or equivalent review?
- 16.3 Are restrictions on public campaign events reasonable?⁹⁹²
- 16.6 Is the abuse of state resources during campaigning regulated?⁹⁹³
- 17.1 Are there provisions granting the media freedom of expression?
- 17.2 Are there provisions requiring equitable access for all political parties and candidates to public media?⁹⁹⁴

With regard to more specific anti-discrimination standards and requirements, as Pippa Norris (one of the founders of the Electoral Integrity Project (EIP)) points out, the 2012 *UN General Assembly Resolution 66/163 on Democratization and Elections* is based not just on the principles of the *UN Universal Declaration on Human Rights (UDHR)* and the *UN International Covenant on Civil and Political Rights (ICCPR)*, but also the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*. As a result, the 2012 UN Resolution reaffirms the Article 25 *ICCPR* rights “that citizens, without distinction of any kind, have the

(2021), online: <<https://www.ohchr.org/sites/default/files/Documents/Publications/Human-Rights-and-Elections.pdf>> at 63 (para. 123) (hereinafter “OHCHR, *Handbook on Human Rights and Elections* (2021)”).

⁹⁹² IDEA, *International Obligations* (2014), *supra* note 973, at 214-220.

⁹⁹³ IDEA, *International Obligations* (2014), *supra* note 973, at 222. See also guideline 21.7 at 278.

⁹⁹⁴ IDEA, *International Obligations* (2014), *supra* note XX973XX, at 228-233.

right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives, and to vote and to be elected in genuine periodic elections” and recognizes not only the need to uphold the right to free and fair elections, but also the need to “promote the participation of women on equal terms with men”.⁹⁹⁵

The 2011 Resolution 66/130 on women and political participation that was adopted by the UN General Assembly echoes these statements as it expresses concern that “many obstacles still prevent women from participating in political life on equal terms with men” and calls on states to “eliminate laws, regulations and practices that, in a discriminatory manner, prevent or restrict women’s participation in the political process” and to “counter the barriers faced by marginalized women in accessing and participating in politics and decision-making at all levels.”⁹⁹⁶

The UN High Commissioner for Human Rights’ 2021 handbook on human rights in elections summarizes the general anti-discrimination provisions, and provisions concerning rights to self-determination, free expression, assembly and association, equal access, and free and fair elections provisions, that are set out in covenants and conventions and aim to protect the participation rights of voters and parties generally.⁹⁹⁷ In addition, the handbook echoes the statements cited above from the UN’s 2011

⁹⁹⁵ Pippa Norris, *Why Electoral Integrity Matters* (New York: Cambridge University Press, 2014) at 23-26. NOTE: the book refers incorrectly to *UN Resolution 63/163* when it is, in fact, *Resolution 66/163*. See the *Resolution* in full at: <[https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/468/60/PDF/N1146860.pdf](https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/468/60/PDF/N1146860.pdf?)>.

⁹⁹⁶ United Nations General Assembly, *UN Resolution 66/130* (December 2011), online: <[https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/466/62/PDF/N1146662.pdf](https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/466/62/PDF/N1146662.pdf?)>.

⁹⁹⁷ OHCHR, *Handbook on Human Rights and Elections* (2021) at 3-27.

Resolution 66/130⁹⁹⁸ and summarizes the obligations of states to ensure through legal measures such as financial assistance and quotas (temporary or longer-term) that there is equal access to participation in political and public life by men and women and everyone regardless of sexual orientation,⁹⁹⁹ minorities and indigenous peoples,¹⁰⁰⁰ people with disabilities,¹⁰⁰¹ youth and people in poverty.¹⁰⁰² The aim of these special measures is to correct past and current discrimination that causes structural inequalities and barriers to equal opportunities for access and participation, with the end goal being representation in public office that is at least proportional to the demographics of any jurisdiction.¹⁰⁰³

International IDEA's 2014 election guidelines also summarize the anti-discrimination requirements set out in various international treaties and conventions.¹⁰⁰⁴ as well as the following specific requirements concerning parties and political finance concerning gender equality:

4.5 Are there provisions to promote internal party democracy?

⁹⁹⁸ OHCHR, *Handbook on Human Rights and Elections* (2021), *supra* note 997 at 27, para. 58.

⁹⁹⁹ OHCHR, *Handbook on Human Rights and Elections* (2021), *supra* note 997 at 36-38, paras. 70-73.

¹⁰⁰⁰ OHCHR, *Handbook on Human Rights and Elections* (2021), *supra* note 997 at 38-40, para. 74.

¹⁰⁰¹ OHCHR, *Handbook on Human Rights and Elections* (2021), *supra* note 997 at 40-41, para. 75.

¹⁰⁰² OHCHR, *Handbook on Human Rights and Elections* (2021), *supra* note 997 at 40-41, para. 75.

¹⁰⁰³ OHCHR, *Handbook on Human Rights and Elections* (2021), *supra* note 997 at 36-37, 41-42 and 63, paras. 70-71, 77 and 124.

¹⁰⁰⁴ IDEA, *International Obligations* (2014), *supra* note 973. See guidelines: 1.6. 1.7 at 65-66; 2.3 at 73; 7.1 to 7.3 at 110 to 114; 7.5 to 7.10 at 116-119; re: enforcement measures 7.15 at 122; and 7.17 at 123. See also the Checklists concerning each obligation set out at 284-329. See also measures concerning Civic and Voter Education in Chapter 11 at 159-166. See also measure 12.6 at 173-174; 13.4 at 183; 17.3 at 233.

- 4.6 Are there measures to promote gender equality in political party leadership?¹⁰⁰⁵
- 7.4 Are there provisions allowing and providing for appropriate measures to promote gender equality in all elected bodies?¹⁰⁰⁶
- 7.11 Are there any measures that indirectly restrict women's right to vote or stand for office?
- 7.12 Are there provisions for the public funding of women candidates, where applicable?
- 7.13 Are there provisions for capacity building for women and on gender equality?
- 7.14 Are there measures to promote gender equality in political parties?
- 7.16 Are there provisions to regulate the equal treatment of women by the media?¹⁰⁰⁷

Although the EIP's Perceptions of Electoral Integrity Index (PEI) does not include an explicit anti-discrimination variable in its 49 election-evaluation criteria to measure whether people face barriers to running for office because of economic disadvantage or other disadvantages due to discrimination, it somewhat incorporates these egalitarian standards into its first category of "Electoral Laws" which includes the following indicators/survey questions that the experts are asked to answer:

- 1-1 Electoral laws were unfair to small parties.
- 1-2 Electoral laws favoured the governing party or parties.
- 1-3 Electoral laws restricted citizens' rights.¹⁰⁰⁸

¹⁰⁰⁵ IDEA, *International Obligations* (2014), *supra* note 973 at 87-88.

¹⁰⁰⁶ IDEA, *International Obligations* (2014), *supra* note 973 at 114.

¹⁰⁰⁷ IDEA, *International Obligations* (2014), *supra* note 973 at 120-123.

¹⁰⁰⁸ EIP, *Global Electoral Report* (2019-2021), *supra* note 982, at 62-63, paras. 122-123.

International IDEA's 2014 handbook also highlights the need, in order to have a more equitable system, to address the "gender gap" of women facing more obstacles than men in raising funds for political campaigns.¹⁰⁰⁹ In 2020, International IDEA issued another report on political finance reforms also highlighting that, because women worldwide on average earn less than men, are overrepresented in low-paying jobs and underrepresented in senior positions, lack of adequate financing is a barrier to women deciding to run, and successfully running, for public office.¹⁰¹⁰ This is also a characteristic of Canadian politics, as the overall gender wage gap in 2021 was that on average men earned 11.1 percent more than women,¹⁰¹¹

A survey conducted in 2009 by the Inter-Parliamentary Union (IPU – which has 178 Parliaments as members)¹⁰¹² and the United Nations Development Programme (UNDP) to which 132 parliamentarians from 48 countries responded concluded that "lack of finances" was also the greatest deterrent to minority and indigenous groups entering politics.¹⁰¹³ As of 2021, Statistics Canada reported that Canada has a pay gap in this area as well as

¹⁰⁰⁹ IDEA *Funding* (2014), *supra* note 973, at 363.

¹⁰¹⁰ International IDEA, *Political Finance Reforms: How to Respond to Today's Policy Challenges*, (2020), online: <<https://www.idea.int/publications/catalogue/political-finance-reforms-how-respond-todays-policy-challenges?lang=en>> (hereinafter "IDEA, *Political Finance Reforms* (2020)") at 24-25.

¹⁰¹¹ Statistics Canada, *Quality of Employment in Canada: Pay Gap, 1998 to 2021*, (May 30, 2022), online: <<https://www150.statcan.gc.ca/n1/pub/75-004-m/75-004-m2019004-eng.htm>> and <<https://www150.statcan.gc.ca/n1/en/pub/14-28-0001/2020001/article/00003-eng.pdf>> (hereinafter "StatsCan, *Pay Gap* (2022)") at 2.

¹⁰¹² Inter-Parliamentary Union (IPU), *Members*, online: <<https://www.ipu.org/about-ipu/members>>.

¹⁰¹³ Inter-Parliamentary Union (IPU) and United Nations Development Programme (UNDP), *The Representation of Minorities and Indigenous Peoples in Parliament: A Global Overview* (Geneva and New York: IPU and UNDP, 2010), <<https://www.ipu.org/resources/publications/reports/2016-07/representation-minorities-and-indigenous-peoples-in-parliament-global-overview>> at 16-17.

some visible minority employees earn 15-25% less than their non-indigenous, non-visible minority employees and,¹⁰¹⁴ as of 2016, that Indigenous peoples earn 11 to 16 percent less than non-indigenous employees overall.¹⁰¹⁵

The 2020 International IDEA report also points to studies showing that low income and lack of financing is also a barrier to people with disabilities running for office.¹⁰¹⁶ In Canada, according to Statistics Canada data from 2017, only 59% of people with disabilities age 25 to 64 are likely to be employed compared to 80% of Canadians in that age range without disabilities, and the median personal after-tax income of people with disabilities was also \$4,650 lower annually, with women with disabilities having on average only 75 percent of the income of men with disabilities.¹⁰¹⁷ International IDEA's 2014 election guidelines summarize the general anti-discrimination requirements under international law,¹⁰¹⁸ and the following specific requirements, to create equal opportunity for visible minorities and indigenous peoples in elections and political financing:

8.6 Are there special measures to promote the representation of minorities?¹⁰¹⁹

¹⁰¹⁴ StatsCan, *Pay Gap* (2022), *supra* note 1011, at 2-3.

¹⁰¹⁵ Taylor N. Paul, "On Unequal Terms: The Indigenous Wage Gap In Canada," (2020), *MA Research Paper*, 46, online: <https://ir.lib.uwo.ca/sociology_masrp/46>.

¹⁰¹⁶ IDEA, *Political Finance Reforms* (2020), *supra* note 1010, at 25.

¹⁰¹⁷ Statistics Canada, *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over*, 2017, online: <<https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm>>.

¹⁰¹⁸ IDEA, *International Obligations* (2014), *supra* note 973 at 126. See guidelines: 8.1-8.5 at 128-131; 8.7-8.11 at 132-136; 8.13-8.14 at 136-138. See also the Checklists concerning each obligation set out at 284-329. See also measures concerning Civic and Voter Education in Chapter 11 at 159-166. See also guidelines 12.3 at 170-171; 12.5 at 173; 13.5 at 184-185; 13.7-13.9 at 186-187; 15.6 at 209; 16.5 at 221; 17.4 at 223-224; 18-12 at 247; 21.9 at 279.

¹⁰¹⁹ IDEA, *International Obligations* (2014), *supra* note 973 at 131-132.

8.12 Do conditions for candidate registration disadvantage or exclude minorities?¹⁰²⁰

and the general anti-discrimination and equal opportunity requirements concerning people with disabilities,¹⁰²¹ including the following specific obligation:

9.5 Are persons with disabilities effectively granted an equal right to stand for office?¹⁰²²

Finally, international treaties and conventions and standard-setting documents set out some obligations with regard to between-election participation in political processes, mainly covering the area of engagement and consultation by governments with the public. For example, as International IDEA's 2014 election guidelines set out, there is an obligation to establish "consultative bodies" representing minorities and indigenous peoples that are formally consulted by governments and/or to devolve powers to regional bodies that represent minorities (if they live in a specific geographic area).¹⁰²³ As well, requirements for public participation are set out in the conventions and standards covering areas relating to political finance.

For example, article 13 of the *UNCAC* requires states "to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based

¹⁰²⁰ IDEA, *International Obligations* (2014), *supra* note 973 at 136.

¹⁰²¹ IDEA, *International Obligations* (2014), *supra* note 973 at 141. See guidelines 9.1-9.4 at 143-146; 9.6-9.10 at 146-150. See also the Checklists concerning each obligation set out at 284-329. See also measures concerning Civic and Voter Education in Chapter 11 at 159-166. See also guideline 12.7 at 174; 13.6 at 185-186; 17.4 at 223-224; 18.3-18.4 at 242-243; 21.9 at 279.

¹⁰²² IDEA, *International Obligations* (2014), *supra* note 973, at 146.

¹⁰²³ IDEA, *International Obligations* (2014), *supra* note 973, guideline 8.15 at 138.

organizations, in the prevention of and the fight against corruption” including by “Enhancing the transparency of and promoting the contribution of the public to decision-making processes.”¹⁰²⁴ As well, the Conference of the States parties under the UNCAC is required under Article 63 (subsection 4(c)) to cooperate “with relevant international and regional organizations and mechanisms and non-governmental organizations...” In addition, Principle 10 of the OECD’s 10 principles on lobbying states that not only public office holders, lobbyists and watchdog agencies should be involved in developing, implementing and regularly reviewing restrictions on lobbyists but also civil society (non-profit, citizen organizations, media, etc.).¹⁰²⁵

These standards relate to the issue of equality of opportunity in participation in lobbying during policy-making processes. Beyond the lobbying disclosure and integrity standards that the OECD has set out summarized in the above subsection, the International Parliamentary Union (IPU) calls in its *Global Parliamentary Report 2022* for systemic changes to policy engagement and consultation processes as the means for ensuring equality of opportunity.¹⁰²⁶ The report points out that goal 16 of the 17 Sustainable Development Goals (SDGs) that were passed unanimously by the UN General Assembly in 2015 and set developments goals for 2030¹⁰²⁷ includes the commitments to:

¹⁰²⁴ UN, *UNCAC* (2004), *supra* note 20.

¹⁰²⁵ OECD, *Recommendation on Lobbying* (2010), *supra* note 960.

¹⁰²⁶ Inter-Parliamentary Union (IPU), *Global Parliamentary Report 2022*, (2022), online: <<https://www.ipu.org/resources/publications/reports/2022-03/global-parliamentary-report-2022>> (hereinafter “IPU, *Report* (2022)”).

¹⁰²⁷ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, online: <<https://sdgs.un.org/2030agenda>>.

- 16.6 Develop effective, accountable and transparent institutions at all levels, and;
- 16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels.¹⁰²⁸

The report also states that “public engagement is not a preference or a choice, but a necessity for effective representation” and that it “enables parliaments to create better laws and policies by tapping into wider sources of information” and counters distrust.”¹⁰²⁹ It also states that “without a special effort to create a level playing field, only some individuals or groups may have the resources and understanding necessary to advance their interests or articulate their concerns” and that “systemic inequities mean that certain groups and individuals may be less likely to be heard.”

In addition to recommending that parliaments have an overall engagement plan that provides training and resources to MPs and government officials for meaningful public consultation using a variety of innovative approaches and processes, the IPU specifically calls on parliaments to:

- Implement a comprehensive inclusion action plan to eliminate barriers to participation across all facets of parliamentary activity so that all members of the community have equal opportunity to participate, and no one is left behind.
- Assess all parliamentary engagement through the lens of an inclusion checklist that ensures broad participation in programmes and activities based on factors such as income,

¹⁰²⁸ IPU, *Report* (2022), *supra* note 1026, at 6, 13, 15, 49, 53 and 63.

¹⁰²⁹ IPU, *Report* (2022), *supra* note 1026, at 12-17.

sex, age, race, ethnicity, migratory status, disability and geographic location.

- Ensure engagement is gender-sensitive by mainstreaming women's engagement across the work of parliament, involving women in all conversations and making public engagement safe and accessible for women. ...
- Partner and collaborate with community-based organizations across the nation to broaden the reach of engagement and co-design processes that will open up parliament to new ideas and new ways of engaging.¹⁰³⁰

Chapters 6 and 7 set out suggestions for changes to removing arbitrary, inequalitarian barriers to registering and running as a nomination contestant, leadership contestant and election candidate, including removing economic barriers, and to help ensure the required equality of opportunity and participation (which I take to mean not just formal equality but instead substantive equality)¹⁰³¹ in Canada's political finance and lobbying systems.

5.2.7. Democracy as a framework

While the OECD and International IDEA use "democracy" as an overall basis for their political finance, gifts, favours, conflict of interest and lobbying standards, and while many of their statements and standards concerning these areas reflect the three key principles of the Supreme Court of Canada's egalitarian model, I am not contending that the more egalitarian model I am

¹⁰³⁰ IPU, *Report* (2022), *supra* note 1026, at 49-59, 63-66 and 71.

¹⁰³¹ Sandra Fredman, "Substantive equality revisited," (2016) *International Journal of Constitutional Law*, Vol 14(3) 712.

developing through this chapter fulfills every democratic theory framework or standard. I am not contending this first because there are, according to one estimate, more than 2,200 possible systems of democracy.¹⁰³² As a result, as discussed in the subsections above, while the more egalitarian model I am proposing falls under the usual general democratic criteria of transparency, political equality, electoral fairness and accountability that appear in many international standards, it does not fit within libertarian framework established in U.S. case law as discussed above in subsection 5.2.3, nor the epistocratic framework proposed by some political theorists as discussed above in subsection 5.2.2.

As well, as discussed below in section 5.3, the model I am proposing aligns much more with the open-democracy (pluralistic) model than with the party-democracy model.¹⁰³³ It also fits more with the representative democracy model in which politicians are expected to represent and advocate voters' views and concerns in the legislature and, as result, implicitly they should be elected in a way that also represents voters. Correspondingly, it fits less with the Burkean model in which politicians are trustees who participate in Parliament and policy-making processes based on their own knowledge and experience and concept of the public interest – a model that is less

¹⁰³² The Sydney Democracy Network database, cited in Lea Heyne, "The Making of Democratic Citizens: How Regime-Specific Socialization Shapes Europeans' Expectations of Democracy," (2018) Vol. 25(1) *Swiss Political Science Review* 40 at 40 (hereinafter "Heyne (2018)"). See also Appendix A: Types of Democracies in Michael Haas, *Why Democracies Flounder and Fail* (New York: Palgrave Macmillan Cham, 2019) at 317-329 (hereinafter "Haas (2019)").

¹⁰³³ The open-democracy model has also been called the "anti-party" model. See MacIvor (2002), *supra* note 2, at 483-484. I think "open-democracy" is a better term because viewing all political actors as equally important in political processes is not a stance that is against parties but instead in favour of democratic equality.

concerned with how representative the process is through which politicians are elected.¹⁰³⁴ And, of course, given it is an egalitarian model, it does not fit with the Herrenvolk democracy model (which only allows political participation by one ethnic group), the illiberal or procedural democracy model (which uses some aspects of democratic good government processes but does not protect civil liberties), the religious or sectarian democracy model (in which those who belong to the state religion control institutions and policy-making processes), nor with the elitist democracy model.¹⁰³⁵

Further, International IDEA's 2014 handbook on political finance explicitly acknowledges that the political culture and context in each country and sub-national jurisdiction will lead to different reforms, and recommends that the best way to make changes is to tailor them to fit with local characteristics.¹⁰³⁶ While the 2016 book *Checkbook Elections?* concludes, based on nine country case studies set out in the book, that "a balanced mix of regulatory policies appears to be most effective to control political finance" (including donation and spending limits, public funding and disclosure),¹⁰³⁷ it also concludes that "there is no single "right" mix of policies regulating political finance that fits countries with diverse institutional, cultural, and economic parameters" and that "both affect and are affected by numerous contingent factors, some of which may be controlled and some of which lie beyond the control of policymakers and politicians."¹⁰³⁸ The introduction to the 2022 book

¹⁰³⁴ Burke 1790 [1968], *supra* note 30.

¹⁰³⁵ Haas (2019), *supra* note 1032, at 317-329.

¹⁰³⁶ IDEA *Funding* (2014), *supra* note 970, at 12-20, 355-359 and 362.

¹⁰³⁷ Norris and Abel van Es, eds., *Checkbook Elections?* (2016), *supra* note 986 at 260.

¹⁰³⁸ Norris and Abel van Es, eds., *Checkbook Elections?* (2016), *supra* note 986 at 262.

Comparative Election Law poses this as the debate between “democratic universalism” and “democratic particularism” and lists multiple questions that must be considered in the construction of any society’s election law, with the answers indicating the “underlying concept of democracy to which that society subscribes” – including the factors relevant to this thesis of: “What avenues of political participation will be available to citizens, both individually and when organized into groups, and under what conditions?” and “Cost: How will the cost of electoral politics be distributed – who pays?” and “Political information: By what means will political information be generated and distributed, by whom, and under what circumstances?”¹⁰³⁹

The egalitarian model I propose fits within Canada’s first-past-the-post voting system in which some parties have a higher or lower percentage of seats in the House of Commons than their percentage of popular vote. As a result, the model would very likely be altered if Canada’s voting system was changed to a proportional representational or other system. The model would also very likely change if Canada’s appointed Senate was changed into an elected body or structurally reformed in some other way. In addition, while I address briefly in Chapter 6 the implications of the model for Canada’s federal referendum law, I do not address it fully, and the model would also very likely change if Canada’s policy-making system shifted from being a parliamentary democracy to being a direct democracy system in which plebiscites and referendums were held regularly.

¹⁰³⁹ James A. Gardner, “Introduction: election law – universal or particular,” in James A. Gardner, ed., *Comparative Election Law* (Northampton, Mass.: Edwin Elgar Publishing Inc., 2022) at 3-4.

The egalitarian framework that is the basis in this thesis of the evaluation of Canada's political finance, gifts, conflict of interest and lobbying systems is also, of course, different from the wide variety of frameworks that could be used from the spectrum of different definitions of "democracy". For example, Lisa Young in 2004 evaluated the state at that time of Canada's political finance system, and used the similar criteria of transparency, integrity, equity and accountability as I am deploying, but also included the criteria of whether the system strengthens political parties, and whether it encourages citizen participation.¹⁰⁴⁰ Another example is that in 2012 Lisa Young again evaluated the main provisions of federal political finance system (not including many of the details examined in Chapter 3), this time looking back to the effects of the changes made in 2004. Her analysis is based on the values of participation (by voters, donors, candidates and third parties), inclusiveness (with regard to effects on the candidate selection process, and the party system) and responsiveness which, as she points out, were the core values for the evaluations produced by the 10-book Canadian Democratic Audit initiative.¹⁰⁴¹

Andrea Rounce in 2015 evaluated all aspects of Canada's federal election system based on a framework attempting to assess whether our electioneering is broadly in the "public interest" as defined in an overall democratic system.¹⁰⁴² And, to give another example, Lesley A. Jacobs in

¹⁰⁴⁰ Young (2004), *supra* note 3, at 444-445.

¹⁰⁴¹ Young (2012), *supra* note 22. See information about the Canadian Democratic Audit series of books at: <<https://www.ubcpres.ca/democraticaudit>>.

¹⁰⁴² Rounce (Spring 2015), *supra* note 901.

2015 proposed that Canada's election system be evaluated based on a three-dimensional approach to fairness to ensure procedural fairness (in terms of who has the right to vote and run as a candidate), that "all candidates, parties, and voters enter competitions at roughly the same starting position" (background fairness – which she acknowledges as a Rawlsian approach), and stakes fairness (defining what powers are won through election).¹⁰⁴³

In addition, as Yasmin Dawood has argued, the Supreme Court of Canada's rulings can be seen to provide another example of a democracy framework as they have deployed, explicitly or implicitly under the egalitarian model, a "bundle" of four democratic "structural rights" approaches: 1. the right to effective representation; 2. the right to meaningful participation; 3. the right to equal participation; and 4. the right to a free and informed vote.¹⁰⁴⁴ Dawood argues that these approaches are difficult to reconcile in some situations and, as a result, conflicts exist between various Court's rulings as the Court takes into account and attempts to balance these four rights.¹⁰⁴⁵

This dissertation is focused on evaluating and further developing the Court's egalitarian model which encompasses the four structural democracy rights that Dawood posits. However, again by definition that means I am addressing only part of the possible scope of a democracy framework. At the same time, in developing this more egalitarian framework, and in developing

¹⁰⁴³ Lesley A. Jacobs, "When Are Elections Fair? A Three-Dimensional Approach to Electoral Fairness," (Spring 2015), 2015 *Journal of Parliamentary and Political Law* 293.

¹⁰⁴⁴ Dawood (Fall 2013), *supra* note 10.

¹⁰⁴⁵ Dawood (Fall 2013), *supra* note 10, esp. at 290-295. See also: Pal, "Breakdowns," (2011), *supra* note 205, and; Michael Pal, "The Unwritten Principle of Democracy," (2019) 65 *McGill Law Journal* 269 at 271-272, 278-279, 284 and 286-289.

the proposals set out below in chapters 6 and 7, by necessity I also address why the egalitarian model should override unrestricted free speech rights (which are part of a libertarian framework), as the Supreme Court did in its rulings in *Libman* and *Harper*. I also address why a set of specific principles that also encompass elements of integrity and accountability (in order to give the public confidence), equity, fairness and inclusiveness (in order to ensure equal participation), and transparency (in order to inform voters), inclusiveness, should form the basis of our political finance, gifts and benefits, conflict of interest and lobbying system, and why the rules should align with those principles fully.¹⁰⁴⁶ In other words, I think it is arguable that, while there are differences in policy choices based on social and cultural factors in various jurisdictions, the choices made concerning the rules when the political finance system is based on a democratic-egalitarian framework generally fall within a fairly well-defined range of principles and legal standards, as examined above in subsection 5.2.6 concerning the international requirements and standards that have been established in the past few decades.

I include and prioritize as one of elements that form the basis of the system I propose a democratic right that is somewhat excluded in Lisa Young's analysis of the political finance system, and is not mentioned as one of the four democratic rights in Yasmin Dawood's analysis¹⁰⁴⁷ (or others'

¹⁰⁴⁶ See a summary of how the Supreme Court addressed these competing principles in *Harper* in Dawood (Fall 2013), *supra* note 10 at 292-293.

¹⁰⁴⁷ Which is puzzling, given Dawood addresses the issue of how the right to equal participation is a part of the framework of government integrity fully in the U.S. context in Dawood, Corruption (2014), *supra* note 21, esp. at 123-127. See also Yasmin Dawood,

analyses, as addressed in Chapter 1, subsection 1.4.3). As detailed in the following two subsections, that element is the right to government integrity and the appearance of government integrity. I include this right because, as I detailed in Chapter 2, sections 2.2 and 2.3, it is one of the three fundamental bases of the Supreme Court's egalitarian model.¹⁰⁴⁸

I am guessing that this right has received less attention than the other four democratic rights proposed by Dawood because the Court's rulings have addressed only one narrow aspect of this right in the context of political finance, namely the effect of spending by third parties on the public's perception of the integrity of the system. The courts in Canada have not had the opportunity to rule on many of the statutory provisions that are very relevant to the issue of integrity of political processes, including: donation and loan limits;¹⁰⁴⁹ political benefits such as fundraising and campaigning by lobbyists for candidates and parties; party leaders choosing election candidates and promoting MPs, and; conflicts of interest caused by the assets and liabilities of politicians and public officials.

I prioritize the right to integrity as a key egalitarian element in all political processes mainly because, I contend, it simply must be upheld or the

"Campaign Finance and American Democracy," (May 2015), Vol. 18, *Annual Review of Political Science* 329 at 334-338 (hereinafter "Dawood (2015)"). See also Dawood (2006), *supra* note 2, esp. at 277-282. See also Atkinson (November 2014), *supra* note 2, esp. at 706-716.

¹⁰⁴⁸ *Libman*, *supra* note 41 at paras. 41, 52 and 84. *Harper* (2004), *supra* note 10 at paras. 23-24, 63, 79, 82-83, 91-92, 95-99 (esp. 97 and 99), 101-104, 108-109, 120, 122, 142 and 146.

¹⁰⁴⁹ Two cases being pursued in Quebec that challenge two of the province's donation limits will, possibly, be the courts' first opportunities to determine the legality and constitutionality of donation limits. See: *Maheux c. Procureur général du Québec*, 2020 QCCS 4039 (CanLII), <<https://canlii.ca/t/jbwqj>> and; *Directeur général des élections du Québec c. Péladeau*, 2022 QCCA 1202 (CanLII), <<https://canlii.ca/t/jrsvl>>.

other fundamental egalitarian principle of equal opportunity for equal participation will not be upheld. For example, ensuring equal opportunity to two contestants, candidates or parties to register and run in an election would be significantly undermined if the election process did not have integrity because gifts were allowed to be given to voters to entice them to vote for one candidate or the other. And ensuring equality of opportunity for two parties to run in an election would be undermined if the election process did not have integrity because it allowed secret, unlimited donations or secret, unlimited spending. And ensuring equal opportunity to two groups of voters to lobby public officials in a policy-making process would be significantly undermined if either group was allowed to do favours for the official, or if the official had financial investments that caused them to favour one of the group's proposals.

Lisa Young's analyses do mention the objective of the political finance system preventing the corruption of public office holders, but argues that the annual individual donation limit of \$1,100 established in 2004 makes "the possibility of contributions resulting in undue influence over or access to decision makers is highly unlikely"¹⁰⁵⁰ – even though it was well known at the time that the federal Liberal Party regularly gave extra access to their party leader and other top MPs and officials in the Party through its Laurier Club events that were open only to people who donated \$1,100, as detailed in Chapter 3, section 3.9. She also argues that "it is important not to overstate the role that contributors play in parties' or politicians' responsiveness" and points to studies that claim there is little evidence of a connection between

¹⁰⁵⁰ Young (2012), *supra* note 22, at 158 (footnote 14).

donations and particular policy outcomes.¹⁰⁵¹ Lisa Hiebert takes an even more restrictive view, arguing that the purpose of regulating third-party expenditures is not at all to prevent corruption but instead to enhance equality of participation.¹⁰⁵²

However, I contend that these broad claims ignore the key point that it is essentially impossible to determine why exactly politicians and public officials make policy decisions, and is especially impossible to know the effects of donations, loans and other forms of contributions on these decisions, because: it is unlikely that any politician or official would admit that they are returning favours from donors; they can respond to donors' wishes through inaction (i.e. not regulating or prohibiting an activity); the effects of secret fundraising activities (such as private events held in homes by lobbyist "bundlers") and secret lobbying (both of which are legal) cannot be taken into account because they are secret; whether funneling of donations is happening is very difficult to track, and; the undue influence of donations may operate on a subconscious level (as the next subsection shows based on the research of behavioural psychologists worldwide). The argument that the \$1,100 annual donation limit makes undue influence highly unlikely also misses the key point that, to many people, a donation of that amount alone would appear to result in undue influence.

Young also argues that the donation limit Canada enacted in 2007 levelled the playing field "at least somewhat" for nomination contestants

¹⁰⁵¹ Young (2012), *supra* note 22, at 153.

¹⁰⁵² Hiebert (2006), *supra* note 2, at 280.

because it prohibits them from self-financing their campaign (other than donating, at the time, \$1,100 of their own money to their own campaign), and points to evidence that male and female contestants raised similar amounts in 2004.¹⁰⁵³ However, at the same time she acknowledges that this prohibition only applies “once the formal nomination contest has started.”¹⁰⁵⁴ What these and other scholars’ arguments gloss over is that while wealthy male and female contestants were able to raise similar amounts after donations were limited, it may have been because they were all wealthy or all had wealthy friends, while many other people with low incomes were still effectively shut out from running.

While it is difficult to count exactly how many people were shut out doesn’t mean that these people don’t count. As well, as detailed in section 3.11, the 2004 political finance reforms still left it open to a party, or a business, union or organization, or a wealthy individual, to support a contestant before the formal contest has started (for example with a fake job that allows them to campaign or prepare to campaign full-time) and/or also by holding a secret fundraising event of wealthy donors who can afford to donate \$1,100 each before or during the contest. Not only do these activities make the opportunity to run unequal, they also create conflicts of interest for the contestant as they owe greatly whichever person or entity gave them the job or raised funds for them.

¹⁰⁵³ Young (2012), *supra* note 22, at 149-150.

¹⁰⁵⁴ Young (2012), *supra* note 22, at 150.

In other words, I contend that the problem is that, given this kind of support is legal under the current rules, many scholars and commentators would call it part of our democratic system and not corruption, even though it does corrupt these processes in fundamental ways by creating a conflict of interest, and is far from actual or apparent political integrity. Ensuring the appearance of integrity requires measures that go far beyond preventing actual corruption. As set out below in subsection 5.2.9, there is well-established case law concerning the requirement for public office holders to avoid a reasonable apprehension of bias (i.e. an appearance of a conflict of interest) when making legal decisions.

However, these precedents do not apply when politicians and public officials are making policy decisions. I detail in the next two subsections, and in subsections 5.2.11 and 5.2.12, and in section 5.3, and through chapters 6 and 7, why it is essential that all the rules ensure the prevention of all apparent conflicts of interest in all political processes as this is the fundamental basis of a more egalitarian model, and is needed in order to fully uphold the democratic right to government integrity.

5.2.8. Behavioural psychology standards

Clinical testing by psychologists in societies worldwide back up the international standards that call for restrictions on gifts and donations, as they have revealed that one of the most potent means of influence is “reciprocity” – giving a gift or doing a favour – because it creates a subconscious obligation

to return the favour (a conclusion that anthropologists also support).¹⁰⁵⁵ This same testing also shows that even small gifts can have significant influence over the decisions of the person receiving the gift.¹⁰⁵⁶ One leading study shows that the size of the gift only increases the influence, but when participants were asked if they thought the gift they received affected their judgement they all answered “absolutely not.”¹⁰⁵⁷

One could argue that these studies are about people making choices that don’t have significant impacts on other people and are therefore distinct from the kinds of decisions that politicians and other public officials are required to make. I agree. However, another set of studies that I think is more analogous also shows even small gifts affect people making decisions that have significant impacts on others. The studies examined the impact of gifts from pharmaceutical companies on doctors’ prescribing or drug support practices and concluded that “accepting gifts or inducements from industry influences and likely undermines a physician’s independent clinical judgment,

¹⁰⁵⁵ Kenrick (2012), *supra* note 32. Schultz (2010), *supra* note 32. Graycar and Jancsics (2017), *supra* note 32 at 3-4.

¹⁰⁵⁶ For example, in one study a server at a restaurant giving customers two after-dinner mints increased the average tip by 14 per cent over servers who did not give any gift. If while giving the mints, the server made a specific and special comment praising the customer, thereby making the gift “meaningful, tailored to an individual and unexpected” then the average tip increased by 23 per cent. Kenrick (2012), *supra* note 32; Cialdini and Goldstein (2002), *supra* note 32. Cialdini and Martin (2007), *supra* note 32.

¹⁰⁵⁷ Participants in the study were shown slides of paintings while they were in an MRI machine that was scanning their brain activity. The slides were marked in one corner with the logo of one of two art galleries, and the participants had been told that one or the other gallery was paying for their participation in the study. Not only did the participants like the paintings from their sponsoring gallery more, their brain scans showed that the parts of their brains that are related to pleasure were more active whenever their sponsoring gallery’s logo was on the screen. Some participants were told that their sponsoring gallery was paying them \$30, others \$100 and others \$300. The participants’ favouritism toward the paintings linked with their sponsoring gallery increased with the amount of the payment. Ann H. Harvey, Ulrich Kirk, George H. Denfield and P. Read Montague, “Monetary favors and their influence on neural responses and revealed preference,” (2010) 30(28) *The Journal of Neuroscience* 9597 summarized in Ariely (2013), *supra* note 32 at 75-77.

even where the physician believes otherwise.”¹⁰⁵⁸ Further, accepting funding changes evaluations of the safety of drugs.¹⁰⁵⁹

Based on the results of the studies, the College of Physicians and Surgeons enacted a policy in 2014 that states: “Physicians must not accept personal gifts of any value from industry or industry representatives.” This rule is undermined by loopholes that allow for gifts of drug samples, meals at industry-sponsored events, and payment for presenting at events, consulting and participating in industry-sponsored research.¹⁰⁶⁰ The pharmaceutical industry has similar rules on giving gifts with similar loopholes.¹⁰⁶¹

The behavioural psychology scientific evidence set out above provides strong evidence concerning why gift giving to politicians should be much more strictly regulated than the *UNCAC* suggests (and more strictly than the rules for doctors). Put simply, the giver of even a small gift fairly clearly will have greater influence over a politician than a voter who does not give any gift. Dan Ariely, a leading behavioural psychologist, has concluded that lobbyists, more than any other profession, “spend a lot of time and money trying to engender a feeling of obligation in others” – namely politicians “who they hope

¹⁰⁵⁸ College of Physicians and Surgeons of Ontario, “Physicians’ Relationships with Industry: Practice, Education and Research,” (2014), online: (2014) Policy #2-14, Footnote 1 <<http://www.cpso.on.ca/Policies-Publications/Policy/Physicians-Relationships-with-Industry/>>; Ariely (2013), *supra* note 32 at 77-80. C.B. Sufrin and J.S. Ross, “Pharmaceutical industry marketing: understanding its impact on women’s health,” (2008) 63(9) *Obstet Gynecol Surv.* 585. Dana Katz, Arthur L. Caplan and Jon F. Merz, “All Gifts Large and Small: Toward an Understanding of the Ethics of Pharmaceutical Industry Gift-Giving,” online: (2010 (originally 2003)) 10:10 *The American Journal of Bioethics* 11 <<http://www.tandfonline.com/doi/full/10.1080/15265161.2010.519226?src=recsys/>>.

¹⁰⁵⁹ Cialdini (2007), *supra* note 32.

¹⁰⁶⁰ College of Physicians and Surgeons of Ontario, “Physicians’ Relationship with Industry,” *supra* note 1058.

¹⁰⁶¹ International Federation of Pharmaceutical Manufacturers and Associations (IFPMA), “IFPMA Code of Practice,” online: (2012) <<http://www.ifpma.org/resource-centre/ifpma-code-of-practice/>>.

will repay them by voting with their interest in mind.”¹⁰⁶² As a result, he concludes that, to prevent conflicts of interest, gifts from lobbyists must be prohibited.¹⁰⁶³

Disclosure may help check the politician from returning the favour but the gift would still have influence. As mentioned above in subsection 5.2.4, a politician can help a gift giver by doing nothing (for example, helping a company whose lobbyist gives a gift by not regulating the company in a way that it doesn’t want to be regulated). Therefore, prohibiting gift giving to ensure the politician is not influenced into action or inaction to help one voter over others seems clearly to be a necessary measure to uphold the one-person, one-vote principle.

It is true that not every politician or public official is in the same position to return the favour to the gift-giver or person who has provided some benefit, including campaigning or fundraising for a politician. The Prime Minister, Cabinet ministers and their staff, deputy ministers and other top government officials all would have more discretionary decision-making power to assist anyone or any entity more directly than any one MP. However, at any one time an additional 30-40 MPs are parliamentary secretaries whose role is to assist a minister with moving legislation through Parliament, answering for the minister during Question Period, serving on the committee related to the minister’s portfolio, and communicating with the minister regularly about which

¹⁰⁶² Ariely (2013), *supra* note 32 at 77-78.

¹⁰⁶³ Ariely (2013), *supra* note 32 at 94.

issues other MPs, including MPs on committees, are expressing concerns.¹⁰⁶⁴

In addition, other MPs can have close working or personal relationships with ministers and/or other MPs that can help move a proposed change up in the government's priority list. As well, if an MP sits on a committee and/or is media savvy, they can also play a key role in putting the spotlight on an issue and pressuring the government to take action, even as an opposition critic or committee MP (especially during a minority government when opposition parties hold the majority of seats in the House of Commons).

It is also true that there are other forces that could counter the sense of obligation to return the favour such as a guilty conscience, the scrutiny of the media and the public, pushback from caucus colleagues and politicians of other parties, and legal provisions such as the *Charter* that may make the changes sought by the gift-giver unconstitutional. However, as set out in the next subsection, and in subsection 5.2.12, the standard that the egalitarian model requires is that the public must have confidence in not only the actual integrity of political processes, but also the appearance of integrity.

It is impossible to know exactly why any politician or government official is making a decision or taking an action (or not taking an action), even if they express reasons publicly, as they could present reasons that are not the actual reasons. It is also difficult, if not impossible, in many situations to know the exact level of power or influence any politician or government official has over decisions and/or decision-makers. Therefore, to ensure the

¹⁰⁶⁴ Prime Minister of Canada, *Guide for Parliamentary Secretaries*, (2016) online: <<https://pm.gc.ca/en/news/backgrounders/2016/01/05/guide-parliamentary-secretaries>>.

appearance of integrity, the system must prohibit gifts, favours or other benefits to be given to public officials that create the appearance of a sense of obligation that the official return the favour. Alternatively, if such benefits are provided, the official must then recuse themselves from participation in any decisions or actions that affect the gift-giver.

5.2.9. Canadian case law on appearance of integrity standard

As I cited in Chapter 1 with regard to the legal good governance basis for prohibiting giving gifts to, or doing favours for, politicians, in a 2009 unanimous ruling the Canadian Federal Court of Appeal articulated that ethics rules for lobbyists are important because "[a]ny conflict of interest impairs public confidence in government decision-making" (para. 48). I cited it in Chapter 1, but set it out below again, as the Court of Appeal's ruling clearly expressed the need for such rules because:

A lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. (para. 53)¹⁰⁶⁵

¹⁰⁶⁵ *Democracy Watch v. Campbell*, 2009 FCA 79, online: <<http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/36355/index.do/>>. Democracy Watch, Media Release: Federal Court of Appeal Rules That Lobbyists Violate Rule 8 of *Lobbyists' Code of Conduct* If They Do Anything To Create Any Private Interest Or Obligation..., (March 17, 2009), online: <<http://dwatch.ca/camp/RelsMar1709.html>>.

Again, as I pointed out in Chapter 1, the court uses the same “sense of obligation” phrase deployed by behavioural psychologists, as addressed in the above subsection, to describe the effect of a lobbyist giving a gift to a public office holder or doing them a favour.

I also mentioned in Chapter 1 the British court ruling that contained the precedent-setting phrase that justice must be seen to be done (in order to prevent judicial bias). I highlight that ruling here again because it articulates the same standard as the Canadian courts have (see below), and as the behavioural psychology studies do, in order to maintain integrity in politics. As Justice Hewart articulated in the ruling, the question was not “what actually was done but what *might appear* to be done. Nothing is to be done which creates *even a suspicion* that there has been an improper interference with the course of justice.”¹⁰⁶⁶ [emphasis added].

This standard prohibiting a judge from having a “reasonable apprehension of bias” has been articulated in Canada in the Supreme Court’s ruling in *Committee for Justice and Liberty et al. v. National Energy Board et al.*¹⁰⁶⁷ Justice Parker in his 1987 commission report cited both of the British court and Supreme Court rulings, and other Canadian case law, in making the point that ethics rules must prohibit apparent conflicts of interest by politicians and public officials for the same reasons – integrity in governance must not only be done, it must appear to be done.¹⁰⁶⁸ As Justice Parker stated:

¹⁰⁶⁶ *R. v. Sussex Justices*, *supra* note 33. Nwauche, (2004), *supra* note 34.

¹⁰⁶⁷ *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394, online: <<https://canlii.ca/t/1mk9k>> (hereinafter “*Committee for Justice and Liberty et al.* (1978)”).

¹⁰⁶⁸ Parker Commission report (1987), *supra* note 812, at 31-34.

The concern about appearance of conflict as an important ethical postulate of modern government is one that is well founded. The reasons are obvious. Trust and confidence in government can be maintained and enhanced only if the occasions for apparent conflict are kept to a minimum. Public perception is important. Indeed, the perception that government business is being conducted in an impartial and even-handed manner goes a long way to enhancing public confidence in the overall integrity of government.¹⁰⁶⁹

As also mentioned in Chapter 1, in two rulings in 1996, the Supreme Court of Canada also articulated clearly the principle that the appearance of integrity in government must be maintained to have a functioning democracy. In *Harvey v. New Brunswick*, the Supreme Court stated that ensuring the integrity of elections “is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society”¹⁰⁷⁰ and that “If democracies are to survive, they must insist upon the integrity of those who seek and hold public office.”¹⁰⁷¹

As also mentioned in Chapter 1, in *R. v. Hinchey* concerning the actions of a federal government employee, the majority stated at paragraph 14 that it was not necessary “to expand on the importance of having a government which demonstrates integrity. Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question.”¹⁰⁷² The court also stated soon after in the ruling: “it is not necessary for a corrupt practice to take place in order for the appearance

¹⁰⁶⁹ Parker Commission report (1987), *supra* note 812, at 31.

¹⁰⁷⁰ *Harvey*, *supra* note 37, para. 38.

¹⁰⁷¹ *Harvey*, *supra* note 37, at para. 61.

¹⁰⁷² *R. v. Hinchey*, *supra* note 35, at para. 14.

of integrity to be harmed. Protecting these appearances is more than a trivial concern.”¹⁰⁷³ Also with regard to the actions and decisions of government employees, the Supreme Court stated in *Fraser* that it is in “the public interest” to have both “actual, and apparent, impartiality of the public service”¹⁰⁷⁴ and based its ruling on “the importance and necessity of an impartial and effective public service.”¹⁰⁷⁵

With regard to the actions of lobbyists, for example in its 8-1 ruling in 2018 upholding the conviction for influence peddling of Bruce Carson, a former senior advisor to Prime Minister Harper, the Supreme Court of Canada echoed the previous rulings, citing several past cases and stating that the *Criminal Code* prohibition on influence peddling “aims to preserve both government integrity and the appearance of government integrity” and that:

“As this Court’s jurisprudence on both judicial independence and the impartiality of the public service demonstrates, the appearance of integrity, impartiality, and independence are tied to actual integrity, impartiality, and independence...”

...

The behaviour criminalized by this section risks depriving citizens of a true democracy predicated on free and open access to government. Corruption and the sale of influence, whether real or apparent, with government may undermine the integrity and transparency that are crucial to democracy.¹⁰⁷⁶

¹⁰⁷³ *R. v. Hinchey*, *supra* note 35, at para. 17.

¹⁰⁷⁴ *Fraser v. P.S.S.R.B.*, 1985 CanLII 14 (SCC), [1985] 2 SCR 455, online: <<https://canlii.ca/t/1ftzn>> at para. 41 (hereinafter “*Fraser* (1985)”).

¹⁰⁷⁵ *Fraser* (1985), *supra* note 1074, para. 39.

¹⁰⁷⁶ *R. v. Carson*, 2018 SCC 12 (CanLII), [2018] 1 SCR 269, <<https://canlii.ca/t/hr51s>>, at paras. 38-39.

Last but certainly not least, as detailed in Chapter 2, section 2.2, this concern with ensuring that political processes not only are fair and have integrity, but also appear to have integrity so that the public can have confidence in the actual integrity of the processes, was articulated by the Supreme Court in the ruling in *Libman* as one of the three key principles of the egalitarian model.

Other than in such court cases, who is the “judge” of whether the actions, interests or relationships of decision-makers create an appearance that causes suspicion of improper interference in their decision-making in ongoing political processes? Again, as mentioned in Chapter 1 and above, although arguments are ongoing, many commentators and courts have proposed that the “judge” should be the hypothetical “fair minded observer” who is a reasonable member of the public (and also well-informed to varying degrees depending on the standard applied by various courts).¹⁰⁷⁷ And, as I set out in Chapter 1 in my initial overall framework for evaluating whether the Supreme Court’s jurisprudence is consistent with the egalitarian model that the Court articulated, I propose that the same reasonable member of the public should be positioned as the “judge” of whether any action in politics also lacks integrity by being undermined by an appearance of a conflict of interest. In other words, the public’s perceptions should be paramount in determining whether the decision-making process has integrity or has been tainted.¹⁰⁷⁸

¹⁰⁷⁷ Groves (2009), *supra* note 40.

¹⁰⁷⁸ Schultz, “Ethics Regulation,” *supra* note 32, at 168.

It is important to note that, while the courts do not state the test entirely clearly in every instance in every case, the test is what a “reasonable person who is reasonably well-informed” would conclude when observing the appearance of the situation. First, the person does not have to be fully informed because it is impossible for an outside observer to be fully informed of all the internal machinations that are behind any public official’s actions or decisions, let alone of the state of mind of the official. As Justice Parker stated in his report, all that is required is that the person perceive the conflict based on the “surrounding circumstances” and “although appearance of conflict requires that the perception be fair-minded and reasonably well informed, it does not require that the perception be based on a complete understanding of all the facts...”¹⁰⁷⁹ There is no need for the outside observer to “conduct his or her own commission of inquiry before he or she can draw any conclusions about appearance of conflict.”¹⁰⁸⁰

Secondly, as summarized in Chapter 4, section 4.4. concerning the strict rules that prohibit federal government employees from being in an appearance of a conflict of interest that creates even the slightest doubt about their impartiality, the state of mind of the public official is irrelevant other than they must know about their private interest when they undertake the action or decision. They may feel their participation in an action or decision was innocent, and taken in good faith, but if a reasonable outside observer would conclude it creates an apparent conflict of interest than it does.

¹⁰⁷⁹ Parker Commission report (1987), *supra* note 812, at 32.

¹⁰⁸⁰ Parker Commission report (1987), *supra* note 812, at 33.

Third, no actual conflict of interest needs to exist because the test is based solely on the outside observer's perception of the situation. Fourth, while the public official needs to be aware of their private interest, in some cases the official does not even have to be aware of the appearance of the conflict – most specifically when a lobbyist who has assisted a politician in some way then lobbies people who work for that politician about matters for which the politician has decision-making power. In this situation, the lobbyist has placed the politician in an apparent conflict of interest even if the politician is not aware of the lobbying. The fault in this situation is with the lobbyist – the politician would not be liable if they acted without knowing about the lobbying, but the apparent conflict of interest would still exist because an outside observer (who, like the lobbyist, could not determine from the outside whether the politician was aware of the lobbying) would conclude that the conflict was created by the lobbyist's lobbying people who worked for the politician.

The other key element of the test is determining how the hypothetical "reasonable" person would observe and reach conclusions about the situation? As mentioned above, Justice Parker stated that such a person is required to be "fair-minded" – but beyond excluding someone who is blatantly partisan in favour of one political party from being the "reasonable" judge of the actions of a politician from another political party, this term does not really define "reasonable" in any specifically useful and applicable way. The person is required to be reasonably well-informed, so they know key facts concerning the situation, and so their perception is not based on fiction or some mental

state like irrationality or hatred that would cause speculation or an unreasonable assessment.

The question is: how do they perceive those facts reasonably? The Supreme Court answered this question in *Committee for Justice and Liberty et al.* by setting out that the test is whether the outside observer, after “viewing the matter realistically and practically – and having thought the matter through” would conclude “that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”¹⁰⁸¹ Of course, a range of reasonable observers could have a range of reasonable definitions of each of these words “realistically” and “practically” and “fairly” and what they require when assessing any situation.

The Court set one boundary by stating that a situation does not have to satisfy a person with a “sensitive or scrupulous conscience”¹⁰⁸² – meaning the assessment does not have to be based on a strict, moral, painstaking standard of what is proper. In another ruling, the Supreme Court established another boundary – that the reasonable person must have knowledge of the context of the situation (more knowledge for an assessment of judicial bias, given the assessment is about whether a ruling of a judge, as opposed to a situation, appears biased).¹⁰⁸³ In another ruling, the Court stated that “The reasonable

¹⁰⁸¹ *Committee for Justice and Liberty et al.* (1978), *supra* note 1067, at 394.

¹⁰⁸² *Committee for Justice and Liberty et al.* (1978), *supra* note 1067, at 395.

¹⁰⁸³ *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, online: <<https://canlii.ca/t/1fr05>>, paras. 46-48.

person is usually the average person in the community, but only when that community's current mood is reasonable.”¹⁰⁸⁴

However, even if one circles back to these standards and/or to fundamental principles, while the test for apprehension of bias/apparent conflict of interest is posited as an objective assessment, there is still a fair amount of subjective perception at play in the assessment. And I use the words “circle back” consciously, recognizing that the application of the test in reality is somewhat circular in nature as it requires a reasonable tribunal, reasonably well-informed, to reasonably reach a conclusion that a hypothetical reasonable person, reasonably well-informed, would reach a reasonable conclusion that an appearance of a conflict of interest exists.

At the same time, I contend that it is important to, again, base the assessment on the British court ruling that established that justice must “manifestly and undoubtedly be seen to be done” without even a suspicion that there has been impropriety that would undermine impartiality.¹⁰⁸⁵ If these words are taken seriously when applied to assessing whether a public official is in an apparent conflict of interest, as they have been by the Supreme Court when assessing judicial impartiality¹⁰⁸⁶ – if there can be no doubt nor even a suspicion of impropriety that undermines impartiality – then the range of what constitutes a realistic and practical assessment narrows considerably. And this is the standard and test that, I contend, should be used when evaluating

¹⁰⁸⁴ *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265, <<https://canlii.ca/t/1ftnd>>, para. 33.

¹⁰⁸⁵ *R v. Sussex Justices*, *supra* note 33.

¹⁰⁸⁶ See *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259, online: <<https://canlii.ca/t/51pj>>, para. 66.

whether or not any part of any political process upholds the egalitarian model principle that the public can have full confidence, without doubt, in the integrity of the process.

As I examined in Chapter 3 and Chapter 4, and explore further below in subsection 5.2.12, federal Canadian politicians have enacted donation, gift and lobbying rules that, combined with weak and confusing enforcement actions by such tribunals as the Conflict of Interest and Ethics Commissioner and Commissioner of Lobbying, continue to allow for not only apparent but also real conflicts of interest and, in this way and others, thereby continue to fail to meet the public's standards and expectations.

5.2.10. Rules or an honour system

Throughout this thesis, I have been summarizing and evaluating the specific rules of Canada's political finance system, and suggesting specific changes to the rules, and I continue that process below in subsection 5.2.11, section 5.3, and chapters 6 and 7. The international standards and other frameworks summarized in the subsection 5.2.6 above also propose various rules.

However, it is important to note that a counterpoint to a rules-based system is the honour system.¹⁰⁸⁷ A variation on the honour system is the

¹⁰⁸⁷ See, for example, discussion of this point in: Kenneth Kernaghan, "Promoting Public Service Ethics: The Codification Option," in Richard A. Chapman, ed. *Ethics in Public Service* (Ottawa: Carleton University Press, 1993) 15 (hereinafter "Kernaghan (1993)"); and in various chapters of John W. Langford, Allan Tupper, *Corruption, Character, and Conduct: Essays on Canadian Government Ethics* (Toronto: Oxford University Press, 1993), and in; Glor and Greene (2003), *supra* note 615.

approach that any rules should be general and aspirational as opposed to specific and concrete. The idea behind this approach is that specific rules cannot be drafted to take into account every possible situation in the future and, therefore, it is better to use very general rules. As well, the approach posits that general, aspirational rules are better because they are simpler to remember than specific rules, and specific rules can be set at a low-level standard which does not encourage acting in a way that meets higher, aspirational standards.

Some commentators propose, I contend, two related straw-man arguments in favour of the honour system and “values-based” aspirational rules. First, that the ultimate aim of ethics laws is to increase public confidence and trust in the integrity of government – in fact, such laws are enacted for multiple reasons, including defining and preventing conflicts of interest and quasi-bribery through gift-giving, and to define the scope of the job description of public officials by defining part of what it means to make decisions in the public interest. Secondly, that ethics laws fail to increase confidence because such laws don’t make people ethical.¹⁰⁸⁸ Of course more than just rules are needed to change behaviour and prevent violations, and of course trust and confidence would only even be likely to increase if all public officials comply with the rules. As well, ongoing lack of trust and confidence

¹⁰⁸⁸ See, for example: Lori Turnbull, “The Federal Accountability Act: How Ottawa Steps Backward in Monitoring Political Ethics and Integrity,” in G. Bruce Doern, ed., *How Ottawa Spends 2007-2008: the Harper Conservatives: climate of change* (Ottawa: Carleton University. School of Public Administration, 2007) 87 at 88.

could be based on many other factors such as being disappointed in the past and, therefore, still skeptical.

As well, with either an honour system or an aspirational general rules system, conflicting expectations and definitions of key standards and terms can mean that one person feels they have acted honourably or complied with the general rule (such as a requirement to act with “integrity”) while another person can, quite legitimately, make the case that they did not act honourably or that the rule was violated. Behavioural psychologists call this subjective process “moral balancing” as the person who committed the alleged wrongdoing justifies their action at the time to give themselves some leeway to act dishonourably or violate the vague rule, usually for their own advantage or benefit (however they define that).¹⁰⁸⁹

Another problem with general rules is that they can be unenforceable due to vagueness. For example, in 2004 the Federal Court of Canada was compelled to declare of no force and effect the report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens (known as the “Parker Commission report”) because the ethics code that applied to Stevens did not define conflict of interest, and Stevens simply claimed that he had a different notion of what line was drawn by the term than the definition developed by the Commission.¹⁰⁹⁰

¹⁰⁸⁹ OECD, *Behavioural Insights for Public Integrity: Harnessing the Human Factor to Counter Corruption* (March 2018), online: <https://www.oecd-ilibrary.org/governance/behavioural-insights-for-public-integrity_9789264297067-en> at 11-12, 16-18, 21, 24-26 and 28-29 (hereinafter “OECD *Behavioural Insights* (2018)”).

¹⁰⁹⁰ *Stevens v. Canada (Attorney General)* 2002 FC 1746, paras. 46-47. See the Parker Commission report (1987), *supra* note XXX.

As a result, scholars generally recommend that both general and specific rules are needed; that even specific rules need to be clarified with explanations and case studies; that everyone subject to the rules be required to study them in formal training sessions¹⁰⁹¹ and; that reminder messages be sent regularly to everyone covered by the rules (along with undertaking other educational and enforcement measures).¹⁰⁹² I concur with all of these recommendations.

5.2.11. Addressing the nine inconsistencies in the Supreme Court's egalitarian model

In Chapter 2, subsection 2.10, I listed nine inconsistencies in how the Supreme Court and other Canadian courts have applied the egalitarian model that all arise, I contend, because in rulings on various parts of the system the courts contradicted one or more of the model's three fundamental tenets: 1. that the public must perceive, and have confidence in, the fairness and integrity of every aspect of the processes of the system (no matter what the outcomes); 2. that the principle of one person, one vote and equality of participation must be upheld throughout the system, and; 3. that voters must be allowed to express themselves enough, and receive enough information, in

¹⁰⁹¹ Kernaghan (1993), *supra* note 1087 at 22-23 and 26. Glor and Greene (2003), *supra* note 615 at 61. Ian Greene "A Case for Personal Meetings with the Ethics Commissioner," (2011) 2 *Journal of Public Policy, Administration and Law* 5. Kernaghan and Langford, *supra* note 611, at 260-261. Maurice E. Stucke, "In Search of Effective Ethics & Compliance Programs," online: (2014) 39 *Journal of Corporation Law* 769 University of Tennessee Legal Studies Research Paper No. 229 <<http://ssrn.com/abstract=2366209>>. OECD *Behavioural Insights* (2018), *supra* note 1089 at 34-35 and 40-42.

¹⁰⁹² OECD *Behavioural Insights* (2018), *supra* note 1089 at 14-16 and 48-51.

order to meaningfully participate in political processes. Here is a summary of the nine inconsistencies:

1. When the Supreme Court limited third party ad spending to informing voters only, it should have considered, and evaluated, candidate and party limits to ensure that they also limited spending to a level that only informs voters, or set out arguments concerning why their limits should be based on a different objective.
2. The Court should not have upheld a blanket third-party ad spending limit of \$3,000 in each electoral district and \$150,000 nationally. It should have allowed a third-party citizen group that is supported by many more voters than a candidate, or more voters even than a party, or is supported by many more voters than another third party, to have a greater voice than the candidate, party or other third party.
3. The Court should not have upheld the same high advertising spending limit for third parties who are voters whether a voter is wealthy or has a low income because only the wealthy voter has the funds to spend the maximum allowed.
4. The Court should not have upheld the same high advertising spending limit for a third-party citizen organization supported by many voters as for a third-party individual voter. An organization that represents many voters' views on an issue should be allowed to spend a multiple of what one voter is allowed to spend;
5. The Court should not have upheld the same high advertising spending limit for a third-party private corporation with one or a few shareholders and a union or citizen organization with hundreds or thousands of members or supporters. Given a private corporation represents only a few voters at most, it

should have a lower spending limit than organizations that represent hundreds to tens of thousands of voters.

6. The Court should have ruled that, if spending limits are justifiable during elections to prevent wealthy interests (third-party groups) from dominating election debates through partisan and issue advertising and other ways that drown out other voices and is perceived to be unfair, then spending limits are also justifiable between elections to prevent the same harms during public policy debates;
7. The Ontario Court of Appeal should have ruled that, if any voters support a candidate or party, then the candidate or party should receive public funding and subsidies that are at least proportional to the voter support received, no matter what political purpose the money is used for by the candidate or party.
8. The Supreme Court should have ruled that, in order to inform voters effectively, third parties (and candidates and parties) should be required to make public reports before election day listing all their donors (including those who donate less than \$200), spending and expenses.
9. Given media outlets are not required under Canadian law to be fair or non-partisan, the Court should have prohibited them (as candidates, parties and third parties are) from publishing the results of a survey on election day to prevent a false or fraudulent attempt to influence voters, and should have limited their spending like any third party to close a loophole that allows a third party to establish a media outlet in order to escape third-party spending limits.

I address, and attempt to resolve and correct, all of these consistencies in the proposed framework I set out below in subsection 5.3, and in the detailed proposals for changes that I set out in Chapter 6.

5.2.12. The public's overall standards and expectations

A final factor to consider in developing a framework for a more egalitarian political finance model is the public's expectations, given the objective in the Supreme Court's egalitarian model of ensuring the public's confidence in the appearance of, and actual, fairness and integrity of the system. The numerous ways in which Canada's current political finance system does not comply with the key equity, fairness, integrity principles of the Supreme Court's egalitarian model, as set out in my Chapter 3 and Chapter 4 evaluations of the registration, donation, spending, subsidies, disclosure and gifts, favours and lobbying parts of the system, is an indication that most federal politicians support the current system. If they didn't, then presumably they would have changed the system in key ways to make it more egalitarian, as even opposition parties have had several opportunities to do so in the minority governments of 2006 to 2008, 2008 to 2011, 2019 to 2021, and currently (as of May 20, 2023).

It's true that opposition parties opposed the Conservatives' attempt to eliminate the mostly egalitarian per-vote annual subsidy for parties in 2008,¹⁰⁹³ and opposed the Conservatives' move in 2011 to gradually decrease and eliminate of the per-vote subsidy through to 2015.¹⁰⁹⁴ However,

¹⁰⁹³ John Geddes and Aaron Wherry, "Inside a crisis that shook the nation," (December 11, 2008) *Maclean's*, online: <<https://www.macleans.ca/news/canada/inside-a-crisis-that-shook-the-nation/>>.

¹⁰⁹⁴ Canadian Press, "Layton accepts he can't stop Tory plan to kill per-vote party subsidies," (May 25, 2011) *The Record*, online: <<https://www.therecord.com/news/canada/2011/05/25/layton-accepts-he-can-t-stop-tory-plan-to-kill-per-vote-party-subsidies.html>>. Evan Dyer, "End to federal per-vote subsidy looms as parties ready for lengthy 2015 campaign," (January 2, 2015) *CBC.ca*, online:

by 2016 the Liberals had joined the Conservatives in opposing the subsidy.¹⁰⁹⁵ As I note below in various parts of Chapter 6, while a few MPs have proposed egalitarian changes to the federal political finance system since then, no changes have been approved by the House of Commons.

In contrast to politicians' general tolerance and approval of significant donations, spending and gift-giving and other favours by lobbyists, encouraged by weak or contradictory rulings from the Ethics Commissioner and Lobbying Commissioner, the available evidence shows that the media and the public disapprove. This is not surprising given that, as Michael Atkinson detailed in 2011, while Canada ranks high compared to other countries in surveys of politicians and business leaders concerning the perceived level of corruption in the country, it ranks at the low end in public opinion surveys because of a perceived problem with "grand corruption." In Canada and some other countries, Atkinson argues, this form of corruption is based on the public defining "corruption" to include not only stealing from the public but also all unethical, immoral and self-serving partisan activities of people in politics (including the privileges and perks they enjoy that most people in most workplaces don't).¹⁰⁹⁶

Ian Greene argued that, already by 1990, various societal factors had combined to increase the Canadian public's expectation that not only judges

<<https://www.cbc.ca/news/politics/end-to-federal-per-vote-subsidy-looms-as-parties-ready-for-lengthy-2015-campaign-1.2888613>>.

¹⁰⁹⁵ Gloria Galloway, "Most opposition parties favour a return to per-vote subsidy amid cash-for-access controversy," (December 27, 2016) *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/most-opposition-parties-favour-a-return-to-per-vote-subsidy-amid-cash-for-access-controversy/article33436144/>>.

¹⁰⁹⁶ Michael M. Atkinson, "Discrepancies in perceptions of corruption, or why is Canada so corrupt?" (2011) 126(3) *Political Science Quarterly* 445 at 454-455, 460 and 463.

but also politicians (specifically Cabinet MPs) would also act impartially and avoid even the appearance of conflicts of interest, including: reforms that made hiring and administrative practices in Canada's public service more impartial; the doctrine of fairness in administrative decision-making upheld by the Supreme Court of Canada from 1979 on; the emphasis on substantive social equality in Canada's *Charter of Rights and Freedoms*, and; (as Kenneth Kernaghan suggested) high-profile public scandals and subsequent studies of how to prevent future scandals.¹⁰⁹⁷

I would argue public expectations also include the sense the public has that a relatively small elite really only talk to and listen to each other, and control the government and Parliament, while everyone else faces high barriers to being heard. And I would also include the relatively weak ethics rules and enforcement system this elite has enacted for themselves compared to the strict laws and penalties they have imposed on many members of the public. For example, a national survey of 4,500 Canadians conducted in May-June 2019 found 88% feel that politicians care more about staying in power than doing what's right, and 78% say they believe that the country is divided between "ordinary people" and "elites."¹⁰⁹⁸ Another national survey of 1,000 youth aged 15 to 30 conducted in March-April 2019 found that 65 percent of respondents give governments a score of 5 out of 10 or less for responding to the needs and views of young Canadians, while a national survey of 1,502

¹⁰⁹⁷ Greene (1990), *supra* note 608, at 238-246. Greene, *Honest Politics*, *supra* note 6 at 22-24 and 26-30.

¹⁰⁹⁸ Éric Grenier, "Conflicted and worried: CBC News poll takes snapshot of Canadians ahead of fall election," (June 30, 2019) CBCNews.ca, online: <<https://www.cbc.ca/amp/1.5188097>> (hereinafter "CBC News poll (2019)").

adult Canadians conducted between January 5-12, 2023 found that only 22 percent of those surveyed trust politicians in general.¹⁰⁹⁹

This divide can be seen in the example of Liberal Party fundraising events that were revealed in 2016. During that year, the Liberal Party of Canada held more than 90 exclusive, invitation-only, high-priced (\$500 to \$1,500 per ticket) fundraising events that Cabinet MPs hosted or attended. The list of events was disclosed only after pressure from the media for two weeks, and media reports that began in late October 2016 revealed lobbyists assisting with or attending three of the 90 events. The Liberal Party refused to disclose who organized and attended each event.¹¹⁰⁰ Prime Minister Trudeau dismissed all concerns about the Liberals' fundraising events.

However, research I conducted found, from early November 2016 to mid-December 2016 across Canada: editorials in six of Canada's largest newspapers (and three editorials in two of the six newspapers); columns by 11 columnists in four major newspapers, and; articles on average every three days in 15 newspapers and news websites (such as CBC.ca), all criticizing the events as unethical "cash-for-access" or "pay-to-play" events and calling for the events to be stopped.

¹⁰⁹⁹ David Coletto and Oksana Kishchuk, *Another Youthquake?* (April 25, 2019), online: <https://abacusdata.ca/wp-content/uploads/2019/05/NYS-Youth-Report_April252019_FINAL.pdf>, at 14. Proof Strategies, "Trust in governing is recovering but a new "generational gap" is emerging," (February 9, 2023), Finance.Yahoo.com, online: <<https://finance.yahoo.com/news/trust-government-recovering-generational-trust-113400888.html>>.

¹¹⁰⁰ Democracy Watch, News Release: Group files ethics complaint with federal Lobbying Commissioner about August 2015 fundraising event involving Apotex and Justin Trudeau, (November 4, 2016), online: <<http://democracywatch.ca/20161104-group-files-ethics-complaint-re-fundraising-involving-apotex-and-trudeau/>>.

One national survey asked, from November 26 to November 30, 2016, 1,000 randomly selected adult Canadians the question “Do you approve, somewhat approve, somewhat disapprove or disapprove of political parties holding fundraising events with elected officials present where the tickets cost \$1,500?” The results were: 42 per cent disapprove; 20 per cent somewhat disapprove; 18 per cent somewhat approve; 15 per cent approve, and; five per cent were unsure.¹¹⁰¹ The survey also asked “If an individual donor bought a \$1,500 ticket for a political event with the Prime Minister, would they be able to influence, somewhat influence, somewhat not influence or not influence the Prime Minister on an issue of importance to the donor?” The results were: 17 per cent would influence; 31 per cent would somewhat influence; 16 per cent somewhat not influence; 30 per cent not influence, and; six per cent unsure. Finally, the survey asked how few people would have to attend a \$1,500-per-ticket event in order for an attendee to have an opportunity to influence the Cabinet minister in attendance, and 50.1 per cent answered that one can’t influence a Cabinet minister for \$1,500, while the mean number overall was 32.9 attendees. The margin of error for the survey was +/- 3.1 per cent 19 times out of 20.

It is important to note that the survey did not ask a key question, which is whether the organizer of the event, who would be easily identified by the party as the person mainly responsible for raising whatever amount of funds is raised at the event, would have more influence in the party after the event?

¹¹⁰¹ Nanos Research, “Perceptions of Canadians on Political Donations,” (December 2016) online: <<https://democracywatch.ca/wp-content/uploads/PollOnPolDonationsGlobeNanosDec2016.pdf>>.

Based on the answers to the survey questions, my prediction would be that a majority would answer that the event organizer would have more influence after the event. While donations are not exactly the same as gifts, I propose that the above evidence can be used as a proxy for the public's standards concerning gifts to federal Canadian MPs. I think the above evidence shows that a significant percentage of the public, close to a majority, would consider that gifts also have unethical influence over politicians.

A general national survey of 1,848 adult Canadians was conducted from December 12-14, 2016 concerning the public's reactions to eight changes in politics that occurred during fall 2016.¹¹⁰² Concerning the Liberal fundraising events, the survey found that: 31 per cent had not heard of the events; 32 per cent said the events had no impact on their views; 27 per cent said it made them feel worse about the Trudeau government, and; nine per cent said it made them feel better. More generally, surveys have shown a significant percentage of adult Canadians are concerned about undue influence and unethical activities in politics.

A national survey released in July 2013 found that: 53 per cent of adult Canadians believed the level of corruption in Canada had increased in the previous two years; 54 per cent believed the government is either "entirely" or "to a large extent" run by a few big entities acting in their own best interests, and; 62 per cent of adult Canadians thought political parties are affected by

¹¹⁰² Bruce Anderson and David Coletto, "After My Democracy, Castro, 'cash for access', pipelines, climate plan, Liberals end the year well ahead," (December 2016), online: <<http://abacusdata.ca/after-my-democracy-castro-cash-for-access-pipelines-climate-plan-liberals-end-the-year-well-ahead-but-off-their-summer-peak/>>.

corruption.¹¹⁰³ A national survey of 1,1513 adult Canadians released in October 2015 found that: 44% somewhat agree and 19% completely agree that “politics has a tendency to corrupt otherwise honest people.”¹¹⁰⁴ And, as mentioned above, a national CBC-commissioned survey in May 2019 found a large majority of voters had similar feelings concerning politicians’ motivations and connections to elites.¹¹⁰⁵

The above is, admittedly, limited evidence concerning public perceptions in Canada. However, based on this available evidence, I contend that a general conclusion can be reached that the current Canadian political finance system raises serious questions for a significant segment of voters and, therefore, they lack full confidence in the fairness and integrity of the system. In Chapter 6, section 6.1 below, I also cite some additional evidence concerning another non-monetary form of preferential, favourable treatment, namely how election candidates are often appointed by party leaders or party officials, about which Canadians have also expressed concerns.

5.3. Summary of a proposed more egalitarian model for a political finance, gifts, benefits, conflict of interest and lobbying system

The key premises of the Supreme Court’s egalitarian model – one person, one vote (equality of opportunity for equality of participation), right to

¹¹⁰³ Andy Radia, “Canadians believe corruption is on the rise: survey,” online: (July 10, 2013) Yahoo Canada <<https://ca.news.yahoo.com/blogs/canada-politics/canadians-believe-corruption-rise-survey-161926854.html>>.

¹¹⁰⁴ Ryerson University (Jim Pattison Ethical Leadership Program), Public Perceptions of the Ethics of Canada’s Political Leadership, (2015), online: (2015) <<http://www.ryerson.ca/content/dam/trlc/pdf/ethicssurvey2015.pdf>>.

¹¹⁰⁵ CBC News poll (2019), *supra* note 1098.

an informed vote, and appearance of, and actual, fairness and integrity – form the basis of the more egalitarian model for a political finance system that I am proposing. However, as discussed above in Chapter 2, section 2.10, and in Chapter 5, subsection 5.2.11, while the Court in *Libman* began to establish a model aimed at least somewhat at substantive equality by suggesting a \$1,000 limit on spending by third parties, and by explicitly recognizing that many (if not most) voters did not have any means to participate in any significant way, it ended up establishing a model based largely on formal equality of opportunity.

Under this model, everyone and all third parties are assumed to be equal and have equal resources and, as a result, it is reasonable in a free and democratic society to uphold as constitutional and egalitarian the same limit of \$150,000 on ad spending by third parties, no matter whether the third party is a wealthy individual, a person with a low income, a private corporation with a few shareholders, a public corporation with thousands of shareholders, a union with tens of thousands of members, a small citizen group or a citizen group with tens of thousands of members. The rulings of the Supreme Court, and other Canadian courts, have also generally focused on upholding the party-democracy model (which upholds the rights and interests of parties over other political actors).¹¹⁰⁶

Given, however, that the Court's egalitarian model is based on voters' rights, interests and perceptions, I contend that the model itself always should

¹¹⁰⁶ See for example, the Supreme Court's ruling in *Libman*, *supra* note 41 at para. 50. See also the summary of the Supreme Court's ruling in *Figueroa* in Dawood (Fall 2013), *supra* note 10 at 279-280.

have been, and should be, focused on protecting voters' rights and interests, and protecting candidate, party and third-party rights and interests only to the extent that they are supported by voters, and no more. What I propose in Chapters 6 and 7, based on the evaluations I set out in Chapters 3 and 4, are largely changes to the current federal Canadian registration, donation, spending, disclosure, subsidy, media, gifts, favours, and lobbying rules that are fully aimed at ensuring substantive equality – in other words, aimed at fully implementing the fundamental principle of one person, one vote, the right to an informed vote, and preventive measures to ensure that the public can have confidence that their right to the appearance of, and actual, fairness and integrity of the system is being upheld.

I emphasize and prioritize this third element, ensuring the appearance of integrity and actual integrity in all political processes, because I contend that it has been neglected by both the courts and legal scholars, as outlined above in subsection 5.2.7. Measures to prevent corruption have been developed and ruled on by the courts, and the courts have also well-developed the standard of preventing a reasonable apprehension of bias in legal decisions by public office holders, as detailed above in subsection 5.2.9. However, neither policy-makers nor the courts have grappled with the full implications of preventing a reasonable apprehension of bias in political decision-making and policy-making processes.

This is understandable, as it is a difficult task, given that politicians run on election platforms that reflect their biases, and are supported by voters who support those biases, and are expected then to make policy changes that

are based on those biases. The key question I attempt to answer with this more egalitarian model, and the changes suggested in chapters 6 and 7 to the current rules in every area of the system, is where the line should be drawn to define what is a valid, ethical, egalitarian interest/bias of a politician or public official based on the support of a broad enough base of voters that it can be termed a “public interest” versus what is an invalid, unethical, inequalitarian interest/bias of a politician or public official based on the support of only a few voters or lobbyists (or the leader or executive of a party) who have undue influence, or is based on the financial or other personal interests of themselves, their family or friends, so that it can be termed a “private interest”. Again, policy-makers and the courts have understandably not fully answered this question because it raises multiple issues, including how policy-making processes are supposed to function in our parliamentary system if no one with an appearance of a conflict of interest is allowed to participate in the processes. I attempt to answer this question, and address all of these multiple issues, both practically and effectively.

In addition, by emphasizing upholding the fundamental principle of one person, one vote, I am essentially contending that a more egalitarian model cannot be based upon the party-democracy model (i.e. cannot be focused mainly on protecting the role and rights of parties in the system) but is instead based on the open-democracy model (which, again, focuses on balancing the rights and interests of all political actors).¹¹⁰⁷ Another reason I am arguing for

¹¹⁰⁷ See discussion of the two models in Bakvis and Smith (1997), *supra* note 44. And again, see also a critique of how the party-democracy model conflicts with the egalitarian model in:

an open-democracy model is that while political parties, of course, have a role in Canada's political system, they are not mentioned in the *Constitution*, and they are arguably not essential to the formation or operation of our electoral system or Parliament. Parties don't exist in Nunavut and the Northwest Territories, and the members of their legislative assemblies make decisions by consensus.¹¹⁰⁸

As in those Canadian jurisdictions, every part of Canada's *Constitution*, and democratic legal system, could operate without parties. Every federal election candidate could be independent; voters could vote in each EDA based on the policy positions of each candidate; the Prime Minister and Cabinet ministers could be chosen by and from elected MPs; most bills introduced in Parliament could be a private member bill, and; policy and spending decisions could still be made simply through debates and votes in the House of Commons. Yes, this would be a very different way of operating elections and Parliament, but there is no constitutional or legal barrier to operating this way, and the standing orders of the House of Commons could be changed as needed to accommodate it.

Feasby (2005), *supra* note 10 at 263-267, and; Bredt and Pottie (2005), *supra* note 10 at 293-299 and 301-303.

¹¹⁰⁸ Kevin O'Brien, "Some Thoughts on Consensus Government in Nunavut," (2003) Vol. 26, No. 4, *Canadian Parliamentary Review*, online: <<http://www.revparl.ca/english/issue.asp?param=60&art=26>>. Hon. Hunter Tootoo, MLA, "Consensus Government in Nunavut," (2012) Vol. 35, No. 4 *Canadian Parliamentary Review*, online: <<http://www.revparl.ca/english/issue.asp?param=213&art=1498>>. David M. Brock and Alan Cash, "Is There a Confidence Convention in Consensus Government," (2012) Vol. 37, No. 3 *Canadian Parliamentary Review*, online: <<http://www.revparl.ca/english/issue.asp?param=220&art=1602>>. Tim Mercer, "Consensus Government in the Northwest Territories: Westminster with a Northern "Twist"," (2015) Canadian Study of Parliament Group: Studies of Provincial and Territorial Legislatures, online: <https://cspg-gcep.ca/pdf/CSPG_NWT_Legislature-e.pdf>.

However, our democratic legal system could not operate without voters, which the *Charter* recognizes and prioritizes in our constitutional system not only by setting out the rights in section 3 under the sub-heading “Democratic rights of citizens” but also through shielding the section 3 rights from being even temporarily overridden by politicians and parties through enacting a bill invoking the section 33 notwithstanding clause. As well, while federal parties receive significant voter support across Canada on election day, total voter turnout in the past seven federal elections has averaged only 63.3%,¹¹⁰⁹ and the approximate percentage of total Canadian voters who are members or donors to the five main federal political parties is only four percent for the category of members¹¹¹⁰ and 0.85 percent for the category of donors,¹¹¹¹ out of the total of 27.5 million registered voters in Canada as of 2021.¹¹¹²

Many third-party interest groups in Canada have as many or more supporters and donors than political parties, even though their donors do not receive the significant tax breaks that parties and candidates receive. As a result, these relatively low levels of support for parties are, I contend, another reason parties’ and candidates’ interests do not merit being placed over

¹¹⁰⁹ Calculated using figures from Elections Canada, Voter Turnout at Federal Elections and Referendums, online:

<<https://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e>> (hereinafter “Elections Canada, Voter Turnout”).

¹¹¹⁰ Calculated using 1,153,620 as the total membership of the five parties, from Chart 23 in Chapter 6, subsection 6.4.2, using the most recent numbers available for party member totals, some of which are out of date, and most of which were reported when each party’s membership total was at its highest in the past eight years.

¹¹¹¹ Calculated using 234,821 as the total number of donors of the five parties, from Chart 23 in Chapter 6, subsection 6.4.2, adding up the average number of annual donors for each party from 2016 to 2020 (including the 2019 election year when donor totals increased significantly for more of the parties).

¹¹¹² Elections Canada, Voter Turnout, *supra* note 1109.

voters' interests in the overall design and operation of Canada's political finance system.

In addition, my evaluation of the current political finance system's rules and suggestions for changes are not as constrained by the deference, as established by the *Oakes* test,¹¹¹³ that the Supreme Court is required to give in its section 1 *Charter* analysis of any statute or regulation to the legislature's broad discretion to fashion a reasonable rule, a deference the Court showed for example in its 2004 ruling in *Harper* upholding third-party ad spending limits.¹¹¹⁴ It is, of course, important to note that the Supreme Court in *Sauvé* carved out an exception to the deference requirement when the courts are addressing the section 3 *Charter* right to vote because it is a fundamental right.¹¹¹⁵

All the changes I propose fall within the expanded definition of the section 3 right as articulated by the Supreme Court in *Figueroa*, *Harper* and *Frank*¹¹¹⁶ as a right to free and fair elections and political processes, with the caveat that many of them also fall within subsection 2(b) and (d) rights, under which the courts are required to defer to the legislature concerning the specifics of any legislative scheme. However, as others have argued,¹¹¹⁷ deference is also not owed to the legislature with regard to policy decisions in

¹¹¹³ *Oakes*, *supra* note 53.

¹¹¹⁴ *Harper*, *supra* note 10.

¹¹¹⁵ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 SCR 519, <<https://canlii.ca/t/50cw>>, paras. 9-18 (hereinafter "*Sauvé*").

¹¹¹⁶ *Figueroa*, *supra* note 133; *Harper*, *supra* note 10. *Frank v. Canada (Attorney General)*, 2019 SCC 1 (CanLII), [2019] 1 SCR 3, <<https://canlii.ca/t/hwx2p>>, paras. 26-27.

¹¹¹⁷ See a critique of why deference is not due when electoral laws are being reviewed by the courts because of the self-interest of politicians and parties in: Feasby (2005), *supra* note 10, at 264, 273-277, 281-282, 285-288, and; Bredt and Pottie (2005), *supra* note 10 at 299-303.

the areas of electoral and other political process issues because politicians and parties are explicitly self-interested when making such decisions.

The changes I propose are based in part on upholding the same three principles of 1. “political equality”¹¹¹⁸ and “equal participation”¹¹¹⁹ and; 2. public confidence in the appearance of, and actual, fairness and integrity of the system¹¹²⁰ and; 3 ensuring that, from the voters’ point of view, adequate information is available to make informed choices in political processes,¹¹²¹ that were set out by the Supreme Court in its *Libman*, *Harper* and *Figueroa* rulings. The changes are also based in part on the same section 3, pre-section 1 analysis rationale set out by Iacobucci J. for the Supreme Court majority in *Figueroa* that emphasizes the importance of protecting the fundamental rights of each citizen/voter, not the interests of the mainstream political parties:

Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government, is found in the fact that the rights of s. 3 are participatory in nature.... This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and

¹¹¹⁸ *Libman*, *supra* note 41, paras. 41, 47 and 61.

¹¹¹⁹ *Harper* (2004), *supra* note 10, paras. 61-63. *Libman*, *supra* note 41, para. 47.

¹¹²⁰ *Harper* (2004), *supra* note 10, at paras. 23-24, 63, 79, 82-83, 91-92, 97, 99, 101-104, 108-109, 120, 122, 142 and 146. *Libman*, *supra* note 41, at paras. 41, 52 and 84.

¹¹²¹ *Libman*, *supra* note 41, paras. 41, 47 and 61. *Harper* (2004), *supra* note 10, paras. 61-63, 67-70, 112, 114-118, and 120-121. *Figueroa* (2003), *supra* note 133, para. 54.

democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly.¹¹²²

...

The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy.

... Legislation that purports to encourage the aggregation of political preferences might advance certain collective interests, but it does not benefit all citizens, namely, those whose interests are not aggregated by the mainstream political parties.¹¹²³

...

the fact that our current electoral system reflects certain political values does not mean that those values are embedded in the *Charter*, or that it is appropriate to balance those values against the right of each citizen to play a meaningful role in the electoral process. After all, the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.¹¹²⁴

¹¹²² *Figueroa* (2003), *supra* note 133, para. 26.

¹¹²³ *Figueroa* (2003), *supra* note 133, paras. 30-31.

¹¹²⁴ *Figueroa* (2003), *supra* note 133, para. 37.

It is consistent with this open-democracy model, I contend, also to treat political parties as public entities, not private organizations.¹¹²⁵ As many have contended, parties have a significant role in our political system and their actions have significant consequences.¹¹²⁶ However, they are only fully regulated in the *CEA* in terms of their financial operations. Some scholars argue that the increase of politicians granting public funding to their parties in recent decades is the primary reason for even greater regulation of their internal operations, whether or not politicians intended that effect.¹¹²⁷

I contend that there are broader reasons for regulating party activities, even if parties received no public funding or subsidies, simply because of their importance as gateways, and gatekeepers, for individuals who want to enter and participate in politics, legislatures and government. Therefore, to fulfill a more egalitarian model, I contend in Chapter 6 that the registration and operations of nomination and party leadership contests should be covered by the *CEA*, and rules concerning the registration of electoral district

¹¹²⁵ See discussion of this dichotomy in Anika Gauja, “Political parties: private associations or public utilities?” in James A. Gardner, ed., *Comparative Election Law* (Northampton, Mass.: Edwin Elgar Publishing Inc., 2022) 177 (hereinafter “Gauja (2022)”).

¹¹²⁶ See, for example: LeBel J., *Figueroa* (2003), *supra* note 133, paras. 138-143; Richard Johnston, “Political Parties and the Electoral System,” in John Courtney and David Smith, eds., *Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010) 208; Richard Johnston, “The Party System, Elections, and Social Policy,” in Keith Banting and John Myles, eds., *The Fading of Redistributive Politics: Inequality and the Politics of Social Policy* (Vancouver: UBC Press, 2013) 187; Amanda Bittner and Royce Koop, eds. *Canadian Parties, Voters, and Elections: A New Era* (Vancouver: UBC Press, 2013); Richard Johnston and Campbell Sharman, eds., *Parties and Party Systems: Structure and Context* (Vancouver, BC: UBC Press, 2015).

¹¹²⁷ Ingrid van Biezen, “Political Parties as Public Utilities, (2004), Vol. 10(6) *Party Politics* 701 (hereinafter “van Biezen (2004)”). Ingrid van Biezen and Petr Kopecký, “The State and the Parties: Public Funding, Public Regulation and Rent-Seeking in Contemporary Democracies,” (2007), Vol. 13(2) *Party Politics* 235. Anika Gauja, “State Regulation and the Internal Organisation of Political Parties: The Impact of Party Law in Australia, Canada, New Zealand and the United Kingdom,” (2008) 46:2 *Commonwealth & Comparative Politics* 244 at 246-247 (hereinafter “Gauja (2008)”). Cross and Crysler (2011), *supra* note 345, at 168-169.

associations, election candidates and parties should be strengthened, all to protect individual citizens' rights as voters, contestants and candidates.

In suggesting this new more egalitarian model framework, I am also attempting to incorporate the critiques of, and variations on, Rawls' approach set out above in section 5.2 and, as also set out in section 5.2, to incorporate democratic theory, government ethics principles, international standards, Canadian case law on political integrity, and behavioural psychology findings as part of a broader base for a more egalitarian framework for changes to Canada's political finance system. I am also attempting to update the framework, and the proposals for rules for each part of the system, to take into account the effects that the availability of email, the Internet and social media have had, if any, on lowering the costs of reaching voters with political information and appeals, which the Supreme Court and other Canadian courts have largely not addressed mainly because most of their key rulings were made before these technological services were fully developed and utilized in Canadian politics. As well, I attempt to anticipate and prevent unintended consequences, including being careful that any proposed changes to measures do not favour incumbents by, for example, imposing spending limits that disadvantage challengers.¹¹²⁸

¹¹²⁸ For an analysis of how reforms can have unintended consequences, see: Cass R. Sunstein, "Political Equality and Unintended Consequences," (1994) 94 *Colum. L. Rev.* 1390 (hereinafter "Sunstein (1994)"). For another analysis that makes claims concerning unintended consequences which, unlike Sunstein, argues against campaign finance limits and for a libertarian model of unlimited donations that are fully disclosed, see: Sullivan (1997), *supra* note 918. See also: Dawood (2006), *supra* note 2 at 272.

At the same time, given the possible effects of the changes proposed in Chapters 6 and 7 are largely unpredictable other than in the areas where other jurisdictions have implemented similar changes, I have developed proposed changes primarily on the same basis as the Supreme Court's used in articulating the egalitarian model, namely by focusing not on outcomes but instead on the fundamental fairness and integrity of the process.¹¹²⁹ As a result, I also suggest that a fully egalitarian model does not allow for the broad discretion that the "effective representation" principle in the Supreme Court's model could be read to include.¹¹³⁰ That principle can be read to allow discretion that reduces the full equality of citizen participation to "relative parity" – meaning that the right and opportunity of some voters to participate can be up to 25 percent less effective than other voters.

I do not contest that absolute parity is not possible in the processes for every part of the political finance system. However, as others have, I contest that 25 percent is a reasonable rate of variation and suggest that it should be no more than 10 percent.¹¹³¹ I also do not contest the Supreme Court's contention that "better government" in terms of ensuring representation of all voters, which essentially is an argument for partial or full quota systems, is a valid reason for a 10 percent variance from the principle of voter equality.¹¹³²

¹¹²⁹ *Harper* (2004), *supra* note 10 at paras. 64 and 97, and see also paras. 95-96 and 98-99. *Figueroa* (2003), *supra* note 133 at para. 29.

¹¹³⁰ *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, at 181-188.

¹¹³¹ As, for example, Cory J. did in the dissent in *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, at 170. See also Pal, *Fractured Right to Vote* (2015), *supra* note 147.

¹¹³² *Reference re Prov. Electoral Boundaries (Sask.)*, *supra* note 140, at 184-185 (see also 186 to 188), citing *Dixon v. B.C. (A.G.)*, 1989 CanLII 248 (BC SC), <<https://canlii.ca/t/1p6rb>> at 414.

However, I do contest the Supreme Court's suggestion that "better government" in terms of outcomes can be offered as a valid reason for this variance and violation of fundamental democratic rights. I am not contending that the Supreme Court makes this suggestion strongly in its ruling in *Reference re Prov. Electoral Boundaries (Sask.)*. The Court may have been proposing only that better government in terms of actual demographic representation is a valid reason for a variance from political equality – it is not entirely clear.

I contest any claim that better government decision-making and policy-making outcomes should be used as a basis for justifying the violation of these key democratic rights, as I have discussed above in subsections 1.4.1, 5.2.2 and 5.2.5. Answering the question of what is a better outcome is, even in some areas of human rights, laden with multi-variant conflicting contentions of what is the better way to live, spend the public's money, deliver programs and services, or organize society and solve societal problems. The difficulty is not solely the lack of ability to measure outcomes in many areas, but also that the belief that a specific outcome is better is a value-laden, not solely evidence-based, calculation based on philosophical perspective, personal biases and other factors.¹¹³³ As a result, allowing a government to justify violating democratic rights on the basis of the outcomes of government decisions would, in effect, allow for overly broad discretion, including the

¹¹³³ As pointed out by many others – see for example, Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review," (1987) 21 *UBC L Rev* 87 at 126-128 (hereinafter "Monahan (1987)"). Again, see an attempt to define "public interest" elections in: Rounce (Spring 2015), *supra* note 901.

obvious example of a government rigging all the rules of elections, legislative and policy-making processes to ensure that it remains in power and is allowed to enact whatever it wants because “it knows best”.

To be entirely clear through giving one example of many possible examples, I am not contending that the more egalitarian model that I propose below will result in government policy-making decisions that will produce a “better Canadian economy.” Even if all the changes I suggest in chapters 6 and 7 were made to implement a more egalitarian model of political finance, conflict of interest and lobbying processes, still the ideology of political leaders, global economic forces, decisions of business executives, technological developments and myriad other social, cultural, environmental and community developments could produce what many would conclude is a “worse Canadian economy”. As well, it may be difficult, if not impossible, to isolate the effect of egalitarian changes on policy-making decisions as factors that caused the state of the economy to change.

The OECD’s 2017 report *Preventing Policy Capture: Integrity in Public Decision-making* sets out a brief summary of 28 academic articles, seven books and 14 reports of multiple studies of countries around the world as the basis for arguing that inegalitarian policy-making processes that allow for “policy capture” by private interests not only erode “the fundamental idea of democratic decision-making based on dialogue, consensus and openness” but also lead to “a negative impact on economic productivity by misallocating resources and endangering sustainable growth” and “nurtures a vicious cycle” that increases social inequality, and; leads to “some countries failing to

address problems” because they focus on certain solutions or misstate the facts in order to protect private interests.¹¹³⁴ However, even based on this extensive evidence, the conclusions do not go further, in most cases, than saying that these processes “may” cause or “can lead” or “is likely to foster” these outcomes in “some countries.”

As evidenced by the studies cited in OECD’s 2017 report, I contend that a separate dissertation (at least) would be needed to assess the actual determinants of substantive policy outcomes in any specific sector of Canadian society, let alone to assess what determinants exactly would make any sector “better”. As Pippa Norris documented in the 2014 book *Why Electoral Integrity Matters*, many of the theories and claims concerning the effects of the lack of electoral integrity on policy-making and other aspects of society had, at that time, not been backed by clear evidence.¹¹³⁵ This dissertation is not attempting to prove effects on policy-making in any sector nor, while I agree with the broad conclusions set out in the OECD’s 2017 report concerning the effects of inequalitarian policy-making systems, is this thesis attempting to prove that those conclusions are true in Canada.

Instead (again), this thesis has the more modest objectives only of evaluating the Supreme Court’s egalitarian model, setting out its inconsistencies, proposing the more egalitarian model summarized immediately below, and in chapters 6 and 7 suggesting changes (and questions that need to be answered through comprehensive studies) to

¹¹³⁴ OECD, *Preventing Policy Capture* (2017), *supra* note 955, at 25-31.

¹¹³⁵ Norris et al (2014), *supra* note 981, at 3-74.

move Canada's current political finance, conflict of interest and lobbying system toward fulfilling that more egalitarian model. What effects the suggested changes may have would have to be evaluated if and when any of the changes are made (again, if the changes can even be causally connected to any effects).

To give another example of the difficulty of connecting political process changes to outcomes, while the 2016 book *Checkbook Elections?* concludes that nine country case studies and other evidence show that "stronger legal regulations are significantly linked with the perceived quality of political finance regimes, as assessed by expert surveys"¹¹³⁶ it also concludes that "the available evidence was unable to establish that the degree of state regulation has any significant impact, positive or negative, on longer-term societal and political conditions" and that the effect of any change is likely to be a "long-term process."¹¹³⁷ This is in no small part due to, as the case study of Russia set out in the book shows, that even if stronger political finance and ethics regulations are enacted, a "deep-rooted endemic culture of corruption"¹¹³⁸ can continue to thwart government policy-making and spending processes from producing results that are in the interests of a majority of the public.

In Chapter 2, section 2.10, I projected in a brief, summary manner what the effects would likely be of extending the Supreme Court's egalitarian model

¹¹³⁶ Norris and Abel van Es, eds., *Checkbook Elections?* (2016), *supra* note 986 at 266.

¹¹³⁷ Norris and Abel van Es, eds., *Checkbook Elections?* (2016), *supra* note 986 at 266.

¹¹³⁸ Norris and Abel van Es, eds., *Checkbook Elections?* (2016), *supra* note 986 at 267 and Chapter 7.

to all the areas of the political finance system that the Court and other courts have not addressed in rulings to date. Below, I set out a more detailed list of elements that form the basis of a more egalitarian model for Canada's interconnected political finance, gifts and benefits, conflicts of interest and lobbying systems and rules, based on the various frameworks and approaches summarized in the above subsections in this chapter that I have accepted and incorporated, including approaches from democratic theory, case law, international standards, and also suggested by the results of behavioural psychology studies. Again, to summarize, and as noted below in each listed element, these elements are developed from the perspective of protecting the rights of voters over other actors in all political processes (given voters are the fundamental basis of political parties, and electoral and policy-making processes), and are based on what I contend is a full and consistent application of the three key egalitarian principles/rights developed by the Supreme Court of Canada of 1. the right to substantive equality of opportunity for substantively equal participation and influence; 2. ensuring the appearance of integrity of the system, as well as its actual integrity, so the public's right to have full confidence in that integrity is upheld, and; 3. ensuring adequate information so that voters can make informed choices.

As Yasmin Dawood ably summarized,¹¹³⁹ developing lists of elements such as those set out below involves choices and (unlike the Supreme Court of Canada in various rulings), I am most explicitly choosing to restrict the freedom of expression of wealthy individuals and businesses so that there is

¹¹³⁹ Dawood (Fall 2013) *supra* note 10.

substantive equality of opportunity for expression and for the provision of information by voters (and voter-backed organizations) to voters in political processes. As I argue in chapters 6 and 7 in setting out detailed proposals based on the lists of elements set out below, this will restrict the opportunities for wealthy individuals and businesses to dominate political process debates more than the Supreme Court has under some of its rulings but, if the proposals I make are implemented, will not result in less information being provided to voters.

Based on all of these frameworks, theories, principles and choices discussed above, I contend that a more egalitarian political finance system for Canada would include the following 12 key general elements in the areas of registration, donations, spending, disclosure and public subsidies:

1. Rules-based, as opposed to party- and party leader-controlled, registration of electoral district associations (EDAs), nomination contestants, election candidates and party leadership contestants (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
2. Only allowing party officials and/or party leaders to choose the party's election or by-election candidate in an electoral district when there is no EDA in the district (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
3. Having Elections Canada run nomination contests and party leadership contests for all parties and contestants, in the same way it currently runs elections and by-elections for all parties and candidates (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);

4. Limits on donations, loans and gifts of money, property, use of property and/or services, and favours and assistance, to contestants, candidates, EDAs and parties, set at a level that a low-income vulnerable voter can afford (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
5. Only allowing donations and loans to EDAs and local candidates from voters in the jurisdiction (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
6. Requiring party headquarters to share a portion of each donation with the local EDA and/or candidate's campaign (during an election campaign period) in the district in which the person making the donation resides (in order to ensure substantively equal opportunity for substantively equal participation and influence);
7. Spending limits for all contestants, candidates, parties and third parties based on their actual level of voter support (in order to ensure substantively equal opportunity for substantively equal participation and influence in not only election debates but also debates on issues between elections, and to ensure public confidence in integrity – with no more than a 10 percent variation in the equality of opportunity and influence of individuals and entities with the same number of voter supporters);
8. Public funding and subsidies for contestants, candidates and parties to address structural inequalities caused by past and ongoing discrimination, and economic disadvantage, based on their actual level of voter support (in order to ensure substantively equal opportunity for substantively equal participation and influence in contests, by-elections and elections, and to ensure public confidence in integrity);
9. Additional public funding and subsidies provided only if it can be proven that contestants, candidates and parties need them in order

to inform voters and operate effectively, again only provided based on actual level of voter support (in order to ensure substantively equal opportunity for substantively equal participation and influence, and to ensure adequate information is provided to voters);

10. Access to media and social media that also ensures substantive equality of opportunity for all voters to participate in and influence contests, by-elections, elections and policy debates between elections (also in order to ensure adequate information is provided to voters, and public confidence in integrity);
11. Requirements for contestants, candidates, parties and third parties to disclose donations, loans and spending regularly, as well as before any election day, to ensure the media and public can easily determine who is bankrolling each campaign during an election and whether each campaign is complying with the donation, loan and spending limits and restrictions, and also to ensure the media and public can easily determine the financial status, sources of funding and use of donations and loans during the time period of any policy-making process (in order to ensure adequate information is provided to voters, and public confidence in integrity), and;
12. Requirements to ensure fully independent, fully empowered auditing of donations, loans and spending – mainly by having Elections Canada do all the auditing for nomination contestants, election candidates, EDAs, parties, party leadership contestants and third parties (in order to ensure public confidence in integrity).

The two distinct areas that I do not address fully in the above list of key elements are restrictions on donations and loans to third parties (and auditing of those contributions), and possible public funding and subsidies for third parties. I address those areas below in Chapter 6, subsections 6.15 and 6.16, in part by raising questions that, I contend, need to be researched and answered before final decisions could be made concerning changes to current

rules in these areas. Among the questions that flow from, and are not fully answered in, the above list are the following three significant questions:

1. What balance should be struck between private donations and public subsidies?;
2. What balance should be struck in spending limits for contestants, candidates, parties and third parties? and;
3. What balance should be struck in spending limits for various types of third parties?

My proposed answers to some of those questions and proposals for changes needed to comply with the above list of principles and standards were mentioned briefly in the Chapter 3 evaluation of how the current registration, donation, rules are not egalitarian. In Chapter 6, I provide more detailed proposals for changes needed to Canada's existing rules. Again, on some issues I raise further questions that, I contend, need to be researched before final answers could be provided concerning what changes should be made to the current rules. I also summarize briefly in Chapter 6 the arguments set out in above sections in this chapter that are the basis for my suggested changes, add to those arguments reasons why the changes comply with the *Charter*, and provide examples from other jurisdictions that have implemented similar changes.

With regard to the gifts, favours and lobbying parts of the overall political finance system, I set out again from Chapter 4 the following lists of key overall elements that, again I contend, align with the Supreme Court's fundamental egalitarian model principles and uphold them consistently and comprehensively, as well aligning with international best-practice standards –

first concerning gifts, favours and promotions/demotions given to public office holders:

1. Overall, the rule that should apply to all political situations and processes is that public officials are prohibited from being in an apparent of conflict of interest (so that the public can have full confidence in the appearance of, and actual, fairness and integrity of all processes);
2. Limits on gifts, benefits and favours, including the combined total limit that applies to a business, union or other entity (including a lobbying firm or collective lobbying effort by more than one business or organization, or a family), at a level that an average low-income voter can afford (to uphold the principle of one person, one vote, prevent wealthy individuals and organizations from having undue, overwhelming influence that undermines relative equality of participation, to prevent even an appearance of a conflict of interest, and thereby ensure the public can have confidence in the appearance of, and actual, fairness and integrity of the system);
3. Comprehensive, loophole-free disclosure requirements for gifts, benefits, hospitality and favours (including the favour of a promised future gift, benefit or job offer) and for conflicts of interest (in order to ensure adequate information is provided to voters to make informed choices in political processes), and;
4. Removing from party leaders the power to promote and demote MPs (to restrict the power of one person to offer or withhold promotions/demotions as a way of creating a conflict of interest and unduly influencing an MP's substantive equality of participation in representing voters in Parliament), and also regulate MP party-switching so that they do not have unrestricted power to overturn the results of the will of voters in their district (in order to ensure equality of opportunity for participation and influence of voters).

and, secondly, the following rules for lobbyists who give the gifts or favours, and for the lobbying system overall:¹¹⁴⁰

1. Overall, the rule that should apply to all political situations and processes is that lobbyists are prohibited from doing or proposing anything that places any public official in an apparent of conflict of interest, and from lobbying in any way that is improper (so that the public can have full confidence in the appearance of, and actual, fairness and integrity of all processes);
2. Comprehensive, loophole-free requirements to require registration of, and public disclosure of, all lobbying and lobbying spending and sources of funding (in order to ensure adequate information is provided to voters to make informed choices), and;
3. Relative, substantive equality of opportunity for relative, substantive equality of participation and influence in the government and political decision-making system, based on actual level of voter support (with no more than a 10 percent variation in the equality of opportunity and influence), in order to ensure public confidence in the integrity of decisions.

I mentioned briefly, in the Chapter 4 evaluation of how the current gifts, favours, conflict of interest and lobbying rules are not egalitarian, my suggestions for some of the changes needed to comply with the above list of key elements of a fully egalitarian system. Chapter 7 sets out more detailed suggestions for all the changes needed in these areas. I also summarize briefly in Chapter 7 the arguments set out in the above subsections in this chapter that are the basis for my suggested changes in these areas, add to those arguments reasons why the changes I am proposing comply with the

¹¹⁴⁰ See discussion of 12 principles, many of which overlap, that set out similar standards in Gold (2020), *supra* note 11, at 500-570.

Charter and other constitutional provisions, and also provide examples from other jurisdictions that have implemented similar changes.

Finally, to note again, while I believe that effective enforcement is key to ensuring that the rules in any system actually have effect on ensuring actions and activities comply with the rules, my focus in this dissertation is only on the rules of each part of the system, other than addressing two aspects of enforcement by evaluating the rules concerning auditors and other internal compliance officers, and disclosure of donations, loans and spending, and gifts, favours, benefits and lobbying. Effective enforcement involves many other measures, policies, practices and penalties including – as the 2016 book *Checkbook Elections?* concludes – “enforcement mechanisms, such as the role of the judiciary, as well as whether the principles behind new laws are widely endorsed within the informal culture, involving social sanctions to ensure compliance.”¹¹⁴¹

5.4. Would the Supreme Court of Canada rule that the standards in this proposed more egalitarian model are constitutional?

I set out in Chapter 2, section 2.10, and also addressed above in subsection 5.2.11, the nine inconsistencies I contend exist in the Supreme Court of Canada’s and other Canadian courts’ application of the Court’s egalitarian model in the area of political finance, and I also addressed above somewhat in chapters 3 and 4, and more directly in section 5.1 and subsections 5.2.7 and 5.2.9 above, how the Court and scholars have

¹¹⁴¹ Norris and Abel van Es, eds., *Checkbook Elections?* (2016), *supra* note 986 at 266.

established constitutional and legal principles that form the basis of the egalitarian model. I then set out above in section 5.3 a list of 12 general standards in the area of political finance, four standards in the area of public official transparency and ethics, and three standards in the area of lobbying transparency and ethics – 19 standards in total – that are based on these egalitarian principles if they were, I contend, applied fully and consistently. For each of the 19 standards, I summarized at the end which of the three key egalitarian principles form the basis for the standard.

In chapters 6 and 7, I set out 201 specific proposals and argue why they align with these 19 standards and the key principles of the egalitarian model, and will therefore comply with Canada's *Constitution*, including the *Charter*. In this section, I am setting out a general argument about whether the Supreme Court would judge these measures to be constitutional. The first point is that it is far from clear whether this would happen simply because, as set out in chapters 2 and 3, the Court has issued split rulings on several issues in the area of political finance and democratic rights generally.

Secondly, there has also been significant turnover in the members of the Court since those rulings. Thirdly, there has been significant developments in electoral processes since the Court ruled on many of the issue areas, most specifically the phenomena of social media and, overall, the increase of lower-cost online and electronic campaigning and provision of information to voters. As a result, who could predict how the Court would rule on any of the standards if they were used as the basis for challenging the current rules in any of the areas?

In terms of the approach that, I contend, the Court would have to take in order to uphold the measures I am proposing as constitutional, Feasby has argued that four principles underlie the conflicting rulings of the Supreme Court of Canada concerning political finance rules and democracy law generally: 1. majoritarianism; 2. egalitarianism; 3. legitimacy; and 4. free debate,¹¹⁴² and that the Court has, depending on the subject matter of the law, favoured one or another or some balancing of these principles. Dawood argues the Supreme Court has established, and to varying, conflicting extents upheld, four democratic rights – 1. the right to effective representation; 2. the right to meaningful participation; 3. the right to equal participation, and; 4. the right to a free and informed vote.¹¹⁴³ As outlined above in subsections 5.2.7 and 5.2.9, I contend that the Court has clearly also established a fifth democratic right to political processes that have integrity, and appear to have integrity, so that the public can have confidence in them, as that right is one of the three key principles of the Court's egalitarian model (and is also the basis of Feasby's "legitimacy" principle).

The approach I am proposing that the Court would have to take in order to uphold the 19 general standards (and the 201 proposed measures) is essentially that the Court would have to stop trading off on these principles and rights in various, conflicting ways ruling by ruling, and instead consistently base its assessments of the constitutionality of political finance, ethics and lobbying measures on whether they are aimed at, and achieve, integrity and

¹¹⁴² Feasby (2007), *supra* note 3, at 539-541.

¹¹⁴³ Dawood (Fall 2013), *supra* note 10, at 269-279.

substantive equality in all political processes, and provide the public timely access to key information about each process so that voters can determine whether each process actually uphold integrity and equality.

In other words, as mentioned in section 5.3, a majority of the Court would have to adopt the approach that I contend fully and consistently upholds the egalitarian model – namely that preventing and prohibiting apparent conflicts of interest in all political processes, and ensuring substantive equality of opportunity to participate at a substantively equal level in all processes, are both required to ensure public confidence in the integrity of the processes, and so these should be the fundamental bases for determining the rules concerning freedom of political expression to ensure adequate information for voters to make an informed choice. Increased disclosure of key information about all processes (i.e. donations, spending, lobbying etc.) would remain a fundamental goal, as it is in the Court’s current approach.

I understand, of course, that these rights/requirements of equality and integrity are not set out in the *Charter* and, as Dawood argues, can be (like the right to information) categorized as “soft rights or quasi-rights” drawn from the constitutional principles of democracy and the rule of law and the *Charter* section 3 right to vote in fair elections.¹¹⁴⁴ However, they are drawn from fundamental constitutional principles of a free and democratic society, and are based on the concept of democratic freedom, and to have constitutional

¹¹⁴⁴ Dawood (2013), *supra* note 10, at 290. See also a discussion of the connections between constitutional principles and ethics rules in: Greene (1990), *supra* note 608, at 236-245.

meaning those principles have to be articulated not just as vague, aspirational terms but instead expanded into firm objectives and rules such as ensuring integrity, ensuring substantive equality. As a result, I contend that these requirements/rights should be regarded by the Court as having as equal force as constitutional rights as the rights explicitly set out in the *Charter*.

This approach means first, that everyone in politics, not just government employees, would be required to meet a high ethical standard in terms of avoiding having private interests that even appear to conflict with the public interest, and so the Supreme Court would have to agree that such a standard should apply to all political actors in all political processes. Secondly, this approach means that freedom of expression through donating and spending during political processes will be restricted to a degree that the Supreme Court and other Canadian courts have ruled in the past violates subsection 2(b) of the *Charter* (although the Court has upheld some such restrictions under section 1, and under section 3 rights to democratic elections).

As a result, it also means that the Court's section 1 analysis would have to be different than it has been at times in the past, again aligning consistently more closely with the framework I propose based mainly on ensuring integrity and equality, in order for the Court to be likely to uphold the expression restrictions as constitutional. The Court would have to agree that any one voter should not have the right, based on wealth, to express political opinions through donations and spending at a volume greater than a voter of low-income means, nor should any organization have the right to express

itself through spending at a volume greater than its actual level of voter support. As detailed in Chapter 2, the Court established that equal opportunity for equal participation and influence is a fundamental basis of the egalitarian model, but in *Harper* it approved under section 1 limits on spending by third parties that are clearly inequalitarian, as they effectively allow individuals and organizations with wealth but a low level of voter support to spend much more than individuals and organizations with few funds but a high level of voter support.

Third, this approach means that full, timely transparency would be required in all political processes to disclose donations, spending, gifts, benefits, lobbying, private interests, conflicts of interest etc. before voters are required to make a decision about which position they take in any process. Such comprehensive disclosure requirements, I contend, will be less controversial for the Supreme Court to uphold given that, as detailed in Chapter 2, the Court has consistently ruled that this information needs to be disclosed in order for the public not only to make informed choices, but also to have confidence in the integrity of political processes.

Fourth, this approach means establishing a priority of equal opportunity for equal participation by voters in all political processes, which would mean that the Court would have to shift to consistently upholding the open-democracy approach (as mentioned in section 5.3 above). This would mean the Court would prioritize the interests of voters, or at least view and protect voters' interests and the interests of third parties as much as the interests of

parties are protected when the party-democracy approach is used as the basis for court rulings.

With regard to strict ethics standards prohibiting even apparent conflicts of interest, as addressed above in subsection 5.2.11, the Supreme Court and other Canadian courts have firmly established that, again at least for government employees, strong rules and high standards are not only constitutional, they are necessary in order to have government integrity. To summarize the Court's rulings in this area in chronological order, the Court in 1985 in *Fraser* ruled that:

"A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints"¹¹⁴⁵

The Federal Court of Appeal in 1987 in *Threader* ruled that:

"The Crown is quite entitled to demand different standards of its employees than those prevailing in the private sector. It is not only entitled in law to enjoin its servants from putting themselves in a position of an apparent conflict of interest; the rationale for its doing so is patently obvious."¹¹⁴⁶

The Court ruled in 1996 in *Harvey* that "the integrity of the electoral process" is "at the heart of a free and democratic society"¹¹⁴⁷ and that "such an objective is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic

¹¹⁴⁵ *Fraser* (1985), *supra* note 1074, at para. 43.

¹¹⁴⁶ *Threader v. Canada (Treasury Board)*, 1986 CanLII 6861 (FCA), [1987] 1 FC 41, <<https://canlii.ca/t/jqt59>>, at para. 15 (page 53).

¹¹⁴⁷ *Harvey* (1996), *supra* note 37, at para. 19.

society”¹¹⁴⁸ and that, as cited above in subsection 5.2.11, “If democracies are to survive, they must insist upon the integrity of those who seek and hold public office.”¹¹⁴⁹ And the Court ruled in 1996 in *R. v. Hinchey*:

“given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.”¹¹⁵⁰

As a result of these precedents, all that would have to happen in order for the Supreme Court to uphold the stronger, higher standards that I have proposed for all political actors is for the Court to accept that not only government employees (and, in *Harvey*, candidates who are elected), but also parties, party leaders, party officials, EDAs, nomination contestants, all candidates, party leadership contestants, Cabinet ministers, their staff and appointees, MPs, Senators and their staff, and lobbyists, must all be held to such standards in order to ensure the public can have full confidence in the integrity of all political processes.

I contend that the likelihood of the Supreme Court upholding the measures as constitutional is increased because the general established approach of the Supreme Court is to defer to Parliament in the area of democracy laws given Parliament is elected by, and accountable to, voters.¹¹⁵¹ As well, I have attempted to design the 20 general standards and the 201 proposed measures, including limits, restrictions and subsidies, so as

¹¹⁴⁸ *Harvey* (1996), *supra* note 37, at para. 38.

¹¹⁴⁹ *Harvey* (1996), *supra* note 37, at para. 61.

¹¹⁵⁰ *R. v. Hinchey*, *supra* note 35, at para. 18.

¹¹⁵¹ *Harper* (2004), *supra* note 10, at 87.

not to favour the two parties that have formed government at the federal level, and also not to favour the opposition parties, other than based on the democratic criterion that one party is supported by more voters than another party and/or the egalitarian criterion that one party deserves to receive a subsidy due to systemic economic disadvantage caused by discrimination or other abuses of fundamental human rights. The measures also do not favour certain election candidates (including incumbents) or nomination race or party leadership race contestants over others, nor certain third parties over others, other than based on the same democratic and egalitarian criteria. As a result, I think the Court would be unlikely to conclude in any case that the measures enacted by Parliament are self-interested and that, therefore, under the principle the Court established in *Sauvé*,¹¹⁵² deference is not due to Parliament's policy choices.

In addition, among the list of 201 measures, I propose five comprehensive studies be undertaken to gather key information needed to ensure that, in the areas of political finance and lobbying, the setting of the levels of limits and restrictions actually ensure equality, and that the setting of levels of various subsidies actually correct inequalities. I also propose measures to require evidence-based assessments of subsidies needed to assist candidates and parties who have faced historical, systemic economic disadvantages. As a result, this extensive evidence and context, along with the evidence that I have presented in chapters 3 and 4, and add to in chapters 6 and 7, concerning the inegalitarian nature of the current federal political

¹¹⁵² *Sauvé*, *supra* note 1115, at para. 15.

finance, ethics and lobbying rules, and how changes would make the rules more egalitarian, would all be available for the Court to take into account when assessing the constitutionality of any of the measures under the justification, proportionality and minimal impairment parts of the *Charter*'s section 1 *Oakes* test.

As well, the Court has clearly concluded in *Harper* that the harm of loss of public confidence in electoral processes satisfies the part of the section 1 test that measures must have pressing and substantial objective¹¹⁵³ and, as set out in subsection 5.2.9 above, the Court and other Canadian courts have also clearly concluded that ensuring that political processes have integrity and appear to have integrity is essential to ensuring public confidence in government integrity, and that is essential to having a democratic system. In other words, integrity not only in elections, but in all political processes, has been well-established by the Court as a pressing and substantial objective, if not an actual constitutional right.

In addition, the Court has also concluded in *Harper* and other cases that loss of public confidence (and other related harms) are very difficult to measure and prove scientifically and that, as a result, courts should use "reasonable apprehension of harm" as the evidentiary standard, and should deploy logic and common sense along with the underlying values and principles of a free and democratic society to evaluate whether legislative measures that are aimed at ensuring public confidence comply with the

¹¹⁵³ *Harper* (2004), *supra* note 10, para. 103.

Charter.¹¹⁵⁴ All of the evidence from the proposed studies, and the evidence from other chapters, and including the evidence from subsection 5.2.12 above about the public's standards and expectations concerning government integrity and undue influence, and other new evidence that could be developed (for example, by conducting surveys of the public) or gathered from ongoing research, I think would provide enough of a basis for the Court to uphold the measures as constitutional because they ensure public confidence in political processes by ensuring the processes have integrity.

With all of this in mind, and with the approach I have outlined above as a framework, the following is a brief summary of how and why the Supreme Court could, and should, uphold as constitutional measures that align with the 19 standards (again, more arguments are presented in chapters 6 and 7 concerning the 201 proposed specific measures). First, would the Court uphold the #1 proposed general standard – namely rules requiring merit-based, voter-driven party registration processes for EDAs, candidates and contestants that are aimed at upholding the constitutional principles of ensuring equal opportunity for equal participation and influence (which is based on section 3 *Charter* rights), and public confidence in integrity of these processes? I think the Court would because this standard so closely aligns with the key egalitarian principles it has established.

Secondly, would the Court uphold the proposed general standard #2 to prohibit, based on the same two objectives, party officials and/or party leaders

¹¹⁵⁴ See summary of these points and cases in: *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 SCR 527, online: <<https://canlii.ca/t/1qsvr>>, paras. 16-23, 25 and 28-29.

choosing the party's election or by-election candidate in an electoral district unless there is no EDA in the district? As detailed in Chapter 3, section 3.20, and discussed in section 5.3 above and also Chapter 6, sections 6.2 and 6.8, parties receive various public subsidies, and they also act in a very public role as gateways, and gatekeepers, for individuals who want to enter and participate in politics, legislatures and government, including sometimes elected a Prime Minister directly if there is a party leadership contest in between elections. These are all strong reasons to regulate parties to ensure their internal processes comply with the egalitarian model.

In addition to parties' public role and subsidies, the fact that there is evidence of extensive problems with party headquarters controlling EDAs and appointing candidates, and thereby overriding the wishes of party members (see details in Chapter 6, sections 6.2 to 6.4), and that the open-democracy approach entails empowering voters to make these choices as opposed to party leaders and executives, are compelling reasons for the Court to uphold greater regulations of parties' internal operations. As well, the barriers that this control by party headquarters creates to people exercising their *Charter* section 3 right to run for office, and overall that these proposed regulations for parties align with the principle of democracy that underlies Canada's *Constitution*, I contend would lead the Court to uphold such requirements.

The Court has already upheld restrictions concerning the financial part of internal party processes based on these same objectives. As a result, if Parliament, and the parties represented in Parliament, decided to regulate their own processes in these ways, it seems likely that the Court would also

defer and uphold these further regulations. Canadian courts have only deferred to and protected internal party processes in past cases because Parliament has not yet regulated those processes and, as a result, the courts have only been confirming that parties are legally private clubs with the right to determine their own processes.

Third, for similar reasons I think the Court would also uphold the general standard #3 that proposes empowering Elections Canada to run nomination and party leadership contests, again based on the same two objectives, given the extensive evidence of problems with these contests that have resulted in contests being unfair, contestants being prohibited from running, and overall the contests favouring wealthy, white men (see details in Chapter 6, section 6.4). Also due to extensive past problems, and for the objective of ensuring integrity and public confidence, I think the Court would uphold a decision by the parties to enact proposed standard #12 to empower Elections Canada to do all the auditing of the finances for all political actors.

Fourth, also based on these same two objectives, general standard #4 to limit all contributions and loans to a level that a low-income vulnerable voter can afford is also based on clear evidence that the current, much-higher limit allows for some voters to use money to gain access to, and influence over, policy-makers, and also that even small gifts and favours have influence, and larger gifts larger influence over decisions. The #4 standard is also based on the facts that the average median annual contribution by voters to parties is only \$75, much lower than the 2023 annual limit of \$1,700 to each party (plus another \$1,700 to the EDAs of each party, plus another \$1,700 to the

leadership contestants of each party that has a contest that year), and that donors who donate the most are benefitting mostly from the tax deduction for donations. As well, the current limits, especially the prohibition on business and other organization donations, can be legally overridden by unlimited loans from financial institutions, and effectively unlimited credit from other businesses and organizations for up to three years for provision of products and services, and can relatively easily be illegally overridden by businesses and other organizations to provide significant contributions by funnelling maximum donations through executives or employees and their family members. For all these reasons, I think the Court would uphold a much stricter limit on donations and loans.

I think it is not quite as sure that the Court would uphold proposed standard #5 to only allow donations and loans to EDAs and local candidates from voters in the jurisdiction. The idea is to ensure that voters in an electoral district are determining in every way who is chosen to represent them, both by controlling the voting process (as addressed above by proposed standards #1 and 2) and by controlling the funding of candidates. The idea behind standard #5 is also to ensure that candidates and the EDA represent the interests of voters in the district and not outside interests.

Related to this is proposed standard #6 to require parties to share a portion of each donation that comes from a voter in a district with the district's EDA and/or candidate's campaign (during an election campaign period). This change, I think, would likely help win the Court's support for change #5 as it would acknowledge that EDAs are part of parties and that sharing donations

makes sense, and that calculating the sharing proportions based on voter's expression of support as opposed to the whim of party executives complies much more with the egalitarian model.

Again, the Court may defer given it would be parties in Parliament deciding to impose these measures on themselves (assuming that all parties in Parliament supported the measures as opposed to the ruling party using its majority to push the changes through). In any case however, the Court could view that a low donation limit is enough to ensure that EDAs and candidates represent their voters, as contributions from outside the district would likely not amount to much money in most cases. The other effect of proposed prohibition #5 is that it would prohibit parties from transferring funds raised across Canada EDAs and candidates in areas where few or no voters supported the party. If a new party was starting up and challenged the provisions because it was raising money in only one or a few parts of the country and wanted to shift funds to other new EDAs to help them start up in other parts of the country, the Court may view the prohibition on transferring funds as a too-high barrier to new parties. As well, the Court may accept an argument that parties are one organization, and so shifting funds within that organization as the party executive feels is best suited to advance the party's objectives is something protected by the *Charter* subsection 2(d) freedom of association right.

Proposed general standard #7, spending limits for all political actors based on their actual level of support, with no more than 10 percent variation for individuals or entities that have the same number of voter supporters, if the

limits are based on an actual assessment of the costs of providing adequate information to voters, should be upheld by the Court because such limits align entirely with the egalitarian model, and also with the constitutional principle of democracy (see details in Chapter 6, section 6.6). Colin Feasby argued that, as happened in the U.S., donation limits could remove reasons for Canadian courts to uphold spending limits as constitutional, given the donation limits reduce the likelihood of money having undue influence, let alone corrupting, policy-making processes.¹¹⁵⁵

However, even with a low donation limit of \$75, there could still be disparities in the amount of funding parties with equal numbers of supporters raise – one party’s donors could all donate \$75 while another party’s donors donate on average only \$10. Spending limits based on the number of voters that support each party would equalize the funding actually available to each party for campaigning in an egalitarian way.¹¹⁵⁶ Related proposed standard #8, public funding and subsidies to address structural inequalities caused by past and ongoing discrimination, and economic disadvantage, but still based on actual level of voter support, would also help equalize the amount of funding available to candidates, contestants and parties that have similar numbers of supporters (see details in Chapter 6, sections 6.8 and 6.16). This approach is different than what Parliament has done in the past, and different from what the Supreme Court upheld in *Harper* and the Ontario Court of

¹¹⁵⁵ Feasby (2007), *supra* note 3, at 561-564.

¹¹⁵⁶ The point that spending limits help ensure parity of parties’ resources was made generally, without reference to the specific proposal of setting limits based on actual level of voter support, in: Feasby (2007), *supra* note 3, at 563-564.

Appeal upheld in *Longley* in terms of subsidies. But, as I argue in Chapter 2 re: the *Figueroa* and *Longley* cases, and in section 3.27, and sections 6.6 to 6.8, 6.12 and 6.13, blanket spending limits, and prohibitions on subsidies for smaller parties, are clearly not egalitarian as they are based on the principle that some voters voices are more valuable than others, and so they should be allowed to spend more (if they have the money, even if they are not supported by more voters) and the parties they support should be subsidized more.¹¹⁵⁷ Making spending limits and public subsidies more egalitarian should make it more likely that the Court will uphold the measures as constitutional.

Also related is proposed standard #9, that additional public funding and subsidies should be provided only if it can be proven that contestants, candidates and parties need them in order to inform voters and operate effectively. If this funding and these subsidies and given based only on actual level of public support, I think they would also be upheld for the same reasons as set out above.

Proposed standard #10, providing access to media and social media in ways that ensure substantive equality of opportunity for all voters to participate in and influence political processes is, as detailed in Chapter 3, sections 3.20 and 3.31, and Chapter 6, sections 6.8 and 6.16, aimed like other public subsidies at ensuring access is based on the actual level of voter support for a candidate, party or third party, taking into account systemic disadvantages such as discrimination and economic hardship due to discrimination that may have the effect of lowering support. As a result, as

¹¹⁵⁷ This has been called the “two-tier” approach: MacIvor (2002), *supra* note 2, at 491-495.

with other proposed public subsidies, I think the Court would approve of the democratic equality objective of the subsidy, and the egalitarian effect of the subsidy on the increased provision, of information to voters by political actors of varying economic means through the airwaves which are owned by the public. Providing this access on this basis would also comply with the egalitarian objective of ensuring public confidence in political processes, as without this subsidy only wealthy parties and wealthy interests would have access to the airwaves which could leave the impression that the process favours them.

The final proposed standard #11 in the area of political finance (standard #12 is discussed further above), namely requirements that all political actors disclose contributions and spending before voting begins, clearly complies with the egalitarian model's objective of informing voters so they can make informed choices in political processes. It is one of the nine inconsistencies in the application of the model by the Supreme Court (and other courts), I contend, that the Court has not ruled that disclosure requirements must be changed, in order to be upheld as constitutional, by requiring pre-voting disclosure. Disclosure currently is only required months or, in some cases, years after voters are required to cast a ballot or express themselves in a policy-making process, which means key information is denied to them that they need to make an informed choice.

As for the four proposed general standards in the area of public official ethics and gifts, standard #1 is that all officials should be required to avoid even an appearance of a conflict of interest. I have already discussed above

why this requirement is key to ensuring public confidence, and equal opportunity for equal participation and influence. Proposed standard #2 is that, as with donations and loans, limits on gifts, benefits and favours should be set at a level that a low-income voter can afford, for the same reasons of not allowing money to be used as a means to have unethical influence in order to ensure equality of influence, and to ensure the public can have confidence in the integrity of policy-making processes.

Proposed standard #3 is, again as with donations and loans, that full, timely disclosure of gifts, benefits and favours should be required to give voters key information and ensure integrity. Based on the same reasons as set out in the corresponding rules in the area of political finance, I contend that the Supreme Court should, and would, find these standards to be constitutional under section 1. I also contend that the Court would likely not even find that participating in decisions when in an apparent conflict of interest, and the provision of gifts, benefits and favours, are protected under subsections 2(b) or (d) of the *Charter* (although they could possibly fall under freedom of association rights), and so an exception under section 1 may not even be needed if such requirements were ever challenged in court.

The final proposed standard #4 in the area of public official ethics and gift giving, removing from party leaders the power to promote and demote MPs (other than the Prime Minister's power to name Cabinet ministers from amongst the ruling party's MPs), and restricting party-switching by MPs in between elections except for substantive reasons, are more likely to be rejected by the Supreme Court. Both provisions would merit some deference

from the Court, as they would not favour one party over another, and are aimed at ensuring that MPs represent the voters who elected them, and not allowing one person (a party leader) . However, the Court may defer in another way, namely to the prerogatives and privileges of party leaders and MPs under the constitutional principle of parliamentary sovereignty to run Parliament and their parliamentary party caucuses as they see fit.

For the final three general standards of the 19 overall standards I am proposing, which cover the area of lobbying transparency and ethics, standard #1 is, as with public official ethics, that all lobbyists must be prohibited from lobbying when there is an apparent conflict of interest and from lobbying in improper ways. Standard #2 is, also as with official ethics, and also political finance, requiring full transparency of lobbying activities and spending and sources of funding, to inform voters and protect integrity so voters can have confidence. And standard #3 is, as in the area of political finance, ensuring through various measures that there is substantive equality of opportunity for substantively equal participation in policy-making processes, based on actual level of voter support. In conclusion, based on the same reasons as set out in the corresponding rules in the areas of political finance and public official's ethics, I contend that the Supreme Court should, and would, find these standards to be constitutional under section 1.

6. Proposals for changes to Canada's political finance system to fulfill a more egalitarian model

Based on the list of general principles and standards set out at the end of Chapter 5, and the international standards and other evidence and arguments I set out in Chapter 5 and previous chapters in support of those principles and standards, in this chapter I expand on and provide proposals for specific changes to the current rules in the areas of registration, donation and loan, spending, public subsidies and disclosure (including auditing) to make Canada's political finance system more egalitarian. These are only proposals – based on the information I have gathered, and options I have considered – not proofs beyond any reasonable doubt. In some areas I make more definite proposals, in other areas the proposals are more conditional, and in some areas I raise questions that need to be answered before specific changes could be developed and implemented.

I also summarize briefly the arguments set out in previous chapters that are the basis for my suggested changes, add to those arguments reasons why the changes comply with the *Charter* and other constitutional provisions, and provide examples from other jurisdictions that have implemented similar changes. I also summarize which rules in each area already, I contend, comply with fully egalitarian principles. It should be noted that, although I use terms “election” or “elections” throughout this chapter, all of the proposed changes to the current rules that I suggest should also be applied to by-elections in electoral districts held between general elections. Finally, as I have mentioned in previous chapters, enforcement of the suggested rules is

key to actually changing practices, and the culture, of political finance in Canada. However, the proposals below only focus on changes to the rules, and in section 6.15 below only the basic enforcement mechanisms of disclosure and auditing are covered.

6.1. More egalitarian election dates and schedules

As mentioned in several sections below in this chapter in which I suggest changes, one systemic difficulty at the federal level in Canada with ensuring fair, open processes for the registration of parties, and also for nomination contests and elections overall in terms of leaving adequate time for potential participants to plan and raise funds to support their participation, is that unannounced “snap” elections are allowed to be called by the Governor General on the advice of the Prime Minister. Calling a snap election is allowed despite the fact that provisions were added to the *CEA* in 2007,¹¹⁵⁸ and have also been added to the election statute in every province and territory, fixing election dates on a specific date every four years. In their wisdom, courts have ruled in four cases (one of which was still being appealed as of May 20, 2023) that the provisions do not prohibit the Prime Minister at the federal level, or a premier, from calling a snap election.¹¹⁵⁹

¹¹⁵⁸ *CEA*, *supra* note 79, section 56.1.

¹¹⁵⁹ The first case re: the federal fixed election date provision was *Conacher v. Canada (Prime Minister)*, 2009 FC 920, *aff'd* 2010 FCA 131, leave to appeal *ref'd*. Courts in three provinces have also ruled that snap elections are still allowed: Alberta – *Engel v. Alberta (Executive Council)*, 2019 ABQB 490, *aff'd* 2020 ABCA 462, leave to appeal *ref'd*, and; B.C. – *Democracy Watch v British Columbia (Lieutenant Governor)*, 2022 BCSC 1037 (CanLII) (appealed to BCCA, July 21, 2022). A second federal case is also proceeding through the federal courts: *Democracy Watch v. Canada (Prime Minister)*, 2022 FC 239 (CanLII) (granting motion to strike to respondent – appealed to FCA, March 4, 2022).

In one other fixed election case, the New Brunswick Court of Appeal (NBCA) did reject the lower court's ruling, but concluded only that the fixed election date provision prohibits only one type of snap election call, when the call is "driven by purely partisan electoral advantage" – and, in any case, the provincial government soon introduced legislation to change the statute so that the NBCA's ruling likely would not apply to any future snap election call.¹¹⁶⁰ The NBCA's ruling would have only helped somewhat to restrict snap election calls in New Brunswick because, while snap election calls often seem to happen when it best suits the ruling party,¹¹⁶¹ this will be difficult to prove in court, especially if the Premier offers another reason when calling the election.

When a snap election is called, the time period available for nomination contests is usually squeezed into only two to three weeks because election campaign periods are required to be between 36-50 days long¹¹⁶² (but are usually between 36-40 days long), and the closing day of nominations is 21 days before election day.¹¹⁶³ Even for a ruling party with a majority of, for example, 180 of the 338 seats in the House of Commons with all 180 MPs running for re-election, a snap election means that it could be in the position of having to find and nominate 158 additional election candidates in a very

¹¹⁶⁰ *Democracy Watch v. The Premier of New Brunswick et al*, 2022 NBCA 21. The lower court ruling is: *Democracy Watch v. The Premier of New Brunswick et al*, 2021 NBQB 233. Jacques Poitras, "N.B. legislature to close loophole in fixed-date election law after court ruling," (March 24, 2023), CBC.ca, online: <<https://www.cbc.ca/lite/story/1.6852443>>.

¹¹⁶¹ See a recommendation to fix election dates as a check on the power of the Prime Minister (and, by extension, premiers) in: Herman Bakvis, "Prime Minister and Cabinet in Canada: An Autocracy in Need of Reform?" (2001), Vol.35 (4), *Journal of Canadian Studies* 60 at 75-76 (hereinafter "Bakvis (2001)").

¹¹⁶² CEA, *supra* note 79, clause 57(1.2)(c).

¹¹⁶³ CEA, *supra* note 79, section 69.

short time period. As well, those candidates must find campaign managers, secure funds for their campaign, and recruit volunteers, all of whom have little time to make arrangements in their own lives to volunteer. All of the parties must also secure campaign managers, funding and other resources (e.g. transportation for the leader to tour the country) for their campaigns, as well as develop communications materials, including advertising, and arrange and purchase broadcast time for election advertising.

In addition, the short-time period makes it very difficult for anyone to mount a nomination challenge to any incumbent MP who wants to run for re-election. In fact, under rule 18 of the Liberal Party of Canada's rules for selecting candidates, the National Campaign Chair can invoke "electoral urgency" which gives them the power to change any of the nomination contest rules in any EDA.¹¹⁶⁴ Any of these factors caused by the short nomination time period after a snap election call can undermine equality of opportunity for equal participation in elections. Further, even if a party is successful in nominating a full slate of candidates after a snap election is called, the 21-day period after nominations are closed is a very short time period for candidates and parties to inform voters, and for voters to become informed about candidates and party platforms, especially if any election campaign period is only 36 days total.

For these reasons, I contend that fixed election dates, and longer election campaign periods, comply overall more fully with the egalitarian

¹¹⁶⁴ Liberal Party of Canada, *National Rules for the Selection of Candidates*, online: <<https://liberal.ca/wp-content/uploads/sites/292/2020/10/National-Nomination-Rules.pdf>> at 21 (hereinafter "Liberal Candidate Selection Rules").

model. Fixed date elections give ample advance notice not just to all the political parties, but also to anyone who wants to run (including independent candidates), work on a campaign, volunteer and even to vote so that they can plan and schedule their lives to make their participation more possible. A fixed election date also fixes a pre-election period during which spending and advertising can be regulated, including prohibiting government advertising that is partisan in favour of the ruling party, and prohibiting travel and announcements and re-announcements by Cabinet ministers that the public pays for even though they are aimed mainly at promoting the ruling party.

Election dates cannot be fully fixed in Canada's Westminster parliamentary system, given the confidence and responsible government conventions operate to essentially require the calling of an election if a government loses a vote of confidence in the legislature and no other party can show that it has the confidence of the legislature. As a result, I make the following overall proposals for fixing election dates as much as possible and to give reasonable notice if a snap election is going to be called, as the United Kingdom enacted in 2011,¹¹⁶⁵ and for extending election campaign periods a bit longer to give everyone more time to prepare, participate and become informed before election day:

¹¹⁶⁵ The UK law allowed for an early "snap" election to be called if two-thirds of MPs approved it, or if a vote of non-confidence occurred and was not reversed within 14 days. The law was repealed in March 2022 as the British Prime Minister Boris Johnson wanted full control back over the calling of elections. House of Commons Library, "The Fixed-term Parliaments Act," (January 14, 2020), online: <<https://commonslibrary.parliament.uk/the-fixed-term-parliaments-act/>>. House of Commons Library, "Dissolution and Calling of Parliament Act 2022: Progress through Parliament," (March 28, 2022), online: <<https://commonslibrary.parliament.uk/research-briefings/cbp-9308/>>.

Proposal 1: Fix election dates as much as possible

To give ample advance notice of elections in order to increase equality of opportunity to participate as a candidate or volunteer, section 56.1 of the *CEA* should be changed to fix the election date for every four years, explicitly only allowing the Prime Minister to advise the Governor General to call an early election if a majority of the members of the legislature votes in favour of a motion that states simply that the legislature does not have confidence in the government, and a majority of members of the legislature do not vote to reverse that motion within three weeks after it is first approved.

Proposal 2: Increase the length of the election campaign period

The *CEA* should be changed to set 46 days as the minimum length, and 56 days as the maximum length, of the election campaign period, with the close of nominations 28 days before election day.

These changes would mean that, even if a snap election is called, a time period of at least six weeks would be available for holding nomination contests (double or triple the current time period), and likely eight to nine weeks would be available as some advance public notification of the introduction and potential passing of a motion of non-confidence would likely be given, and the motion would be debated for some time period before it was approved.

6.2. More egalitarian registration and operation of political parties

As identified in Chapter 3, subsection 3.3, the only barrier to parties registering that does not comply with an egalitarian model is that a Prime Minister could call a snap election to thwart a new, popular party registering in

time to run candidates in an election, and that would also prevent the party from registering until a by-election or the next election occurred. As a result, I suggest the following change to the current rules:

Proposal 3: Faster party registration process

The CEA requirement for new parties to register 60 days before an election campaign period begins¹¹⁶⁶ should be changed to ensure that if an application is filed any time before a snap election is called, the party will have the right to run candidates in the election, and Elections Canada will process the application quickly to ensure the party has that right (assuming, of course, that the party files accurate and complete registration forms).

In addition, as many contend, parties play an important role in Canada's democratic system. Using various processes they select election candidates, and essentially only the candidates they select have a chance of winning office, as only one or two independent candidates win in any election cycle.¹¹⁶⁷ They also select leaders who have extensive powers to influence the direction of public policies and who, after a ruling party leadership contest, automatically become Prime Minister. The candidates become MPs who, through parliamentary decision-making processes, make and change the laws of the nation.

As a result, allowing them to operate undemocratically in any way can undermine the public's confidence in the fairness and integrity of the system, which can reduce participation in parties and policy-making processes,

¹¹⁶⁶ CEA, *supra* note 79, section 390.

¹¹⁶⁷ Lisa Young and William Cross, "Candidate Recruitment in Canada," in Amanda Bittner and Royce Koop, eds., *Parties, elections, and the future of Canadian politics* (Vancouver, BC: UBC Press, 2013) 24 at 25 (hereinafter "Young and Cross (2013)").

thereby also reducing the equality of opportunity for equality of participation, and also the level of informed voters. As some of the international standards summarized in Chapter 5 establish, requiring internal party democracy is one key part of ensuring equal opportunity and fair treatment of voters and prospective candidates. Justice LeBel in the Supreme Court of Canada's ruling in *Figueroa* also endorsed the view that parties are central to our system, and also suggested that regulations are needed commensurate with their role.¹¹⁶⁸

However, under the *CEA* parties are regulated only in terms of their registration and finances (contribution limits, loan and other debt regulations, disclosure and auditing), and under current case law in Canada parties are private clubs immune from review by the courts of rejections of contestants and candidates as long as their internal qualification rules are clear and the review process is at least somewhat procedurally fair (including being in compliance with the rules).¹¹⁶⁹ I agree with those who argue, on the basis of the many important public functions of parties, for more regulation of the operations of parties.¹¹⁷⁰ I also think that, given that further regulation would align with the principles of the egalitarian model, the courts would allow it under section 1 of the Charter even though it would restrict freedom of

¹¹⁶⁸ *Figueroa*, *supra* note 133, paras. 138-143. See also: R. Kenneth Carty and Lisa Young, "The Lortie Commission and the Place of Political Parties as Agents of Responsible Government," in Herman Bakvis and Mark D. Jarvis, eds. *From New Public Management to New Political Governance: Essays in Honour of Peter C. Aucoin* (McGill-Queen's University Press: 2012) 105.

¹¹⁶⁹ *Karahalios*; *Graff*, and; *Arsenault*, *supra* note 246.

¹¹⁷⁰ See, for example: Cross and Crysler (2011), *supra* note 345, at 168-169; Seidle (2011), *supra* note 429. Terry D. Hancock, "Blood Sport": The Struggle for Political Party Transparency in Ontario," (July 2020), 14 *Journal of Parliamentary and Political Law* 367. Gauja (2022), *supra* note 1126.

association rights. As a result, I make the following general proposal which I expand upon with other more specific proposals further below:

Proposal 4: More regulation of internal party democracy

In the *CEA*, the party registration process, and overall requirements for parties, should include requirements for parties' internal operations to use fair, democratic and accountable rules and processes, and more oversight by Elections Canada.

6.3. More egalitarian registration of electoral district associations

From the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5, the following three relate to the area of registration of nomination contestants, candidates and party leadership contestants as addressed in this section and section 6.4:

1. Rules-based, as opposed to party- and party leader-controlled, registration of electoral district associations (EDAs), nomination contestants, election candidates and party leadership contestants (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
2. Only allowing party officials and/or party leaders to choose the party's election or by-election candidate in an electoral district when there is no EDA in the district (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
3. Having Elections Canada run nomination contests and party leadership contests for all parties and contestants, in the same way it currently runs elections and by-elections for all parties and candidates (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity).

As outlined in Chapter 3, subsection 3.4, to register an electoral district association (EDA) is required to file various documents identifying the executive of the EDA, along with a statement from the party leader, with the CEO certifying that the association is the party's association.¹¹⁷¹ This system allows a party leader and his/her executive to install loyal members as the executives of every new EDA. Given the egalitarian model is based on political equality of all citizens, it does not comply with the model to allow a party leader and/or executive to determine who shall represent the local members of the party in the local EDA.

Proposal 5: Require more members to establish an EDA

Change the *CEA* to require that a specific minimum number of voters must sign with a new EDA, and a vote run by Elections Canada in which the members vote on who will be the first executive members of the EDA, and that the vote is binding on the party leader to accept the association and executive into the party.

Under the *CEA*, the party leader and two officers of the party can, other than during an election, have the association deregistered simply by filing an application with the CEO.¹¹⁷² This gives the party leader and executive more power to control the association than voters in the district have, which is not egalitarian. Nor is it ethical as it creates a conflict of interest for the party leader when making decisions concerning MPs from associations, or associations themselves, that may be challenging the leader or executive in some way.

¹¹⁷¹ *CEA*, *supra* note 79, clause 448(2)(c).

¹¹⁷² *CEA*, *supra* note 79, subsections 467(2) and (3), and 470-471.

Federal Canadian political parties have discussions internally regularly concerning the party's position on any issue, including through formal policy conventions where proposals are put forward by the party's caucuses, wings and associations, voted on by party members or delegates to the convention, and adopted or rejected based usually on a simple majority vote (50 percent plus one). As well, the parties all have leadership contests in which usually more than one candidate runs, with a ranked ballot system often used to determine the winner, often after more than one round of voting.

These party processes allow competing positions on issues, and for direct public dissent, even by 49 percent of party members. What, therefore, is the purpose of allowing the leader and the executive to have sole control over whether a district association exists? If it is to quell dissent, that contradicts the regular tolerance of high levels of dissent in other party processes. And, even if it isn't to quell dissent, the threat of deregistration by the leader or executive could silence opposing voices, which goes against the egalitarian principle of equal participation.

The main federal parties usually have district associations registered in each district, so the main threat of a party leader abusing his/her power is deregistration of the existing association. I suggest two possible constructive solutions for making this part of the system more egalitarian.

Proposal 6: Restrict leader/executive power to deregister EDA

The *CEA* should be changed to allow party leaders and/or executives to deregister an EDA only if the EDA violates the requirement of expressing dissent concerning party policies and actions through the party's internal processes. Party leaders and/or executives should be

prohibited from deregistering an EDA if the EDA has blown the whistle on wrongdoing by anyone in the party (and the federal whistleblower protection system should be extended to cover parties and EDAs).

Making this change would not remove but instead just restricts the party leader's and executive's power by requiring parties to set specific conditions under which an association could be deregistered, to establish specific internal avenues of dissent in between policy conventions and leadership contests, and to extend the federal whistleblower protection law to cover parties. A party could require all its associations to dissent from the party's policies on any issue only through the established internal process or processes through which the party decides its policy positions and operating procedures. This would allow for constructive dissent on these positions and procedures while protecting the leader and executive from public attacks from people, including people who are loyal to other parties, who may join a party with the sole aim of undermining the party's capacity to function or undermining the leader.

Whistleblowing as a form of dissent from the party leader or executive should not, I contend, be addressed in the same way because of the conflicts of interest inherent in complaint review systems that are internally controlled when wrongdoing is being investigated. Best practice whistleblower protection requires that the complaint investigator and tribunal must be fully independent from the people being investigated for alleged wrongdoing. This is not to say that the current federal whistleblower protection system is fully independent or effective. A House of Commons committee unanimously

recommended in June 2017 several changes needed to make the system effective.¹¹⁷³

However, I contend that it is better to have the parties covered by the federal law than to allow them to hire their own whistleblower protection investigators on an ad hoc basis because, again, the investigators could easily be in a situation of working for people who are involved in the alleged wrongdoing or have relationships or connections to the people being investigated. With these two review systems in place, one for constructive dissent on policy and procedure, the other for reporting wrongdoing, and a blanket protection from being deregistered by the party leader or executive as long as they use these systems for expressing dissent, members of electoral district associations would have more assurances that they have a clear right to equality of opportunity for participation in, and influence, over their party.

Proposal 7: Require member approval for EDA deregistration

Change the *CEA* to require a petition signed by a certain percentage of the local members of the EDA (something like 20 percent) in order for a deregistration vote to be held, and then a vote scheduled at least 30 days in advance and approved by a majority of registered EDA members to deregister, with the process operated by Elections Canada and (as in elections) prohibitions on anyone offering incentives or disincentives to voting one way or another.

A second way to make the district association registration system more egalitarian and fairer is to require a vote by the local members of the

¹¹⁷³ House of Commons Standing Committee on Government Operations and Estimates, *Strengthening the Protection of the Public Interest Within the Public Servants Disclosure Protection Act*, (June 2017), online: <<https://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/>>.

association concerning deregistration. Requiring this vote would effectively remove the party leader's and executive's power, except to the extent that they could persuade members of the association to vote in favour of deregistration. In order to ensure a free and fair vote, the provisions in the *CEA* that prohibit voting without being qualified to vote, and prohibit the leader or executive or anyone else offering any kind of incentive or benefit to the members or making false claims in order to induce voting one way or another, should be adapted and apply to deregistration votes.¹¹⁷⁴

As well, using party staff or resources to organize in favour of or against deregistration should be prohibited. To prevent anyone from inducing "instant" new members to show up last minute to vote for de-registration, advanced registration to vote on the motion to deregister should also be required. Finally, again to guard against self-dealing and conflicts of interest, Elections Canada should be mandated to run these voting processes.

6.4. More egalitarian registration of contestants and candidates

As detailed in Chapter 3, subsections 3.5 to 3.7, federal Canadian nomination contests (which choose election candidates for each party's EDAs) and party leadership contests are largely regulated and overseen by political parties, and various party rules and practices are not egalitarian, including in the area of registration of nomination contestants, election candidates and party leadership contestants. This section explores this area and suggests, based on egalitarian principles, international standards, and the

¹¹⁷⁴ *CEA*, *supra* note 79, sections 91-92, and 281 to 282.8.

rules and practices in other jurisdictions, changes to Canada's rules to make the registration process more egalitarian.

6.4.1. More egalitarian nomination contest and candidate registration

A study published in 2019 that covered 2004 to 2015 found that the candidate was appointed in just under 41 percent of EDAs, and in 70 percent of EDAs there was only one nomination contestant.¹¹⁷⁵ There have also been numerous disputes in federal parties over the years concerning the favouring of one or another nomination contestant or the outright appointment of one contestant as the election candidate or the protection of incumbent MPs from being challenged for the nomination in the next election, and also concerning the favouring of one or another party leadership contestant.¹¹⁷⁶

¹¹⁷⁵ Samara, *Party Favours* (2019), *supra* note 231.

¹¹⁷⁶ See examples in Chapter 3, section 3.7 re: party leadership contest disputes. See re: nomination races, for example: Caroline Alphonso and Jeff Sallot, "Liberals miffed at Ignatieff candidacy," (November 28, 2005), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/national/liberals-miffed-by-ignatieffs-candidacy/article1131539/>>. Steven Chase, "Sitting Tories to be automatically renominated," (May 5, 2009), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/sitting-tories-to-be-automatically-renominated/article1364942/>>. Royce Koop and Amanda Bittner, "Parachuted into Parliament: Candidate Nomination, Appointed Candidates, and Legislative Roles in Canada," (2011) Vol. 21(4) *Journal of Elections, Public Opinion and Parties* 431. Josh Wingrove, "Resignation of top Conservative gives hope to blocked candidates," (March 31, 2014), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/resignation-of-top-conservative-gives-hope-to-blocked-candidates/article17743978/>>. Susan Delacourt, "Christine Innes fighting back against Trudeau," (April 3, 2014) *Toronto Star*, online: <https://www.thestar.com/news/canada/2014/04/03/christine_innes_fighting_back_against_trudeau.html>. Craig Offman, "Federal Liberals cultivate Mandarin powerhouse in GTA," (August 18, 2014), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/politics/federal-liberals-cultivate-mandarin-powerhouse-in-gta/article20104666/>>. CBC News, "Andrew Leslie's Liberal nomination win draws protest," (Dec. 8, 2014), online: <<https://www.cbc.ca/news/canada/ottawa/andrew-leslie-s-liberal-nomination-win-draws-protest-1.2864099>>. Glen McGregor, "Bertschi sues top Liberals after nomination squabble," (Feb. 24, 2015) *Ottawa Citizen*, online: <<https://ottawacitizen.com/news/politics/bertschi-sues-top-liberals-after-nomination-squabble>>. Royce Koop, "Who Selects Candidates? Candidate Nomination in Canadian Parties," (Spring 2015) 2015 *Journal of Parliamentary and Political Law* 145. CBC News, "Federal Liberal members in eastern Quebec quit party to join NDP," (August 4, 2015), online:

The contestants who lose due to a candidate being appointed or unfair treatment by the party or association have no legal rights under the *CEA* to overturn the contest results. The courts have rejected claims by contestants that their *Charter* rights were violated on the basis that parties are private organizations and so not subject to the *Charter*,¹¹⁷⁷ nor to judicial review¹¹⁷⁸ unless the party does not have internal procedural protections, or if that procedure is covered by another statute, such as a statute that regulates arbitrations, that gives a contestant the right to challenge unfairness in the running of a contest.¹¹⁷⁹

If a party or EDA appoints an election candidate or essentially rigs the contest in favour of one contestant in a nomination contest, including by holding the contest very quickly, it amounts to a significant gift/donation to the

<<https://www.cbc.ca/news/canada/montreal/federal-liberal-members-in-eastern-quebec-quit-party-to-join-ndp-1.3179262>>. The Canadian Press, "Liberals settle election nomination lawsuit with Ottawa-area candidate," (June 29, 2016), CTVNews.ca, online: <<https://www.ctvnews.ca/politics/liberals-settle-election-nomination-lawsuit-with-ottawa-area-candidate-1.2967076>>. Scott Pruysers and William Cross, "Candidate Selection in Canada: Local Autonomy, Centralization, and Competing Democratic Norms," (2016) Vol. 60(7) *American Behavioral Scientist* 781 (hereinafter "Pruysers and Cross, *Candidate Selection* (2016)"). The Canadian Press, "Trudeau denies Quebec MP forced out for not lauding him as feminist," (September 25, 2019), GlobalNews.ca, online: <<https://globalnews.ca/news/5950841/trudeau-denies-quebec-mp-forced-out-for-not-lauding-him-as-feminist/>>. Abbas Rana, "Backroom handling of potential Liberal nomination in Kanata-Carleton causing fissures in riding, say riding association members and potential candidates," (August 4, 2021), *Hill Times*, online: <<https://www.hilltimes.com/2021/08/04/backroom-handling-of-potential-liberal-nomination-in-kanata-carleton-causing-fissures-in-riding-say-riding-association-members-and-potential-candidates/310120>>. The Canadian Press, "As Bloc prepares for federal election, infighting grows over candidate selection process," (August 9, 2021), CTVNews.ca, online: <<https://montreal.ctvnews.ca/as-bloc-prepares-for-federal-election-infighting-grows-over-candidate-selection-process-1.5539197>>. Neil Moss, "Supporters irked as parties eschew competition amid tight deadline to fill candidate slots," (August 18, 2021), *Hill Times*, online: <<https://www.hilltimes.com/2021/08/18/supporters-irked-as-parties-eschew-competition-amid-tight-deadline-to-fill-candidate-slots/312236>>.

¹¹⁷⁷ *Galati v. Ontario Liberal Party*, *supra* note 323, paras. 20, 30 and 39.

¹¹⁷⁸ *Knox v. Conservative Party of Canada*, 2007 ABCA 295 (CanLII), *supra* note 232, paras. 20-22, 26-27. *Olumide v. Conservative Party of Canada*, *supra* note 324, paras. 7-8.

¹¹⁷⁹ *Knox* (2007), *supra* note 324, paras. 30-35.

appointee/preferred contestant as it means they are not required to raise funds or devote time and/or resources to the contest. As a result, appointments or barriers that thwart a nomination contest from occurring, or tilt or rig it in favour of one contestant (including by protecting an incumbent MP from being challenged¹¹⁸⁰ or making the contest very short),¹¹⁸¹ violate the egalitarian model's requirements of a relatively equal opportunity to participate equally in an election process, and of ensuring that those with money to donate or spend (or, in this area, the power to reduce the financial burden for a contestant) do not dominate or have undue influence. Allowing parties to operate in this way can also undermine the public's confidence in the fairness and integrity of the system, and reduce participation in parties, thereby reducing the equality of opportunity for equality of participation, all of which does not comply with the egalitarian model.

Arguments can be made that political party leaders and/or the executive of a party should have some say in choosing the party's election candidates. First, studies show that only a very small percentage of voters (between five to 15 percent) cast their ballot based on the local candidate, while the rest vote based on party or party leader.¹¹⁸² Secondly, parties have

¹¹⁸⁰ Samara, *Party Favours* (2019), *supra* note 231 at 22-24.

¹¹⁸¹ Samara, *Party Favours* (2019), *supra* note 231 at 14-16.

¹¹⁸² André Blais, Elisabeth Gidengil, Alexandra Dobrzynska, Neil Nevitte and Richard Nadeau, "Does the local candidate matter? Candidate effects in the Canadian Election of 2000," (2003), 36(3) *Canadian Journal of Political Science* 657. Jason Roy and Christopher Alcantara, "The candidate effect: Does the local candidate matter?" (2015) 25(2) *Journal of Elections, Public Opinion, and Parties* 195. Amanda Bittner, "Leaders always mattered: The persistence of personality in Canadian elections," (August 2018), Vol. 54, *Electoral Studies* 297. Benjamin Allen Stevens, Md Majahedul Islam, Roosmarjin de Gues, Jonah Goldberg, John R. McAndrews, Alex Mierke-Zatwarnicki, Peter John Loewen and Daniel Rubenson, "Local Candidate Effects in Canadian Elections," (2019) Vol. 52(1) *Canadian Journal of Political Science* 83. Semra Sevi, Marco Mendoza Aviña and André Blais, "Reassessing Local

core policies that are supported by a majority of MPs and others involved in the party, and parties also have a legitimate concern about the reputational damage that could be done to the party leader and the party overall if they are associated with candidates who have undertaken highly questionable, let alone illegal or criminal, activities. As a result, parties undertake vetting processes of anyone who wishes to be a nomination contestant or candidate,¹¹⁸³ and control other aspects of their “franchisee” EDAs in a “stratarchical” structure.¹¹⁸⁴

Thirdly, parties have an interest in attracting what they view as “high-profile” candidates whom they think could help them win an election in a district or overall.¹¹⁸⁵ Fourthly, parties may want to ensure that a certain percentage of their candidates are women or racialized or indigenous to help win the election and/or to address systemic barriers to equality of participation, and may want to intervene in a nomination contest to ensure that contestants that are representative of those constituencies are treated fairly in the contest and/or are favoured in the contest.¹¹⁸⁶

Candidate Effects,” (2022) 55 *Canadian Journal of Political Science* 480. All of these studies hereinafter cited as “Party vs. local candidate effects studies”).

¹¹⁸³ Alex Marland and Brooks DeCillia, “Reputation and Brand Management by Political Parties: Party Vetting of Election Candidates in Canada,” (2020) Vol. 32(4) *Journal of Nonprofit & Public Sector Marketing* 342. Alex Marland, “Vetting of Election Candidates by Political Parties: Centralization of Candidate Selection in Canada,” (2021) Vol. 51(4) *American Review of Canadian Studies* 573.

¹¹⁸⁴ Roland Kenneth Carty, “The Politics of Tecumseh Corners: Canadian Political Parties as Franchise Organizations” (2002) Vol. 35(4) *Canadian Journal of Political Science* 723. R. Kenneth Carty, “Parties as Franchise Systems: The Stratarchical Organizational Imperative,” (2004), Vol. 10(1) *Party Politics* 5.

¹¹⁸⁵ Cristine de Clercy, “Recruitment of Star Candidates,” in Alex Marland and Thierry Giasson, eds., *Inside the Local Campaign: Constituency Elections in Canada* (Vancouver: UBC Press, 2022) at 107 (hereinafter “Marland and Giasson (2022)”).

¹¹⁸⁶ Pruyers and Cross, *Candidate Selection* (2016), *supra* note 1176. Samara, *Party Favours* (2019), *supra* note 231 at 21-22 and 24-25. Anna Lennox Esselment and Matthew Bondy, “Local Nominations” in Marland and Giasson (2022) 85, *supra* note 1185.

However, the egalitarian model is based on the relative political equality of all citizens, with only a maximum 10 percent or so variation in the effectiveness of participation amongst various voters permitted. As a result, while it may comply with the democratic norms of the party-democracy model or stratarchical party model (though whether it fully complies is questionable in the areas including candidate selection and policy development),¹¹⁸⁷ it does not fulfill the model to allow one or a few citizens (a party leader or party executive members) to have this exclusive power to grant such a significant favour to a person applying to run for office, or to protect incumbents from being challenged by other contestants. It does not comply with the egalitarian model because it gives them essentially 100 percent of decision-making power and reduces the participation rate by local voters to zero.

As well, as mentioned above, the system should prevent conflicts of interest inherent in having a political party control all the rules, and the enforcement of rules, for the selection of its election candidates, as those conflicts can undermine public confidence in the integrity of election processes, as can lack of transparency in selection processes. For example, the Liberal Party's rules for selecting candidates do not require the National Campaign Chair to disclose the reasons for rejecting anyone wanting to run in a nomination contest (Rules 3.3, 6.10 and 6.14); give the party leader the power to reject a candidate properly chosen by an EDA, in writing but with no

¹¹⁸⁷ R. K. Carty and William Cross, "Can Stratarchically Organized Parties be Democratic? The Canadian Case," (2006), Vol.16 (2) *Journal of Elections, Public Opinion and Parties* 93 at 98-100 (hereinafter "Carty and Cross (2006)"). The article argues that local members at least have major influence in the selection of party leaders (at 102-106), but questions how much power they have in candidate selection (at 106-109) and policy development (109-110).

requirement to provide a reason (Rules 5.2 and 6.11); give the leader the power to appoint a candidate without a nomination meeting (Rule 5.3); give the Chair the power to set the date, time and location of nomination vote meetings (Rule 8.1 and Schedule B) with only 14 days notice (Rule 9.2), and the power to set the date by which a member must join the Party in order to vote in a nomination contest (Rule 9.3), and to choose the Chair, Deputy Chair and Returning Officer for the meeting (Rules 11.1 to 11.3) and to resolve vote count disputes (Rule 14.7).¹¹⁸⁸

The Party's rules also give the leader the power to protect incumbent MPs from nomination challenges (Rule 19.2 and Schedule A); and, as mentioned above in section 6.1, give the Chair the power to invoke "electoral urgency" and change the timelines and rules of all nomination races (Rule 18); and give the Chair the power to change any of the rules at any time without providing reasons (Rule 19.1), and overall give the party the power to resolve any disputes. A systemic difficulty in ensuring fair, open nomination contests is that, even with a fixed election date, resolving disputes can take so long within a party, or through the courts (if that even proves possible) that the subsequent election occurs and the dispute becomes largely moot, with no remedy reversing the damage of being excluded from running as a candidate.¹¹⁸⁹

¹¹⁸⁸ Liberal Candidate Selection Rules, *supra* note 1164 at 2-3, 7, 9, 11, 16, 21-26. See also: Samara, *Party Favours* (2019), *supra* note 231 at 13.

¹¹⁸⁹ See for example: *Singh v. PCPO*, 2018 ONSC 203 (CanLII), <<https://canlii.ca/t/hpvh0>> which illustrates the difficulties of holding anyone accountable if a nomination contest is undermined by unfair actions.

In addition, there is significant evidence that party leaders and executives have not been very proactive or successful in ensuring a demographically representative slate of candidates in past elections and/or have slotted those candidates, whether women or minorities, into districts where their party has little chance of winning.¹¹⁹⁰ For example, a study of the 2015 and 2019 federal elections found that: 52 percent of the candidates were white men (even though they make up only 36 percent of Canada's population); 65% of incumbents running were white men; 74 percent of candidates who ran in a "safe" stronghold district for any party were white men; white male candidates received 10 percent more funding from their parties for their campaigns; after the elections 62 percent of MPs were white men, and; even when the analysis was restricted to only non-incumbent

¹¹⁹⁰ For historical information and perspective, see Lortie Commission, *supra* note 47, at 73-122. See also: Carty and Cross (2006), *supra* note 1187 at 108-109 re: the fact that none of the six main parties that existed at the time came close to nominating a representative number of female candidates in four consecutive elections from 1993 to 2004. Melanee Thomas and Marc André Bodet, "Sacrificial lambs, women candidates, and district competitiveness in Canada," (March 2013), Vol. 32(1) *Electoral Integrity* 153. Benjamin Forest, "Representation of Minority Communities in the Canadian and American Political Systems," (August 2014) 8 *Journal of Parliamentary and Political Law* 453. Samara, *Party Favours* (2019), *supra* note 231 at 18-19 and 24-25. Erin Tolley, "Who You Know: Local Party Presidents and Minority Candidate Emergence," (2019), Vol. 58 *Electoral Studies* 70. CBC Radio, "Running for office? It'll cost all your money, friends and free time," (October 18, 2019), CBC.ca, online: <<https://www.cbc.ca/radio/costofliving/the-cost-of-running-either-for-election-or-a-deficit-1.5323745/running-for-office-it-ll-cost-all-your-money-friends-and-free-time-1.5323781>> (hereinafter "CBC, Running for office? (2019)"). Jerome H. Black, "Visible Minority Candidates and MPs in the 2019 Federal Election," (Summer 2020) Vol. 43(2) *Canadian Parliamentary Review* 17. Erin Tolley, Melanee Thomas and Marc André Bodet, "A New Dataset on the Demographics of Canadian Federal Election Candidates," (2021) Vol. 54(3) *Canadian Journal of Political Science* 717. Jerome H. Black and Andrew Griffith, "Do MPs represent Canada's diversity?" (January 7, 2022), *Policy Options*, online: <<https://policyoptions.irpp.org/magazines/january-2022/do-mps-represent-canadas-diversity/>>. Erin Tolley, "Gender Is Not a Proxy: Race and Intersectionality in Legislative Recruitment," (2022) *Politics and Gender* 1. Erin Tolley, Aneurin Bosley, and Nana aba Duncan, "Still Not There: Diversity and Inclusion in the 2021 Canadian Election Campaign," in Jon H. Pammett and Christopher Dornan, eds., *The Canadian Federal Election of 2021* (Montreal: McGill-Queen's University Press, 2022).

candidates, still white male candidates received more money and ran in party strongholds more than any other category of candidate.¹¹⁹¹

As well, some parties require potential nomination contestants to pay non-refundable registration fees, which is an inequalitarian barrier to becoming a contestant for people with lower incomes. As described above in Chapter 2, section 2.7, in 2017 a court in Alberta struck down the deposit fee for election candidates as a violation of the *Charter* right to run for office, and the deposit fee for being a nomination contestant should also be prohibited.

More open, scheduled, longer contests that give ample advance notice would be more egalitarian. The processes could still allow party leaders and executives to prohibit contestants from running based on legitimate concerns only (such as past illegal or highly questionable activities, or refusal to commit to support core party policies), and allow them continue to play their central role in recruiting contestants,¹¹⁹² including vocally supporting “star” contestants. But the processes could prohibit them from controlling the processes, making arbitrary decisions, or using incentives, disincentives or party resources to help their preferred contestants.

Making the process of nomination contests more egalitarian in and of itself, including in terms of political financing and public subsidies as suggested below in sections 6.4 to 6.6 and 6.8, could make the candidates chosen more demographically representative of the Canadian population. If

¹¹⁹¹ Valérie Ouellet, Naël Shiab and Sylvène Gilchrist, “White men make up a third of Canada's population but a majority of MPs — here's why,” (August 26, 2021), Radio Canada.ca, online: <<https://ici.radio-canada.ca/info/2021/elections-federales/minorites-visibles-diversite-autochtones-racises-candidats-politique/en>>.

¹¹⁹² Young and Cross (2013), *supra* note 1167, at 43-44.

not, as suggested in the proposals below, quotas and other measures to address systemic past and current discrimination and inequality could be implemented, as called for in the international conventions summarized above in Chapter 5.

Further points in support of regulating nomination contests more thoroughly to ensure equality of opportunity are that one of the results of a national survey of 1,000 adult Canadians in November 2014 (which is not recent, but is the only survey I have found on the subject) was that 61 percent of those surveyed supported the position that the views of local party constituent members “should be supreme in determining who represents the party locally” and only 24 percent supported the party leader having the power “to prevent someone from becoming a party candidate in a riding.”¹¹⁹³ The survey was conducted and made public as the House of Commons was considering Bill C-586, the *Reform Act, 2014*,¹¹⁹⁴ a private member bill introduced by Conservative MP Michael Chong that suggested in its initial form, among other changes, giving EDAs the sole power to choose and register election candidates.

However, Conservative MPs did not heed the call of the survey and led the move to change the bill to require parties only to designate someone or some entity to register election candidates.¹¹⁹⁵ As a result, most parties

¹¹⁹³ Nanos, *2014-611 Nanos Survey on Democratic Renewal*, (December 2014), online: <<https://www.yumpu.com/en/document/read/48440680/polnat-s14-t628>> at 2-3 and 7 (hereinafter “Nanos, *Democratic Renewal* (2014)”).

¹¹⁹⁴ LEGISinfo, *Bill C-586: An Act to amend the Canada Elections Act and the Parliament of Canada Act (candidacy and caucus reforms)*, online: <<https://www.parl.ca/LegisInfo/en/bill/41-2/c-586>> (hereinafter “*Reform Act 2014*”).

¹¹⁹⁵ Democracy Watch, “Op-ed: How Conservative MPs changed the Reform Act into the ‘Hope for Reform Act’,” (December 16, 2014), online: <<https://democracywatch.ca/how->

designated the same person who had the power in the past – either the party leader or someone appointed by the leader or an entity like the national executive that is at least somewhat controlled by, or under the influence of, the party leader.

While it did not survey a randomly selected group of Canadians and, as a result, should be viewed with some skepticism, according to a survey conducted in August 2022 of 2,000 adult Canadians, 66 percent are concerned or surprised that Canada ranks 59th in the world in representation of women in Parliament (down from 27th place 20 years ago), 77 percent agree that women face greater criticism than men when running for public office, and 84-86 percent agree that having gender parity in the legislature is good for communities, the economy and effective representation. As well, 35 percent believe parties should be recruiting a set of candidates that represent the diversity of the country's population, and 28 percent believe governments should create policies to ensure legislatures represent that diversity.¹¹⁹⁶

In contrast to Canada's federal system, laws in Finland, Germany, New Zealand, and the U.S. require parties to use democratic processes for the selection of election candidates.¹¹⁹⁷ For example, for more than 100 years in

conservative-mps-changed-the-reform-act-into-the-hope-for-reform-act/>. Democracy Watch, "News Release: Senate should stop playing games on Monday and pass 'Hope for Reform Act'," (June 22, 2015), online: <<https://democracywatch.ca/senate-should-stop-playing-games-on-monday-and-pass-hope-for-reform-act/>>. See also subsection 406(2) of the CEA, *supra* note 79, which contains the new requirement. See also: Paul Geisler, "Will the Reform Act, 2014, Alter the Canadian Phenomenon of Party Discipline," (2015) 38:2 *Man Law Journal* 17. Adrian Pel, "The Reform Act 2014: A Critical Analysis," (2017) 11 *Journal of Parliamentary and Political Law* 177.

¹¹⁹⁶ Abacus Data, *Reaching Gender Parity in Politics: We Still Have Room to Grow*, (September 20, 2022), online: <<https://abacusdata.ca/reaching-gender-parity-in-politics/>>.

¹¹⁹⁷ Gauja (2008), *supra* note 127 at 251-252. Gideon Rahat and William P. Cross, "Political Parties and Candidate Selection," (2018) *Oxford Research Encyclopedia of Politics* (Oxford: Oxford University Press, 2022).

the U.S., each state's election law has set out the rules for parties choosing their candidates for both state and federal public offices (including for President) through "primaries" – partisan primaries for partisan offices are elections in which parties choose their candidate for the general election, with either only members of a party (closed primary) or members and anyone who is unaffiliated with any party (semi-closed primary) or anyone (open primary) voting in the primary (with various vote-counting methods used), and non-partisan primaries are elections to narrow the candidates who will run in the general election for non-partisan elected state offices.¹¹⁹⁸ In addition, 135 countries have required gender quotas for election candidates in their constitution, or in a statute or party rules.¹¹⁹⁹

Based on the international standards set out in Chapter 5, subsection 5.2.6 (especially 5.2.6.2 re: anti-discrimination and equality of opportunity for participation standards), and for all of the reasons set out above, I make the following proposals for making nomination contests more egalitarian by making them more open, equal opportunities for participation, and more

¹¹⁹⁸ Hans J.G. Hassell, *The Party's Primary: Control of Congressional Nominations* (New York: Cambridge University Press, 2017). Ballotpedia, "What kind of primary elections are used in the United States?" online: <https://ballotpedia.org/What_kinds_of_primary_elections_are_used_in_the_United_States>. Clay S. Jenkinson, "Why Does America Have Primaries?" (May 29, 2022) Governing.com, online: <<https://www.governing.com/context/why-does-america-have-primaries>>.

¹¹⁹⁹ International IDEA, Gender Quotas Database: Country Overview, online: <<https://www.idea.int/data-tools/data/gender-quotas/country-overview>>. See also, International Foundation for Electoral Systems (IFES), *Lessons on Gender Equality and Women's Political Participation*, (November 2021), online: <https://www.ifes.org/sites/default/files/election_case_law_analysis_series_part_i_-_gender.pdf>.

transparent and designed to prevent conflicts of interest that undermine the integrity of contests:¹²⁰⁰

Proposal 8: Prohibit protecting incumbents

Given their position gives them built-in advantages in any nomination contest, as being an MP involves, in part, constantly campaigning for re-election on an ongoing basis, the *CEA* should be changed to prohibit parties from protecting incumbents from being challenged in a nomination contest.¹²⁰¹

Proposal 9: Prohibit appointing candidates

The *CEA* should be changed to prohibit a party leader or a party executive council from appointing a candidate in an electoral district unless no one applies to run in a contest to become the district's candidate. As well, the appointed candidates for each party should, overall, reflect the demographic makeup of Canada.¹²⁰²

Proposal 10: Schedule nomination contests with adequate time

The *CEA* should be changed to require that nomination contests be held during a scheduled time period at least six months before a fixed election date, and give at least two months advance notice of when each district's contest will begin to every party member who is in the district and has provided contact information to the party or EDA,¹²⁰³ and set a minimum length of contests (e.g. 30 days), including when a snap election is called.

¹²⁰⁰ See a similar discussion of options, but based more on democratic norms criteria, in Cross, *Political Parties* (2004), *supra* note 3 at 49-75 and 174-177. See also William P. Cross, "Democratic Norms and Party Candidate Selection," (2008) Vol. 14(5) *Party Politics* 596; Gideon Rahat, "Which Candidate Selection Method is the Most Democratic?" (2009) Vol. 44(1), *Government and Opposition* 68, and; Connor Macorin, "Enhancing Canada's Democracy Without Electoral Reform," (2020) 13 *Journal of Parliamentary and Political Law* 309 at 330-333.

¹²⁰¹ Samara, *Party Favours* (2019), *supra* note 231 at 27.

¹²⁰² See similar recommendation in: Samara, *Party Favours* (2019), *supra* note 231 at 28.

¹²⁰³ See similar points and recommendation in Samara, *Party Favours* (2019), *supra* note 231 at 16-17 and 27-28.

Proposal 11: Prohibit requirement to pay registration fee

Some political parties require potential nomination contestants to pay a significant registration fee, which is an inequalitarian barrier to running. As it has been for election candidates, the *CEA* should be changed to prohibit such entrance fees.

Proposal 12: Require support signatures from party members

Requiring potential nomination contestants to obtain a set number of signatures from party members in the district (e.g. one percent of members) in order to qualify as a contestant aligns with the egalitarian model. The *CEA* should be changed to require this.

Proposal 13: Restrict vetting criteria to legitimate concerns

The *CEA* should be changed to prohibit parties from using arbitrary criteria for vetting potential nomination contestants, and to restrict the criteria to legitimate concerns such as past illegal or highly questionable behaviour or refusal to support core party policies.

Proposal 14: Require written reasons for rejection

The *CEA* should be changed to require the party to give detailed, written reasons for rejecting a potential nomination contestant at the same time they are given notice that they have been rejected.¹²⁰⁴

Proposal 15: Allow appeal to Commissioner of Elections

To ensure an independent, quick resolution of disputes concerning nomination contests, the *CEA* should be changed to allow a rejected nomination contestant or contestant who believes the contest is not

¹²⁰⁴ See similar points and recommendation in Samara, *Party Favours* (2019), *supra* note 231 at 20-21.

following the rules, to appeal to the Commissioner of Canada Elections, who should be empowered to rule on disputes.¹²⁰⁵

Proposal 16: Set a reasonable cut-off date for new members

To allow nomination contestants to sign up new members, but prevent contestants or others from inducing “insta-members” to show up and vote last minute in contests, set a reasonable cut-off date for registering as a voter in a party’s district contest (for example, one week before the vote).

Proposal 17: Empower Elections Canada to run nominations

Other than the party vetting process of potential nomination contestants, as others have suggested¹²⁰⁶ the CEA should be changed to empower Elections Canada to run nomination contests for all the parties using essentially the same rules under the CEA that govern the running of elections (adapted as needed).¹²⁰⁷ The changes should include especially: making eligible voter lists available to all the contestants; prohibiting voting when not qualified; only allowing adults who are Canadian citizens or permanent residents to vote; prohibiting anyone from inducing anyone to vote a particular way in a contest or not vote through incentives or disincentives or false claims, and; ensuring multiple polling stations in each EDA for each nomination contest. In addition, as detailed further and suggested below in section 6.5.1, offering or giving anything, any benefit or advantage, including a job, to someone to induce them not to run as a nomination contestant (or candidate if they win a contest) should be prohibited.

¹²⁰⁵ See similar recommendation in Samara, *Party Favours* (2019), *supra* note 231 at 29.

¹²⁰⁶ See for example: John Manley, “Lets tame riding politics,” (February 3, 2005), *Globe and Mail*, online: <<https://www.theglobeandmail.com/opinion/lets-tame-riding-politics/article734324/>>. Samara, *Party Favours* (2019), *supra* note 231 at 29-30. *Hill Times* editorial, “All federal parties need to improve their leadership and nomination processes or risk losing credibility,” (July 25, 2022), online: <<https://www.hilltimes.com/2022/07/25/all-federal-parties-need-to-improve-their-leadership-and-nomination-processes-or-risk-losing-credibility/373891>>.

¹²⁰⁷ See those rules in CEA, *supra* note 79, sections 91-92, and 281 to 282.8.

Proposal 18: Use ranked ballot vote counting system

A ranked ballot allows voters to express their support more clearly and equally by ranking candidates on the ballot instead of being forced to choose only one candidate and, as a result, the winner is the candidate that has the highest level of support from the most voters. Both of these effects align with the egalitarian model, and most parties use the system already for leadership contests, so it is reasonable to require all parties to use the ranked ballot vote counting system also for nomination contests.

Proposal 19: Prohibit party leader from rejecting contestant

The *CEA* should be changed to prohibit a party leader or executive from rejecting a contestant who has been selected through a process certified by the returning officer and CEO of Elections Canada.

Proposal 20: Require timely, public reports on contests

To inform voters, and help ensure integrity of nomination contests, the *CEA* should be changed to require public disclosure by the CEO of a report on each nomination contest at least two weeks before the general election or by-election day that includes: number of potential contestants who were rejected by the party after vetting; number of eligible voters and the voting results of the contest; biographical information about the candidate chosen; the contributions and spending report of at least the top three contestants, and Elections Canada should be required to post all that information for all parties' contests on a webpage for each electoral district that is accessible through a searchable website.¹²⁰⁸

¹²⁰⁸ See similar recommendations in Samara, *Party Favours* (2019), *supra* note 231 at 28-29.

Proposal 21: Establish quotas for nominations if needed

If the above suggested measures, and the donation, loan and public subsidy measures suggested in sections below,¹²⁰⁹ do not result in a demographically representative slate of election candidates being nominated in each party, based on the requirements set out in international conventions, the *CEA* should be changed to establish some form of quotas for representative candidates in each party.¹²¹⁰

Concerning another, more specific process issue raised in Chapter 3, section 3.5, it is inconsistent with the egalitarian model to prohibit, as the rules currently do, a member of the legislative assembly of a province from being a candidate.¹²¹¹ A member of an assembly has demonstrated that they have voter support by being elected, and so having them run as a federal candidate aligns with the egalitarian model. Other people are not required to give up their jobs in order to be candidates, and members of territorial legislatures and municipal councils are allowed to be candidates.

As well, the process of running only takes up a few months, so a provincial member would not be distracted from their duties for a significant time period. However, given they are paid by the public, and it is difficult to prevent them from using their office resources or staff for their campaign, provincial members, and territorial and municipal members, who run should

¹²⁰⁹ See possible other measures in House of Commons Standing Committee on the Status of Women, *Elect Her: A Roadmap for Improving the Representation of Women in Canadian Politics*, (April 2019), online: <<https://www.ourcommons.ca/DocumentViewer/en/42-1/FEWO/report-14/>>. See, for example, the proposal in section 6.8 below to tie any public subsidies to a requirement that parties nominate a diverse, representative list of candidates.

¹²¹⁰ See an exploration of the bases and form of quotas under various constitutional theoretical models in Patricia Popelier, "A constitutional perspective on electoral gender quotas," in James A. Gardner, ed., *Comparative Election Law* (Northampton, Mass.: Edwin Elgar Publishing Inc., 2022) at 322.

¹²¹¹ *CEA*, *supra* note 79, subsection 65(c).

be required to take an unpaid leave during the federal election campaign period:

Proposal 22: Allow provincial politicians to run as candidates

The *CEA* should be changed to allow members of provincial legislatures to run as federal election candidates. However, they, and members of a territorial legislature or municipal council, should be required to take an unpaid leave of absence during the federal election campaign period, with their staff continuing to fulfill their constituent service duties while they are absent.

6.4.2. More egalitarian party leadership contest registration

Other than it being less likely that a snap election call could force a political party leadership contest to be held within just a few weeks, all of the other points and arguments made above concerning nomination contests apply also to leadership contests. It is true, however, that there is no legal prohibition on the Prime Minister calling a snap election when another party that has MPs in the House of Commons has a leadership contest underway. Prime Ministers have refrained from calling snap elections during other parties' contests, but given the unfairness that would result from such a snap election call, especially based on the studies cited in the previous section that show most voters take into account who leads each party when considering how to cast their ballot, I suggest the following change to the rules:

Proposal 23: Prohibit election calls during leadership contests

If proposal #1 is not implemented to fix election dates as much as possible, section 56.1 of the *CEA* should be changed to prohibit the Prime Minister from advising the Governor General to call a snap

election when another party that is represented in the House of Commons has a party leadership contest underway (as long as the contest is being held within a time period that is no more than the average length of such contests).

I will not repeat all the other points and arguments set out in the section above that apply equally to leadership contests. However, one overall issue to address is how party leaders could, and should, be chosen. As with any election, all of the possible processes for selecting party leaders raise the issues of who is allowed to vote, at what point in the process, how long the campaign is, and how the votes are counted.¹²¹² Parties in the United Kingdom, Australia and New Zealand generally still select their leaders either by only MPs in the party's caucus making the choice through votes or, in the case of the UK Conservative Party, MPs voting in few rounds until they have selected the top two candidates, and then party members participate in the final vote for the leader.

In contrast, in Canada that practice disappeared decades ago, and was replaced by delegates from EDAs gathering to vote along with MPs from the party's caucus, and then in the past 20 years changed again to allow for direct voting by all party members (with some parties, such as the Conservatives, awarding "points" to contestants based on the percentage of votes won in each district). I contend, as others have,¹²¹³ that given universal suffrage is

¹²¹² Cross, *Political Parties* (2004), *supra* note 3 at 76-107 and 174-178. William P. Cross and Anika Gauja, "Selecting party leaders, reform processes and methods: Examining the Australian and New Zealand Labour parties," (2021), Vol. 42(2) *International Political Science Review* 261 at 267.

¹²¹³ Cross and Blais (2012), *supra* note 247, at 168-169 and 174.

an international law requirement for elections (with only very limited restrictions), it is elitist and undemocratic to allow only MPs to choose party leaders. As well, party leaders play too important a role to allow only MPs to select them, especially given that when the ruling party has a leadership contest the person who wins automatically becomes the Prime Minister.

Some commentators have claimed that allowing leadership contestants to recruit new members to the party for a contest vote creates an incentive for contestants to fake the lists of members they sign up in various ways, or pay for membership fees, or sign up “insta-members” at the last minute who have no real commitment to the party, but that allowing only MPs to vote, or MPs and existing party members leads to a contest that has more integrity.¹²¹⁴ However, this ignores the fact that: fake members will not help any contestant win votes; most Canadian federal parties have very low membership fees so any serious member (who is likely to actually vote in a contest) will likely pay the fee; illegally paying the membership fee for a significant number of voters would put the contestant at a significant risk that someone will blow the whistle on their violation; insta-members can be prevented by having a cut off on membership sales well before voting day, and; only allowing MPs to vote makes it relatively easy for contestants to bribe a significant number of the

¹²¹⁴ Brian Topp, “Party Members Don’t Pick Leaders, and They Should,” (March-April 2020), Vol. 8(2) *Policy* 21, online: <<https://www.policymagazine.ca/wp-content/uploads/2016/11/PolicyMagazineMarchApril-2020-Web.pdf>>. Andrew Coyne, “The very nature of a leadership race based on selling membership as fast as you can is corrupting,” (July 8, 2022), *Globe and Mail*, online: <<https://www.theglobeandmail.com/opinion/article-the-very-nature-of-a-leadership-race-based-on-selling-membership-as/>>.

MPs in return for their support directly or indirectly by offering them positions and perks if they win the contest.

The UK's Conservative Party's hybrid model of having MPs reduce the candidates down to two final candidates before party members vote still gives a very small group of people MPs enormous power in the decision-making process. Yes the MPs are elected but, as pointed out in the previous section, voters vote in Canadian federal elections mainly based on the party and who the party leader is, with only about five percent taking into account each party's candidate. As a result, I contend that it gives MPs too much inegalitarian power to have them do those rounds of selection down to two candidates. As well, as mentioned above, it makes secret favour-trading between contestants and MPs relatively easy, which could undermine public confidence in the integrity of the process.

Given the above, the following are the relevant proposals for changes to key leadership contest registration rules that align with the proposed changes set out in the previous section for nomination contests, adapted with the aim of making such contests more egalitarian:

Proposal 24: Schedule leadership contests with adequate time

The CEA should be changed to require that parties give at least two months advance notice of when a party leadership contest will begin to every party member who has provided contact information to the party, and to set a minimum length of contests (e.g. four months).

As set out above in section 3.7, in recent years parties have required party leadership contestants to pay a \$30,000 (NDP) up to \$300,000

(Conservatives) entrance fee in order to be a contestant. While it's true that parties face costs to run a contest, and while it's true that anyone who wants to lead a national party should have the capacity, and supporters, needed to raise funds, the blanket amounts that parties charge are inequalitarian because contestants who are supported by less wealthy individuals are required to have the support of more people in order to raise the same amount as someone who is supported by wealthy donors.

A more egalitarian requirement would be to require potential contestants to obtain a specific minimum number of donors, whatever amount they donate. For the 2021 federal election, there were 27.5 million registered voters,¹²¹⁵ but requiring a specific percentage of that total number of overall voters to donate in every contest would not make sense given each party has a different number of members and donors depending on its level of popular support.

Chart 24 below shows the most recent total number of members that have been publicly disclosed for the five largest federal parties, and their average number of donors annually from 2016 to 2020 inclusive:

¹²¹⁵ Elections Canada, Voter Turnout, *supra* note 1109.

Chart 24: Most Recent Total Membership Number Disclosed for the Five Main Political Parties, and Average Totals of Number of Donors During 2016-2020 Calendar Years, and During Election Years¹²¹⁶

Statistics	Liberal	Conservative	Bloc	NDP	Greens
Most recent total members (year)	Approx. 200,000 (July 2022) ¹²¹⁷	Approx. 679,000 (July 2022) ¹²¹⁸	19,000 (Aug. 2014) ¹²¹⁹	124,620 (Aug. 2017) ¹²²⁰	Approx. 22,000 (Nov. 2022) ¹²²¹
Average total # of donors (2016 to 2020 (including 2019 election year))	72,702	99,170	7,819	32,705	22,425

¹²¹⁶ Figures from Elections Canada's Registered Party Financial Returns, online: <<https://www.elections.ca/WPAPPS/WPF/EN/PP/Index>>.

¹²¹⁷ Ian Bailey, "Federal Conservatives say they have 678,708 members, record for a Canadian political party," (July 29, 2022), *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-conservative-party-leadership-race-4/>> (hereinafter "Ian Bailey (July 29, 2022)").

¹²¹⁸ Ian Bailey (July 29, 2022), *supra* note 1217.

¹²¹⁹ Don Macpherson, "Don Macpherson: Bloc Québécois's woes bode ill for sovereignty movement," (August 27, 2014), *Montreal Gazette*, online: <<https://web.archive.org/web/20140902095703/http://www.montrealgazette.com/news/Macpherson%2BBloc%2BQu%C3%A9b%C3%A9cois%2Bwoes%2Bbode%2Bsovereignty%2Bmovement/10153845/story.html>>.

¹²²⁰ Éric Grenier, "NDP triples its membership to 124,000 in run-up to party's leadership vote," (August 29, 2017), CBCNews.ca, online: <<https://www.cbc.ca/news/politics/ndp-leadership-members-1.4265642>>.

¹²²¹ Christian Paas-Lang, "Elizabeth May wins Green Party of Canada leadership, set to co-lead with Jonathan Pedneault," (November 19, 2022), CBC.ca, online: <<https://www.cbc.ca/news/politics/green-party-leadership-race-results-1.6657717>>. The last time before September 2022 that the Green Party disclosed its membership was in September 2020 during its 2020 leadership race, when the Party had approximately 35,000 members. The Canadian Press, "Green party membership numbers soar in advance of leadership vote," (September 8, 2020), CTVNews.ca, online: <<https://www.ctvnews.ca/politics/green-party-membership-numbers-soar-in-advance-of-leadership-vote-1.5096233>>.

Average total # of donors (2016 to 2020 (excluding 2019 election year))	69,366	93,040	6,627	31,077	18,975
Total # of Donors 2019 Election Year	86,047	123,688	12,587	39,218	36,226
Total # of Donors 2021 Election Year	75,814	95,222	11,322	47,335	18,387

The above figures show, I contend, that requiring potential party leadership candidates to obtain a donation and/or a signature in support from a specific percentage of party members in order to be a contestant is reasonable and egalitarian. For example, as suggested below, if potential contestants were required to obtain a donation and/or signature from one percent of party members, if member totals were used contestants would have to obtain the support of 1,900 to 6,750 members depending on the party, which is only 0.007 to 0.024 percent of total voters in Canada. If average donor totals were used, contestants would have to obtain donations from 662 to 9,304 voters, which is only 0.0024 to 0.034 percent of total voters. It is reasonable, I contend, to require someone aspiring to be the leader of a

federal party to have at least that many voters as supporters (if not more).

Based on the above information and considerations, I think the following two proposals establish more egalitarian entrance requirements for leadership contests:

Proposal 25: Prohibit blanket registration fee

The *CEA* should be changed to prohibit blanket entrance fees for leadership contests, and instead to only allow parties to require potential contestants to obtain donations of any amount from a specific number (e.g. one percent) of the average annual total number of donors to the party over the past five years.

Proposal 26: Require support signatures from party members

The *CEA* should be changed to require parties to require potential leadership contestants to obtain a set number of signatures from party members (e.g. one percent of members, new or existing) from at least all regions of Canada (if not all provinces and territories) in order to qualify as a contestant. This process could be made a very equal opportunity by requiring parties to send out one email appeal for each potential contestant (as drafted by each contestant, on a day and time chosen by the contestant) that would invite party members to sign up on the party website if they support that contestant.

As for other elements of leadership contests, the following proposals are essentially analogous to the suggestions made in the previous section for nomination contests:

Proposal 27: Restrict vetting criteria to legitimate concerns

The *CEA* should be changed to prohibit parties from using arbitrary criteria for vetting potential leadership contestants, and to restrict the

criteria to legitimate concerns such as past illegal or highly questionable behaviour or refusal to support core party policies.

Proposal 28: Require written reasons for rejection

The *CEA* should be changed to require the party to give detailed, written reasons for rejecting a potential leadership contestant at the same time they are given notice that they have been rejected.

Proposal 29: Allow appeal to Commissioner of Elections

To ensure an independent, quick resolution of disputes concerning leadership contests, the *CEA* should be changed to allow a rejected leadership contestant or contestant who believes the contest is not following the rules, to appeal to the Commissioner of Canada Elections, who should be empowered to rule on disputes.

Proposal 30: Elections Canada should run leadership contests

Other than the party vetting process of potential leadership contestants, the *CEA* should be changed to empower Elections Canada to run leadership contests for all the parties using essentially the same rules under the *CEA* that govern the running of elections (adapted as needed), especially: making eligible voter lists available to all the contestants; prohibiting voting when not qualified; only allowing adults who are Canadian citizens or permanent residents to vote; prohibiting anyone from inducing anyone to vote a particular way in a contest or not vote through incentives or disincentives or false claims, and; ensuring multiple polling stations for each contest. In addition, as detailed further and suggested below in section 6.5.1, offering or giving anything, or any benefit or advantage, including a job, to someone to induce them not to run as a leadership contestant should be prohibited.

Proposal 31: Set a reasonable cut-off date for new members

To allow leadership contestants to sign up new party members, but prevent contestants or others from inducing “insta-members” to show up and vote last minute in contests, set a reasonable cut-off date for registering as a member (for example, two months before the vote) that allows time to verify the accuracy of the voting member list.

Proposal 32: Use ranked ballot vote counting system

A ranked ballot allows voters to express their support more clearly and equally, and the winner is the candidate that has the highest level of support from the most voters. Both of these effects align with the egalitarian model, and most parties use the system already for leadership contests, so it is reasonable to require by law all parties to use the system.

6.5. More egalitarian donations and loans to parties, associations, and all types of candidates

From the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5 that are the framework for the proposals in this chapter, the following three relate to the area of donations and loans:

4. Limits on donations, loans and gifts of money, property, use of property and/or services, and favours and assistance, set at a level that a low-income vulnerable voter can afford (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity);
5. Only allowing donations and loans to EDAs and local candidates from voters in the jurisdiction (in order to ensure substantively equal

opportunity for substantively equal participation and influence, and public confidence in integrity);

6. Requiring party headquarters to share a portion of each donation with the local EDA and/or candidate's campaign (during an election campaign period) in the district in which the person making the donation resides (in order to ensure substantively equal opportunity for substantively equal participation and influence).

The current donation and loan rules are egalitarian in that they only allow individuals who are Canadian citizens or permanent residents to donate or loan their own money (property, use of property or services), and MPs are prohibited from using their MP resources or staff time to support their own campaign (including during the pre-election period) or to support nomination or party leadership contestants when those contests occur, and parties and EDAs are not allowed to support one nomination contestant more than another. The rules are also egalitarian in that they do not allow anyone to give a fake job to a contestant or candidate or their campaign workers to support their campaign, or to an EDA or party staff person – but the lack of disclosure concerning the work activities of contestants and candidates and their campaign workers, and any leave they may be taking from work, and the lack of disclosure concerning “volunteer” labour by people for campaigns, EDAs and parties, make it relative easy to arrange a fake job as a donation (I address this problem below in sections 6.9 and 6.10).

As well, while the *CEA* gives everyone the right to take a leave from their job to run as a nomination contestant or election candidate, those whose have jobs and have a job description that facilitates them taking a leave to run

have an advantage over other contestants and candidates, and especially incumbent MPs who are running again have a particular advantage over other contestants during the nomination contest (if a contest is held), and during the election, and during a party leadership contest, because they are paid by voters through the contest, pre-election and campaign periods, and there are only very minimal legal work requirements for MPs (almost none during an election period). As a result, an MP can essentially spend all of their paid work time campaigning. I address these inequalities below in section 6.8 on public subsidies.

In every other way the donation and loan rules also allow for inequalitarian advantages or benefits for some, but not all, parties, EDAs, contestants or candidates, and they should be changed to comply with the egalitarian model, as summarized in the following subsections. How exactly the rules should be changed in this area, and in the areas of spending and public subsidies, depends on, I contend, the actual current cost of reaching, connecting with and informing voters, and running party and EDA operations, between elections and during election years. Without this information it is impossible to determine what spending limits should be, or what public funding may be needed, if donation limits were decreased to a level that an average voter could afford.

Quite incredibly, I contend, is that the history since 1966 of governments evaluating political finance and Parliament and provincial and territorial legislatures establishing spending limits, and donation limits, and public subsidies, has all been done without such a comprehensive study of

actual costs of reaching and informing voters ever being undertaken. Of course, the politicians who have made these changes over the decades had some sense from their own political parties and EDAs about how much their party executives and EDAs *wanted* to spend annually and during election campaigns.

However, that is likely a different amount than what is *needed* to be spent, especially in the area of reaching and informing voters given the extensive media and social media coverage that party leaders, MPs and parties receive in between elections, and that leaders, candidates and parties receive during election campaigns. For example, in 1966 the Barbeau Committee's mandate was to review and recommend changes to limit and control spending in federal elections, which is based on an underlying assumption that spending was higher than it should be,¹²²² and the Committee was made up of politicians, former politicians and party insiders whose experiences of what their parties wanted to spend, and were spending, at least in part informed their recommendations.¹²²³

If, for example, the argument put forward is that parties need the amounts they want in part to advertise at a significant level to reach voters so that they have adequate information to vote, Lisa Young's analysis in 2012 shows that there is no connection between increased advertising and

¹²²² Barbeau Committee, *supra* note 42 at 5.

¹²²³ Norman Ward, "Money and Politics: The Costs of Democracy in Canada," (September 1972), Vol. 5(3) *Canadian Journal of Political Science* 335 at 339. At 343-346, Ward attempted to estimate the cost of Parliament and government institutions running elections, and also included a very incomplete estimate of the costs of parties, but again it was an estimate of what they were spending (i.e. wanted to spend) not an estimate of what they needed to spend.

increasing voter turnout, as total advertising spending during federal elections by all registered parties increased from just under \$20 million in 1997 steadily election to election to total over \$30 million in 2008 and then just under \$35 million in 2011, but voter turnout in the 2008 election was the lowest of the six elections, and turnout in 2011 was the second lowest.¹²²⁴ As a result, I make the following general overall proposal:

Proposal 33: Comprehensive study of cost of informing voters

A comprehensive study, by a fully independent commission made up of people with no ties to political parties, and not chosen by political parties, should be undertaken to determine the actual annual cost of reaching, connecting with and informing voters in all provinces and territories (and in their sub-regions and EDAs with distinct characteristics), and operating parties and EDAs, in years between elections, and in election years including during pre-election and election campaign periods, to provide solid evidence as the basis for changes to the spending and public subsidies areas of Canada's political finance system.

6.5.1. Decrease donation limit to level average voter can afford

As Charts 1 to 5 above in Chapter 3, section 3.9 show, the estimated annual median individual donation to each of the five main parties from 2016 to 2020 was just over \$75 – which I contend is as close as possible to an accurate figure of the amount that most individuals can afford to give, or want to give. As mentioned in section 3.8, Canada's median income in 2019 was \$37,800, and more than 10 percent of households had an income of \$29,000

¹²²⁴ Young (2012), *supra* note 22, at 143-144 (Figure 6.1).

or less and, in 2021, 16.5 percent of households had a financial situation that was “extremely vulnerable” and 22.8 percent were vulnerable. As well, as the figures in Chart 6 in section 3.9 show, in each party the top donors who donated \$1,000 or more annually from 2016 to 2020 were responsible for six to 10 times the percentage of total donations as they represented as a percentage of total donors.

In addition, based on the figures in Chart 24 in subsection 6.4.2 above, only about 0.85 percent (234,000) of the total of about 27.5 million voters (as of September 2021)¹²²⁵ in Canada donate to one of the five main parties¹²²⁶ (and only four percent are members of a party).¹²²⁷ The other 12 registered federal parties had, as a combined total, 11,377 donors in 2020 (complete 2021 figures for all 12 parties were not available as of July 30, 2022).¹²²⁸

Based on these figures, and on egalitarian principles, I find it difficult to support any position other than that the current annual donation limit for parties of \$1,700 (in 2023 – increasing annually by \$25) should be lowered to \$75, and should be adjusted annually from that amount based on the annual increase or decrease of the median income in Canada (and, as recommended by the CEO in his June 2022 report, this limit should also be explicitly applied

¹²²⁵ Elections Canada, Voter Turnout, *supra* note 1109.

¹²²⁶ Calculated using 234,821 as the total number of donors of the five parties, from Chart 24 in Chapter 6, subsection 6.4.2, adding up the average number of annual donors for each party from 2016 to 2020 (including the 2019 election year when donor totals increased significantly for more of the parties).

¹²²⁷ Calculated using 1,153,620 as the total membership of the five parties, from Chart 24 in Chapter 6, subsection 6.4.2, using the most recent numbers available for party member totals, some of which are out of date, and most of which were reported when each party's membership total was at its highest in the past eight years.

¹²²⁸ Calculated from Elections Canada's Registered Party Financial Returns, online: <<https://www.elections.ca/WPAPPS/WPF/EN/PP/Index>>.

in the CEA to donations or loans made with cryptocurrency¹²²⁹ – and, I contend, also to all other forms of digital/intangible assets).

Why should the system based on the fundamental democratic principle of one person, one vote, and the principle of ensuring public confidence in the integrity of political processes, allow anyone to use money as a means to have greater influence over politicians? I also contend that, based on these principles, \$75 should also be the combined total maximum donation allowed to all parties annually – unlike the current system which allows the annual maximum amount to be donated to each party, allowing people to “hedge their bets” by donating to more than one party (which, as mentioned in section 3.9, only 1.5 to six percent of donors do anyway).

While \$1,700 could be viewed as a relatively low amount compared to the incomes of many Canadians, this assessment fails to take into account that it is 22 times higher than the average median donation. In addition, people who fundraise for parties who have 100 friends who will show up and pay that amount quite quickly and easily can raise \$170,000 which, as Chart 8 in section 3.9 shows, is approximately one percent to 15% of the total amount donated on average to the five main federal parties from 2016-2020. As a result, these people, known as “bundlers” in the U.S.,¹²³⁰ whose identities are currently not required to be disclosed in Canada, can quite easily become significantly important to a party’s financial status. As detailed after charts 7

¹²²⁹ Elections Canada, *Meeting New Challenges: Recommendations from the Chief Electoral Officer of Canada following the 43rd and 44th General Elections*, (June 2022), at 56-58 (Rec. 8.4.1), (hereinafter “CEO, *Recommendations* (June 2022)”).

¹²³⁰ Richard L. Hasen, “The transformation of the campaign financing regime for US presidential elections,” in Ewing, Rowbottom and Tham (2012), *supra* note 2, 225 and 234.

and 8 in section 3.9 with regard to the ongoing Liberal Party's Laurier Club and short-lived Leader's Circle, these top donors and bundlers are rewarded with special access to top party officials including Cabinet ministers.

As also detailed in section 3.9 just below Chart 8, the \$1,700 limit also facilitates funneling of donations from businesses and other organizations through their executives and employees and their family members, all of whom may be very difficult to tie together as even family members may have different last names. A business with 10 executives, each of whom has a spouse and two kids who are married (and so have different last names), could relatively easily funnel enough money through the executives to donate a total of \$51,000 to a party, contestant or candidate. Finally, again, the current rules allow \$1,700 to be donated annually to every party, along with an additional \$1,700 combined total to the EDAs of each party (combined, in an election year, with the nomination contestants and candidates of each party).

It has been suggested that another solution would be to hide from parties and candidates the amounts of donations above a low level, and possibly also the identities of the donors above that level of donation, so that parties and candidates would not know who they owe.¹²³¹ I see two key inequalitarian flaws in this proposal – first that candidates and parties would then still be able to prosper financially by relying on large donations (including donations raised by bundlers) instead of having to address the concerns of

¹²³¹ Perry A. Pirsch, "Blind Trusts as a Model for Campaign Finance Reform," (2012), Vol. 4, *William & Mary Policy Review* 212 (hereinafter "Pirsch (2012)").

more voters in order to attract their donations. As Chart 6 in section 3.9 shows, from 2016 to 2020 a small percentage of donors who donated \$1,000 or more to the five main parties provided a significant percentage of the total average annual amounts raised by each party, especially for the Liberals (just over six percent of donors provided almost 42 percent of the total amount) and Conservatives (just over four percent provided almost 27 percent). Secondly, as others have pointed out,¹²³² donors who donated above the low level, and bundlers who raised large amounts, could still easily, without being detected, confirm to a candidate or party the amount that they had donated.

What will happen if the annual donation limit is decreased to \$75?

Chart 25 below contains a projection of how much the five main federal parties would raise annually, based on their average number of donors from 2016 to 2020 (excluding the 2019 election year), multiplied by \$75, and compared to how much they actually raised annually on average during that five-year period. Chart 25 also shows a projection of how much the federal parties would have raised in the 2019 election year if the donation limit had been \$75, compared to how much they actually raised in 2019.

¹²³² Pirsch (2012), *supra* note 1231, at 228-229.

Chart 25: Average Total Donors and Total Donations During 2016-2020 Calendar Years, and During 2019, and Comparison of Total Projected Donations with \$75 Donation Limit, for Five Main Federal Parties¹²³³

Statistics	Liberal	Conservative	Bloc	NDP	Greens
Average total # of donors (2016 to 2020 (excluding 2019 election year))	69,366	93,040	6,627	31,077	18,975
Average total annual donations 2016-2020	\$16.52 million	\$22.54 million	\$1.05 million	\$5.9 million	\$3.66 million
Total amount party would have raised annually 2016-2020 with \$75 max. donation limit (difference from current average annual amount)	\$5,202,450 (- \$11.31 million)	\$6,978,000 (- \$15.56 million)	\$497,025 (- \$0.55 million)	\$2,330,775 (- \$3.57 million)	\$1,423,125 (- \$2.23 million)
Total # of \$75 donors party would need to raise same average annual amount	220,266 (+150,901)	300,533 (+207,493)	14,000 (+7,373)	78,667 (+47,590)	48,800 (+29,825)

¹²³³ Figures in first two rows of chart are from: Elections Canada's Registered Party Financial Returns, online: <<https://www.elections.ca/WPAPPS/WPF/EN/PP/Index>>.

raised 2016-2020 (increase in total donors)					
Total # of Donors 2019 Election Year	86,047	123,688	12,587	39,218	36,226
Total donations received in 2019	\$20.6 million	\$30.85 million	\$1.8 million	\$8 million	\$6.5 million
Total amount party would have raised in 2019 with \$75 max. donation limit (difference from actual amount)	\$6,453,525 (- \$14.14 million)	\$9,276,600 (- \$21.57 million)	\$944,025 (- 0.856 million)	\$2,941,350 (- \$5.1 million)	\$2,716,950 (- \$3.78 million)
Total # of \$75 donors party would need to raise same amount raised in 2015 (increase in total donors)	264,103 (+178,056)	411,333 (+287,645)	24,000 (+11,413)	106,667 (+67,449)	86,667 (+50,441)
Total average # of donors annually 2016-2020 (including 2019)	72,702	99,169	7,819	32,705	22,425

As Chart 25 above shows, because they currently rely so much on their top donors, with a \$75 annual donation limit parties would either raise a much lower amount of money if they couldn't convince more people to donate, or they would increase their total number of donors and end up with close to or the same amount or even more total donations annually. Given that, based on the 2016-2020 statistics, only 0.85 percent (219,085) of Canada's 27.5 million voters currently donate annually on average to a federal party during a non-election year (1.1 percent (297,766) during an election year, and 0.85 percent (235,270) on average annually overall), the parties have a large pool of potential donors to appeal to in order to increase the number who donate.

Further evidence that the five main parties have a large pool of donors to draw from is the fact that their total number of donors in 2007 was essentially the same as the 2016-2020 average annual total (excluding the 2019 election year), even though the Canadian population is estimated to have grown by approximately five million people from 2007 to 2020.¹²³⁴ As mentioned after Chart 6 in Chapter 3, section 3.9, using \$75 as a sample median donation level, each of the five main parties would have to attract approximately 1,150 (Bloc) to 7,500 (Greens) to 14,000 (NDP) up to 88,000 (Liberals and Conservatives) more donors donating \$75 annually in order to raise the amounts that they currently raise from the small percentage of their donors who donate \$1,000 or more annually. They would, of course, also

¹²³⁴ Young (2012), *supra* note 22, at 146-147 (Figure 6.2). Statistics Canada, "Table 17-10-0009-01, Population estimates, quarterly," online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901>>.

have to attract many more donors to raise the same amounts they currently raise from donors who donate from \$500 to \$1,000, and from \$75 to \$500.

As Chart 25 above shows, if all five main parties received only \$75 from each donor, in order to raise as much as they did on average annually from 2016-2020 they would need to convince a combined total of 443,182 more voters to donate to them. And, in order to raise the same amount that they raised in the 2019 federal election year, they would need to convince a combined total of 595,004 more voters to donate to them. In both cases, because they currently rely so much on donors who donate \$1,000 or more, the Liberals and Conservatives together would have to convince about 80 percent of these additional donors to donate to them.

Likely however, not all donors would donate the maximum \$75, so the parties would need to convince even more voters to donate to them in order to raise the same amount as they have in the past five years on average. In other words, parties would have to become “mass parties”¹²³⁵ to raise as much annually, and their funding would, therefore, be more egalitarian because they would rely on a much larger number of voters each donating much closer to the same amount compared to current donation patterns.

Proposal 34: Decrease annual party donation limit to \$75

The *CEA* should be changed to decrease the annual limit for contributions of money (including cryptocurrencies, NFTs and other digital/intangible assets), property, use of property or services to all

¹²³⁵ Justin Fisher, “State Funding of Political Parties: Truths, Myths, and Legends,” in Young and Jansen (2011) 19, *supra* note 3, at 19-20 (hereinafter “Fisher (2011)”).

parties combined to \$75 (adjusted annually based on the increase/decrease of Canada's median income).

In addition to the current \$1,700 annual donation allowed to each political party (in 2023), individuals are allowed to donate another \$1,700 as an annual combined total to the EDAs, nomination contestants (if a contest is happening) and election candidates' campaigns (during election years) of each party. In other words, generally, other than during an election year, this provision means that anyone can donate \$1,700 as a combined total to each party's EDAs. Set out below in Chart 26 are the total number of contributors, and total contributions, to the EDAs of all the federal parties from 2018 to 2020, including election year 2019.

Chart 26: Total Donors and Total Donations During 2018-2020 Calendar Years, and Averages, for All Federal Parties' EDAs¹²³⁶

Year	Total Donors	Total Donated	Average Donation
2018	80,488	\$15,396,783	\$191
2019	161,725	\$38,850,051	\$240
2020	56,043	\$11,727,357	\$209
Average over three years	99,419	\$21,991,397	\$213

¹²³⁶ Figures are calculated from: Elections Canada's Registered Party Financial Returns, online: <<https://www.elections.ca/WPAPPS/WPF/EN/PP/Index>>. Figures rounded to nearest dollar. The Total Donated figure for 2020 is a calculation of total donations (\$11,870,689) minus returned donations (\$143,332). Total number of EDAs each year: 2018 – 1,254; 2019 – 1,491; 2020 – 1,339. The total number of EDAs is five more in Chart 25 than the total in Chart 10 in Chapter 3, section 3.10, because when I did the calculation for Chart 10 in March 2022 five fewer EDAs had filed their 2019 returns with Elections Canada than when I did the calculations in July 2022 for Chart 25.

The average of \$213 is, not surprisingly, higher than the average median donation to the five main parties of \$75 during those years. I have not calculated the median donation to EDAs through these years simply because it is a significant research task given there are 1,200 to 1,500 EDAs registered in any year, each receiving multiple donations from their tens of thousands of donors each year. However, given the average donation is similar to the average for the five main parties (as shown in Charts 1 to 5 in Chapter 3, section 3.9), I project that the median would also be a similar amount.

While local fundraising is different than the fundraising undertaken by political party headquarters, more personal and direct than the mass-appeals of parties,¹²³⁷ the above evidence, and egalitarian principles, point also to limiting this extra annual donation to EDAs to \$75 annually, or eliminating it completely. Allowing the double donation of \$150 total puts the maximum donation further out of reach of the most vulnerable, low-income voters. It would also allow fundraising “bundlers” to raise twice as much.

However, the decision about whether to allow it or eliminate should not be made until the comprehensive study suggested above in proposal #33 is undertaken of the actual annual costs of reaching voters in jurisdictions, and different types of EDAs, across Canada. A factor to consider in this study is the implications of, as I propose below, parties being required to share a portion of each donation with the EDA where the donor resides.

¹²³⁷ Erin Crandall, “Local Party Fundraising,” in Alex Marland and Thierry Giasson, eds., *Inside the Local Campaign: Constituency Elections in Canada* (Vancouver: UBC Press, 2022) 266.

Proposal 35: Decrease EDA donation limit to \$75 or eliminate it

Depending on the results of the study of the annual cost of reaching and informing voters and operating an EDA proposed in Proposal #33, the *CEA* should be changed to decrease the annual limit for contributions of money, property, use of property or services to all EDAs combined to \$75 (adjusted annually based on the increase/decrease of Canada's median income), or this contribution category should be eliminated.

I also contend that the evidence of donation patterns, and egalitarian principles, point to the conclusion that the donation limit for nomination contestants, election candidates (through their EDA for their campaign), and leadership contestants should also be \$75. This limit should also apply to the donation that contestants and candidates are allowed to make to their own campaign. In other words, nomination contestants would no longer have the advantage, if they can afford it, of being allowed to donate \$1,000 to their own campaign, candidates would no longer be allowed to donate \$5,000 to their own campaign, and leadership contestants would no longer be allowed to donate \$25,000 to their own campaign (all of which amounts are currently allowed on top of the \$1,700 they are allowed to donate to each party and \$1,700 they are allowed to donate as a combined total to the EDAs of each party (in 2023)).

As well, as suggested above for donations to parties, donations of the same maximum amount would no longer be allowed to be made to each party's nomination contestants and candidates, or to multiple leadership contestants. Instead, the total maximum combined total amount that one person would be allowed to donate would be \$75. The decision about

whether to provide general public subsidies to contestants and candidates (as addressed below in section 6.8) cannot, I contend, be made until the comprehensive study suggested above in proposal #33 is undertaken of the actual annual costs of reaching voters and operating contests and campaigns. A factor to consider in this study re: candidates is the implications of, as I propose below, parties being required to share a portion of each donation received during pre-election and election campaign periods with the candidate's campaign where the donor resides.

Proposal 36: Decrease contest and candidate limit to \$75

The *CEA* should be changed to decrease to \$75 (adjusted annually based on the increase/decrease of Canada's median income) the limit on contributions of money, property, use of property or services to all nomination contestants in a contest, all election candidates in an election, or all leadership contestants in a contest.

6.5.2. Make all other contribution areas more egalitarian

Taking one step back, a donation loophole in nomination, candidate and party leadership registration rules mentioned above in Chapter 3, sections 3.5 to 3.7, 3.11 to 3.13, and 3.24 and 3.25, that does not align with the egalitarian model is that if a person raises money from contributors to explore becoming a contestant or candidate, and then does not register (including if a candidate wins a nomination contest and then does not register as a candidate), the contributors of the money are not required to be disclosed, and the person can keep the money. As well, no disclosure is required if the person exploring running is offered contributions, benefits or

other advantages (including job offers) not to run for whatever reason, for example to give another person a better chance of winning.

As mentioned above in sections 3.11 and 3.12, contributing or offering or giving to induce someone not to run should be prohibited because it violates the egalitarian principles of integrity and equal opportunity to participate. This is mainly a problem if the person exploring running is a sitting MP and/or a Cabinet minister and, as discussed in Chapter 4, sections 4.2 and 4.3, it is unclear whether these donations are covered under their gift and benefits rules or the *Criminal Code*. I also address the lack of disclosure part of this loophole below in section 6.9.

Proposal 37: Unregistered contestant/candidate return benefits

As proposals #17 and #30 above mention, the CEA should be changed to prohibit anyone or any entity from offering anything, benefit or advantage (including a job) to anyone who is exploring being a nomination contestant or leadership contestant, or has won a nomination contest but has not yet registered as a candidate, to attempt to induce them not to run. As well, potential nomination contestants, candidates who have won nomination contests, and potential leadership contestants, if they do not actually register to run in the contest or election, should be required to return the remaining amounts of any monetary contributions they received, and within 30 days to disclose the total amount/value of all contributions they received of money, property, use of property, services, gifts, benefits or other advantages (including job offers or work of any kind) to Elections Canada which should be required to make them public immediately in an online, searchable database.

Another type of donation to nomination contestants and election candidates creates similar problems as large donations and other benefits do.

As detailed above in Chapter 3, sections 3.11 and 3.12, the *CEA* exempts from the donation limit, and from the prohibition on businesses, unions and other organizations making donations, an employer giving an employee a paid leave of absence to run in a nomination contest or an election. This not only gives a significant financial advantage to any nomination contestant or candidate who has an employer willing to do this, it also creates another layer of loyalty on behalf of the contestant and candidate to the company or organization that creates a conflict of interest.

This also ties into the issue of whether businesses or organizations are offering fake jobs to some people in order to then give them a paid leave to run. Interestingly, there is no provision in the *CEA* allowing employers to give employees paid leave to run in a party leadership contest. The following proposal addresses this inequality of opportunity and conflict of interest, and in section 6.8 below I suggest public subsidies as a more egalitarian way of providing this support for running for office.

Proposal 38: Prohibit paid leave for contestants and candidates

The *CEA* should be changed to prohibit employers offering paid leave to nomination contestants and candidates. Instead, while anyone who wants to run should still have the right to take leave from their employment, public subsidies should be provided to both employed and unemployed contestants and candidates to compensate them for any lost income or opportunities to seek employment, as this is a more egalitarian way of supporting people running for office.

Whether these changes to the rules would mean that public subsidies of some sort would be needed for contestants and candidates again depends on the results of the comprehensive study suggested in proposal #33 above

of the actual annual costs of reaching voters in jurisdictions and different types of EDAs across Canada, and the costs of operating EDAs and nomination, candidate and leadership campaign offices. I suggest egalitarian models for subsidies, if such a study establishes that they are needed, below in section 6.8.

Some other relevant factors to take into account when determining a limit on donations and other forms of contributions are that, not surprisingly, the figures in Chart 24 in the previous section show that the number of donors during an election year increases, as parties attempt to raise more funds during election years to pay election campaign costs, and their donors respond to those appeals. As well, while the number of donors dropped significantly in the 2021 election year compared to the 2019 election year for three of the five main federal parties (not for the Bloc or the NDP), I do not think that those two election years provide enough information to draw any conclusions such as that an election on a fixed election date (as in 2019) provides more opportunities for more donors to donate than a snap election does (like 2021). With the COVID crisis happening in 2020-2021, and many other developments that made those years very different from 2019, there are multiple possible causes of the change of in total number of donors.

Quebec's current provincial donation system – enacted in 2013 in response to a corruption scandal that involved, among other unethical activities, illegal political donations – adheres much more closely to egalitarian principles than Canada's current federal system. Quebec's system not only prohibited donations from corporations, unions and other organizations from

the late 1970s on,¹²³⁸ but also decreased in 2013 its annual donation limit from \$2,000 down to \$100 (an amount that is closer to, in Rawlsian terms, what a “least advantaged” voter can afford).¹²³⁹ It is difficult to determine whether Quebec’s provincial parties would have been able to raise all the funds from donations needed to inform voters and operate because the 2013 changes also introduced various public subsidies on the assumption that the parties needed the money. I examine Quebec’s and other models of subsidies below in sections 6.8.

In order to prevent funneling of donations by a business or other organization through a “straw-person” donor (including donations gathered through an online “crowdfunding” website), which was the most prevalent illegal activity in Quebec’s corruption scandal and had also been revealed to be occurring at a high level in the past,¹²⁴⁰ the new Quebec rules enacted in 2013 also require that donations of more than \$50 be routed through the provincial elections agency which verifies that the donation is legitimately coming from the individual donor and is not being funneled.¹²⁴¹ Such a provision helps ensure the integrity of the system, which can give the public

¹²³⁸ See a history of political finance reforms in Québec in Louis Massicotte, “Financing Parties at the Grass-Roots Level: The Québec Experience,” in K. D. Ewing and Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart Publishing, 2006) 153 (hereinafter “Massicotte (2006)”). As Massicotte documents, Québec also enacted a law in 1963 limiting party and candidate spending and requiring disclosure of candidate spending, and essentially prohibiting third-party spending during elections.

¹²³⁹ Rawls (1999) and (2001), *supra* note 14.

¹²⁴⁰ Massicotte (2006), *supra* note 1238, at 175-176.

¹²⁴¹ Quebec’s provincial law allows an additional \$100 to be donated to each party and independent candidate during each election campaign. Donations above \$50 annually must be routed through Elections Quebec. See Elections Quebec, “Contributions,” online: <<http://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/contributions.php/>>.

more confidence in its integrity, and so I contend that it should also be implemented at the federal level as well.

Proposal 39: Have Elections Canada verify donations of \$35+

The *CEA* should be changed to require donors donating \$35 or more to submit the donation to Elections Canada so that it can be verified that the donation is legitimately being made by an individual donor.

There are other types of contributions that raise concerns, even if most contestants and candidates do not receive them. First, as set out as the eleventh area of concern in section 3.12, while the *CEA* prohibits an election candidate from accepting gifts that might reasonably be seen to be given to influence the candidate if they are elected, the exceptions to these rules are not only that they can accept campaign donations (which is obviously fine given they are a candidate), but also that they can accept courtesy/hospitality gifts with no restrictions, as well as gifts or advantages from relatives, and through unconditional inheritances. A related concern, as mentioned near the end of sections 3.11 and 3.13, is that nomination contestant and leadership contestants are allowed to accept all gifts without limit. The following proposal addresses these loopholes.

Proposal 40: Prohibit most gifts to contestants and candidates

The *CEA* should be changed to prohibit giving to a nomination contestant, candidate or leadership contestant anything more than one very low value gift or courtesy or hospitality (no more than a combined total of \$30 per contest or election should be allowed from everyone (as a combined total) who is connected to the same business, organization, family or lobbying effort). This rule should apply to gifts, courtesy or hospitality even from a relative or a friend if the relative or friend is lobbying or has dealings (or has lobbied or had dealings) with

the federal government, and it should also apply to prohibit inheritances if the person who made the testamentary gift is connected with a lobbying effort happening at that time or during a time period that a contestant or candidate was in public office.

As detailed as the fifth area of concern in Chapter 3, section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, another area of concern is that, under the *CEA*, anyone and any entity can pay an unlimited amount of expenses of a nomination contestant, election candidate or party leadership contestant (including the contestant or candidate) for childcare, care for a person with a mental or physical disability, and assistance for themselves if they have a disability, as long as the expenses are in addition to their usual expenses, and these payments are not counted as a contribution, and these expenses are not counted toward the limits on expenses set in the *CEA* for all the entities except leadership contestants.

Based on egalitarian principles, it makes sense to assist in covering the costs of these expenses given that contestants and candidates that face these unavoidable costs, and the time it takes to provide the care required in some situations, would be disadvantaged compared to other contestants and candidates. However, allowing anyone or any entity to cover these costs does not, I contend, comply with the egalitarian model because it allows those who can afford it to give more to a contestant or candidate than anyone else, and also gives an advantage to contestants or candidates who are wealthy enough to pay the costs or who have friends, family or colleagues who can afford to pay these costs for them.

Currently under the *CEA*, 90 percent of the three expenses addressed in the next four proposals set out below are reimbursed if a candidate wins more than 10 percent of the vote in the election.¹²⁴² However, the candidate still has to have the money to pay the expenses during a campaign period, which means any candidate who knows people or entities that can pay these expenses for them has an advantage. As well, candidates who win less than 10 percent of the vote are not compensated. The public funding system could be designed in a much more egalitarian way to cover these costs, including by covering them as they are incurred by every candidate. I address this more fully below in section 6.8.

Proposal 41: Prohibit paying of care expenses

The *CEA* should be changed to prohibit anyone or any entity from paying the care expenses of a contestant or candidate. Instead, these expenses should be paid from a public fund (as addressed below in section 6.8).

As detailed as the sixth area of concern in section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, another area of concern is that, by decision of Elections Canada (i.e. not by a specific statutory provision in the *CEA*), anyone and any entity can pay an unlimited amount of other personal expenses of a nomination contestant or leadership contestant, and up to \$200 for an election candidate, if the expense is incurred because they are a contestant or candidate. For all the same reasons as care expenses, allowing this is not egalitarian. It is questionable

¹²⁴² *CEA*, *supra* note 79, sections 477.73, 477.74 and 477.741.

whether other, somewhat undefined personal expenses of contestants or candidates (Elections Canada only lists “drycleaning” and “personal grooming” as examples) should be covered by a public fund. If subsidies are going to be given to equalize the opportunity to run as a contestant or candidate, they should be for specific, identified, unavoidable systemic or personal disadvantages.

Proposal 42: Prohibit paying of personal expenses

The *CEA* should be changed to prohibit anyone or any entity from paying the other personal expenses of a contestant or candidate. If any of these other types of expenses can be shown to present a systemic or personal disadvantage for any contestant or candidate, then these expenses should be paid from a public fund (as addressed below in section 6.8).

Also mentioned as the fifth area of concern in Chapter 3, section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, is that anyone or any entity is allowed to pay the expenses for any nomination contestant, leadership contestant or candidate for any litigation that results from their campaign. This, again, allows someone or some entity to give more support than other voters and entities are allowed to give. Public funding is a more egalitarian way of providing this support.

However, while it is important to protect contestants and candidates from frivolous lawsuits that may be filed in an attempt to derail their campaign, there is an argument for requiring the litigation to qualify for public support. For example, if the Commissioner of Canada Elections is prosecuting a contestant or candidate for failing to comply with the *CEA*, I don't see a good

reason for this form of public funding to pay the costs for their defence, especially given that they would likely be provided with a lawyer under provincial legal aid systems.

Proposal 43: Prohibit paying of litigation expenses

The *CEA* should be changed to prohibit anyone or any entity from paying the litigation expenses of a contestant or candidate. Unless the litigation is due to a clear violation by the contestant or candidate of the *CEA* (for which they are being prosecuted), the expenses should be paid from a public fund (as addressed below in section 6.8).

A related area of concern mentioned above as the eleventh area of concern in section 3.11 is that after the election a candidate is allowed to keep any surplus from someone or some entity who has paid the care, personal or litigation expenses for them. This causes an obvious conflict of interest between the candidate and the person or entity who paid their expenses. This conflict will be prevented if the above proposals are implemented as that would mean no one or entity would be paying these expenses, and there would be no surplus because a public fund would only pay for actual expenses incurred. However, I include the following proposal to ensure this area of concern is addressed.

Proposal 44: Candidate can't keep personal expense surplus

If the above changes are not made prohibiting anyone or any entity from paying the care, personal or litigation expenses of an election candidate, the *CEA* should be changed to prohibit the candidate from retaining any surplus funds from the paying of those expenses.

As detailed as the seventh area of concern in section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, another area

of concern is that, under the *CEA*, anyone or any entity can pay up to \$5,000 to compensate an election candidate's representatives at polling stations. For all the reasons provided concerning the other above expenses, this is inequalitarian. If it can be proven through a comprehensive study that parties and candidates cannot raise enough from contributions of \$75 annually to pay the costs of informing voters and operating during election campaign periods, including having representatives to observe polling stations, then these costs should be paid for through public subsidies.

Proposal 45: Prohibit paying of polling station representatives

The *CEA* should be changed to prohibit anyone or any entity from paying a candidate's costs of having representatives at polling stations. If it can be proven that parties and candidates cannot raise enough to pay these costs, then these costs should be paid from a public fund (as addressed below in section 6.8).

As detailed as the eighth area of concern in Chapter 3, section 3.8, and also detailed for all the political entities in sections 3.9 to 3.13, another area of concern is that, by decision of Elections Canada (i.e. not in the *CEA* as a statutory provision), a celebrity who usually charges for public appearances can appear at a nomination or leadership contest or candidate or party campaign event for free and, unlike every other contributor or supplier, it is not counted as a contribution or an expense. Only their costs of travelling to the event are counted as a contribution (or as an expense if the campaign pays the costs). This exemption gives allows celebrities to make a donation that no one else is allowed to make (as all other supplies of products and services are counted as a donation or an expense), and gives contestants, candidates and

parties that are supported by celebrities an advantage, and allows them to collude with this third party only (all other collusion is prohibited). For all these reasons, allowing this does not comply with the egalitarian model.

Proposal 46: Count celebrities as a donation or expense

The *CEA* should be changed to count the appearances by celebrities who normally charge for appearances toward either a celebrity's \$75 annual donation limit, or as an expense.

Another problem support area is that, as detailed above in section 3.11, unlike election candidates, nomination contestants and third parties are allowed to collude with each other in sharing information, and there is no limit on the amount a third party can spend in supporting (or working against) a nomination contestant, and the same gaps in the rules exist for leadership contestants and third parties (as detailed above in section 3.13). I address these problem areas below in section 6.6 (proposal #65), and in sections 6.12 (proposals #124 and #125) and 6.13 (proposals #142 and #143).

Other issues related to donations include that nomination contestants and candidates (and EDAs) are allowed to receive contributions of money, property, use of property or services from outside of their electoral district. Given candidates are elected to represent their district, their capacity to have an equal opportunity to run should be based on the support of voters in their district through donations directly to their campaign or through their EDA or a directed contribution through their party (other than subsidies that may be granted to compensate for systemic disadvantages).

Proposal 47: Prohibit donations from outside a district

The *CEA* should be changed to prohibit donations to nomination contestants, candidates and EDAs from outside the electoral district.

Another area of concern is that the current rules in the *CEA* allow, but do not require, party headquarters to share a portion of each membership fee or donation (or loan or subsidy, which I address in other sections below) with local EDAs annually or, during election years, with candidates' campaigns. As Chart 10 in Chapter 3, section 3.10, shows, parties do share their funding with EDAs. For example, in the 2019 federal election year, a fixed date election year following four years during which EDAs had ample time to fundraise for the election, still 39.5 percent of EDAs received transfers from their party, and on average the transfer was approximately 33 percent of the total average amount raised by EDAs that received contributions from voters.¹²⁴³

Some of these may be transfers of directed contributions, which is a donation that is made to the party out of convenience because the party has an online donation system or other donation infrastructure that an EDA may not have, but is directed to an EDA (this is also done during leadership contests), and there is nothing inequalitarian about this kind of transfer as long as the donor lives in the district. However, if these are not directed contribution transfers, then they are inequalitarian because the party leader and executive have the discretion whether or not to do the transfer to an EDA

¹²⁴³ See similar overall averages in transfers from parties to EDAs, with variations for each party, in William P. Cross, Rob Currie-Wood and Scott Pruyzers, "Money talks: Decentralized personalism and the sources of campaign funding," (October 2020), Vol. 82 *Political Geography* 102242, section 5.

(or a candidate during an election campaign period), which gives these few people disproportionate power compared to EDA members, and also it is a means of “buying” the support of the local MP. As well, it allows an EDA with little or no local voter support to keep operating based only on support from its party headquarters. The following proposal addresses this, and set out below in section 6.8 are proposals for requiring parties to also share part of any public subsidy with its EDAs.

Proposal 48: Require parties to share donations and fees

The *CEA* should be changed to prohibit party headquarters from transferring any funds they want to their EDAs, and instead to require parties to share a portion of each donation and membership fee with the EDA and/or candidate’s campaign (during an election campaign period) in the district in which the person making the donation or paying the fee resides.

Another problem area is that, as Chart 10 in section 3.10 also shows, 16.2 percent of EDAs received transfers in 2019 from other EDAs, and on average the transfer was approximately 28 percent of the total average amount raised by EDAs that received contributions from voters. This gives the MP and executive of these EDAs disproportionate power over the members of the EDA sending the funds (as they likely didn’t donate to have the funds go elsewhere) and also over the members of the EDA receiving the funds. It also allows the MP of one EDA to do a favour for other MPs that creates a conflict of interest. This also allows an EDA with little or no local voter support to keep operating or prosper based only on support from other EDAs.

Proposal 49: Prohibit EDAs from transferring to other EDAs

The *CEA* should be changed to prohibit EDAs from transferring funds to other EDAs (and their candidates).

In addition to these kind of transfers, as detailed as the fifteenth area of concern at the end of section 3.12, a party candidate after an election is required under the *CEA* first to transfer any capital assets (computers, campaign signs etc.) to their party or EDA, or to sell the assets and transfer the money from the sale along with any other surplus funds to their party or EDA.¹²⁴⁴ Corresponding with the proposals above concerning only allowing donations and transfers from within an EDA, the following proposal addresses candidate surplus transfers.

Proposal 50: Transfer candidate surplus proportionally

The *CEA* should be changed to require candidates to transfer any capital assets (either as an asset or as money from the sale of the asset) and any other surplus campaign funds to their EDA and party proportionally based on how much each funded the candidate's campaign.

In addition, as detailed as the fourteenth area of concern near the end of section 3.11, nomination contestants who did not win the nomination in a district are allowed to transfer any surplus of their campaign to the district candidate's campaign account, or to the district association or party which can then transfer it to the candidate's campaign, even if the donors to the contestant's campaign do not support the candidate who won the contest.¹²⁴⁵ It should be noted that this is not a significant current concern, as only 29

¹²⁴⁴ *CEA*, *supra* note 79, sections 477.8 (especially subsection 477.8(2)) to 477.84.

¹²⁴⁵ *CEA*, *supra* note 79, clause 364(5)(a), and sections 476.91 to 476.94.

candidates in the 2019 federal election received a transfer from a failed nomination contestant, and the total amount received was \$63,737.69 (for an average of \$2,197.85 per candidate).

As detailed at the end of section 3.13, party leadership contestants are also allowed under the *CEA* to donate any surplus they have from their contest campaign to the party holding the contest (or to EDAs of that party). Even if this does not happen very often, these rules still provide an opening for a candidate, EDA or party to receive financial support from voters who may not actually support them, and it also allows a failed contestant to make a larger donation than anyone else is allowed to make. It would be more egalitarian to require them to return the surplus in proportional amounts to the people who made the donations to let them decide if they wanted to re-donate it to the candidate, EDA or party. For example, if a contestant raised \$10,000, and then had a surplus of \$1,000, each of their donors would be reimbursed 10 percent of whatever amount they donated.

Proposal 51: Required failed contestants to return donations

The *CEA* should be changed to prohibit failed nomination contestants and leadership contestants from transferring their surplus to a candidate, EDA or party, and instead they should be required to return a proportional amount of the surplus to each of their donors.

A final donation area that does not align with the egalitarian model is that, as detailed in Chapter 3, subsection 3.12.1, under the *CEA* an independent candidate is not allowed to accept contributions until the campaign period begins. In contrast, EDAs and parties are allowed to raise money every year in between elections and then, as mentioned above,

transfer it to their candidate's election campaign account when the campaign period begins. In addition, as mentioned above re: proposal #48, a party candidate after an election either transfers any capital assets (computers, campaign signs etc.) to their party or EDA, or sells the assets and transfers the money from the sale along with any other surplus funds to their party or EDA. If transferred to the EDA (proposal #48 suggests this should be required) it can provide a base level of funding and resources for the next candidate's campaign in the next election.

Independent candidates could be allowed to register and begin fundraising one year before a fixed-election date election. However, as mentioned above in section 6.1, even though legislatures across Canada have enacted measures to set a fixed election date every four years, the courts have not upheld those measures and snap elections can still be called at any time. Obviously, if a "snap" election is called suddenly, independents are disadvantaged financially even more compared to party candidates as they would not even have time to prepare to fundraise and campaign.

As a result, I contend that, to equalize the opportunity to participate as much as possible, independent candidates should be allowed to register and begin fundraising right after each election in preparation for the next election. For the same reasons set out above for all candidates, independent candidates should be prohibited from donating or loaning more than \$75 total to their own campaign, and from receiving donations/loans of more than \$75 annually etc., as addressed in the following proposal.

Proposal 52: Allow independents to register/fundraise any time

The *CEA* should be changed to allow independent candidates to register and begin fundraising any time after the previous election, while prohibiting them, like all candidates, from donating more than \$75 to their own campaign or receiving a donation/loan combined that totals more than \$75, and from receiving donations/loans from outside their electoral district. Independent candidates should also be eligible for any public subsidies on an equal basis as party candidates.

In addition, independent candidates are required to transfer any campaign surplus and assets to the Receiver General of Canada¹²⁴⁶ while, as mentioned above, party candidates transfer it and any campaign assets to their party or EDA which can provide a base for the next candidate in the next election. If an independent candidate intends to run again, and has a campaign surplus, they should be allowed to keep their surplus and assets for their next campaign.

Proposal 53: Independents can keep surplus for next election

The *CEA* should be changed to allow independent candidates, if they intend to run again in the next election, to keep any campaign surplus and assets they may have and begin to use it for their next campaign.

6.5.3. Decrease loan limit to level average voter can afford

As detailed as part of the first area of concern in Chapter 3, section 3.8, and also detailed for all the political entities in sections 3.9 to 3.13, loans raise all the same concerns as donations, and even more so because some forms

¹²⁴⁶ *CEA*, *supra* note 79, sections 477.8 (especially subsection 477.8(2)) to 477.83, and 477.841.

of loans are essentially unlimited (as raised as the second, third and fourth areas of concern in section 3.8, and detailed in the other sections). For all the same reasons set out in the previous subsection, the limit on loans from individuals to all parties, and to all EDAs, and to all nomination contestants and candidates during an election year, and to all contestants in a leadership contest, should be decreased to, combined with a donation, a combined total of \$75, down from the current combined total of \$1,700.

Proposal 54: Decrease loan limit to \$75 combined with donation

The *CEA* should be changed to decrease to \$75 (adjusted annually based on the increase/decrease of Canada's median income) the limit on loans to all parties, nomination contestants in a contest, all election candidates in an election, or all leadership contestants in a contest.

In addition, as detailed in Chapter 3, section 3.8 and subsection 3.9.1, the huge favour that financial institutions are allowed to extend to parties, EDAs, contestants and candidates by loaning them an unlimited amount,¹²⁴⁷ puts every MP in a conflict of interest afterwards when they are addressing proposals concerning financial institution and financial services issues. For the 2015 and 2019 elections, despite having had three-and-a-half years to fundraise since the previous election, all five of the main federal parties obtained loans ranging from 32 percent to more than 100 percent of the amount they spent. Even if it the parties didn't take out these huge loans, and even if the lenders were not regulated by the federal government, it would still be inequalitarian to allow this one type of business loan an unlimited amount

¹²⁴⁷ *CEA*, *supra* note 79, subsection 373(3).

while every other business or organization is prohibited from making loans (somewhat – see exception described below) and while loans from individuals are limited.

While it could be said that a \$75 dollar loan limit amounts to essentially a ban on loans, it should be noted that it would still allow candidates to begin a campaign based on small loans from many people, with the loans repaid as the candidate raised money from other donors. If the initial loans could not be repaid at the end of a campaign then they would simply be transferred into a \$75 donation (which would still be egalitarian). It should also be noted that, according to International IDEA, 18 countries prohibit parties, and 19 prohibit candidates, from taking out loans for election campaigns.¹²⁴⁸

If any loans are needed by any candidates or parties, to be egalitarian they should first be based on a requirement to prove that voters support the candidate or party, and secondly that the loan limit is proportional to the level of voter support. Thirdly, loans should be provided through a public fund that does not have a stake in federal political policy decisions. Again, however, the first step is to determine whether loans are even needed through a comprehensive study, as proposal #33 calls for, of the costs of informing voters and operating between elections and during campaigns and contests.

Proposal 55: Prohibit large loans except from public fund

The *CEA* should be changed to prohibit financial institutions from making loans. If a comprehensive, independent study shows that

¹²⁴⁸ International IDEA, Political Finance Database, online (as at July 20, 2022): <<https://www.idea.int/es/themes/political-finance>> and <<https://www.idea.int/data-tools/world-view/55?st=bpi#rep>> (hereinafter “IDEA, Political Finance Database”). The Database contains answers to 27 questions about the political finance laws in 180 countries. Question 24 is about loans to parties, and question 25 is about loans to candidates.

individual donations of \$75 annually will not provide enough funding for parties and EDAs to inform voters and operate between elections and in election years and in contests, then large loans should be made available through a public fund, with the amount of the loan limited by the actual number of voters who are members and donors of the party, EDA, contestant or candidate.

As described in section 3.8, other businesses, organizations and individuals who sell products and services are, in effect, allowed to make loans because the *CEA* allows parties, EDAs, candidates and contestants to make purchases and then not pay for up to three years. Allowing this brings into question the integrity of the system, given businesses and other organizations are prohibited from making donations. It is also inequalitarian as it allows, like the financial institution loans addressed above do, individuals to run as contestants and candidates, and parties to operate for years, even if they can't raise any money from any voter (i.e. even if they have no voter support).

I contend that parties, contestants and candidates should be required effectively to spend only what they raise or know they will raise very soon or that they receive as a public subsidy that is given to them based on their actual level of support or to correct a systemic disadvantage. Allowing them to spend more money than they have through any avenue not only allows people who do not have voter support to campaign on the same level as people who do have voter support, it also allows businesses and other organizations, and individuals, to do favours that others are not allowed to do

or can't afford to do, favours that cause conflicts of interest, both of which do not comply with the egalitarian model.

In contrast to the federal rules, Elections Ontario considers that if a product or service is purchased from a supplier that is a corporation, union or other organization, and the invoice is not paid within a normal time period (which would be 30-60 days), then it will be considered an illegal contribution or loan (as it comes from “an ineligible source” given donations and loans from businesses and other organizations are prohibited under Ontario’s election finance law).¹²⁴⁹ As the Commissioner of Canada Elections notes in a recommendations report issued in June 2022, before changes were made to the CEA in 2014, the deadline for paying debts was four months, and the longer deadline means that candidates are now incurring debts that they likely won’t be able to pay back as donors lose interest in donating such a long time after a campaign is over.¹²⁵⁰ While the Commissioner recommends shortening the time period for paying debts from the current three years down to 18 months, I think that misses the overall point that no political entity should be spending money it hasn’t already raised or knows for sure it will raise.

¹²⁴⁹ Elections Ontario, *CFO Handbook for Leadership Contestants* (March 2022), online: <<https://www.elections.on.ca/content/dam/NGW/sitecontent/Compliance%20Documentation/English/Leadership%20Contestants/CFO%20Handbook%20for%20Leadership%20Contestants.pdf>> at 29 and 50. The same statements also appear in Elections Ontario’s *CFO Handbook for Political Parties* (March 2022, at 38 and 77), *CFO Handbook for Constituency Associations* (March 2022, at 35 and 55), *CFO Handbook for Constituency Associations of Independent Members* (March 2022, at 30 and 45), *CFO Handbook for Nomination Contestants* (March 2022, at 26 and 34), and the *CFO Handbook for Candidates* (March 2022, at 31 and 49), which can all be accessed through the links online at: <<https://www.elections.on.ca/en/political-entities-in-ontario.html>>.

¹²⁵⁰ Commissioner of Canada Elections, *Recommendations Report: 2019 and 2021 General Elections*, (June 7, 2022), online: <<https://cefcce.ca/content.asp?section=rep&dir=rep9&document=index&lang=e>> at 9-10 (hereinafter “CCE, *Recommendations Report* (June 2022)”).

Proposal 56: Prohibit political entities operating on credit

The *CEA* should be changed to prohibit a party, EDA, contestant or candidate to obtain a product or service from a business or other organization, or an individual, unless it has the funds or knows for sure that it will soon have the funds to pay the cost (i.e. within a few months).

Another area of concern described in section 3.8 is that, under Elections Canada policy, businesses, organizations and individuals are allowed to, in effect, make another type of loan by purchasing products and services on behalf of parties, EDAs, candidates and contestants and then not be paid back for up to three years. Elections Canada's policy allows this as long as the arrangement appears to be a commercial transaction. As with the other type of loan described above, allowing this brings into question the integrity of the system, and it is also inequalitarian. The policy presumably exists to allow parties etc. that cannot obtain credit to obtain it through another person or entity. However, if proposal #52 above is implemented, that won't be a problem because political entities will not be allowed to operate on credit.

Proposal 57: Prohibit fronting purchases for political entities

The *CEA* should be changed to prohibit individuals and entities from purchasing any product or service on behalf of a party, EDA, contestant or candidate.

6.6. More egalitarian spending by contestants, candidates, and political parties, during the pre-campaign and campaign periods

From the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5 that are the framework for the proposals in this chapter, the following standard addresses the area of spending:

7. Spending limits for all contestants, candidates, parties and third parties, based on their actual level of voter support (in order to ensure substantively equal opportunity for substantively equal participation and influence in not only election debates but also debates on issues between elections, and to ensure public confidence in integrity – with no more than a 10 percent variation in the equality of opportunity and influence of individuals and entities with the same number of voter supporters).

As detailed in Chapter 3, sections 3.14 to 3.17, the *CEA* already limits spending by nomination race contestants, candidates and parties using a calculation based on the number of voters in an electoral district, the geographical size of the district and, for parties, the number of candidates the party has running in an election. However, the calculation is not based on any assessment of the actual costs of a campaign. In addition, as detailed in section 3.17, the *CEA* already limits spending by parties during the pre-election period (if an election occurs on a fixed-election date), but again the limits are not set based on any assessment, and the period is very short as it runs only from June 30 of the election year until the writ is dropped in early September, a summertime period during which parties (and third parties) are

unlikely to spend money given how many voters are travelling and/or vacationing.

What amount of money is needed to run as a nomination contestant, election candidate, party leadership contestant or political party at the federal level in Canada? The answer is unknown as this has not been studied. Cost factors include the size of the jurisdiction, the type of campaigning, the resources deployed, whether the jurisdiction has spending limits, and the level of funding that other contestants and candidates have. While politicians and political parties across the spectrum claim that they need large sums of money to run campaigns and reach voters, their claim is not based on any evidence that all the spending they may want to do is necessary, nor on any evidence that the free media coverage they receive is insufficient to communicate their election platform and messages to voters.

Election campaigns at a local level could be completely volunteer-run with little funding. National campaigns of political party leaders usually necessitate spending on campaign and support staff, travel and event costs. However, they also often involve significant spending on surveys and broadcast advertising, and the necessity of that spending can be justifiably questioned given that media outlets often publish survey results during elections, some jurisdictions offer an amount of free broadcasting time for party advertisements (in the UK that is the only advertising parties are allowed to do), and several studies show that the advertising has only a small effect on voters.¹²⁵¹

¹²⁵¹ See sources in footnote 288 at end of Chapter 3, section 3.8.

As well, the growing availability worldwide of email, cell phone and social media communications, as well as smartphones and texting, and robocalls and voter-tracking software and hardware,¹²⁵² has reduced the costs of reaching voters and advertising. This includes the phenomenon of a political ad posted only on social media that, combined with an email to supporters and a news release to the media, can make the video go viral through the sharing and media coverage that results, all at no cost to the candidate or party.¹²⁵³ As well, advertising costs on social media are exponentially lower than the past costs of TV, radio and print media advertising.

Despite all of these costs decreasing since 2000, the base rate for party election expenses in the 2003 version of the *CEA* of \$0.62 (the amount is adjusted upwards each election by the inflation rate since 1992) multiplied by the number of voters in all the ridings in which the party is running a candidate¹²⁵⁴ was increased to \$0.70 in 2004,¹²⁵⁵ and then to \$0.735 in 2015.¹²⁵⁶ As well, the base rates for candidate election expenses in any district in the 2003 version of the *CEA* of \$2.07 per voter for the first 15,000

¹²⁵² Kady O'Malley, "Election law changes could boost Conservative MPs' campaign tools," (December 9, 2014), CBC.ca, online: <<https://www.cbc.ca/news/politics/election-law-changes-could-boost-conservative-mps-campaign-tools-1.2860344>>.

¹²⁵³ Petrova, Sen and Yildirim (2021), *supra* note 289.

¹²⁵⁴ *Canada Elections Act*, SC 2000, c 9, (January 1, 2003 to March 7, 2003 version), online: <<<https://canlii.ca/t/l3qc>>, subsection 422(1) (hereinafter "*CEA* (2003 version)").

¹²⁵⁵ *Canada Elections Act*, SC 2000, c 9, (January 1, 2004 to February 13, 2004 version), online: <<https://canlii.ca/t/j0vp>>, subsection 422(1) (hereinafter "*CEA* (2004 version)").

¹²⁵⁶ The amount was increased by the *Fair Elections Act*, SC 2014, c 12, online: <<https://canlii.ca/t/52m3l>> (hereinafter "*Fair Elections Act*") which re-wrote the *CEA* and so previous section 422 became section 430. The increase did not come into effect until January 1, 2015, in *Canada Elections Act*, SC 2000, c 9, (January 1, 2015 to August 1, 2015 version), online: <<https://canlii.ca/t/j0vp>>, subsection 430(1) (hereinafter "*CEA* (2015 version)").

voters, \$1.04 per voter for the next 10,000 electors, and \$0.52 per voter for the remaining voters in the district¹²⁵⁷ (the amounts are adjusted upwards each election by the inflation rate since 1992) were increased to \$2.1735, \$1.092 and \$0.546 in 2015.¹²⁵⁸ While these spending limits are egalitarian in form, as they are based on the number of votes in a district, the amounts need to be evaluated to determine if they actually accord with the cost of reaching and informing voters and operating a campaign.

Several scholars ignore that the question of the actual cost of running in an election has not been studied and/or assume that the cost is whatever candidates (and parties) are spending at whatever time period they are studying or reviewing.¹²⁵⁹ I contend that the discussion of spending limits has to begin with a study of the costs of running a campaign, as called for by proposal #33 above in section 6.5, specifically the costs of reaching and informing voters – not convincing voters (which would be very difficult to measure) just reaching them – and the costs of operating a campaign and, in between elections, operating an EDA or party.

As listed in section 3.14, the factors considered in such an assessment should include, all based on average costs for past successful campaigns: office and staff costs: the actual current cost of communicating in a way that reaches each voter in a district, and in a national campaign; actual current

¹²⁵⁷ CEA (2003 version), *supra* note 1254, subsections 441(3) and (7).

¹²⁵⁸ The amount was increased by the *Fair Elections Act*, *supra* note 1256 which re-wrote the CEA and so previous section 441 became section 477.5. The increase did not come into effect until January 1, 2015, in CEA (2015 version), *supra* note 1256, subsections 477.5(3) and (7).

¹²⁵⁹ See, for example: Sunstein (1994), *supra* note 1128 at 1410; Stoney and Waters (2008), *supra* note 3 at 157; MacIvor (March 2008), *supra* note 3 at 106-107; Gauja (2008), *supra* note 1127 at 250, and; Fisher (2011), *supra* note 1235, at 19-20.

travel costs in a district, and for a party leader's campaign, and; actual current cost for "get-out-the-vote" efforts (taking into account, when assessing the costs of running in an election, that Elections Canada spends millions to encourage voter turnout).

I also contend that we should be skeptical of claims by candidates and parties that they need to spend money on any specific campaign tactic or action. First, while there is evidence showing that higher spending sometimes correlates with electoral success (in part by discouraging challengers from even running), many studies and analyses in North America show either that it is very difficult to isolate and determine the causal effect of spending and/or that other factors (including being the incumbent candidate) have just as much or more influence on election outcomes.¹²⁶⁰ To be clear, these studies, most of which have been undertaken in the U.S., show that very often the candidate who spends the most wins, however it is not clear whether the fact that they spent more caused their victory.

Secondly, it is clear just from a comparison of Canada and the U.S. alone that parties, politics, legislatures, governments can campaign and operate equally well under a wide variety of spending levels. In the 2019 Canadian federal election, the Conservatives, Liberals and NDP spent on average \$21.7 million each on their national campaigns; in 2011 on average \$21 million; and in 2008 on average \$16.9 million.¹²⁶¹ Also in the 2019 federal

¹²⁶⁰ See articles by Scarrow, Milligan and Rekkas, Press and Bryden, Barutt and Schofield, Bekkouche and Cagé, and Schuster, *supra* note 29.

¹²⁶¹ Calculated from figures at: Elections Canada: Election Expenses, *supra* note 408. The 2015 election is not included because the campaign period was much longer than on average and, as a result, the parties all spent more than usual.

election, the average spending limit for candidates was \$110,000.¹²⁶² In contrast, in 2018 eight U.S. Senate candidates spent on average \$23.8 million each on their campaigns for one Senate seat, even in states with smaller voting populations than Canada has.¹²⁶³ Also, as detailed in Chapter 3, section 3.17, Canadian elections in the past 25 years show examples of parties spending less but winning more seats than parties that spend more.

After, through the completion of the comprehensive study suggested in proposal #33 above, a reasonable estimate is determined concerning the amount of spending that is needed to reach and voters during an election campaign, and run a campaign office, then the gap between what donors provide and that amount of spending can be determined. If the \$75 egalitarian donation and loan limit suggested in the previous section is enacted, along with the public subsidies I propose below in section 6.8, it is quite possible that these changes may, in effect, set an egalitarian spending limit, as no political entity will have significantly more money to spend than any other entity except on the basis that the entity is supported by more voters. Possibly the current spending limits for nomination contestants, election candidates and parties will be much higher than the amounts they will be able to raise. If whatever reasonable estimate the study suggested in proposal #33 produces of the actual costs is lower than the current limits, the limits should be lowered to that amount.

¹²⁶² Elections Canada, Final Election Expenses Limits (2019), *supra* note 376.

¹²⁶³ Karl Evers-Hillstrom, "State of Money in Politics: The price of victory is steep," (February 19, 2019), OpenSecrets.org, online: <<https://www.opensecrets.org/news/2019/02/state-of-money-in-politics-the-price-of-victory-is-steep/>>.

Proposal 58: Set spending limits after study of campaign costs

The spending limits in the *CEA* for nomination contestants, candidates and parties during the pre-election and election periods should be adjusted after completion of the comprehensive study suggested in proposal #33 of the actual costs of reaching and informing voters, and operating a campaign. If election dates are fixed more fully as suggested in proposal #1, the limits for the pre-election period should be extended to cover a period of four months before the election campaign period begins (i.e. if the current third Monday in October election date became more fixed, with the writ drop in the first week of September, the pre-election period would run from May 1st to the drop of the writ).

As suggested in Chapter 3, subsection 3.18, parties should also no longer be allowed to set spending limits for party leadership contests as they often set clearly inequitable limits (in addition to, as addressed above in subsection 6.4.2, setting other inequalitarian rules for their contests). Instead, a limit should be set out in the *CEA* that takes into account the number of members in the party and whether the party operates only regionally (like the Bloc Quebecois) or on a national level, as the costs of running for the leadership in a small and/or regional party would obviously be less than the costs of being a contestant in a larger, national party's contest.

Proposal 59: Set limits for leadership contests after study

After the comprehensive study of the costs of campaigns suggested in Proposal #33 is completed, the *CEA* should be changed to set spending limits for party leadership contests based on the number of members in the party, and the geographical range of the membership and the party's operations.

In addition, it is possible, maybe even likely, that if the \$75 donation and loan limit is enacted, contestants, candidates and parties will need to public subsidies in order to pay the costs of reaching and informing voters during a campaign. However, we should again be skeptical of claims by contestants, candidates and parties concerning the difficulties of raising funds, as the difficulty may simply be that they are refusing to promise, and prioritize, changes to laws and government programs that most voters want implemented, and so voters are not donating to them. If contestants, candidates and parties can prove that they need public subsidies, I address in section 6.8 below the issue of how to change the current subsidies so that they are more egalitarian. As well, proposal #55 above suggested that a public fund be established for lending to parties (if they can show that they need loans), and to pay personal expenses of candidates.

In addition to the expenses problem areas addressed above in proposals #41-43 and #45 (given anyone or any entity is currently allowed to pay an unlimited amount for the expenses), there are a few other spending issues that raise questions. First, as detailed in section 3.17, only a government policy suspends government advertising from June 30 on in a fixed date election year (with the election following on the third Monday in October), but the policy allows for advertising during an election campaign period if approved by the deputy head of a government institution (who is someone appointed by the ruling party Cabinet).¹²⁶⁴ As well, a private sector

¹²⁶⁴ Government of Canada, News Release (May 12, 2016). Government of Canada, Directive on Management of Communications, online <<https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=30682>>, subsections 6.44 and 6.45.

organization, Ad Standards, is the arbiter of whether government advertising is partisan, even though its board is made up of representatives of businesses and organizations that bid on federal government contracts and/or are affected by federal government policy decisions.

In a Spring 2019 report, the Auditor General found that only advertising initiatives of more than \$500,000 are covered by the policy, and that reviews to ensure ads are non-partisan were not consistent or thorough. As a result, effectively the governing party can use partisan government advertising before June 30 in an election year on the fixed election date, and in the lead up to any snap election, to give itself an advantage over the other parties. The CEO has recommended taking the government policy and putting it into the *CEA*.¹²⁶⁵

Proposal 60: Prohibit government ads before/during election

The *CEA* should be changed to prohibit government advertising during a fixed election date year from June 30 on through to election day, unless the Auditor General approves the ad as necessary to inform Canadians of something urgent and related to their health or safety. Also, the *Auditor General Act* should be changed to give the Auditor General the power to review all government advertising for partisanship no matter when the ad is running, and to reject or required changes to ads that are partisan.

A second spending concern, also as highlighted in section 3.17, is that Cabinet ministers can travel to make, and re-make, announcements about government spending, policies or programs leading up to an election, with the

¹²⁶⁵ CEO, *Recommendations* (June 2022), supra note 1129, at 14 (Rec. 1.4.1).

public paying the costs of the travel. This gives the ruling party a promotion opportunity that opposition parties do not have, although opposition leaders do have a larger publicly funded travel allowance than other MPs.¹²⁶⁶ This prohibition on travel that is actually campaigning should also apply to MPs who are running in nomination contests or party leadership contests. The following proposal addresses this, and in section 6.10 below I set out a proposal concerning how to monitor and audit these trips and announcements.

Proposal 61: Prohibit partisan travel/statements pre-election

The *CEA* should be changed to very clearly define party leader and Cabinet minister business and travel as distinct from political party business and travel during the six months before an election, to ensure that political parties, especially the ruling party, pay the cost of what are essentially campaigning activities (for example, a Cabinet minister and staff travelling to issue a statement or make an announcement of promised spending or changes to laws or programs, or re-announcements of spending that has already been approved). The *CEA* should also be changed to very clearly define MP business travel during nomination contests and party leadership contests, to ensure MPs who are running in contests do not use the travel allowance provided to them by the public for their campaign.

A third concern, also as highlighted in section 3.17, is that transfers of funds from a registered party to its candidates do not count toward the party's

¹²⁶⁶ House of Commons, *Members' Allowances and Services*, Fiscal Year 2022-2023, Chapter 11, section 3 House Officers, section 3.8 Travel: Opposition Party Leaders; Chapter 4, section 4.4 Travel Allocations; Chapter 6, section 6.6 Travel Points System, online: <<https://www.ourcommons.ca/Content/MAS/mas-e.pdf>>.

spending limit under the *CEA*.¹²⁶⁷ This is a significant, inegalitarian loophole in the *CEA* rules because transfers to candidates are part of a party's election spending, and so should be counted as an expense by the party, not just by the candidate.

Proposal #48 above in subsection 6.5.2 suggested that parties be prohibited from transferring any funds they want any time they want to EDAs or candidates, as it gives undemocratic boost of support from outside the district that violates the egalitarian principle of equality of participation by voters in the district, and instead requiring parties to share donations and membership fees that come out of a district with the district's EDA. If that proposal is not implemented, and parties continue to be allowed to do transfers of any amount, then as suggested below parties should be required to count transfers as a party election expense, given it is the party spending the money not the local candidate. The EDA or candidate should still be required to account for how the money was spent.

Proposal 62: Require party transfers to be counted as expenses

If parties continue to be allowed to transfer funds raised from outside an EDA to an EDA, the *CEA* should be changed to require parties to count transfers they make to EDAs and candidates during campaigns as election expenses. The EDA or candidate should still be required to account for and report on how the money was spent.

¹²⁶⁷ *CEA*, *supra* note 79, subsection 430(3). See also Elections Canada, Interpretation Note 2020-07 (February 2020), online: <<https://www.elections.ca/content.aspx?section=res&dir=gui/app/2020-07&document=index&lang=e>>.

A fourth concern, as mentioned above in sections 3.15, 3.16 and 3.18, is that “reasonable compensation” can be paid to a nomination contestant or leadership contestant during a contest, and to a candidate during an election campaign. Contestants and candidates who have wealthy donors who give enough for them to be paid thereby have an advantage over others who have to continue working to pay their living costs.

Proposal 63: Prohibit compensating contestants/candidates

The *CEA* should be changed to prohibit compensating nomination contestants, leadership contestants and election candidates as this favours those who are supported by wealthy donors who donate enough for them to be paid. Instead, public subsidies should be used for compensation, but only to equalize the opportunity for everyone to run by correcting systemic or personal disadvantages.

A fifth area of concern, as mentioned in section 3.16, is that candidates are allowed to do unlimited partisan advertising during the pre-election period, and it is not counted as an expense under their election spending limit.¹²⁶⁸ As a result, candidates who are confirmed and register early enough, and raise enough money to do this advertising (which will, again, most likely be candidates backed by wealthy donors) will have an unfair advantage.

Proposal 64: Count pre-election advertising as an expense

The *CEA* should be changed to require candidates to count partisan advertising done in the pre-election period as an election expense.

¹²⁶⁸ Elections Canada, *Candidate Handbook*, *supra* note 279, at 102. Note that, under subsection 429.2(2) of the *CEA*, *supra* note 79, potential candidates (i.e. candidates who have won their nomination contest but whose nomination has not been confirmed) are not allowed to collude with a party to do partisan advertising in order to exceed the party's spending limit on such ads.

A sixth spending concern, highlighted in section 3.18, is that unlike for nomination contestants, candidates and parties, there are no rules in the *CEA* prohibiting collusion between third parties and leadership contestants to exceed a contestant's spending limit, nor prohibiting sharing information. This loophole does not comply with the egalitarian model because it allows third parties to support a contestant more than average voters, including personal expenses as addressed above in proposals #41 to #43. This is a significant loophole, especially because party leadership contests choose the Prime Minister when the contest is held by the ruling party in between elections, as they were in 1993 and 2003.

As mentioned in section 3.13 and in Chapter 4, sections 4.2 and 4.3, even if the leadership contestant that the third party supported was a sitting MP or Cabinet minister, it is unclear whether this support would be considered a gift or would create a conflict of interest that is prohibited by federal ethics laws. If it is considered a prohibited gift, then leadership contestants who are not sitting MPs or ministers would have an advantage because they could accept support from, and collude with, a third party or parties during a contest.

The proposal below addresses this loophole, and I also address it below in sections 6.12 and 6.13 in which I also address the fact that nomination contestants and third parties are allowed to collude in sharing information, and also that there are no limits on third-party spending during nomination contests and party leadership contests.

Proposal 65: Prohibit leadership contestant-3rd party collusion

The *CEA* should be changed to prohibit party leadership contestants from colluding with third parties, including by sharing information or to exceed the spending limit that should be set (see proposal #59 re: the spending limit) for all leadership contests (see also proposal #143 below).

Finally, as highlighted above at the beginning of sections 3.14 and 6.5, one area of campaign donations, and expenses, that is currently exempted in every way from the *CEA* is “volunteer” labour, which causes the problem of not being able to monitor whether people are actually being paid by third parties to volunteer on campaigns. I address this issue further below in sections 6.9 and 6.10 on disclosure measures.

6.7. More egalitarian spending by parties and electoral district associations between elections

As detailed in Chapter 3, section 3.19, the main inequality in spending power for parties and EDAs between elections flows from the fact that, due to Canada’s first-past-the-post electoral system, some parties end up with a higher percentage of MPs than their percentage of popular vote in an election. Given each MP receives an annual office budget funded by the public ranging from (in fiscal year 2022-2023) \$388,000 up to 481,710 depending on the number of voters and geography of their district,¹²⁶⁹ and the ruling party received on average 13.23 percent more seats than votes in the 13 federal elections from 1980 to 2021 inclusive, the ruling party alone receives millions

¹²⁶⁹ House of Commons (2022-2023), *supra* note 423.

of dollars of public funding annually than it deserves if our system was based on the fundamental democratic principle of one person, one vote and, as a result, it has millions more to spend. I am not addressing inequalities of the voting system overall in this thesis; however I do propose a public subsidy in section 6.8 below to correct this inequality.

Charts 6 and 7 in section 3.9 show that the Liberals and Conservatives are supported more by donors who donate \$1,000 or more compared to the other three main federal parties. As Chart 25 in section 6.5 above projects, the revenues of the parties annually between elections would, based on the projection in that chart, be somewhat more egalitarian with a \$75 donation limit as the Liberal Party would, with the same number of donors as it had on average from 2016-2020, only have 10.5 times more money annually to spend than the Bloc (currently it has 15.7 times more on average), and 2.23 times as much as the NDP, and 3.65 times as much as the Greens (currently it has, on average, 2.8 times as much as the NDP, and 4.5 times as much as the Greens). The Conservatives would only have 14 times more money to spend than the Bloc (currently it has 15.7 times more on average), and approximately 3 times as much as the NDP, and 5 times as much as the Greens (currently it has, on average, 3.8 times as much as the NDP, and 6.1 times as much as the Greens).

As raised in Chapter 3, section 3.19, given the parties are more frequently engaged in ‘permanent campaigning’ through advertising about each other’s performance and policy stands, the question is whether to impose spending limits on parties during policy-making processes between

elections. I suggest that spending limits are not needed for the following reasons: 1. Parties are still mainly spending during pre-election periods, and I propose above in proposal #58 that the pre-election period be extended from the current two months to four months before the writ is dropped so that spending would be regulated; 2. If parties spend before the pre-election period, the evidence shows that parties spend mainly on reaching out to their own members, in part to raise money, and so that spending would be exempt from any spending limit fashioned as the current third-party spending limits are (as unlimited spending for communications with members are exempt); 3. The ruling party can use government advertising anytime, even if it is regulated more fully as suggested in proposal #60, to make voters aware of what it has done for them, so it would put other parties at even more of a disadvantage if their between-elections spending was limited, and; 4. If a \$75 donation and loan limit is set as suggested above in section 6.5, and donations only allowed from voters, and public subsidies as suggested below in section 6.8 to equalize funding for parties and EDAs based on their number of members/supporters and actual level of voter support, the resources the parties will have for such spending will be egalitarian.

As a result, given a central role of parties is to represent voters in political decision-making processes, if a party decides that it should devote significant funds to communicating with the public about one policy-making process more than another, it seems unnecessary to limit that spending. In contrast, the limits suggested below in section 6.13 on third-party spending during policy-making processes are needed because third parties do spend

significant amounts on advertising advocating their policy positions, not just during the pre-election period and not only to raise funds, and the sources of funding for third parties are not egalitarian in several ways. To be clear, if an egalitarian donation and loan limit is not set for parties, then I contend that there is more of an argument to limit party spending during policy-making processes.

Finally, as several past situations have shown, one of the main concerns with party and EDA spending between elections is whether the money raised is spent on activities, products and services and other things that donors would support. In section 6.10 below, I address this issue with proposals for stronger disclosure and auditing requirements.

6.8. More egalitarian public subsidies to parties, associations, contestants and candidates

From the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5, the following three relate to the area of public subsidies (and I also address the third, concerning access to media and social media, in section 6.17 further below):

8. Public funding and subsidies for contestants, candidates and parties to address structural inequalities caused by past and current discrimination, and economic disadvantage, based on their actual level of voter support (in order to ensure substantively equal opportunity for substantively equal participation and influence in contests, by-elections and elections, and to ensure public confidence in integrity);

9. Additional public funding and subsidies provided only if it can be proven that contestants, candidates and parties need them in order to inform voters and operate effectively, again only provided based on actual level of voter support (in order to ensure substantively equal opportunity for substantively equal participation and influence, and to ensure adequate information is provided to voters);
10. Access to media and social media that also ensures substantive equality of opportunity for all voters to participate in and influence contests, by-elections, elections and policy debates between elections (also in order to ensure adequate information is provided to voters, and public confidence in integrity).

As suggested above in proposal #33 near the beginning of section 6.5, through a comprehensive study of the actual costs of campaigning and, for parties and EDAs operating between elections needs to be done and then, after the combined donation and loan limit to \$75 annually is implemented, a determination can be made of whether parties, associations, contestants or candidates need any general, overall public subsidies. Implementing the \$75 limit will, of course, affect the current public subsidies offered through tax credits to donors described in Chapter 3, section 3.20. While the current tax credits scale down the more you donate, you have to have the money to donate, and enough income to be required to pay taxes, to claim the credit, and so the most vulnerable people with the lowest incomes do not benefit at all.

As well, according to Canada Revenue Agency (CRA) reports, the current donation tax credit system amounts provided public funding of almost \$27.8 million to 148,440 donors in 2017 (the most recent year for which final

statistics are available)¹²⁷⁰ and just over \$53.78 million to 270,310 donors in 2015¹²⁷¹ (which was an election year when the number of donors and amount of donations usually increases significantly). As Chart 27 below shows, based on the statistics in these CRA reports, people with the lowest incomes do not claim the credit; people in the three highest income brackets who each make \$100,000 or more annually make up 32.2 percent of the claimants and receive 42.8 percent of the total public funding handed out;¹²⁷² people in the top seven brackets who make \$60,000 or more annually make up 64.47 percent of claimants and receive 73.36 percent of total public funds,¹²⁷³ and; people with a median income (2019 figures) of between \$35,000 to \$40,000 make up only 3.67% of claimants and receive only 2.5% of total public funds.¹²⁷⁴

Given these figures, I contend that this amount of annual public funding could be distributed in a much more egalitarian way.

¹²⁷⁰ Canada Revenue Agency, T1 Final Statistics, online: <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/income-statistics-gst-hst-statistics/t1-final-statistics.html>> (hereinafter “CRA, T1 Final Statistics”). Canada Revenue Agency, Income Statistics 2019 (2017 Tax Year), online: <https://www.canada.ca/content/dam/cra-arc/prog-policy/stats/t1-final-stats/2017-tax-year/table2_ac-eng.pdf>.

¹²⁷¹ CRA, T1 Final Statistics, *supra* note 1270. Canada Revenue Agency, Income Statistics 2017 (2015 Tax Year), online: <<https://www.canada.ca/content/dam/cra-arc/prog-policy/stats/t1-final-stats/2015-tax-year/tbl2ac-eng.pdf>>.

¹²⁷² 47,820 out of 148,440 claimants = 32.2%. \$11.017 million out of \$25.757 million = 42.8%.

¹²⁷³ 95,700 out of 148,440 claimants = 64.47%. \$18.897 million out of \$25.757 million = 73.36%.

¹²⁷⁴ 5,450 out of 148,440 claimants = 3.67%. \$650,000 out of \$25.757 million = 2.5%.

Chart 27: Number of Donors Claiming Federal Political Contribution Tax Credit in 2017, and Total Claimed, Per Income Bracket

Income Bracket	Number Claiming	Total Claimed
\$4,999 and under	0	0
\$5,000 to \$9,999	0	0
\$10,000 to \$14,999	0	0
\$15,000 to \$19,999	860	\$80,000
\$20,000 to \$24,999	2,750	\$260,000
\$25,000 to \$29,999	4,190	\$469,000
\$30,000 to \$34,999	5,450	\$650,000
\$35,000 to \$39,999	7,110	\$907,000
\$40,000 to \$44,999	7,520	\$984,000
\$45,000 to \$49,999	9,230	\$1.263 million
\$50,000 to \$54,999	7,820	\$1.121 million
\$55,000 to \$59,999	7,560	\$1.092 million
\$60,000 to \$69,999	14,430	\$2.232 million
\$70,000 to \$79,999	13,860	\$2.29 million
\$80,000 to \$89,999	10,580	\$1.793 million
\$90,000 to \$99,999	9,010	\$1.565 million
\$100,000 to \$149,999	23,050	\$4.375 million
\$150,000 to \$249,000	14,240	\$3.382 million
\$250,000 and over	10,530	\$3.26 million
Total	148,440	\$25.757 million

Public funding and subsidies for parties and candidates have multiple aims, including to reduce the influence of wealthy supporters (or replace their support) and/or level the playing field for small or new parties,¹²⁷⁵ and to equalize opportunities to participate (as 27 countries do with subsidies to promote gender equality among candidates). Across the more than 60 countries that provide public funding regularly (64 countries) or for campaigns (14 countries) or both (40 countries), the funding levels range from 40 percent to 80 percent of total annual party income, with almost two-thirds of countries

¹²⁷⁵ Ingrid van Biezen, “State intervention in party politics: The public funding and regulation of political parties,” in Ewing, Rowbottom and Tham (2012) at 200–201.

requiring parties to use public funds for specific purposes while one-third (including Canada) allow parties to use the funds as they choose.¹²⁷⁶

As cited above in Chapter 2, section 2.9, and in Chapter 5, section 5.1, Rawls favoured broad public funding of parties and candidates, and so does Teachout, while Lessig (and many others he notes, including Richard Hasen)¹²⁷⁷ favour vouchers in various forms such as tax credits that voters can use to make donations to candidates they support with, in the U.S., candidates who accept vouchers required to agree to comply with a spending limit (a voluntary agreement provision needed to address the constitutional scheme that the U.S. courts have established that does not allow for spending limits).

I contend that these proposals miss the important first step of determining whether political actors and entities even need to receive general, as opposed to targeted, subsidies. Again, as highlighted in section 6.5, if contestants, candidates, parties and EDAs can't raise enough money to campaign and operate through maximum \$75 donations and loans from individuals, then quite possibly it will be their own fault for not promising or taking actions that most voters support, or acting dishonestly, unethically, secretly or wastefully or in other ways that make voters question whether they want to support them financially. As well, a general question to ask is why is it a priority to provide public subsidies to these political entities compared to subsidizing charities, social service agencies, and citizen advocacy groups

¹²⁷⁶ Gauja (2022), *supra* note 1126 at 186-189.

¹²⁷⁷ Lawrence Lessig, *Republic, Lost* (2016), *supra* note 908 at 62-67 and 425 (note 12).

that, arguably, often undertake actions more directly aimed at solving, and preventing, societal problems?

Some opponents of public funding argue that taxpayers should not be forced to fund parties with whom they disagree¹²⁷⁸ – however many public subsidies are, or can be, designed so that taxpayers only fund parties, contestants and candidates that they support with the taxes they pay. Other opponents contend that public funding of parties can have the effect of replacing “labour and fund-raising efforts once provided by party members and interested citizens.”¹²⁷⁹ I agree with this contention, and again suggest that contestants, candidates, EDAs and parties need to be required to prove that they need general public subsidies, and that general subsidies should only provide base level amounts that equalize funding but do not provide most of the funding for any entity, so that they are still required to engage with voters on an ongoing basis in order to raise funds.

Other commentators contend that the establishment of public subsidies for political parties have been described as transforming parties from private voluntary organizations into “public utilities”.¹²⁸⁰ I disagree with this contention because, whether parties receive subsidies or not, they play a significant,

¹²⁷⁸ Lisa Young, “Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada” in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) 107 at 119.

¹²⁷⁹ Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Surrey: Ashgate Publishing, 2010) at 162–63. See also Navraj Singh Ghaleigh, “Expenditure, Donations and Public Funding under the United Kingdom’s *P.P.E.R.A. 2000* – And Beyond?” in K.D. Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Oxford: Hart Publishing, 2006) at 56 (hereinafter “Ewing and Issacharoff, eds. (2006)”). See also Gauja (2022), *supra* note 1126 at 188.

¹²⁸⁰ Leon Epstein, *Political Parties in the American Mould* (Madison: University of Wisconsin, 1986) at 157. van Biezen (2004), *supra* note 1127, at 705.

public role in the political system, and therefore should be regulated like public utilities to ensure they are playing that role fairly, honestly, ethically and are representative and waste-preventing.

Given the framework I developed in Chapter 5, and above, the proposals that follow in this section are mainly for subsidies aimed at correcting systemic and personal disadvantages to provide substantive equality of opportunity to participate, and only for providing other general subsidies if such subsidies can be proven to be needed after a \$75 donation/loan limit is implemented, and only based on actual voter support. I contend that there is a strong argument for only subsidizing donations, as they offer the most direct evidence of voter support and, if a donor is donating monthly, allow a donor the greatest flexibility to withdraw their support if the party or EDA does something to cause them to stop supporting it.

Some other types of subsidies somewhat lock voters into supporting a party or EDA longer term whether or not they want to continue their support.¹²⁸¹ As well, it is not suggested again below, but it should be noted that proposal #55 suggests that a public fund be established for lending to parties (if they can show that they need loans), and to pay unavoidable expenses for candidates for personal care and care of dependents (as suggested in proposals #41-43 and #45) – so this public funding would be part of the subsidy system.

¹²⁸¹ See discussion of similar options for reforming nomination contestant subsidies in Cross, *Political Parties* (2004), *supra* note 3, at 180-182.

The \$75 donation/loan limit should, in and of itself, have an effect of at least somewhat equalizing the opportunity to participate as a contestant, candidate, EDA or party, as it is the average median donation level to the main parties from 2016-2020. If such a limit is implemented, the range of donation levels amongst donors will be narrowed very significantly. However, there still will be an inegalitarian difference between donors, as some donors (the most vulnerable in Rawlsian terms) will still not be able to afford anywhere near the maximum donation of \$75.

To correct the systemic disadvantage of people with low incomes in participating in the public finance system, a direct donation subsidy should only be offered to donors who cannot afford to donate the entire \$75, not through a tax credit but through providing them directly with the money to donate (if they choose to donate). This could be done by, for example, having them indicate on a government form that they want to donate to a party or candidate.

Proposal 66: Only subsidize lowest tier income donors

If subsidies are needed, the *CEA* should be changed to subsidize only people who cannot afford to donate the entire \$75, directly by giving them the money to donate if they choose to donate (not a tax credit as they may not have enough income to be required to pay taxes).

A second egalitarian donation subsidy, I contend, is to match donations with public funding, with the matching starting at a high ratio amount and scaling down in several tiers so that it has an equalizing effect on overall funding of parties and candidates when some of them are supported by many donors who donate lower amounts and others are supported by fewer donors

who donate more on average (or if they are supported by the same number of donors but one is supported by donors who donate more on average). The system enacted in Quebec in 2013 provides annual public funding to match the amounts that parties raise in between elections, and the same matching amounts based on donations are also made to parties during election campaigns.¹²⁸²

The first \$20,000 of contributions is matched at a higher rate (\$2.50 per dollar raised) to increase the equalization effect of the funding, and total amount a party raises annually up to \$200,000 is also matched at rate of \$1.00 per dollar raised.¹²⁸³ There is a strong argument for further tiers of matching funding to further equalize the amounts the parties have annually. Even with a \$75 donation limit, one party may be supported by donors who can all afford a \$75 donation while another party may have the same number of donors but they may all only be able to afford a \$30 donation. With 10,000 donors each, the first party would raise \$750,000 while the second would only raise \$300,000. However, as Chart 28 below shows, with a multi-tiered matching system the two end up with a much closer amount of total funding.

¹²⁸² Elections Quebec, "Matching sums," online:
<<https://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/matching-sums.php>>.

¹²⁸³ For example, if donations were matched dollar for dollar, and one party raised \$10,000 and the other \$30,000, the first party would end up with \$20,000 while the second ended up with \$60,000 (six times as much). Under Quebec's system, however, the first ends up with \$35,000 while the second ends up with \$60,000 (less than twice as much). The maximum amount that a party can receive in matching funding annually is \$250,000.

Chart 28: Sample of effects of multi-tier public donation matching system on total funding

	Party 1	Party 2
Total donors	10,000	10,000
Average donation	\$75	\$30
Total raised	\$750,000	\$300,000
Relative Difference	\$450,000 more (2.5 times as much)	\$450,000 less (60% less)
Total raised when first \$100,000 matched \$3 per \$1 raised, second \$100,000 matched \$2 per \$1; third matched \$1.50 per \$1	\$100,000 + \$300,000 match + \$100,000 + \$200,000 match + \$100,000 + \$150,000 match + Extra \$450,000 raised = \$1.4 million	\$100,000 + \$300,000 match + \$100,000 + \$200,000 match + \$100,000 + \$150,000 match + = \$950,000
Relative Difference	\$450,000 more (1.47 times as much)	\$450,000 less (32% less)

As well, as detailed above in section 6.7, Canada's current voting system gives some parties a higher percentage of MPs compared to votes they received, and each extra MP receives hundreds of thousands of dollars in public funding for their offices, while other parties end up with fewer MPs than they deserve. Donation-matching public funding should take that into account. It is important to note that despite its egalitarian characteristics, the Quebec system disadvantages independent members of the legislature as it offers them only up to \$800 in matching funding annually and, for an

independent candidate, the same amount during the election.¹²⁸⁴ As well, Quebec's system does not allow donations to party candidates or provide matching funding to party candidates for funds they raise for their individual election campaigns. This makes party candidates dependent on funding from party headquarters, which gives the party leader undue power over candidates.

Overall, given its equalizing effects, a multi-tiered donation-matching funding system should be implemented at the federal level with the aim of equalizing the amount of funding that parties and candidates, and nomination contestants and party leadership contestants, with the same number of supporters have. Given the extra expenses that parties and EDAs (through transfers to their election candidate) have for election campaigns, it seems to make sense to increase the donation-matching amount for donations to them during a fixed date election year (or during an election campaign if a snap election happens), but whether that is actually needed should, again, be determined by the comprehensive study of the cost of campaigning suggested above in proposal #33, and after the effects of decreasing the donation/loan limit to \$75 become known.

Also, to remedy the inequality of Quebec's system, multi-tiered matching funding should be given to independent candidates and party candidates, both based on the amounts they raise for their election campaigns. As well, consistent with proposal #48 above in section 6.5, parties should be required to share part of the matching public funding the

¹²⁸⁴ Elections Quebec, "Matching sums," *supra* note 1282.

party receives with the EDA of the donor who made the donation that was matched (and, during elections, parties should be required to share the matching funds with candidates, also based on the location of the donor who made the donation).

Proposal 67: Provide equalizing donation-match public funds

The *CEA* should be changed to provide matching public funding on a multi-tier sliding scale to equalize the total funding of parties and candidates, and nomination contestants and party leadership contestants, who have the same number of donors/members. For candidates, parties and contestants, the amount of matching funding provided per donation should take into account how much their donors donate on average, with higher matching funding for those who are supported by donors who donate less on average to equalize overall funding more. For parties, the matching amount should be higher for parties that received a lower percentage of MPs compared to the percentage of votes they received in the previous election, and lower for parties that received a higher percentage of MPs than they deserve.

Proposal 68: Possibly provide more match-funds for elections

If the comprehensive study suggested in proposal #33 of campaign costs shows, along with the effects of decreasing the donation/loan limit to \$75, that parties and candidates need more funding for election campaigns, the *CEA* should be changed to provide more donation-matching public funding during fixed date election years or election campaigns (if a snap election is still allowed to be called), and still on a multi-tier sliding scale to equalize the total funding of parties and candidates who have the same number of donors/members, and also based on the other criteria set out in proposal #67.

Proposal 69: Require parties to share donation-match funds

The *CEA* should be changed to require parties to share part of donation-matching public funding with the EDA (or, in an election, the candidate) in the district from which the donation was made.

Proposal 70: Increase donation-match funds for independents

Given independent candidates are not supported by the infrastructure, resources and staff of an EDA and party, the *CEA* should be changed to give a higher amount per donation in donation-matching funding to independents through the entire time they are registered and fundraising for their campaign.

For candidates, one aspect of the problem of systemic economic disadvantage being a barrier to running for public office was revealed by a study in 2019 that examined 94 of Ontario's 121 federal ridings, mainly in Southern Ontario, and found almost 40 percent of the candidates who ran in the 2019 federal election were already politicians at some level of government or worked in business, 13 percent were lawyers, and 31.5 percent were either doctors/health care professionals, teachers/professors, government employees, military/law enforcement officers, engineers or journalists. Only 13.5 percent came from other sectors of society, and only 3.5 percent were students.¹²⁸⁵ One systemic difference in donation patterns is that women donate less often and smaller amounts than men.¹²⁸⁶ Another is that ethnic minority Canadians donate to candidates less often than European-origin

¹²⁸⁵ CBC, *Running for office?* (2019), *supra* note 1190.

¹²⁸⁶ Erin Tolley, Randy Besco and Semra Sevi, "Who Controls the Purse Strings? A Longitudinal Study of Gender and Donations in Canadian Politics," (2020) Vol. 18(1) *Politics & Gender* 18(1) 244. See also summary online at: <<https://erintolley.ca/gender-and-donations-in-canadian-elections>>.

Canadians, other than donation rates for South Asian Canadians which are twice their proportion of the population.¹²⁸⁷

Proposals have been made to allow parties, at their discretion, to do things like nominating diversity candidates in safe, winnable ridings; have a policy of nominating a diversity candidate if a current party politician retires, and; establish special funds to grant to women and racialized candidates.¹²⁸⁸

Other commentators have suggested tying subsidies for parties to requirements that parties nominate a demographically proportional number of women candidates and candidates from underrepresented communities¹²⁸⁹ (such as racialized, visible minority, indigenous candidates and candidates with disabilities).

I contend that, while these measures may assist in overcoming systemic barriers to running, they keep party leaders and executives as the gatekeepers of who is allowed to run. This will likely lead to, as is already happening as detailed above in section 6.4, leaders not supporting, appointing or allowing anyone to run whom they don't support and who doesn't support them entirely. Having a more diverse group of MPs, all of whom still toe the party line, will not, I contend, likely result in policy-making that addresses the concerns of more voters. As suggested above in section 6.4, to make the system more egalitarian, and more open to diverse candidates, many

¹²⁸⁷ Randy Besco & Erin Tolley, "Ethnic group differences in donations to electoral candidates," (2020), Vol. 48(5) *Journal of Ethnic and Migration Studies* 1072. See also summary online at: <<https://erintolley.ca/ethnicity-political-donations>>.

¹²⁸⁸ Petros Kusmu, "How Canada's political parties can get more Black candidates elected," (March 17, 2022), *Globe and Mail*, online: <<https://www.theglobeandmail.com/opinion/article-how-canadas-political-parties-can-get-more-black-candidates-elected>>.

¹²⁸⁹ Samara, *Party Favours* (2019), *supra* note 231 at 29.

commentators recommend decreasing the power of party leaders and executives to appoint candidates and run nomination contests, and the proposals made in that section are all aimed at that goal.

Due to the factors set out above, I focus in the proposals I list below on making the system fully egalitarian, equalizing the opportunity to participate as much as possible, especially for individuals who want to run as contestants and candidates (following the principles and standards reflected in the proposals made above in section 6.4). I also focus on equalizing as much as possible the ability of contestants, candidates and parties to inform voters (equalized based on their actual level of voter support), and then letting voters decide whom they want as their representatives.

Lowering these inegalitarian barriers to participation through the proposals made in sections 6.4 to 6.6. above, and the proposals made in this section, should work to allow individuals who have faced systemic disadvantages to actually run for office on a substantively equal footing, and do not result in any change to who runs and who wins. But, if they do not work, then as suggested above in proposal #21 quotas could be implemented, along with the measures mentioned above of parties setting nomination targets in winnable districts, or tying subsidies to parties' record of nominating a diverse slate of candidates.

However, I contend that it would still be more egalitarian to restrict somehow the power party leaders and executives to control these nominations and the implementation of quotas and other changes, in order to ensure not only that demographically diverse candidates are chosen, but also

candidates with diverse points of view – not just people who will feel obliged to support the party leader without question because the leader handed them a candidacy and can take it away at the time of the next election.

Beyond the general donation-matching proposals made above in this section, I contend that public matching funds for candidates can be designed to have an even more significant equalizing effect. For example, if a potential contestant or candidate has faced a systemic economic disadvantage due to discrimination or another factor beyond their control, a lump sum amount for an initial development stage of their campaign could be provided to assist them in recruiting initial supporters for their campaign. Given that proposal #38 above in subsection 6.5.2 suggested prohibiting allowing employers to give paid leave to an employee to run as a contestant or candidate (as it favours people with employers willing to do this), and given that the *CEA* gives everyone the right to take an unpaid leave to run as a contestant or candidates, a similar lump sum payment could be provided to anyone who can't afford to take a leave from their job to run.

If these contestants or candidates have success with recruiting supporters during that initial stage and continue with their campaign, then the amounts provided through matching donations with public funding could be increased for them and/or provided based solely on the contestant or candidate demonstrating that they have the support of voters through gathering signatures (instead of donations, if they are supported by voters who cannot afford donations). For example, they could receive the overall median individual donation amount from the previous year for their campaign

per signature they obtained of someone pledging their support. The amount of matching funding could also be increased depending on the overall negative effect of the systemic disadvantage they suffered.

As well, public matching funding should be increased for candidates who are running against incumbent MPs in a nomination contest or election, given MPs are paid right up to election day to campaign and reach out to voters, and have an overall advantage of being able to fundraise since the last election, with the support of their EDA and their party.¹²⁹⁰ Public matching funds should also be increased for party leadership contestants who are not MPs, given again that MPs are paid right through their entire party leadership contest. While they are not allowed to use their office resources in their campaign, sitting MPs still have an advantage given they have an office in Ottawa and their district, a housing allowance of accommodation in Ottawa, and an allowance that pays their costs of travelling to return to their district.

The exact amounts to be provided in these various matching funding subsidies should be determined through the comprehensive study suggested above in proposal #33 in section 6.5. As with all aspects of any public subsidy program, and all aspects of the political finance system, safeguards are needed, including disclosure to allow for public and media scrutiny, and

¹²⁹⁰ As summarized in Massicotte (2006), *supra* note 1238, at 156-157, Québec had a reverse of this proposed system from the 1984 on, as the incumbent and the candidate for the party that came second in the previous election in each district received a subsidy at the beginning of the next election campaign period, while every other candidate was required to receive 20 percent of the vote in order to receive a reimbursement months after the election. The courts struck down the system in 1998, and it was repealed in 2001, with the threshold for reimbursement reduced to 15 percent.

empowering and requiring Elections Canada to audit applications for the subsidy to verify the actual level of voter support.

Proposal 71: Provide initial funding to correct disadvantages

The *CEA* should be changed to subsidize nomination contestants, party leadership contestants and candidates who have suffered systemic disadvantages with initial lump sum funding to recruit supporters for their campaign. Similar lump sum initial funding should be provided to people who can't afford to take a leave from their job to run in a contest or election.

Proposal 72: Provide matching funds to correct disadvantages

The *CEA* should be changed to subsidize nomination contestants, party leadership contestants and candidates who have suffered systemic disadvantages or can't afford to take a leave from their job to run with matching funds based on them demonstrating voter support through signed pledges, nominal donations, with each voter's support matched at a specific level that takes into account the overall financial effects of the disadvantages faced by the contestant or candidate.

Proposal 73: Provide more matching funds to non-incumbents

Given MPs who are running for re-election are paid right through to election day essentially to campaign and reach out to voters, the *CEA* should be changed to subsidize nomination contestants who are non-incumbents with more matching funding for the contest than the incumbent receives.

Proposal 74: Provide more matching funds to non-MPs

Given MPs who are running in a party leadership contest are paid right through to the voting day of the contest, and that public funding pays for their offices in Ottawa and their district, and their housing in Ottawa, and their travel between their district and Ottawa, the *CEA* should be

changed to subsidize party leadership contestants who are not MPs with more matching funding than contestants who are MPs receive.

As well, as mentioned above in section 3.8 on donations, and in section 3.14, under the *CEA* anyone or any entity is allowed to pay, for a nomination contestant, leadership contestant or election candidate, the expenses for childcare, for care of anyone with a mental or physical incapacity, and for additional expenses related to any personal disability they may have,¹²⁹¹ that are incurred because they are running in an election. For election candidates, the *CEA* provides that 90 percent of these three expenses are reimbursed, but only if a candidate wins more than 10 percent of the vote in the election.¹²⁹² Neither of these provisions are equitable, as they favour contestants and candidates who are supported by people or entities who can pay these expenses for them, and only reimburse candidates (not contestants), and only reimburse them months after they have incurred the expenses, and favour election candidates of the main parties who are most likely to win 10 percent or more of the vote.

Proposal #41 above in subsection 6.5.2 proposes prohibiting anyone or any entity from paying these expenses and, instead, addressing these inequities through a public subsidy that assists everyone who is running for public office substantively equally.

Proposal 75: Provide subsidy for required personal care costs

The *CEA* should be changed to provide the reimbursement of required personal care expenses of nomination contestants, leadership

¹²⁹¹ *CEA*, *supra* note 79, clause 378(1)(b) to (d).

¹²⁹² *CEA*, *supra* note 79, sections 477.73, 477.74 and 477.741.

contestants and candidates from a public fund as soon as the contestant or candidate submits a valid receipt for the expense.

As detailed as the sixth area of concern in section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, anyone and any entity can pay an unlimited amount of other personal expenses of a nomination contestant or leadership contestant, and up to \$200 for an election candidate, if the expense is incurred because they are a contestant or candidate. For the same reasons as care expenses, allowing this is not egalitarian. Proposal #42 above in subsection 6.5.2 proposes prohibiting anyone or any entity from paying these expenses and, instead, addressing inequities through a public subsidy.

Proposal 76: Provide subsidy for unique personal expenses

The *CEA* should be changed to provide the reimbursement of required other personal expenses of nomination contestants, leadership contestants and candidates from a public fund, if they can show that they incur needed expenses not incurred by others, as soon as the contestant or candidate submits a valid receipt for the expense.

Also mentioned in the fifth area of concern in Chapter 3, section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, is that anyone or any entity is allowed to pay the expenses for any nomination contestant, leadership contestant or candidate for any litigation that results from their campaign. Proposal #43 above in section 6.5.2 suggested prohibiting this, and instead providing a public subsidy. However, while it is important to protect contestants and candidates from frivolous lawsuits, other types of litigation, such as the Commissioner of Canada Elections prosecuting

a contestant or candidate for failing to comply with the *CEA*, do not seem to merit public funding, especially given that they would already be provided with a lawyer under their provincial legal aid system.

Proposal 77: Provide subsidy for justified litigation expenses

The *CEA* should be changed to provide the reimbursement of litigation expenses of nomination contestants, leadership contestants and candidates from a public fund, unless the litigation is due to a clear violation by the contestant or candidate of the *CEA* (for which they are being prosecuted), as soon as the contestant or candidate submits a valid receipt for the expense.

As detailed as the seventh area of concern in section 3.8, and also detailed for each type of political entity in sections 3.10 to 3.13, anyone or any entity can pay up to \$5,000 to compensate an election candidate's representatives at polling stations. For all the reasons provided concerning the other above expenses, this is inequalitarian, and proposal #45 above suggested prohibiting it. If it can be proven through a comprehensive study that parties and candidates cannot raise enough from contributions of \$75 annually to pay the costs of informing voters and operating during election campaign periods, including having representatives to observe polling stations, then these costs should be paid for through public subsidies. These representatives play a key role in our electoral system, as important as auditors for contestants, candidates and parties, and the costs of auditors for

contestants, candidates and EDAs are currently reimbursed through public funding.¹²⁹³

Proposal 78: Public funds to pay polling station representatives

If it can be proven that parties and candidates cannot raise enough to pay a candidate's costs of having representatives at polling stations, the *CEA* should be changed to provide a reasonable amount of public funding to pay for these representatives for all candidates.

Matching funding is based on donations the parties receive, which presumably will increase and decrease based on the party's level of voter support. As a result, it is a more accurate way than per-vote funding (which is based on a past election result) to provide egalitarian funding for parties. As noted above in Chapter 3, subsection 3.20, the per-vote annual subsidy, which was the most egalitarian part of Canada's federal system given it was explicitly based on the principle of one person-one vote, was phased out beginning in 2011 and then ended in 2015 (although the per-vote subsidy provisions are still in the *CEA*).¹²⁹⁴ The subsidy was criticized as providing state support that maintains existing parties and thwarts competition by new parties,¹²⁹⁵ but a counterpoint to that claim is that it was actually a very democratic, efficient way to provide financial support from voters who supported a party with their vote.

¹²⁹³ *CEA*, *supra* note 79, sections 476.901 (for nomination contestants), 477.75 to 477.761 (for election candidates), 475.8 (for EDAs) and 478.931 (for leadership contestants).

¹²⁹⁴ *CEA*, *supra* note 79, sections 445-446.

¹²⁹⁵ The per-vote subsidy was in place from 2004 until 2015 – it was phased out by the Harper Conservative government over four years, from 2011 at \$2 per-vote then reduced by \$0.50 each year until 2015. Richard S. Katz, "Finance Reform and the Cartel Party Model in Canada," 60 at 68-73 (hereinafter "Katz (2011)"), and Lisa Young and Harold Jansen, "Cartels, Syndicates, and Coalitions: Canada's Political Parties after the 2004 Reforms," 82 at 85-102 in Young and Jansen (2011), *supra* note 3.

I contend that the three more potent criticisms of the subsidy are, first, that it was set at an arbitrarily high level of \$1.75 annually per vote by the then-Liberal government specifically to replace the amount in corporate donations that the Liberal Party was receiving at the time (and then the subsidy increased at the inflation rate to \$2.04 in 2011 before the government initiated the four-year, \$0.50 per year phaseout of the subsidy). As a result, the subsidy provided the parties with what I contend was a too-high percentage of their annual budget, thus removing the incentive for parties to stay connected to voter concerns in between elections, especially for some parties like the Bloc Quebecois as the subsidy totalled 77 percent of its funding in 2008.¹²⁹⁶ In contrast to the current federal system, Quebec's provincial system continues to provide per-vote annual public funding to political parties, but also, as detailed further below, at what I contend is too high a level.¹²⁹⁷

Secondly, parties received the subsidy annually even if they broke all of their election promises, failed to engage with voters in meaningful ways, acted in various other undemocratic, unethical ways, and lost significant voter

¹²⁹⁶ Counting only the per-vote subsidy and individual donations parts of the Bloc's funding. Duff Conacher, "Changes needed to make public funding of politics more democratic," January 31, 2011, *Hill Times*, online: <http://dwatch.ca/camp/OpEdJan3111.html>>. See also Table 5.18 in Young and Jansen, eds., (2011), *supra* note 3 at 89 (although it should be noted that the charts do not count tax deductions received by donors as one of the state sources of income). See this point about the subsidy providing a high amount of all the main parties funding from 2004 to 2011 also made in Young (2012), *supra* note 22 at 155. See also Lisa Young, "Money, Politics and the Canadian Party System," in Alain-G. Gagnon and Brian Tanguay, eds., *Canadian Parties in Transition: Recent Trends and New Paths for Research (Fourth Edition)* (Toronto: University of Toronto Press, 2016) at 28.

¹²⁹⁷ The annual amount started in 2013 at \$1.58 per vote obtained in the last general election, and is adjusted annually based on the Consumer Price Index rate. Elections Quebec, "Allowance to political parties," online: <https://www.electionsquebec.qc.ca/english/provincial/financing-and-election-expenses/allowance-paid-to-political-parties.php>>.

support during the years leading up to the next election. As a result, the subsidy provided an increased incentive, in addition to the incentive of winning the election, to bait voters with false promises during an election. It would be a challenge, but I propose that, if per-vote funding was reinstated, a method could be devised for denying a party a portion of the subsidy if its voter support clearly decreased since the previous election, and shifting that portion to another party if it could be clearly shown that its support had increased.

Thirdly, in addition to the unequal effects of the removal of the federal per-vote subsidy, as detailed in Chapter 2, section 2.8, and point #7 in section 2.10 and subsection 5.2.11, in its 2007 ruling in the *Longley* case, the Ontario Court of Appeal, I contend, failed to adhere to the egalitarian model by ruling that the threshold parties had to meet to receive the subsidy was, while unconstitutional, justifiable under s. 1 of the *Charter*. The threshold was that a party had to receive two percent of the total number of valid votes cast in the previous election or five percent of the votes cast in the districts in which the party ran candidates.¹²⁹⁸ The Supreme Court's *Figueroa* ruling had set the stage for the *Longley* ruling by stating that thresholds for some benefits parties receive could be constitutional.¹²⁹⁹

However, I disagree with the *Longley* ruling's conclusion that the government had a rational objective in arguing that it would be a "misuse of public funds" that harms the integrity of the electoral process to give parties

¹²⁹⁸ *Longley* (2007), *supra* note 152 at para. 25.

¹²⁹⁹ *Figueroa* (2003), *supra* note 133 at para. 91.

that don't meet the thresholds the annual per-vote subsidy, given that the court based that conclusion on its assessment that some parties run campaigns that are satirical or focused on fringe ideas.¹³⁰⁰ Yes, these parties can still register and operate and benefit from the basic tax credit subsidies at issue in the *Figueroa* case, but to uphold these thresholds on the basis of not liking some smaller parties' ideas, proposals, strategies and tactics is, I contend, antithetical to the egalitarian model as expressed in the *Figueroa* ruling which required equal treatment of small and large parties no matter what their "purpose". It also contradicts the Court's holding in *Libman* that it was fair and democratic for groups "affiliated" with the "no" and "yes" referendum committees to receive part of the grant that the Government of Quebec gave to each committee, with the amount received determined solely based on how many supporters each affiliated group had, not on any means test of their strategies, tactics or ideas.¹³⁰¹

If voters choose to support any small party, then their support is, by definition, a valid expression of their will as a voter. That expression should, in an egalitarian system, be respected and be accorded the same benefits as the expression of the will of a voter who supports a larger party.¹³⁰²

¹³⁰⁰ Longley (2007), *supra* note 152 at para. 54.

¹³⁰¹ *Libman* (2007), *supra* note 41, paras. 70 and 72.

¹³⁰² This point is made by the trial judge in *Conservative Fund Canada v. Chief Electoral Officer of Canada*, 2009 CanLII 72340 (ONSC) <<https://canlii.ca/t/2765x>> at paras. 75-76. In the ruling on the appeal in this case, *Conservative Fund Canada v. Chief Electoral Officer of Canada*, 2010 ONCA 882 (CanLII) <<https://canlii.ca/t/2f2fn>>, the appeal court criticized the trial judge at para. 100, and claimed at para. 83, incorrectly, that there is no debate that Parliament has enacted the egalitarian model. At para. 92, the court quotes the Supreme Court of Canada's ruling in *Harper (2004)*, *supra* note 10 at para. 62 in which Bastarache J. says that Parliament can uphold the egalitarian model in two ways, subsidies or spending limits. As proposed above in section 6.5, donation and loan limits are, of course, another way in which Parliament can uphold the model.

The per-vote subsidy was also a much more egalitarian and democratic way to provide financial support from public funds than the current tax credit system. As highlighted above in section 6.7, and above re: proposal #67, Canada's current voting system gives some parties a higher percentage of MPs compared to votes they received, and each extra MP receives hundreds of thousands of dollars in public funding for their offices, while other parties end up with fewer MPs than they deserve. The per-vote subsidy somewhat corrected that unequal and inequitable public funding.

However, I contend that it should be designed to correct it entirely by giving more per-vote to parties that obtained fewer MPs than their vote percentage, and less to parties that received more MPs than they deserve. As well, if the subsidy was set at the rate of \$1 annually per vote, the total cost of the subsidy would then be only approximately \$15.5 million annually, which is \$10 million or so less than the annual cost of the current tax credit subsidy. This amount would give each party only a base of public support, thereby encouraging them more than the old \$2 per vote subsidy did to address the concerns of voters on an ongoing basis in order to prosper financially by attracting their donations.¹³⁰³

The exact amount of any per-vote subsidy should be set only after the comprehensive study of the costs of campaigning and operating between elections suggested in proposal #33, so that it actually provides only a base

¹³⁰³ Based on average voter turnout in the last three federal elections of 15.5 million voters: Elections Canada, Voter Turnout at Federal Elections and Referendums, online: <<http://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e>>. The subsidy could also be proportionally less for any party that only operates in one region or province, as that party would have lower travel and operations costs.

level of support to each party. Part of this calculation should include the number of members in each party, not donors as that favours parties who are supported by voters who can afford to make a donation. The calculation should also include whether the party operates nationally or, like the Bloc Quebecois, only in one province or regionally, as the operational costs for a regional party are lower than for a national party.

I make the following proposal for a more egalitarian per-vote funding system with the caveat that I contend that subsidizing individual donations directly, including with matching funding, are better ways of providing public subsidies, again if general public subsidies can be proven to be actually needed.

Proposal 79: If per-vote funding, low level equal to vote support

If annual per-vote funding is re-established at the federal level, it should be modified from the past system to have the following five characteristics: (i) set at a level that only provides a base amount to each party so parties all still have to reach out to voters for support (with the level set after the comprehensive study suggested in proposal #33); (ii) a lower per-vote subsidy if a party operates only across a province or region(s) instead of nationally; (iii) parties that received fewer MPs than percentage of votes should receive more per-vote, and parties that received more MPs than votes should receive less per-vote; (iv) parties that have the same number of members as other parties, but whose donors donate less on average, should receive a higher per-vote subsidy, and; (v) each party's per-vote subsidy, which will be paid quarterly, should be adjusted according to whether its level of voter support increases or decreases from the support level it received in the election, based on the average results of a group of national, longitudinal surveys conducted/commissioned by the Chief

Electoral Officer (using a consistent question like “If a national election was held today, which party would you vote for?”).

Canadian provinces provide examples of some of these subsidies operating, although in different ways than suggested above. Do the Quebec parties have sufficient funding under the province’s donation matching and per-vote funding system to reach and inform voters and operate effectively? As mentioned in Chapter 3, subsection 3.1 above, a full analysis of the actual costs of operating as a party is needed to answer that question. Does the Quebec system create a dependency on public funding? The answer to that question, in my opinion, is yes. According to the 2015 and 2018 reports of Elections Quebec, on average each year from 2013 to 2017 inclusive, public funding amounted to just under 70 percent of total funding for all provincial parties annually,¹³⁰⁴ almost an exact reversal of the relative percentages for the years 2007 to 2011 inclusive.¹³⁰⁵

As well, examining just the three years from 2015 to 2017 inclusive, only one of the four main parties was able to raise more funds than it received in public funding (the Liberal Party), and only for one of those years (in 2015).¹³⁰⁶ The per-vote funding for all the parties during those three years amounted to, on average, 86 percent of the total public funding the parties

¹³⁰⁴ The average was 69.5 percent. Elections Quebec, *Portrait sur le financement des partis politiques provinciaux*, July 2016, online: <<https://www.electionsquebec.qc.ca/documents/pdf/DGE-6355-16-06.pdf>> at 9. Elections Quebec, *Portrait sur le financement des partis politiques provinciaux*, July 2018, online: <<https://www.electionsquebec.qc.ca/documents/pdf/DGE-6355-18-07.pdf>> at 9 (hereinafter “Elections Quebec, *Portrait* (2018)”).

¹³⁰⁵ Elections Quebec, *Portrait* (2018), *supra* note 1304 at p. 23.

¹³⁰⁶ Given that 2013 was the first year of the new system, and 2014 was an election year, the figures from those two years are not as regular as 2015 to 2017. During an election year, Elections Quebec, *Portrait* (2015), *supra* note 1304 at 15.

received.¹³⁰⁷ The percentage that public funding represented compared to total party funding in 2018 (a provincial election year) remained high at 77.6 percent, with 96.7 percent of the funding going to the four parties represented in the legislature).¹³⁰⁸ Elections Quebec's annual reports for 2019 to 2021 did not include statistics concerning the level of public funding of the parties during those years.

If Quebec's per-vote subsidy was cut in half, the public funding received by the parties would average 53 percent of the total amount of funding obtained by the parties from 2015 to 2017. As suggested in the proposals listed above, there is an argument for reducing the per-vote funding even further, and increasing the matching funding amounts on a multi-tiered basis, as the matching funding is more equalizing (and therefore, more egalitarian), and tracks more closely the actual annual voter support for each party.

For example, from 2015 to 2017 inclusive, the total number of donors to the Quebec Liberal Party dropped 23.7 percent, from 11,474 to 8,750, while the number of donors to the Coalition avenir Quebec more than doubled from 1,491 to 3,191.¹³⁰⁹ However, because the donation-matching system only boosts the first \$20,000 in donations, the gap between the amounts each

¹³⁰⁷ Elections Quebec, *Portrait* (2018), *supra* note 1304 at 9.

¹³⁰⁸ With 12 percent from contributions, seven percent from other revenues, and three percent from party membership fees. Elections Quebec, *Financement politique: Bilan and perspectives 2019*, (2020), online:

<<https://docs.electionsquebec.qc.ca/ORG/5ecd67c873385/DGE-6354-2019.pdf>> at 40-41.

¹³⁰⁹ Elections Quebec, *Portrait* (2018), *supra* note 1304 at 19.

party ended up with during those years was not equalized as much as a multi-tiered system would have done.

Another problem area with the Quebec system is that the per-vote subsidy and matching funding flows only to party headquarters, even though it is based on votes received by candidates. The system implemented in Ontario in 2017 only very marginally addressed this inequity by designating \$6,250 annually of the per-vote funding to each electoral district which is then divided up among all the parties' EDAs in the district based on the number of votes that were received in the last election by each party's candidate.¹³¹⁰ A much more egalitarian system would be to require some percentage of the quarterly per-vote subsidy amount given to each party to be distributed to its riding associations based on the number of votes the party's candidate received in the last election.

Proposal #48 above in subsection 6.5.2 proposes requiring parties to share part of every donation and membership fee that comes out of an electoral district with the EDA in the district (or the candidate's campaign if any election is happening). Proposal #69 above proposes requiring parties to share donation-matching funding that results from a donation in an electoral district with the EDA (or candidate) in the district. The following proposal makes a similar proposal with regard to any public per-vote subsidies that may be received by a party.

¹³¹⁰ *Elections Finances Act*, R.S.O. 1990, c. E-7, subsection 32.1(5), online: <<https://www.ontario.ca/laws/statute/90e07#BK38>>.

Proposal 80: Require parties to share per-vote subsidy

If the per-vote subsidy is re-established, the *CEA* should be changed to require parties to share part of subsidy with each party EDA based on the votes the party received in the district of each EDA.

The per-vote subsidy is a form of indirect reimbursement for running as a candidate or party. In addition, Canada's current system provides direct subsidies during and after elections, including reimbursements to some parties and candidates. First, as detailed in Chapter 3, section 3.20, there is the relatively egalitarian system of reserving and allocating free and paid time to parties for political broadcasts during elections. There is no set amount of free time that a broadcasting network is required to make available, other than the requirement to provide at least as much time as during the previous election (which means only three networks provided free time during the 2019 election as they were the only networks that provided it in 2015).¹³¹¹

Each party, established and new, is given at least two minutes of free time on each of those networks, and the rest of the free time on those networks is allocated based on the criteria for the allocation of the 6.5 hours (390 minutes) of total paid prime time broadcast time that every broadcaster (or broadcasting network) is required to make available to the parties.¹³¹² The key criteria are the number of seats in the House of Commons and percentage of votes obtained by each party in the last election (taking into account how many candidates each party ran).¹³¹³

¹³¹¹ *CEA*, *supra* note 79, subsections 345(1) and (2). Allocation of Free Broadcasting Time (2019), *supra* note 444.

¹³¹² *CEA*, *supra* note 79, sections 335 and 345.

¹³¹³ *CEA*, *supra* note 79, subsection 338(1) and 345.

It is prohibited for any party to be given more than 50 percent of the 6.5 hours of paid time, and the Broadcasting Arbitrator can also modify the paid time allocation if necessary for fairness or the public interest, including taking into account whether voter support for a party has increased or decreased since the last election.¹³¹⁴ Newly registered parties are eligible for at least six minutes of the paid time made available by each broadcaster, and up to 39 minutes. Purchasing broadcast time outside of Canada is prohibited, and based on the fairness principle the Arbitrator now allocates one-third of the available time equally among all registered parties.¹³¹⁵

Parties can also purchase additional broadcasting time if they want – this was prohibited in the past but was struck down in 1995 by a five-justice panel of the Alberta Court of Appeal (ABCA) as a violation of the *Charter* in a ruling on a challenge of several of the political broadcasting system rules.¹³¹⁶ I agree with this conclusion as parties should be left to choose what strategies and tactics they want to devote their funding to, including to broadcast ads. As Canada's federal law did in the past, the law in the UK still prohibits all paid political advertising – only free broadcast time for advertising that is required to be granted to political parties is allowed.¹³¹⁷ I evaluate this measure, which effectively bans third-party advertising, below in section 6.12 which covers third-party spending.

¹³¹⁴ CEA, *supra* note 79, section 345 and subsections 338(1) and (5); Feasby (2012), *supra* note 2 at 200.

¹³¹⁵ Feasby (2012), *supra* note 2 at 213–14.

¹³¹⁶ *Reform Party* (1995), *supra* note 452, at paras. 84-90 and 98.

¹³¹⁷ *Communications Act 2003* (UK), c 21, clause 319(2)(g) and section 333.

The argument of the trial judge in that Alberta court case, and the dissenting justices on the ABCA panel, was that the broadcast system favoured the main existing parties too much because they receive more media coverage than other parties, which amounts to free broadcast time, and the Arbitrator may not allocate time fairly so, to be equitable, the allocation should give the same amount of free time to each party because any party could have as important information to convey to voters as any other party.¹³¹⁸ I agree that ensuring fair and equitable coverage of all parties is a valid concern, and I address it with proposals set out in section 6.17 below on the role of media and social media in the system. However, I disagree with the dissenting justices that all parties should be granted the same amount of time on the airwaves – under the egalitarian model, I contend that the time should be allocated based on the actual level of voter support for each party.

As with all the general public subsidies evaluated above, however, the first question is whether the parties need to be given the free broadcast time allocation at all. While broadcast time is an expensive way of reaching voters, and reducing the cost of it for all parties seems to make sense as a way of providing an equal opportunity for smaller parties to reach voters, whether the free time allocation is needed can only be determined based on the results of the comprehensive study suggested in proposal #33 above of the costs of campaigning in an election, and based on the effects of decreasing the donation/loan limit to \$75, and the direct donation subsidies and donation-

¹³¹⁸ *Reform Party* (1995), *supra* note 452, at paras. 173-178, with section 1 analysis at paras. 199-219 (especially paras. 206-214). See a similar proposal in: Grant (Spring 2015), *supra* note 443, at 339-342.

matching funding suggested in proposals #66 to #74, along with possibly re-establishing a modified, more egalitarian annual per-vote subsidy (also including a requirement that parties share the funding with EDAs and candidates) as suggested in proposals #79-80, and possibly the modified reimbursements suggested below in proposal #88.

If the conclusion is that parties cannot raise enough to reach and inform voters, and to pay for broadcasting time, and that free broadcast time should therefore be given to parties, I propose that it would be more equitable first to require all broadcasters to give parties free time (same as the rule is for the paid time allocation), not just broadcasters that offered free time in the last election.¹³¹⁹ Secondly, the airing of the free-time broadcasts should be required to be spread over the weeks of the election campaign period, and throughout the day and evening (especially during prime-time viewing and listening hours) as equally as possible for each party.

Thirdly, the initial calculation of the allocation should be based only on the popular vote percentage for each party in the previous election, not on the number of MPs each party elected, given that our voting system means some parties end up with more MPs than they deserve and some with fewer.¹³²⁰ Fourth, as with the per-vote subsidy proposal set out above in proposal #79, given voter support for parties can change in between elections, I propose that a group of national surveys should be used to determine whether a party's allocation should be decreased because its voter support has

¹³¹⁹ See a similar proposal in Grant (Spring 2015), *supra* note 443, at 341.

¹³²⁰ See a similar proposal in Grant (Spring 2015), *supra* note 443, at 342-343.

decreased since the previous election, or increased because its support has increased.

As well, the number of members of a party should be taken into account, not donors as that would favour parties who are supported by people who can afford to make donations. Fifth, as with the donation-matching system, and per-vote subsidy, suggested above, more broadcast time should be made available to parties that have leaders and/or are supported by voters who have faced systemic economic or other disadvantages that mean their ability to provide donations and support to the party is more limited than the capacity of the supporters of other parties.

I note here that, while I am not addressing it fully, being allowed to participate in the official broadcasted election debates for party leaders that are organized by the Leaders' Debates Commission is part of the free broadcast time that a party can receive. As a result, the current criteria for participation in the debates, which are having an elected MP in the House of Commons or four percent of votes cast in the previous election or four percent support in national surveys after the election is called,¹³²¹ should be changed to use more egalitarian criteria for free broadcast time similar to the criteria suggested below.¹³²²

¹³²¹ Leaders' Debates Commission, Participation Criteria for the Leaders' Debates for the 44th General Election, (June 22, 2021), online: <<https://www.debates-debats.ca/en/participation-criteria/criteria-for-next-election/>>.

¹³²² See a critique of the current criteria, and history of past criteria and case law concerning leaders' election debates, in: Robyn McDougall, "The Evolution of Canadian Election Debate Law: Has the Nature of Debates Changed?" (June 2021), 15 *Journal of Parliamentary and Political Law* 369.

If the number of party leaders who qualified increases beyond six, making it difficult to hold a debate that lasts a reasonable length of time and actually involves debating as opposed to each leader just making statements, more debates could be held (which the Commission is currently prohibited from holding) that give smaller parties the opportunity to debate the main party leaders. In the 2000 election, a debate for smaller party leaders was held by the Democracy Channel that was also broadcasted on the Canadian Parliamentary Affairs Channel (CPAC) and partially on CBC's cable news channel (Newsworld, as it was then called), but without main party leaders or broadcasters participating it did not attract many viewers or listeners.¹³²³

An egalitarian system, I contend, would ensure that these smaller parties receive at least a proportional amount of time to participate in debates involving the main party leaders. The Commission currently exists only based on an Order in Council of Cabinet,¹³²⁴ but to ensure the rule changes would have permanence and not be subject to sudden changes that would favour the ruling party, as with the Broadcast Arbitrator position the CEA should also be changed to incorporate the Commission and its rules.

Proposal 81: Require all broadcasters to provide free time

If the free broadcasting time allocation can be shown to be needed, given the airwaves are owned by the public, the CEA should be

¹³²³ Joan Russow, "The Politics of Exclusion," in Jon H. Pammett and Christopher Dornan, eds. *The Canadian General Election of 2000* (Toronto: Dundurn Press, 2012) 149 at 158. See videos of the smaller party leader debate at: DemocracyChannelInc, online: <<https://www.youtube.com/c/democracychannel/featured>>.

¹³²⁴ Leaders' Debates Commission, Mandate and roles, (June 17, 2021), online: <<https://www.debates-debats.ca/en/about/mandate-and-roles/>>.

changed to require all broadcasters to give free broadcast time to all parties.

Proposal 82: Increase/decrease free time allocated as needed

If the free broadcasting time allocation can be shown to be needed, and the amount of free time needed to provide a substantively equal opportunity for all parties to participate and inform voters is more than the current amount of free time that is provided to parties, the *CEA* should be changed to increase the amount of free time allocated. If it is a shorter period of time, than the *CEA* should be changed to decrease the amount of time.

Proposal 83: Allocate broadcast time based on voter support

If the free broadcasting time allocation can be shown to be needed, based on the results of the comprehensive study suggested in proposal #33, and the effects of the other suggested changes to the donation and public subsidy rules, the *CEA* should be changed to require that the allocation be based on the following characteristics similar to the per-vote subsidy: (i) the total time allocated should only be an amount shown by the study to be needed to inform voters; (ii) the allocation should be based on the percentage of votes received by each party in the previous election, not the number of MPs elected, given that our voting system gives some parties fewer MPs than percentage of votes they received, and some more; (iii) the allocation should also be based on each party's total number of members, not donors, as that would favour parties who are supported by people who can afford to donate, and; (iv) and the allocation should be based on the average level of voter support for the party in the three months before the election campaign period begins, based on the average results of a group of national, longitudinal surveys conducted/commissioned by the Chief Electoral Officer (using a consistent question like "If a national election was held today, which party would you vote for?"). The *CEA* should also be changed to cover the Leaders' Debates Commission and

require it to use the same criteria to determine participation in election debates it holds during the election campaign period.

Proposal 84: Give more free time to disadvantaged parties

As with the donation-matching system suggested in proposal #67, and the per-vote subsidy suggested in proposal #79, if the free broadcasting time allocation is maintained (or expanded), the *CEA* should be changed to grant more free time to parties whose supporters or leaders have suffered systemic disadvantages.

Unlike allocating free broadcast time, the paid broadcast time allocation system in the *CEA* does not, I contend, need to be proven to be needed based on a comprehensive study of the costs of campaigning, simply because it is paid time. The system is in place to ensure that a broadcaster can't refuse to broadcast a political advertisement or other broadcast that a party submits to the broadcaster, thereby ensuring equality of opportunity to inform voters, which aligns with the egalitarian model. Still, a comprehensive study may show that more paid time should be allocated to ensure that parties have access to enough broadcast time to inform voters, and should also assist in determining how the time can be allocated to correct systemic disadvantages for some parties.

As noted above, as with the free broadcast time allocation, the paid allocation per party should be based only on the popular vote percentage for each party in the previous election, not on the number of MPs each party elected and, as with the per-vote subsidy proposal set out above in proposal #79, given voter support for parties changes, a group of national surveys should be used to determine a party's allocation, along with the number of

party members, and whether the leader and supporters of a party have faced systemic economic or other disadvantages.

Proposal 85: Increase/decrease paid time allocated as needed

If the comprehensive study suggested in proposal #33 shows that more paid broadcasting time needs to be allocated than is currently allocated in order for all parties to have adequate time to inform voters, the *CEA* should be changed to increase the amount of time. If the study shows the paid time could be shortened, the *CEA* should be changed to shorten it.

Proposal 86: Allocate broadcast time based on voter support

The *CEA* should be changed to allocate the paid time based on the following characteristics similar to the per-vote subsidy: (i) the total time allocated should only be an amount shown by the study to be needed to inform voters; (ii) the allocation should be based on the percentage of votes received by each party in the previous election, not the number of MPs elected, given that our voting system gives some parties fewer MPs than percentage of votes they received, and some more; (iii) the allocation should also be based on each party's total number of members, not donors, as that would favour parties who are supported by people who can afford to donate, and; (iv) and the allocation should be based on the average level of voter support for the party in the three months before the election campaign period begins, based on the average results of a group of national, longitudinal surveys conducted/commissioned by the Chief Electoral Officer (using a consistent question like "If a national election was held today, which party would you vote for?").

Proposal 87: Give more paid time to disadvantaged parties

As with the donation-matching system suggested in proposal #67, and the per-vote subsidy suggested in proposal #79, if the paid broadcasting time allocation is maintained (or expanded), the *CEA*

should be changed to grant more time to parties whose supporters or leaders have suffered systemic disadvantages.

As also detailed in section 3.20, reimbursements of 50 percent of election campaign costs are also given to parties whose candidates receive two percent or more of the national vote in an election (and/or five percent of the votes in the electoral districts they run in), and 60 percent of costs to candidates (and 90 percent of childcare, other care and accessibility expenses, as noted above in relation to proposal #75) who receive 10 percent or more of the vote in an electoral district.¹³²⁵ As with the other general subsidies evaluated above, the first question that needs to be answered is whether these reimbursements are needed, based on the results of the comprehensive study suggested in proposal #33 above of the costs of campaigning in an election.

I contend that the reimbursements should be continued only if there is still a gap in financing and supports needed to ensure an equal opportunity to participate as a contestant, candidate or party in contests and elections after completing the study and implementing the equalizing direct donation subsidies and donation-matching funding suggested in proposals #66 to #74 (including requiring party headquarters share matching funding with EDAs and candidates), and the equalizing public subsidies for various candidate campaign expenses suggested in proposals #75 to #78. As well, after possibly re-establishing a modified, more egalitarian annual per-vote subsidy (also including a requirement that parties share the funding with EDAs and

¹³²⁵ CEA, *supra* note 79, sections 444, and 477.73 to 477.76.

candidates) as suggested in proposals #79-80, and making the free and paid broadcast time allocations more egalitarian, as suggested in proposals #81-87.

If the reimbursements are continued, as with the subsidies for personal care and unique personal expenses suggested above in proposals #75 and 76, and with the per-vote subsidy suggested in proposal #79, it is inequalitarian to have thresholds for these reimbursements because thresholds advantage the five main parties and their candidates (which are the only parties that receive the subsidies, and their candidates also almost exclusively only receive reimbursements) and disadvantage every other party and their candidates, as detailed near the beginning of section 3.20. A proposal has been made to reduce the threshold for parties to one percent,¹³²⁶ but I contend that the thresholds should simply be eliminated because doing so is consistent with the principle set out in the Supreme Court's ruling in *Figueroa*, which was that no matter how small they are, parties are the vehicle through which citizens exercise their right to express their support for, and elect, their representatives.¹³²⁷

Thresholds should also be eliminated because small parties with low levels of support also have low levels of expenses, so the subsidy would not amount to much compared to the more than \$34 million in reimbursements received by the five main parties after the 2019 federal election, and the

¹³²⁶ Seidle (2011), *supra* note 429, at 50. See also discussion of similar options for reforming candidate subsidies in Cross, *Political Parties* (2004), *supra* note 3 at 180-182.

¹³²⁷ *Figueroa* (2003), *supra* note 133 at para. 39. See also questioning of the constitutionality of the thresholds in: Feasby (2006), *supra* note 2, at 253-259.

almost \$29 million their candidates received, or the amounts that elected MPs each receive in public funding annually through to the next election. A higher reimbursement should also be provided to candidates with a systemic economic or other unavoidable disadvantage, and to independent candidates given they do not have the support infrastructure of a party and EDA.

Proposal 88: If continued, make reimbursements egalitarian

If, after the comprehensive study suggested in proposal #33 is completed, and the other public subsidies suggested in proposals #66 to 81 implemented, there is still a financial gap in the equality of opportunity for candidates and parties to campaign in elections, reimbursements in the *CEA* should be continued, but the *CEA* should be changed to make the reimbursements based on the following four characteristics: (i) set at a level that only provides an equalizing amount to all candidates and parties to allow them to continue to operate until the next election; (ii) set at a higher level for a candidate that has faced systemic disadvantages; (iii) parties that received fewer MPs than percentage of votes should receive a higher reimbursement, and parties that received more MPs than votes should receive a lower reimbursement; (iv) parties that have the same number of donors as other parties, but whose donors donate less on average, should receive a higher reimbursement.

6.8.1. Could a new party form under the suggested rules?

A significant question that flows from all of the above suggested public subsidy changes, and the changes suggested above in sections 6.5 to 6.7 to donation, loan and spending limits, is whether they increase or decrease the barriers to establishing a new party. In other words, do they protect the

existing main parties and their incumbent candidates? The People's Party of Canada (PPC) has shown that a new party can start under the current rules.

It is not surprising, I contend, that Maxime Bernier, an MP and Conservative Party leadership contestant who came second in that contest vote at the end of May 2017, started the PPC in August 2018 and was able to attract many donors in the first year of the party. He would have had the contact information of the almost 11,000 voters who supported him in the contest (See above Chart 14 in section 3.13), as well as the contact information for Conservative Party members and supporters in his electoral district, and so could appeal to them all to support the PPC. I speculate that any future new federal political party will likely also be formed by an MP, and even more likely by an MP who is a leadership contestant who comes second or third, or by a well-known person or interest group that builds support over years and then attempts to convert some or all of its members/supporters into members of a new political party (the way that the Reform Party formed in the 1990s). I reach this conclusion based simply on the need to have voter support in order to sustain a viable party, and so starting from scratch with no support at all would be extremely difficult.

The PPC raised a bit more than \$1.98 million from 22,945 people in 2019, its first full year in operation, with almost exactly half of donors (11,444) donating less than \$200. However, 257 of its donors donated \$1,000 or more, thereby providing \$338,374 (17 percent) of its total donations that year,¹³²⁸

¹³²⁸ Elections Canada, Registered Party Financial Returns, *supra* note 290. A total of 125 of its donors donated \$1,600 (the maximum donation allowed that year), another four donated

and another 339 donors donated from \$500 up to \$999 for a total of \$182,452 (9.2 percent) of its total.¹³²⁹ In other words, only 596 of its donors (2.6 percent) provided 26 percent of the total donated.

Under the donation limit I am suggesting of \$75, the PPC would have had to attract an additional 6,348 donors to raise the same amount it raised from only 596 donors in 2019. Given it had more than 22,000 donors in 2019, this would not be impossible. However, it would obviously be more difficult. In addition, 2019 was an election year, and so donations were higher for the PPC that year than in non-election years, as it only raised slightly more than \$963,000 from 9,094 donors in 2020 (7,904 of which contributed less than \$200).¹³³⁰ In 2021, another election year, it raised slightly more than \$2.94 million from 20,037 donors (16,493 of which contributed less than \$200).¹³³¹ The PPC did not have any loans during these three calendar years.

In the 2019 federal election, the PPC ran 315 candidates but garnered only 1.6 percent of the popular vote, the most in both categories of any party other than the five main parties, but not enough to receive the party election expenses' reimbursement, and only one of its candidates received more than 10 percent of the vote in the district to qualify for the candidate expense reimbursement.¹³³² In the 2021 election, the PPC ran 312 candidates and

between \$1,500 and \$1,600, 8 donated \$1,500, 9 donated between \$1,000 and \$1,500, and 111 donated \$1,000.

¹³²⁹ Elections Canada, Registered Party Financial Returns, *supra* note 290. A total of 3 of its donors donated \$950, 12 donated \$800, 8 donated \$750, 7 donated \$700, 35 donated \$600, 265 donated \$500 and another 9 donated between \$500 and \$999.

¹³³⁰ Elections Canada, Registered Party Financial Returns, *supra* note 290.

¹³³¹ Elections Canada, Registered Party Financial Returns, *supra* note 290.

¹³³² Elections Canada, Forty-Third General Election 2019 Official Voting Results: Percentage of valid votes by political affiliation, online: <<https://www.elections.ca/res/rep/off/ovr2019app/51/table9E.html>>. Elections Canada, Forty-

obtained 4.9 percent of the popular vote, the fourth highest number of candidates and the fourth highest percentage of vote as the Green Party moved to fifth with 252 candidates and 2.3 percent of the vote.¹³³³ Based on the official results, the PPC had 23 candidates qualify for the 2021 candidate reimbursement, and with its overall vote percentage also qualified for the party reimbursement and received 50 percent of its \$1.41 million total election expenses. However, the PPC did not elect an MP in either election. Its sole MP and founder, former Conservative MP and party leadership contestant Maxime Bernier, lost his seat in the House of Commons in the 2019 election and lost again in the 2021 election.

Taking this all into account, would the PPC have been able to start up in 2019 and be successful to the same level as it was in the 2021 election if the donation and loan limit was \$75 and the spending limit and reimbursement rules were changed as suggested in previous sections in this chapter? And is the PPC even an example of a viable political party? Of course there are great difficulties in projecting different rules onto a past situation, and I am speculating based on the example of only one party. It should be noted that six other parties were also established between the 2015 and 2019 federal elections: Canada's Fourth Front; Canadian Nationalist Party; National

Third General Election 2019 Official Voting Results: Number of candidates by percentage of valid votes received, by political affiliation, online:

<<https://www.elections.ca/res/rep/off/ovr2019app/51/table10E.html>>.

¹³³³ Elections Canada, Forty-Fourth General Election 2021 Official Voting Results: Percentage of valid votes by political affiliation, online:

<<https://www.elections.ca/res/rep/off/ovr2021app/53/table9E.html>>. Elections Canada, Forty-Fourth General Election 2021 Official Voting Results: Number of candidates by percentage of valid votes received, by political affiliation, online:

<<https://www.elections.ca/res/rep/off/ovr2021app/53/table10E.html>>.

Citizens Alliance of Canada; Parti pour l'Indépendance du Québec; Stop Climate Change, and; Veterans Coalition Party of Canada, and all but the Stop Climate Change party remained registered parties for the 2021 election.

However, the official results cited above show that four of six of them ran fewer than eight candidates in both elections (the other two ran only 13 and 25 candidates in the 2019 election, and then 10 and seven in 2021), and also all six of them won less than 0.1 percent of the votes in both elections. The parties' financial returns database cited above shows that only three of the six spent any money during the 2019 campaign (two of which spent approximately \$4,000 to \$6,000 while the third spent about \$600) and only two of the six spent any money during the 2021 campaign (one of which spent approximately \$4,000 while the other spent about \$50).

Does this mean that the current rules prevent viable new parties from being established, or does it just mean that these six parties did not have a leader and a platform that attracted broad support, or was it some combination of those two reasons that caused these parties to fail to attract candidates, donors and votes? Before 2004, the *CEA* allowed individuals to donate an unlimited amount to a party, and so one person could form and largely fund a new party, as former Cabinet minister Paul Hellyer did with the Canadian Action Party (CAP) in 1997.¹³³⁴ Not surprisingly, given he was

¹³³⁴ See, for example, the Canadian Action Party's 2003 Financial Statement which shows that Hellyer had loaned the party \$750,000 while it had only raised about \$45,000 in 2002 and in 2003, online: <https://www.elections.ca/fin/oth/pol/asset/2003/action_2003.pdf>. Taylor C. Noakes, "Former defence minister Paul Hellyer remembered for his love of country," (August 16, 2021), CBC.ca, online: <<https://www.cbc.ca/news/politics/paul-hellyer-obituary-1.6142551>>.

providing 94 percent of CAP's funding, Hellyer also led the party. However, that easy-to-raise funding did nothing to build voter support, as in the 1997, 2000 and 2004 elections the CAP received no more than 0.2 percent of total votes, and through the elections until it was deregistered in 2017 it received less than 0.1 percent of the votes and never elected an MP.

Even if CAP had electoral success, it would have been under an inequalitarian system because it does not comply with the egalitarian model or meaningful conflict-of-interest standards to allow one person to provide unlimited funding to a party. Under the current rules, a federal party in 2019 could have raised \$1 million with only 625 people donating the allowed maximum of \$1,600, or 10,000 people donating \$100. Based on this evidence, I contend that it is fairly clear that lack of voter support, not the rules, is the barrier to a new party starting and building a sustainable base of support. In other words, voters in Canada have demonstrated by their actions over the past few decades that they are largely satisfied with having only five to six main parties, and that only a special combination of a party leader, platform, funding and organizing has a chance of attracting any significant support away from those main parties.

With all those caveats, the answer to the question of whether, under the rules I am suggesting, the PPC would have been able to start up and establish itself to the extent that it has is as follows. First, I think it is likely that the other main parties, especially the Liberals and Conservatives, would not have outspent the PPC as much as they did in the 2019 election because they also would have been under the suggested \$75 donation and loan limit.

As Chart 4 above in section 3.9 shows, that year both those parties received most of their funds from donors donating more than \$200, the Liberals almost 80 percent and the Conservatives just over 73 percent. As Chart 9 above in subsection 3.9.1 shows, the Liberals had a loan that year for more than 100 percent of its election expenses, and the Conservatives for 68 percent of its expenses.

Secondly, the suggested donation-matching system would also have increased the relative amount of overall funding for the PPC given half of its donors donated less than \$200 that year, and would have also benefitted its candidates as none of them were incumbents and I propose in proposal #73 higher level matching funds for non-incumbents. Thirdly, for its 2019 election expenses, which totalled just under \$604,000,¹³³⁵ the PPC would have received the 50 percent party expense reimbursement (i.e. \$302,000) and so would have all of its candidates (if the reimbursements were continued after the study suggested above in proposal #33 was completed). Fourth, if the per-vote funding was re-established without a threshold as I have suggested, the PPC would also have received that public funding.

Fifth, given it was just starting up, the PPC donor total was in 2019 not that far behind the NDP (which had approximately 39,000 donors that year) and Green Party (with approximately 36,000), and it had almost twice as many donors as the Bloc Quebecois (with 12,500 donors that year). Sixth, proposal #55 above suggested that a public fund be established for lending to

¹³³⁵ Elections Canada, Registered Party Returns in Respect of General Election Expenses, online: <<https://www.elections.ca/WPAPPS/WPF/EN/Home/Index>>.

parties (if they can show that they need loans), so the PPC could have applied for a loan from the fund given the guarantee that it would receive the party and candidate expense reimbursements after the 2019 election. And seventh, the other targeted subsidies for donors and candidates suggested above would assist a new party that represented people with low incomes or another group of people disadvantaged in some way due to discrimination or another systemic cause.

As a result, overall I think that, compared to the current rules, the rules I am proposing lower the barriers to a new party starting up and having an opportunity, over a few elections, to attract a sustainable base of voter support. Whether that means a party like the PPC, attracting about five percent of the election vote after two elections but not electing any MPs, should be considered to be a viable party is a different assessment – including taking into account how Canada’s first-past-the-post voting system determines whether a party elects any MPs – and it seems to me that it is too early to conclude that assessment. Perhaps the PPC will develop as the Reform Party did, which was formed in 1992 by Preston Manning and others disenchanted with the then-Progressive Conservative (PC) party, and then evolved into the Canadian Alliance Party and then merged back together with the Conservative Party.¹³³⁶ Or perhaps the PPC will develop as the Bloc Quebecois has – formed in 1993 by former PC Cabinet minister Lucien Bouchard and others, and then continuing to win a significant percentage of

¹³³⁶ Trevor W. Harrison, “Reform Party of Canada,” (June 1, 2017), *The Canadian Encyclopedia*, online: <<https://www.thecanadianencyclopedia.ca/en/article/reform-party-of-canada>>.

the vote, and seats in the House, since.¹³³⁷ Or perhaps it will fade away as other parties have, or only continue to win a relatively small percentage of the popular vote as the Green Party has in elections in the past 20 years, and few if any seats.¹³³⁸

6.9. More egalitarian disclosure requirements for contestants, candidates, and political parties, during the pre-campaign and campaign periods

From the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5, the following two relate to the area of disclosure:

11. Requirements for contestants, candidates, parties and third parties to disclose donations, loans and spending regularly, as well as before any voting day, to ensure the media and public can easily determine who is bankrolling each campaign during an election and whether each campaign is complying with the donation, loan and spending limits and restrictions, and also to ensure the media and public can easily determine the financial status, sources of funding and use of donations and loans during the time period of any policy-making process (in order to ensure adequate information is provided to voters, and public confidence in integrity), and;
12. Requirements to ensure fully independent, fully empowered auditing of donations, loans and spending – mainly by having Elections Canada do all the auditing for nomination contestants,

¹³³⁷ Alain Noël, Bloc Québécois,” (July 16, 2021), *The Canadian Encyclopedia*, online: <<https://www.thecanadianencyclopedia.ca/en/article/bloc-quebecois>>.

¹³³⁸ William Christian and Harold Jansen, “Canadian Party System,” (December 15, 2020), *The Canadian Encyclopedia*, online: <<https://www.thecanadianencyclopedia.ca/en/article/party-system>>.

election candidates, EDAs, parties, party leadership contestants and third parties (in order to ensure public confidence in integrity).

While there are disclosure requirements in the *CEA* for all political entities related to their campaigns, they are not timely, comprehensive, or detailed, other than the requirements in sections 326-327 of the *CEA* that the first person who transmits the results of a survey “respecting whether persons intend to vote at an election or who they voted for or will vote for at an election or respecting an issue with which a registered party or candidate is associated” must disclose details about the survey methodology, and the requirement in section 320 to disclose in any election ad the identity of who placed and paid for the ad. The Commissioner of Canada Elections has made a good recommendation to strengthen the requirement concerning the visibility of the identification, and the CEO has made a good recommendation to extend the identification requirement to all communications, not just paid ads.¹³³⁹

As in other areas examined in sections above and below, changing to a \$75 donation/loan limit changes the disclosure system in significant ways. Currently, only donations of more than \$200 are required to be disclosed by any political entity. The proposed \$75 donation limit, together with the suggestion in proposal #39 above to require donors of more than \$35 to send the donation to Elections Canada so it can verify the donation before passing it on to a party or EDA (similar to Quebec’s system), are designed, in part, to

¹³³⁹ CCE, *Recommendations Report* (June 2022), *supra* note 1250, at 14-15 (Rec. 2.2). CEO, *Recommendations* (June 2022), *supra* note 1229, at 11-13 (Rec. 1.1.1).

end the need to search for donors who are splitting donations or doing other illegal things to try to donate significant sums. However, disclosure of the identity of all donors should still be required in order to fulfill the goals of the egalitarian model of informing voters and ensuring public confidence in the integrity of the system. Disclosure of all donors helps prevent any entity from pretending it has many donors when, in fact, it has accepted illegally large donations from a few donors. The identity of the lowest level donors, below \$35, could just be disclosed to Elections Canada, as long as the CEO is required to do regular audits to ensure that no business or organization is using its executives or employees to funnel multiple donations to any entity.

Beyond this general disclosure requirement, set out further below in proposal #93 along with other related disclosure proposals, another area of concern, mentioned above in Chapter 3, sections 3.5-3.6 and 3.23-3.24, is that if a person raises money from contributors to explore becoming a contestant, and then does not register, or wins a nomination contest and then decides not to register as a candidate, the contributors of the money are not required to be disclosed, and the person can keep the money (or other benefit offered, including accepting an offered job).

This potentially allows contributions, gifts, benefits of any kind (including job offers) to be offered or given in secret to induce someone not to run in a contest or election. Proposals #17, 30 and 37 above suggests prohibiting such inducements, and requiring contestants and candidates to return/not accept any benefits if they decide not to run, and to disclose them.

The following proposal again specifically addresses requiring disclosure of these benefits.

Proposal 89: Unregistered contestant/candidate disclosure

As proposals #17, #30 and #37 above mention, the *CEA* should be changed to prohibit anyone or any entity from offering any thing, benefit or advantage (including a job) to anyone who is exploring being a nomination contestant or leadership contestant, or has won a nomination contest but has not yet registered as a candidate, to attempt to induce them not to run, and they should be required to return any benefits (including not taking the job). As well, the *CEA* should be changed to require them to disclose the total amount/value of all contributions they received of money, property, use of property, services, gifts, benefits or other advantages (including job offers or work of any kind) in an online, searchable database on Elections Canada's website.

Another area of concern to address, as detailed in Chapter 3, sections 3.24 and 3.25, is that nomination contestants, candidates and party leadership contestants can easily be given fake jobs in secret by employers during the time period leading up to a contest or election, and then the employer can give a candidate paid leave during an election (which is legal for an employer to do without it counting as a contribution or expense) or leave during a contest. To stop this, contestants and candidates should be required to disclose publicly all work they have done, either as an employee or through any kind of arrangement, during the year before the contest or election began.

Proposal 90: Contestant/candidate disclosure of past work

The *CEA* should be changed to require nomination contestants, leadership contestant, and candidates to disclose, before voting begins, a summary of any type of paid work they have done in the year

before the contest or election campaign period began, including the list of anyone who has paid them, in an online, searchable database on Elections Canada's website.

Another area of concern is that, while Cabinet ministers, MPs, political staff, and Cabinet appointees are all required to disclose details about most of their investments in businesses, nomination contestants, candidates and leadership contestants who are not MPs are not required to disclose any of this information, nor are they required to disclose whether they have lobbied for any business or entity in the past few years. As with their recent work, and gifts and donations, this is information that voters would likely be interested in knowing, before they vote, as it reveals private interests that may be causing conflicts of interest for the contestant or candidate that relate to their campaign positions, or could cause conflicts of interest for them in the future.

As described in section 4.5 above, Cabinet ministers, MPs, Cabinet staff and appointees are generally prohibited from lobbying after they leave their position for five years (with some unfortunate loopholes), and so, I contend, having the information cover a five-year period is appropriate. The information would not need to be disclosed in detail – just a general statement would be sufficient listing the business sectors in which the contestant/candidate has had investments, including real estate investments, over the past five years; whether they are a homeowner or renter or own other residential properties, and; a list of the businesses or other entities for which they have worked and/or lobbied in the past five years.

Proposal 91: Contestant/candidate investments/lobbying

The *CEA* should be changed to require nomination contestants, leadership contestant, and candidates to disclose, before voting begins, a list of business sectors in which they have had investments in the past five years; whether they own a home or other residential properties, and; a list of businesses or other entities for which they have worked or lobbied in the previous five years, in an online, searchable database on Elections Canada's website.

Another area of concern with nomination contestants is that, as mentioned above near the end of sections 3.11 and 3.13, not only are nomination contestants and party leadership contestants allowed to receive gifts, they are also not required to disclose publicly before the contest vote all gifts that they have received during the contest. As well, as detailed as the twelfth area of concern in section 3.12, while election candidates are prohibited from accepting gifts that might reasonably be seen to be given to influence them if they are elected (other than donations and unrestricted courtesy/hospitality gifts, and gifts or advantages from relatives, and through unconditional inheritances), the required disclosure of gifts worth more than \$500 is only to the CEO who is required to keep the disclosure confidential. Even if proposal #40 above is implemented to prohibit all gifts to contestants and candidates except low-value gifts, disclosure of such gifts should still be required as a second level of enforcement, and legal sanction. The current secrecy allows wealthy individuals and interest groups to give a contestant or candidate a significant gift without the public being informed.

Proposal 92: Disclose gifts to contestants and candidates

Whether or not proposal #40 is implemented to change the *CEA* to prohibit all but low-value (less than \$30) gifts to be given or promised to nomination contestants, candidates and leadership contestants, the *CEA* should be changed to require them to disclose, before voting begins, all gifts they have received or been promised to be given during the contest or election campaign period, and during the pre-contest and pre-election period, in an online, searchable database on Elections Canada's website.¹³⁴⁰

Another significant flaw is that the disclosure of some donations by all political entities comes after voters vote, and some entities are not required to disclose any donations until after the vote. These loopholes exist because, first, an election date can easily fall within the time period between the deadlines for the current required quarterly (i.e. every three months) disclosure of donations by parties. Secondly, while leadership contestants are required to disclose, when they register as a contestant, a statement that provides the details of any contributions and loans received before the first day of the contest, nomination contestants and candidates are not.

Thirdly, third parties (if they raise or spend more than \$10,000) are required to disclose some donations during the pre-election and election campaign periods, and while leadership contestants are required (if they raise or spend more than \$10,000) to disclose publicly all contributions received and spending up to one month before the contest voting day, and then the same information weekly through the last month of the contest, with Elections

¹³⁴⁰ MacIvor (March 2008), *supra* note 3 at 140 suggests requiring the CEO to disclose the gift reports submitted by candidates, but I suggest that direct disclosure online would be better.

Canada publishing all these disclosed statements on its website. However, nomination contestants, candidates and parties are not required to disclose any donation or expense information until months after the election (as detailed in sections 3.22 and 3.24). Fourth, EDAs are only required to disclose their donors once a year, on June 1st, even though an EDA can transfer to a candidate the entire amount that a candidate may use for their campaign, which means the candidate's disclosure will only show one donor, the EDA.

Fifth, if the current rules that allow anyone or any entity to pay the personal care, other personal and litigation expenses of contestants and candidates, and to pay for candidate representatives at every polling station, are not changed to prohibit these payments (as suggested above in proposals #41-45), then at least whomever is paying these expenses must be disclosed fully before voting begins at advance polls and by mail-in ballots (and this applies especially for party leadership contests given that many parties are using mail-in ballots as the main means of voting in those contests).

All of these significant disclosure loopholes and delays deny voters their key right to know, and do not comply with the egalitarian model's objective of informing voters. To give just one example of many jurisdictions that have stronger disclosure regimes, Ontario's election finance law requires parties to disclose donations to the CEO within 15 days, and then the CEO adds the donation to an online searchable database two days after.¹³⁴¹ According to International IDEA, 77 countries require disclosure of all

¹³⁴¹ Ontario *Election Finances Act*, *supra* note 1417, section 34.1.

donations to candidates (101 for donations to parties), while 18 require disclosure above a specific threshold (28 for parties).¹³⁴² Also, in its 2020 report on political finance reforms, International IDEA points to specific monitoring problems caused by online donations, such as that “crowdfunding” websites through which donors can easily make multiple donations below any donation disclosure threshold, thereby allowing donors to, in secret, donate more than the allowable donation limit.¹³⁴³

Requirements for more regular, detailed and full disclosure will close these loopholes and provide more timely information to voters, as suggested in the proposals below.¹³⁴⁴ These disclosures can be done by all federal political entities if Elections Canada is mandated to provide equipment, training and technical assistance. Again, the suggested requirement in proposal #39 to route donations of more than \$35 through Elections Canada will facilitate regular, detailed disclosure, as Elections Canada will be able to disclose those donations directly by simply uploading them into an online, searchable database.

Proposal 93: Disclose all pre-donations when registering

The CEA should be changed to require nomination contestants, election candidates, EDAs, parties and leadership contestants to disclose, in a searchable online database on Elections Canada’s website, any contributions or loans (of money, property, use of property or services) they have received, including promises or pledges to

¹³⁴² IDEA, Political Finance Database, *supra* note 1248, question 7 re: donations to parties and question 8 re: donations to candidates.

¹³⁴³ IDEA *Political Finance Reforms: How to Respond* (2020), *supra* note 1343, at 19-23. IDEA, *Digital Solutions*, *supra* note 1343, at 5-9 and 79.

¹³⁴⁴ This disclosure before voting is suggested in: MacIvor (March 2008), *supra* note 3 at 140, and; Beange (Spring 2015), *supra* note 5, at 274.

contribute anything in the future, during the exploration/preparation pre-contest/pre-election period, and to make this disclosure when they register for the first time, or register for a contest or election.

Proposal 94: Disclose all donations before voting begins

The *CEA* should be changed to require nomination contestants, election candidates, parties and leadership contestants to disclose, in a searchable online database on Elections Canada's website, and a few days before advance voting begins (including a few days before mail-in ballots are required to be mailed), and then again a few days before the main voting day, any contributions or loans (of money, property, use of property or services) they have received, including promises or pledges to contribute anything in the future, during the contest/campaign period. For EDAs and parties, the disclosure must be of all contributions received since their last required disclosure (see proposals in section 6.10 below). For candidates, if their campaign receives a transfer from their EDA or party, their disclosure must include identify the donors who donated to the EDA/party or cross-reference to the EDA/party disclosure of those donors. The same rules should apply if a candidate receives a transfer from another EDA (if such transfers are not prohibited as suggested above in proposal 49).

With regard to fundraising events, the \$75 donation/limit will effectively stop the cash-for-access events that cause conflicts of interests for the politicians and political staff who are lobbied at them. However, even with that donation limit, disclosure should be required to determine who is gaining access to policy-makers through fundraising events. Also as detailed in section 3.22, Bill C-50 in 2018 changed the rules to require, for fundraising events organized by anyone for the party, its EDAs, candidates or leadership contestants, that will be attended by a Cabinet minister or the leader, interim

leader or leadership contestant of a party, that parties publish “in a prominent location” on their websites a few days before an event, the date, time and location of the event, who or what entity it is benefitting, which leader and/or minister(s) are attending, the ticket price, and the event contact person.¹³⁴⁵

The party is also required to file a report with the Chief Electoral Officer (CEO) with that same information as well as the name and municipality of all attendees (with a few exceptions), and a list of all organizers, and the CEO maintains a registry of the events on Elections Canada’s website.¹³⁴⁶

However, for all such fundraising events that are held during an election period, a party is only required, within 90 days after election day, to file with the CEO one report covering all the events and containing the required information listed above.¹³⁴⁷ As well, the requirements do not apply to events at a party convention that have a ticket price that amounts to a contribution of less than \$200, or that are to “express appreciation” for individuals who have made a contribution to the party, or to events held at the location of a party leadership contest debate. These are significant loopholes that allow ministers, leaders and leadership contestants to meet behind closed doors, in the context of raising funds, with lobbyists and others seeking to influence their decisions.¹³⁴⁸

¹³⁴⁵ CEA, *supra* note 79, sections 384.1 and 384.2.

¹³⁴⁶ CEA, *supra* note 79, subsections 384.3(1) to (7). See Elections Canada, Regulated Fundraising Events Registry, online:
<<https://www.elections.ca/content.aspx?section=fin&dir=reg&document=index&lang=e>>.

¹³⁴⁷ CEA, *supra* note 79, subsections 384.4(8) to (12).

¹³⁴⁸ CEA, *supra* note 79, subsections 384.1(2) to (4).

Proposal 95: Disclose all campaign fundraising before voting

The *CEA* should be changed to require nomination contestants, election candidates, parties and leadership contestants to disclose, in a searchable online database on Elections Canada's website and before voting begins, the identity of anyone who fundraised for them, either through solicitations or by organizing or holding fundraising events, during the exploration/preparation pre-contest/pre-election period and contest/election period. People who do fundraising should be identified including any current or recent work they have done for anyone or any business or entity, and the fundraising disclosure should include details about how much was raised and how it was raised.

One particular category of disclosure requirements is needed for the pre-campaign and campaign periods for contestants and candidates who are MPs, and for the Prime Minister and Cabinet ministers, whether or not the prohibition on partisan travel/statements suggested in proposal #61 is implemented. Given MPs have travel allowances that are paid for by the public, as do the Prime Minister and Cabinet ministers, MPs should be required to disclose their pre-nomination contest and contest travel (if they are running for re-election, and their pre-election and election period travel, and their pre-party leadership contest and contest travel (if they are running for party leadership) in order to inform the public and allow monitoring of the possible use of public funds for partisan purposes.

Proposal 96: Prohibit/disclose partisan travel paid by public

The *CEA* should be changed to require party leaders, Cabinet ministers, and all MPs who run in a nomination contestant, election or party leadership contest to disclose all of their travel and their associates' travel in an online, searchable database on Elections Canada's website, to ensure that MPs do not use funds provided to

them under the federal travel allowance program for their campaign or their party's campaign.

In addition to disclosing donations and fundraising events, parties should be required to disclose how many members they have, and nomination and leadership contestants and candidates to disclose how many signatures from supporters they have, in part to inform voters of their level of actual support, but also as part of the qualifications for the donation-matching public funding suggested above in proposals #67 and #68, and (if it is re-established) the per-vote funding suggested above in proposal #79. As Chart 24 in subsection 6.4.2 above shows, the Green Party of Canada disclosed a public update of its membership total in September 2020 but not again until November 2022, and the NDP has not disclosed its total number of members for the past almost six years (when the NDP was asked on July 29, 2022 to disclose its current membership total, its spokesperson refused), while the Bloc Quebecois has not disclosed its membership total for eight years.

Proposal 97: Disclose all supporters regularly, before voting

The *CEA* should be changed to require nomination contestants, election candidates, EDAs, parties and leadership contestants to disclose, in a searchable online database on Elections Canada's website and before voting begins, how many members or supporters they have. Parties should also be required to disclose how many members they have regularly (quarterly with the financial statements, or at least bi-annually).

In addition, every political entity should be required to disclose the identity of everyone who works on their campaign before voting begins, and their current and recent work for anyone or any businesses or other entities

including political parties (including any boards they serve on), so that the public is informed of the private interests of the people who are helping the most to win the contest or election, including whether any of them are lobbyists, and so that the public can track whether any of them become lobbyists, and to help ensure the integrity of political processes. This disclosure will also help prevent collusion with third parties which is currently prohibited for candidates and parties, and which is suggested to be also prohibited for nomination and party leadership contestants in proposals \$65, #125, #126 and #143.

For people who are working for a short term at a low level, their identities would only have to be disclosed to Elections Canada which could audit those disclosures. Elections Canada should disclose publicly the total number of workers on the campaigns of each party and its EDA candidates, and averages per EDA, and also for contestants, to allow tracking of the level of paid work in campaigns, which would inform future policy decisions concerning how to equalize the opportunity to run for all contestants, candidates and parties based on their actual level of voter support.

Proposal 98: Disclose all campaign workers before voting

The *CEA* should be changed to require nomination contestants, election candidates, parties and leadership contestants to disclose, in a searchable online database on Elections Canada's website and before voting begins, the identity of anyone who worked for them for pay or any other benefit or advantage during the exploration/preparation pre-contest/pre-election period and contest/election period, including for each worker any current or recent work they have done for anyone or

any business or entity. Low-level workers would be disclosed only to Elections Canada.

In addition, for the same reasons as for disclosure of campaign workers, and recent work by candidates and contestants, and also to prevent anyone or any entities from giving anyone a fake job that allows them to volunteer for a political entity part-time or full-time, every political entity should be required to disclose the identity of everyone who volunteers for them, and their current and recent work for anyone or any businesses or other entities (including any boards they serve on), before voting begins. For similar reasons, the CEO's recommendations report after the 2005 federal election recommended disclosure of volunteer labour by parties that received the per-vote quarterly allowance that was granted at the time.¹³⁴⁹

However, I propose that the disclosure should happen before voting begins in any contest or campaign, and also between elections, by all contestants, candidates, EDAs and parties. For people who are volunteering at a low level, such as only canvassing a couple of times during a campaign, their identities would only have to be disclosed to Elections Canada which could audit those disclosures. Elections Canada should disclose publicly the total number of volunteers on the campaigns of each party and its EDA candidates, and averages per EDA, and also for contestants, to allow tracking of the level of citizen volunteer participation in campaigns, which could inform

¹³⁴⁹ See subsection 4.2 of Elections Canada, "Completing the Cycle of Electoral Reforms – Recommendations from the Chief Electoral Officer of Canada on the 38th General Election," (September 2005), online: <https://www.elections.ca/content.aspx?section=res&dir=rep/off/r38&document=index&lang=e>.

future policy decisions concerning how to equalize the opportunity to run for all contestants, candidates and parties based on their actual level of voter support.

Proposal 99: Disclose all campaign volunteers before voting

The *CEA* should be changed to require nomination contestants, election candidates, parties and leadership contestants to disclose, in a searchable online database on Elections Canada's website and before voting begins, the identity of anyone who volunteered for them during the exploration/preparation pre-contest/pre-election period and contest/election period, including for each volunteer any current or recent work they have done for anyone or any business or entity. Low-level volunteers would be disclosed only to Elections Canada.

Proposal 100: Elections Canada disclose workers/volunteers

The *CEA* should be changed to require Elections Canada to disclose publicly after each election or contest the total number of workers and volunteers on the campaigns of each party and its EDA candidates, and averages per EDA, and also for contestants, to allow tracking of the level of citizen volunteer participation in campaigns, which could inform future policy decisions concerning how to equalize the opportunity to run for all contestants, candidates and parties based on their actual level of voter support.

All of these timely, detailed disclosure requirements are not useful if the political entity can disclose inaccurate information. As detailed in section 3.22, while nomination contestants, election candidates and leadership contestants are all required to submit supporting documents to Elections

Canada in their election expense reports,¹³⁵⁰ parties are not required to submit receipts thereby making spending by parties above the limits relatively easy to do without being caught. The CEO in his June 2022 report recommends, as past CEOs have, that parties be required to disclose receipts when the CEO requests them.¹³⁵¹

I think it is better simply to require all entities to disclose receipts,¹³⁵² and also other detailed reports of all of the other information suggested to be disclosed in the other proposals set out above in this section, and, as suggested below in proposal #102, to make Elections Canada the auditor of all entities, to avoid wasting the time of having the CEO go back and forth with a party or other entity concerning whether they have complied with the rules. This should include separate disclosure of receipts for any trust fund maintained by a party for any purpose.¹³⁵³

Proposal 101: Parties disclose campaign expense receipts

As nomination contestants, election candidates and leadership contestants are required to disclose to the CEO, the CEA should be changed to require parties to disclose to the CEO their bank statements, deposit slips, cancelled cheques and all other receipts concerning their election expenses, and separately all their receipts for any trust fund maintained by the party.

¹³⁵⁰ CEA, *supra* note 79, sections 437-438 re: parties; subsections 478.8(3) and (4) re: leadership contestants; subsection 476.75(3) re: nomination contestants; subsection 477.59(3) re: election candidates.

¹³⁵¹ CEO, *Recommendations* (June 2022), *supra* note 1229, at 62-63 (Rec. 9.6.1).

¹³⁵² This disclosure of documents proving expenses is suggested in MacIvor (March 2008), *supra* note 3 at 140.

¹³⁵³ This disclosure of trust funds is suggested in MacIvor (March 2008), *supra* note 3 at 140.

Related to this concern is that, as noted above in sections 3.3-3.5 and 3.22-3.24), nomination contestants and candidates (if they spend more than \$10,000 (and candidates also if they win more than 10 percent of the votes in the election)), parties, EDAs, and leadership contestants are allowed to choose their own auditor. This does not align with the objective of maintaining an appearance of integrity because, as past scandals detailed in section 3.22 have shown, political entities have an incentive to choose auditors who are devoted to them and will cover up wrongdoing. As well, as also detailed in section 3.22, party auditors even admit in their reports to Elections Canada that they can't confirm the amounts of expenses themselves even with access to the receipts from the parties.

In addition, as the Commissioner of Canada Elections has pointed out, political entities are not even required to disclose documents to their auditors.¹³⁵⁴ To comply with the egalitarian model, more independent and in-depth auditing should be done and, I contend, it would be most efficient to have the auditing done by Elections Canada, as it is independent of all of the political entities (except in one key way addressed below by proposal #103), and doing this would entail simply establishing a division of auditors who would do whatever auditing was needed at any time during any year. This would not only increase accountability and, likely accuracy of spending accounting, it would also remove the self-auditing requirement that creates a

¹³⁵⁴ CCE, *Recommendations Report* (June 2022), *supra* note 1229, at 22 (Rec. 2.6.4.e).

compliance burden for many EDAs and smaller parties given their lack of staff, resources and professional assistance.¹³⁵⁵

Proposal 102: Empower Elections Canada to audit all entities

The *CEA* should be changed to make Elections Canada the auditor for nomination contestants, election candidates, EDAs, parties and leadership contestants.

With regard to the lack of independence of Elections Canada, the current system for appointing the CEO is that the ruling party Prime Minister and/or Cabinet does its own search for candidates for the position, without any required consultation with other parties, and then the Cabinet announces the CEO who is approved by passage of a resolution in the House of Commons, which can be done easily if the ruling party has a majority. Given the CEO has very significant powers over candidates, EDAs and parties, and also chooses the Commissioner of Canada Elections, the CEO appointment system is far from independent enough to ensure public confidence in the integrity of the federal electoral process.

In the spring 2018, when the Liberal Party held a majority of seats in the House of Commons, media reports said that one candidate was confirmed for the position of CEO, and then the ruling Liberal Party Cabinet changed direction, without giving any reason why to other parties, and appointed the current CEO Stéphane Perrault.¹³⁵⁶ The appointment process of the Broadcasting Arbitrator is more fair and balanced, as the Arbitrator is “chosen

¹³⁵⁵ See these points made in: MacIvor (March 2008), *supra* note 3, at 116-117.

¹³⁵⁶ Alex Boutilier, “Liberals reversing course on new elections’ chief, NDP say,” (May 7, 2018), *Toronto Star*, online: <<https://www.thestar.com/news/canada/2018/05/07/liberals-reversing-course-on-new-elections-chief-ndp-say.html>>.

by a unanimous decision of representatives of registered parties” – however, the CEO chooses the Arbitrator if the parties can’t agree.¹³⁵⁷

A better system would be to have a permanent appointments commission, whose members have no ties to any of the parties, and who are chosen by a committee of representatives from all the parties, do a public, merit-based search for candidates for CEO and Arbitrator (and, I would suggest, the Leaders’ Debates Commission,¹³⁵⁸ the Commissioner of Canada Elections,¹³⁵⁹ and all other officers of Parliament as they all enforce key laws that apply to all the parties and their candidates and politicians), and then make the appointment. This system would ensure the CEO and Arbitrator are fully independent and are not tainted by even the appearance of partisanship, which will help ensure public confidence in the integrity of all processes in which the CEO and Arbitrator are involved, in compliance with the egalitarian model.

Proposal 103: Appoint Elections Canada officials independently

The *CEA* should be changed to have the Chief Electoral Officer (CEO), Broadcasting Arbitrator, Commissioner of Canada Elections, and the members of the Leaders’ Debates Commission, appointed after a public, merit-based search by a fully independent commission whose members have no ties to any political party, and who are chosen by a committee with representatives from all registered parties.

¹³⁵⁷ *CEA*, *supra* note 79, sections 332-333. Under section 334, the CEO also replaces the Arbitrator if the person serving in the position passes away during an election period.

¹³⁵⁸ Leaders’ Debates Commission, Mandate and roles, *supra* note 1324.

¹³⁵⁹ Commissioner of Canada Elections, About us, online: <<https://cef-cce.ca/content.asp?section=abo&document=index&lang=e>>.

One final area of lack of disclosure is, as mentioned above in sections 3.13 and 3.18, that if a party leadership contestant has an outstanding debt at the end of the contest, they have three years to raise funds to pay off that debt. However, while the contestant is required to disclose to the CEO payments of unpaid debts within 30 days after each payment, and also a statement with details about the status of unpaid debts 18 months after the end of the contest, and (if needed) also 36 months after the end of the contest,¹³⁶⁰ the contestant is not required to disclose contributors who have contributed after the contest to assist in paying down the debt. Those contributors are only disclosed in the “directed contributions” section of their party’s annual financial return.¹³⁶¹

If the measure suggested in proposal #56 and #57 that would prohibit contestants from incurring any debt that they do not know they can pay off within 60 days is not implemented, or anyone fronting a purchase and debt for them for three years, then contestants should be required to disclose regularly their contributors who are paying down their debt.

Proposal 104: Leadership contestants disclose all donors

If the changes are not made suggested in proposals #56 and #57 to prohibit leadership contestants from incurring an ongoing debt, the CEA should be changed to require them to disclose, in a searchable online database on Elections Canada’s website, all contributors and contributions made toward paying down their debt.

¹³⁶⁰ CEA, *supra* note 79, subsections 478.8(10) to (15) and 478.86 to 478.93.

¹³⁶¹ CEA, *supra* note 79, clause 432(2)(h).

Finally, while again the \$75 donation/loan limit should serve to reduce the use of money as a means of having undue, unethical influence over government policy-making and decision-making, as suggested after Chart 8 in section 3.9, Elections Canada should undertake the comprehensive audit it promised to do in 2013, an audit similar to the audit undertaken by Elections Quebec undertook in 2011, to determine if the effective ban from January 2004 on of corporate and union donations resulted in them funneling donations through their executives and employees and their families to contestants, candidates and parties.¹³⁶² The results of such an audit are also needed to determine whether the ban on corporate and union donations, and the individual donation limit, has actually made federal spending decision-making more egalitarian by reducing or stopping the buying of access and favourable contracting decisions overall compared to the patterns that existed during the time before the ban and limit.

Proposal 105: Require CEO to do historical audit of donations

The *CEA* should be changed to require the CEO and Elections Canada to do the audit they promised to do in 2013, specifically requiring all donations back to 2004 to be audited to determine if they were funneled, or likely funneled, by a business or other organization or entity through their executives or employees, or by an individual through other individuals. The audit should also examine federal government contracting from 2004 to determine if donations are connected to the awarding of any contracts.

¹³⁶² Elections Quebec (April 13, 2013), *supra* note 307. CP (April 3, 2013), *supra* note 306.

6.10. More egalitarian disclosure requirements for parties and electoral district associations between elections

For all the same reasons set out above in section 6.9, the following suggested measures are proposed for disclosure requirements that would apply to parties and EDAs between elections, including disclosure of the details of the use of funds in any trust funds maintained by a party or EDA. Another reason for the proposals below is that, if the measures suggested by the proposals in section 6.9 are implemented, it is possible that individuals, businesses and other organizations that are trying to influence the decisions of party leaders and MPs will shift to trying to influence who is hired as party and EDA officials, and to influence whoever is working as a party or EDA official.

Proposal 106: Leader and party officials disclosure of past work

The *CEA* should be changed to require parties to disclose in an online, searchable database on Elections Canada's website, for their leader and top party officials, a summary of any type of paid work they have done in the year before the contest or election campaign period began, including the list of anyone who has paid them, and to update it quarterly.

Proposal 107: Leader and party officials investments/lobbying

The *CEA* should be changed to require parties to disclose in an online, searchable database on Elections Canada's website, for their leader and top party officials, a list of business sectors in which they have had investments in the past five years; whether they own a home or other residential properties, and; a list of businesses or other entities for which they have worked or lobbied in the previous five years, and to update the disclosure quarterly.

Proposal 108: Disclose gifts to party leader and top officials

The *CEA* should be changed to require parties to disclose in an online, searchable database on Elections Canada's website, for their leader and top party officials, a list of all gifts they have received from any person or entity who may be trying to influence their decisions, and to update the disclosure quarterly. Though federal ethics rules require MPs to disclose such gifts, it is possible for a party leader to not be an MP for a significant time period after they win a leadership contest.

Proposal 109: Disclose all members/supporters regularly

The *CEA* should be changed to require EDAs and parties to disclose, in a searchable online database on Elections Canada's website and before voting begins, how many members or supporters they have, and to update it quarterly.

Proposal 110: Disclose all party workers regularly

The *CEA* should be changed to require EDAs and parties to disclose, in a searchable online database on Elections Canada's website, the identity of anyone who does work for them, including for each worker any current or recent work they have done for anyone or any business or entity, and to update the disclosure quarterly.¹³⁶³ Low-level workers would be disclosed only to Elections Canada.

Proposal 111: Disclose all party volunteers regularly

The *CEA* should be changed to require EDAs and parties to disclose, in a searchable online database on Elections Canada's website, the identity of anyone who volunteers for them, including for each volunteer any current or recent work they have done for anyone or any business

¹³⁶³ This is an extension of the updating requirements set out in sections 405-408 of the *CEA*, *supra* note 79. Note that the CCE has pointed out some inconsistencies concerning the requirement to update the CEO of changes to people working for candidates, EDAs, contestants, parties and third parties. These inconsistencies should be resolved to require every entity to replace key officials as soon as possible if a position becomes vacant, and to update the CEO on who the new person in the position is. CCE, *Recommendations Report* (June 2022), *supra* note 1229, at 19-20 (Rec. 2.6.4.b). See also the related changes recommended in Rec. 2.6.4.c and 2.6.4.d. at 20-21.

or entity, and to update the disclosure quarterly. Low-level volunteers would be disclosed only to Elections Canada.

Proposal 112: Same requirements for EDAs, only bi-annually

The *CEA* should be changed to require EDAs to make all of the same disclosures, as appropriate for their executives, workers and volunteers, as those suggested for parties in proposals #106 to #111, only on a bi-annual basis.

Proposal 113: Elections Canada disclose workers/volunteers

The *CEA* should be changed to require Elections Canada to disclose publicly each year the total number of workers and volunteers of each party and its EDAs, and averages per EDA, to allow tracking of the level of citizen volunteer participation in campaigns, which could inform future policy decisions concerning how to equalize the opportunity for all parties and EDAs to participate in Canada's political system based on their actual level of voter support.

Proposal 114: Disclose all donations as they are received

The *CEA* should be changed to require EDAs and parties to disclose within 15 days, in a searchable online database on Elections Canada's website, any contributions or loans (of money, property, use of property or services) they have received. If proposal #39 above is implemented, Elections Canada would already have the list of anyone who has donated \$35 or more (including through a crowdfunding site), as those donations would be routed through Elections Canada to verify their source.

Proposal 115: Disclose all fundraising as it happens

The *CEA* should be changed to require EDAs and parties to disclose within 15 days, in a searchable online database on Elections Canada's website, the identity of anyone who fundraised for them, either through solicitations or by organizing or holding fundraising events. People

who do fundraising should be identified including any current or recent work they have done for anyone or any business or entity, and the fundraising disclosure should include details about how much was raised and how it was raised.

Proposal 116: EDAs and parties disclose expense receipts

As nomination contestants, election candidates and leadership contestants are required to disclose to the CEO, and as suggested in proposal #101 concerning parties disclosing election expense receipts, the *CEA* should be changed to require EDAs and parties to disclose to the CEO their bank statements, deposit slips, cancelled cheques and all other receipts concerning their expenses between elections, including a separate set of receipts for any trust funds maintained by a party or EDAs so that the specific uses of the funds in the trust is disclosed in detail.

Finally, currently parties and EDAs only disclose a statement annually (with the statements from EDAs disclosing their contributors), while parties disclose contributions quarterly. This creates a disconnect in the disclosures that essentially makes it impossible to determine the exact financial position of a party or EDA at any time. Publicly traded companies are required to disclose their financial statement quarterly, and given the very public role of parties and EDAs in our political system, and the public funding provided to them, by analogy it makes sense, I contend, to require disclosure of more regular statements from them.

Proposal 117: Disclose parties/EDAs quarterly financial statement

The *CEA* should be changed to require parties and EDAs to disclose a financial statement quarterly setting out their revenues, expenses, assets and liabilities over the previous quarter (including separate

disclosure for any trusts funds they maintain), unless a party or EDA is below specific thresholds and then they would be required to disclose bi-annually or only annually. As recommended above in proposal #102, Elections Canada should do the auditing for all of these statements. The thresholds should be determined through the comprehensive study suggested in proposal #33 concerning the ongoing costs of operating a party an EDA between elections.

6.11. More egalitarian registration of third parties

The registration requirements for third parties, as detailed in Chapter 3, section 3.26, are generally egalitarian as third parties are required to register if they spend more than \$500 on advertising during a campaign. However, one thing that should be evaluated as part of the comprehensive study suggested in proposal #33 is whether the \$500 threshold should be decreased, given that it is now possible to reach tens of thousands of voters by spending only \$499 (or less) on social media ads. In other words, the \$500 threshold makes it relatively easy for multiple third parties to coordinate their activities in relative secrecy while each reaches tens of thousands of voters, and collectively they reach hundreds of thousands of voters, through social media activity.

The CEO has recommended that the registration limit be increased to \$1,000, given it has not been increased in 20 years.¹³⁶⁴ However, that is only half the spending equation, as communication costs have also decreased over the past 20 years. It should be noted that, unlike nomination contestants

¹³⁶⁴ CEO, *Recommendations* (June 2022), *supra* note 1229, at 20 (Rec. 2.2.1).

and candidates, third parties are allowed to register and be active during election campaigns without having to be approved by anyone or any entity, other than in terms of providing information about the third party's chief agent and, if the third party is going to spend more than \$10,000, auditor. This is yet another reason to reform the nomination/candidate selection process, including registration, donations, spending and subsidies, to ensure an equality of opportunity to participate, as suggested by the proposals in the above sections.

It also points to the fact that the registration process for third parties is not difficult and, as a result, if the registration threshold should be changed to be lower than \$500 to ensure voters are informed about the activities of all third parties that are reaching a significant number of voters, and to protect the integrity of the system, the administrative burden of registering should not be used as a reason to refrain from making this change. As well, whether or not the prohibition on collusion by third parties and leadership contestants suggested above by proposal #65 is implemented, and whether or not the existing *CEA* prohibition on third parties colluding with nomination contestants is made clearer as suggested below in proposal #125, third parties should also be required to register for these contests.

Proposal 118: Evaluate third-party registration threshold

As part of the comprehensive study of the costs of campaigning suggested in proposal #33, and given tens of thousands of voters can now be reached for very little cost through social media ads and posts, the registration threshold for third parties of \$500 in ad spending should be evaluated and, likely, decreased.

Proposal 119: Require registration for contests

Given the existing rule in section 476.68(2) of the *CEA* prohibiting collusion between nomination contestants and third parties to exceed expenses, and whether or not the prohibition on collusion between leadership contestants and third parties suggested in proposal #65 is implemented, third parties should be required to register for these contests.

It has also been suggested that provincial governments should be required to register as third parties and disclose their spending on paid advertising given the Ontario government required gas stations to put stickers on pumps six months before the 2019 federal election campaign period began informing people of the government's position on the federal Liberal government's carbon tax.¹³⁶⁵ I think this idea should be considered, but given governments have a very different structure and funding compared to other third parties, and that such advertising has only happened once, and that the ads could be viewed as stating the Ontario government's public policy position and not as opposing the federal ruling party's re-election, I think it is premature to regulate provincial (or territorial) government's spending in this way.

6.12. More egalitarian spending by third parties during the pre-election and election campaign periods

As in sections 6.6 and 6.7 for contestants, candidates, parties and EDAs, from the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5 that are the framework for

¹³⁶⁵ Hoult (July 2020), *supra* note 496.

the proposals in this chapter, the following standard addresses the area of spending during the pre-election and election periods:

7. Spending limits that ensure, for all contestants, candidates, parties and third parties, based on their actual level of voter support, substantive equality of opportunity to participate in and influence not only election debates but also debates on issues between elections (in order to ensure substantively equal opportunity for substantively equal participation and influence, and public confidence in integrity – with no more than a 10 percent variation in the equality of opportunity and influence).

The current third-party spending rules in the *CEA* that apply to the pre-election and election periods align with the egalitarian model only in that:

- i. they cover advertising (partisan in pre-election period, and partisan and issue-based during the election period), canvassing, phone calling, surveys and other paid voter outreach and information activities;
- ii. they require the governing body of any third party to approve the spending (as that prevents a single staff person from having sole power over the decision to spend money contributed by many voters), and;
- iii. they prohibit collusion between third parties and nomination contestants, candidates, parties and other third parties, including (for some political entities) sharing information about communication strategies (a provision that should be extended to cover all political entities, as suggested below).

Otherwise, there are several inconsistencies and loopholes in the spending rules and limits for third parties that do not comply with the egalitarian model, as detailed in Chapter 3, section 3.27. The proposals in this section are

aimed at changing the spending rules to comply with a more egalitarian model.

An initial, important issue concerning third-party spending is preventing foreign interference. As the Commissioner of Canada Elections (CCE) and CEO both recommend in their June 2022 reports, the prohibition on foreign interference aimed at influencing Canadian voters should be extended to cover the pre-election period.¹³⁶⁶ Secondly, the CCE recommends that the *CEA* be changed to ensure all the rules prohibit interference by foreign corporations and entities that do not do business in Canada or have as their “primary purpose” influencing voters – given some of the current rules in the *CEA* only prohibit influencing by corporations and entities that have interference as their “only activity”.¹³⁶⁷

However, I contend that the CCE’s recommendation does not go far enough. As the rules apply to individuals who are not Canadian citizens or permanent residents, unions that do not bargain for employees in Canada, and to foreign political parties and foreign governments, every foreign corporation or entity that does not do business in Canada should be prohibited from interfering simply on the basis that they do not do business in Canada.

¹³⁶⁶ CCE, *Recommendations Report* (June 2022), *supra* note 1250, at 13. CEO, *Recommendations* (June 2022), *supra* note 1229 at 26 (Rec. 4.2.1).

¹³⁶⁷ CCE, *Recommendations Report* (June 2022), *supra* note 1229, at 13-14 (Rec. 2.2).

Proposal 120: Prohibit foreign interference in pre-election

As the CEO and CCE have recommended, the *CEA* should be changed to prohibit foreign interference also during the pre-election period.

Proposal 121: Prohibit election interference by all foreign entities

Clauses 282.4(1)(b), 349.01(1)(b), 349.4(2)(b) and 351.1(2)(b) in the *CEA* should be changed to prohibit interference by all corporations and entities that do not do business in Canada, in the same way that all foreign individuals, unions, parties and governments are prohibited from interfering.

With regard to third-party spending in general, the CEO has recommended that the third-party spending limits should apply to all third-party communications, paid and unpaid, not just advertising, given the definition of advertising has become less clear as social media communication techniques have developed, including texting and creating and posting videos on various sites and platforms. I concur with this recommendation as it aligns with the egalitarian principles of informing voters and ensuring the integrity of political processes (as it allows the public and Elections Canada to more easily track third party activities).

The CEO also recommends that issue advertising be more clearly defined, as it is in Ontario's election law, so that third parties know what communications would be included under their spending limit.¹³⁶⁸ As others have pointed out, the line drawn in the *CEA* regulating issue advertising can be difficult to determine if an issue is "associated" with the position taken by a

¹³⁶⁸ CEO, *Recommendations* (June 2022), *supra* note 1229, at 17-19 (Rec. 2.1.1).

candidate or party¹³⁶⁹ although I don't think it is as difficult as some commentators have claimed.¹³⁷⁰ Given the numerous registered parties, and the extensive and comprehensive election platforms that the main parties usually issue, third parties should simply assume that any issue they advocate about will be associated with at least one candidate or party. Still, I also concur with the recommendation to clarify the definition, as more clarity will assist with enforcement of the provision.

Proposal 122: Limits should cover all communications

As the CEO recommends, given the definition of advertising has become less clear, the *CEA* should be changed to apply to all third-party communications, not just ads (and also to apply to all contestant, candidate and party communications).

Proposal 123: Clarify definition of issue advertising

As the CEO recommends, the *CEA* should be changed to clarify the definition of issue advertising.

Three other general third-party rule changes that are needed are to require third parties to register and limit their spending on paid activities during nomination contests, to prohibit them from colluding with contestants in any way, and to clarify the anti-collusion prohibition. As noted above at the beginning of this section, the *CEA* prohibits collusion between third parties, and between third parties and candidates and parties, including even sharing information in ways that would affect the activities of a third party. However,

¹³⁶⁹ Feasby (2005), *supra* note 10, at 264-267 and 271-273.

¹³⁷⁰ Eric Barendt, *Freedom of Speech*, 2nd ed (Oxford University Press, 2005) at 479–80. Keith D. Ewing and Jacob Rowbottom, "The Role of Spending Controls" in Ewing, Rowbottom and Tham (2012), *supra* note 2, at 85.

the rules are inconsistent as collusion by sharing information between a third party and a nomination contestant is not prohibited. Contestants are only prohibited from colluding with a person or entity in order to exceed their contest expense limit.¹³⁷¹ The lack of spending limits and an anti-collusion rule for third parties during nomination contests are loopholes that can allow third parties to work in secret with, for or against parties and contestants, and other third parties,¹³⁷² in order to have significant, undue influence over who become election candidates.

Proposal 124: Third-party limits during nomination contests

As with pre-election and election periods, the *CEA* should be changed to require third parties to register when spending in nomination contests, and to set third-party spending limits during contests.

Proposal 125: Prohibit all collusion with nomination contestants

As with candidates and parties, the *CEA* should be changed to prohibit nomination contestants from colluding with third parties in any way, including by sharing information.

Proposal 126: Change collusion to coordination, and clarify

As the Commissioner of Canada Elections (CCE) recommends in his June 2022 report, the word “collusion” in the *CEA* should be changed to “coordination” and the rules clarified to make it clear that individuals can hold events or do other things for contestants, candidates, EDAs or parties but whatever they do must be counted as a non-monetary contribution that must amount to less than the \$75 donation/loan limit (or, if they do more, than they must be paid and the payment counted

¹³⁷¹ *CEA*, *supra* note 7, subsection 476.68(2).

¹³⁷² Anika Gauja and Graeme Orr, “Regulating ‘Third Parties’ as Electoral Actors: Comparative Insights and Questions for Democracy,” (2015) 4 *Interest Groups and Advocacy* 249 at 251 (hereinafter “Gauja and Orr (2015)”).

as an expense), and the contribution/expense must be disclosed by the political entity.

On the more specific issue of what the limits should be on third-party spending, the egalitarian, social-contract model developed by the Supreme Court in its 1997 ruling in *Libman* contained the self-contradiction of suggesting that a limit on third-party ad spending of \$1,000 was fine, even though it was exponentially lower than the candidate and party spending limits in force at the time, and was such a low limit that even if multiple third parties were active compared to the number of candidates in any electoral district or parties in a campaign they would still not come close to dominating election debates through their spending.

In 2004, the Supreme Court of Canada ruling in *Harper* upheld the federal limit that had been set in 2000 of \$150,000 per third party for a national advertising, and \$3,000 in any electoral district (increasing each year by the rate of inflation), in doing so ignoring key principles of the egalitarian model by upholding these arbitrary, and relatively high blanket limits that applied to all types of third parties. In 2009, the B.C. Supreme Court also ignored the inherent inequality in such high limits, and noted that the B.C. government also ignored this inequality, when it stated in its ruling on similar B.C. election limits that:

The \$150,000 global spending limit in the *BC Act* applies to both individuals and organizations. While it is certainly conceivable that an individual could spend that amount on election advertising, the limit is, in practical terms, one that essentially only affects organizations. Accordingly, I consider that the provisions in the *BC Act* can be most

logically read as providing individuals with equivalent rights as the organizations to which the legislation would appear to be principally directed. Indeed, the Attorney General admits that the spending limits are essentially set with reference to group, not individual, spending.¹³⁷³

This statement talks around the obvious point that the limits apply to individuals as third parties as well as business and other types of organizations, no matter why they were “essentially set”. As detailed in Chapter 3, section 3.27, the federal government similarly ignored the reality of the inequality of the limits by more than doubling the federal third-party election limit in 2019 with Bill C-76, increasing it to more than \$500,000, as well as setting for the first time a pre-election spending limit of more than \$1 million which was not based at all on realistic likely amounts of spending. As Chart 18 in section 3.27 shows, in the pre-election period of the 2019 federal election (the only election in which there has been a pre-election period since the limit was set) only two third parties spent more than \$500,000, only 35 percent (51 out of 144 total registered third parties) spent any money, and they spent just over \$60,000 on average, with the median amount being just under \$5,000.

As well, as cited below Chart 18 in section 3.27, Elections Canada’s March 2022 report on third parties in the 2011, 2015 and 2019 elections shows that on average 89 percent spent less than 25% of the limit, and on

¹³⁷³ *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436 (CanLII), online: <<https://canlii.ca/t/22z75>>, paras. 20-21 (hereinafter “*B.C.T.F. v. B.C. (2009)*”).

¹³⁷³ *B.C.T.F. v. B.C. (2009)*, para. 65.

average only four percent spent 75% or more of the limit,¹³⁷⁴ and my analysis of third-party spending during the 2021 election shows a similar pattern, as only three percent spent more than 75 percent of the spending limit total, and only eight percent spent more than 50 percent of the limit. In other words, both the courts and the federal government (and parliamentarians), have ignored the inegalitarian nature of the federal third-party spending limits in every assessment undertaken since they were enacted in 2000.

As well, the Supreme Court essentially ignored the fact that the third-party spending limit is not at all consistent with the spending limits for parties and candidates. Parties are allowed to take out a loan and spend millions in an election simply by rounding up a few hundred people to run as candidates in every riding, even if the party actually doesn't have more supporters than those few hundred people. The Green Party and Bloc Quebecois have fewer members or donors than many third-party interest groups, and yet during elections they are allowed to spend millions more than these interest groups. Candidates are allowed to spend tens of thousands on their campaigns, even if they have few supporters, and many have fewer supporters than third party interest groups in their communities. These facts all raise the question of why the third-party ad spending limits are the same for all third-party entities – individuals, private corporations, publicly traded corporations, unions and citizen groups of various sizes – and not relatively higher for large, broad-based citizen groups.

¹³⁷⁴ Elections Canada, *Third Party Report* (March 2022), *supra* note 527, at 29-30.

As well, the Supreme Court upheld the limits in the 2004 *Harper* ruling based on the limits being low enough that several third parties would not be able to overwhelm and drown out the communications of a candidate or party. However, the national limit at the time of \$150,000 was much more than many small parties spend on their national campaigns, and so several third parties spending that amount would drown out those small parties. As well, the district limit of \$3,000 was more than many candidates of small and large parties spent on their campaigns, and so several third parties spending that amount could easily drown out those candidates.

The Supreme Court also ignored the issue of whether businesses should be allowed to spend as third parties. In other words, the Supreme Court in *Harper* made a blanket ruling about blanket limits even though how the limits operate for various third parties, parties and candidates in various situations makes it clear that blanket limits do not make sense.

In little-noticed rulings in 2010 and 2011, the Quebec courts focused more on the egalitarian model's principle of equality of opportunity for equal participation for voters than the Supreme Court did in *Harper*, but still ignored the principle when considering limits on spending by citizen groups that are supported by many voters. The situation involved allegations that, during the 2003 Quebec provincial election, the Quebec federation of unions (Fédération des travailleurs et travailleuses du Québec – known as the “FTQ”) violated provisions in Quebec's *Election Act* that prohibit any corporation or other statutory or legally approved organization (“legal person” – for-profit or not-for-profit (including unions)) from spending any money during an election

campaign period on publicity or advertising to promote or oppose a party or candidate, their platform or policies, or their past actions or suggested actions.¹³⁷⁵

The only exceptions to this spending prohibition for a legal person (such as a business or union) are that it can send “neutral” information to its shareholders or members that inform them of candidate or party platforms, past actions or suggested actions, and they can publish:

... articles, editorials, news, interviews, columns or letters to the editor in a newspaper, periodical or other publication, provided that they are published without payment, reward or promise of payment or reward, that the newspaper, periodical or other publication is not established for the purposes or in view of the election and that the circulation and frequency of publication are as what obtains outside the election period.¹³⁷⁶

and its spokespeople or representatives can appear in “broadcasting by a radio or television station of a program of public affairs, news or commentary, provided that the program is broadcast without payment, reward or promise of payment or reward”.¹³⁷⁷ In other words, other than sending neutral messages to their shareholders or members, a legal person can only attempt to receive coverage from the media of their viewpoints on parties and candidates. The only other exception is that a legal person can incur “the cost at fair market value of producing, promoting and distributing a book that was planned to be put on sale at the prevailing market price regardless of the election order”.¹³⁷⁸

¹³⁷⁵ *Election Act*, CQLR c E-3.3, sections 401, 402 and 404 (hereinafter “*Election Act*”).

¹³⁷⁶ *Election Act*, *supra* note 79, section 404(1).

¹³⁷⁷ *Election Act*, *supra* note 79, section 404(3).

¹³⁷⁸ *Election Act*, *supra* note 79, subsection 404(2).

Quebec's *Election Act* also allows a voter, and individuals in an organization that is not incorporated (if a majority of these individuals are voters), who register as an authorized "private intervenor"¹³⁷⁹ to incur the very limited expenses of up to \$200 total to hold meetings through the election campaign period "provided the meetings are not directly or indirectly organized on behalf of a candidate or party"¹³⁸⁰ as well as:

(13) the publicity expenses, the total of which does not exceed \$300 for the entire election period, incurred by an authorized private intervenor in accordance with Division V, without directly promoting or opposing a candidate or party, to publicize or obtain support for the intervenor's views on a matter of public interest or to advocate abstention or the spoiling of ballots.

A registered political party that does not run candidates in the election can also register as a "private intervenor" with the leader being its representative.¹³⁸¹

¹³⁷⁹ *Election Act*, *supra* note 79, Division V, sections 457.2 to 457.21.

¹³⁸⁰ *Election Act*, *supra* note 79, subsection 404(12).

¹³⁸¹ *Election Act*, *supra* note 79, section 457.2. To register, an individual voter "private intervenor" must affirm an oath: identifying themselves and providing their contact info; identifying the matter of public interest about which they intend to express views; stating they are not a member of a political party, or an authorized private intervenor group that is expressing views on the same issue; stating they do not intend to promote or oppose a party or candidate and that they are not acting directly or indirectly on behalf of a candidate or party (*Election Act*, section 457.3). A representative of an organizational intervenor must affirm an oath for the same things, along with the number of members of the group and that a majority of them are voters, and that no member of the group has obtained authorization as a private intervenor on their own to express views on the same issue (section 457.4). The representative may only represent one private intervenor during each election period (section 457.9), and private intervenors are not allowed to join a political party during an election period (section 457.12) and collusion and the use of others' money to pay for expenses is prohibited (sections 457.13 to 457.16) and a report on expenses along with invoices and receipts is required to be filed with Elections Quebec within 30 days after election day (sections 457.17 and 457.18). Strangely, applications to become a private intervenor are only accepted between the twenty-seventh and thirteenth days before election day, even though the election campaign period is 39 days (section 457.5). Given how low the spending limits are for private intervenors, and the Supreme Court's 1997 ruling in *Libman* striking down similarly low spending limits that were set for similar non-affiliated "intervenors" in the 1995

The issue in the court case was that the FTQ spent tens of thousands of dollars producing and distributing an information kit on the provincial parties' platforms that clearly criticized one party, the now-defunct Action démocratique du Québec (ADQ), more than the others. In other words, it was partisan information. The kit was distributed to the local offices of unions in the federation so that they could distribute it to their members.¹³⁸² The FTQ and affiliated unions were found guilty of violating the *Election Act* by the trial judge, and appealed to the Quebec Superior Court on the grounds that their rights: to safeguard a person's dignity, honor and reputation (*Quebec Charter*, section 4); to equality (*Canadian Charter*, subsection 15(1) and *Quebec Charter*, section 10); to freedom of association (*Canadian Charter* subsection 2(d)) – all of which the trial judge rejected as only applying to individuals¹³⁸³ – and their freedom of expression (*Canadian Charter* subsection 2(b)). The trial judge and Superior Court¹³⁸⁴ and Quebec Court of Appeal¹³⁸⁵ all found that the provisions violate subsection 2(b).

However, the Quebec courts all found that the provisions were justifiable under section 1 of the *Charter*, essentially adopting the same position as the Supreme Court did in *Harper* and *Libman* concerning the

referendum in Quebec, I find it surprising that the limits have not been challenged in court since they were enacted in 1998.

¹³⁸² *Fédération des travailleurs et travailleuses du Québec c. Directeur général des élections du Québec*, 2010 QCCS 956 (CanLII), online: <<https://canlii.ca/t/28knn>>, paras. 5-6 (hereinafter “FTQ (2010)”).

¹³⁸³ *FTQ (2010)*, *supra* note 1382, paras. 21-32.

¹³⁸⁴ *FTQ (2010)*, *supra* note 1382, paras. 34-41.

¹³⁸⁵ *Métallurgistes unis d'Amérique, section locale 7649 (FTQ) c. Directeur général des élections du Québec*, 2011 QCCA 1043 (CanLII), online: <<https://canlii.ca/t/flrmc>>, para. 20 (hereinafter “FTQ (2011)”). Refused leave to appeal to the Supreme Court of Canada, *Fédération des travailleurs et travailleuses du Québec, Syndicat des cols bleus regroupés de Montréal c. Procureur général du Québec et Directeur général des élections du Québec*, 2012 CanLII 700 (CSC), online: <<https://canlii.ca/t/fpmbb>>.

importance of spending limits and their rational connection to fair, democratic elections that are not dominated by wealthy voters and interest groups.¹³⁸⁶ In doing so, the courts also essentially adopted the “party-democracy”¹³⁸⁷ framework that posits that voters need to hear from candidates and parties mainly, and other voters only a bit, in order to have enough information to cast a ballot.

The courts then concluded that the opportunities extended to legal persons – to issue news releases etc. and possibly obtain media coverage, and to inform their members of party platforms in a neutral way, and for their members to spend up to \$200 holding meetings or to register as private intervenors and spend up to \$300 each to express their views on union- or business-related issues – were enough means for legal persons to express their views, and for voters to be informed of those views.¹³⁸⁸ As a result, the courts concluded that the effective prohibition in the statute on spending on partisan advertising by unions, for-profit and not-for-profit corporations, while not a minimal impairment of the right to freedom of expression, was within the spectrum of reasonable measures¹³⁸⁹ and were more beneficial than deleterious.¹³⁹⁰

As expressed also in the Supreme Court’s rulings, the concern about moneyed interests dominating election debates makes sense, I contend,

¹³⁸⁶ *FTQ (2010)*, *supra* note 1382, paras. 67-73. *FTQ (2011)*, *supra* note 1385, paras. 33-38.

¹³⁸⁷ Bakvis and Smith (1997), *supra* note 44.

¹³⁸⁸ *FTQ (2010)*, *supra* note 1382, paras. 105-106. *FTQ (2011)*, *supra* note 1385, paras. 39-41 and 48-49.

¹³⁸⁹ *FTQ (2010)*, *supra* note 1382, paras. 107-109 and 118. *FTQ (2011)*, *supra* note 1385, paras. 49-52.

¹³⁹⁰ *FTQ (2010)*, *supra* note 1382, paras. 110-112.

when the concern is about large businesses spending large amounts, given shareholders do not likely invest in a business because of the business' views on political issues. However, it doesn't make sense to apply that concern to citizen groups that have many members who are voters, whether or not the group is incorporated as a non-profit. These groups represent many voters, and should be permitted to "speak louder" than one voter, and should not be limited to spending only \$300 when candidates are allowed to spend tens of thousands of dollars even if few voters support them, and parties (some of which have far fewer members than some citizen groups) are allowed to spend millions of dollars.

Given the statutory provision that the courts were interpreting in the Quebec case prohibited both unions and corporations from spending, the courts seemed constrained from fully considering the unions' proposal that there could/should be a carve out in the rules to allow them and other citizen groups to spend while businesses should not and/or that the number of members/employees could be taken into account in setting limits.¹³⁹¹ Instead, the courts set out the broad conclusion that allowing non-profit citizen groups to spend any amount (even a restricted amount like the \$150,000 allowed at the federal level (\$3,000 in each electoral district)) would lead to everyone setting up an unlimited number of non-profit groups,¹³⁹² including many non-profit groups that were actually front groups controlled by businesses, and

¹³⁹¹ *FTQ (2011)*, *supra* note 1385, para. 35 citing *FTQ (2010)*, *supra* note 1382, para. 99. See also *FTQ (2011)*, para. 47.

¹³⁹² *FTQ (2011)*, *supra* note 1385, para. 36 citing *FTQ (2010)*, *supra* note 1382, para. 100 (and see also paras. 101-102).

that would lead to “dépenses électorales incontrôlées” (uncontrolled election spending) that would open a “Pandora’s box” that would fundamentally undermine the objectives of the limits.¹³⁹³

I contend that this conclusion is very questionable because if only incorporated non-profit citizen groups were allowed to spend, and relatively low spending limits were set for their spending based on the number of members they have, and anti-collusion measures applied (as they already do under Quebec’s election law for private intervenors), then election spending would still be controlled. Under such a system, even if businesses set up front groups they wouldn’t be allowed to spend any money unless the groups actually had members.

In contrast to these two divergent systems upheld by the Supreme Court and the Quebec courts, one allowing an individual voter, along with interest groups (including businesses) with greatly varying levels of shareholders/members/supporters, to spend up to \$150,000 on ads during an election campaign period, and the other allowing only a voter or unincorporated group of voters to spend only \$300 on ads, I propose that the courts should not have been so deferential to the federal and Quebec legislatures, and should have instead directed them to restructure their limits to be more consistent with the egalitarian model’s principles as established by the Supreme Court, including the principle of “relative parity” in the influence of voters.

¹³⁹³ *FTQ (2010)*, *supra* note 1382, paras. 101-102.

In other words, I contend that both legislative schemes that the Quebec courts, and the Supreme Court, approved, violate the fundamental egalitarian principles of one person, one vote, and equality of opportunity to participate because they are the same for a wealthy individual and a person with a low-income, and for a private corporation with only a few shareholders and for a citizen group that has hundreds, thousands or hundreds of thousands of members. The voting system does not allow wealthy voters to vote multiple times more than low-income voters. For the same reason, the third-party limits should not allow wealthy voters to spend multiple times more than low-income voters. As well, as with the spending limits for political parties, different third parties with different levels of voter support should have different spending limits.¹³⁹⁴ Allowing citizen groups to spend an equal amount per member/supporter aligns with the egalitarian model – a single limit for all third parties, no matter what size or type, does not.

I contend also that the UK law that prohibits political advertising on radio and TV except through the granting of free broadcast time to parties only, and the court ruling that upheld those rules,¹³⁹⁵ do not comply with the principles of the egalitarian model, even under the party-democracy model approach that prioritizes parties and candidates over third parties. While the overall goal of such a system of reducing the role of money and the

¹³⁹⁴ As suggested in a general way in Pal, Permanent Campaign (2019), *supra* note 5.

¹³⁹⁵ *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.

dominance of wealthy interests is laudable,¹³⁹⁶ the blanket prohibition is inequalitarian.

Yes, one wealthy person, or a wealthy private corporation that is run by only a few people, should not be allowed to spend an inordinate amount of money advocating their views, as that violates the principle of equality of opportunity to participate in political processes. But prohibiting a citizen group with tens of thousands of members from broadcasting even one advertisement also violates that principle. Electing parties and candidates may be the focal points of elections, but informing voters of and debating policy issues and how party and candidate platforms address those issues are key parts of the electoral process that leads to voters making the choice of which candidate and party to support, and it is democratic and egalitarian to allow organizations that are supported by many voters to deploy the collective funding and resources of those voters to make their voice and viewpoint heard in the process, just like parties are allowed to do.

As a result, I contend that the courts should have issued directives to the governments stating that blanket limits are unconstitutional, and that the limits for each third party are required to be based as close as possible on each third party's actual voter support. Under this system, a one-person third party would be allowed to spend only a very low-level base amount simply because they only represent one voter. Groups would be allowed to spend a

¹³⁹⁶ Barendt (2005), *supra* note 1370, at 485. Jacob Rowbottom, "Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media" in Ewing and Issacharoff, eds. (2006) 77. Andrew Geddis, "The press: The media and the 'Rupert Murdoch problem'" in Ewing, Rowbottom and Tham (2012) 127 at 146.

certain amount per member/supporter based on a calculation similar to that used to set contestant, candidate and party spending limits as described above in Chapter 3, subsections 3.16 and 3.17 and in section 6.6, or to allocate broadcast time to parties during elections as described above in Chapter 3, section 3.32 and in section 6.8.¹³⁹⁷

As with those other limits, the amount should be set after the comprehensive study on the costs of campaigning that is suggested in proposal #33. The per-member/supporter amount should take into account that multiple third parties may focus on the same candidate or party (both of which have spending limits) and should also take into account the relative spending power of all parties, not just large parties, to ensure that third parties are allowed to spend a proportional amount based on their actual level of voter support.

Finally, in section 6.16 below on public subsidies for third parties, I address another aspect of the equality issue in third-party spending power that I also addressed with regard to candidates and parties above in section 6.8 – namely, how to equalize spending power among third parties that are supported by people who have different levels of income. Would this spending limit and subsidy system that takes into account the actual voter support of each third party, and the equality of the financial support that voters

¹³⁹⁷ See a different critique of how the *Harper (2004)*, *supra* note 10, ruling violated egalitarian principles in Dawood (2012), *supra* note 2 at 307-311, although that critique is based on an oft-repeated miscalculation of what the \$150,000 amount could buy in advertising at the time of the ruling. In fact, that amount was enough to buy 4 full-page national newspapers advertisements (and still is enough to buy multiple full-page national ads), and so the limit was very far from the “virtual ban” on third parties participating in election campaigns that the dissenting judges claimed it was.

can offer to any third party, be more difficult for an election law enforcement agency to administer than the current system of one spending limit for all third parties and no subsidies? Yes, it would be, just as it is more difficult to administer any system that actually attempts to be fully democratic and egalitarian and to take into account differences in how the rules in the system apply to different people and entities. However, I contend that this difficulty is not a valid reason to fail to uphold the equality requirements of the Supreme Court's egalitarian model, especially given the serious deleterious effects of failing to uphold these requirements.

Proposal 127: Different limits for different third parties

After the comprehensive study of the costs of reaching and informing voters, and operating through a pre-election and election period, suggested in proposal #33 has been completed, and spending limits based on the study are set for candidates and parties, different spending limits should be set for different third parties based on their actual level of voter support, taking into account that thousands of third parties exist across Canada so their limits should be proportional to candidates and parties. A third party who is one voter should be allowed to spend a relatively low amount. A third party that is a citizen group (including unions, and worker cooperatives) should be allowed to spend a specific amount per member/supporter on a national level, and a specific amount per member/supporter that the third party has in any electoral district.

It is very questionable whether businesses should even be allowed to spend on advertising as third parties during pre-election and election campaign periods. Unlike citizen groups that individuals join and support because of the issue advocacy work that they do, businesses (i.e. the

executives and/or board) don't necessarily align with the positions of individual shareholders or employees when commenting on public policy issues. Some individual shareholders may support a political position taken by the board and executives of a business, but research shows that many likely invest only to make money (to the extent that can be determined) and, in any case, trying to determine which shareholders are invested for those or other reasons on an ongoing basis would be logistically very difficult, in part because research also shows that many shareholders likely wouldn't indicate either way even if asked.¹³⁹⁸

As well, if their individual shareholders and employees want to advocate the interests of the business, given that channels operate in most big businesses for employees to communicate at least somewhat with other employees, and shareholders to communicate at least somewhat with other shareholders, they can relatively easily organize a citizen group to do that. Big businesses also have economic power, mainly the threat by the executives or board that they will move the business to another jurisdiction unless politicians/governments give them what they want. Businesses also use citizen money for their advocacy, as part of every dollar a consumer spends at a business is shifted to pay for the business' advertising, sponsorships, lobbyists and lawyers, all advocating the business' interests.

¹³⁹⁸ Evaristus Oshionebo, "Shareholder Proposals and the Passivity of Shareholders in Canada: Electronic Forums to the Rescue?" (2012) Vol. 37(2) *Queen's Law Journal* 623 at 646-648. Bryce C. Tingle, "Two Stories about Shareholders," (2021) 58:1 *Osgoode Hall Law Journal* 57. Bryce C. Tingle, "Expressive Voting and Irrational Outcomes in Corporate Elections," (January 28, 2022), *McGill Law Journal*, Forthcoming, Available at SSRN: <<https://ssrn.com/abstract=4122359>> or <<http://dx.doi.org/10.2139/ssrn.4122359>>.

This is a very easy means of fundraising, much easier than any citizen group has of raising funds from individuals, even though likely many consumers would never donate if businesses asked them to donate to pay for the business' ads, lobbyists, lawyers etc.

A business is a very specific form of organization, incorporated under a specific statute,¹³⁹⁹ and the Supreme Court has held that a business is a legal person separate from, and not representing, its shareholders or employees.¹⁴⁰⁰ Businesses have been granted some *Charter* rights by the courts, but the *Charter* and court rulings make clear that businesses do not have all the rights that citizens have.¹⁴⁰¹ The rights at issue with third-party spending, and also donations to candidates and parties, are the subsection 2(b) right to freedom of expression, the subsection 2(d) right to freedom of association, the section 3 right to vote, and the section 15 equality rights. The *Charter* specifies that only citizens have the section 3 right and, based on court rulings, corporations likely also don't enjoy section 15 equality rights.¹⁴⁰²

As detailed in Chapter 2, section 2.3, the Supreme Court of Canada's 2004 ruling in *Harper* concluded that third-party spending limits on third parties comply with section 3 because they help ensure that all voters can meaningfully participate in elections, and that many voices can inform voters

¹³⁹⁹ At the federal level, businesses are incorporated under the *Canada Business Corporations Act* (R.S.C., 1985, c. C-44) or a specific industry sector statute such as the *Bank Act* (S.C. 1991, c. 46) or *Insurance Companies Act* (S.C. 1991, c. 47) or *Telecommunications Act* (S.C. 1993, c. 38).

¹⁴⁰⁰ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII), <<https://canlii.ca/t/jbf0p>>, at para. 2.

¹⁴⁰¹ Elisabeth Foster, "Corporations and constitutional guarantees," (December 1990), Vol. 31(4) *Les Cahiers de droit* 1125.

¹⁴⁰² *Canada (Attorney General) v. Hislop*, 2007 SCC 10 (CanLII), [2007] 1 SCR 429, <<https://canlii.ca/t/1qp29>>, at paras. 72-73.

by preventing election debates from being dominated by the wealthy.¹⁴⁰³ However, as I hint at in the list of inconsistencies in the Supreme Court's egalitarian model that I detail in section 2.10 and address in subsection 5.2.11, I contend that the *Harper* ruling should have gone further to conclude that, given section 3 applies only to citizens, the third-party restrictions should be upheld in part on the basis that businesses do not have the right to meaningful participation in elections. Their executives and employees and individual shareholders do, but the business itself doesn't.

As for subsection 2(b) expression rights, the Supreme Court has upheld a statutory prohibition on the commercial free speech of corporations because of the public purpose of protecting the viewers of the speech (in this case, by prohibiting TV ads aimed at children).¹⁴⁰⁴ By analogy, I contend that it is justifiable to prohibit businesses from spending to speak as third parties during elections for the public purpose of protecting the meaningful participation rights of citizens, and the overall fairness and integrity of elections and, again, because businesses don't represent their employees or shareholders. While some may contend that prohibiting for-profit corporations from spending as third parties during pre-election and election periods is too much of a restriction on free speech rights, it should be noted that the executives of for-profit corporations would still be allowed to participate in all of the ways not covered by the third-party spending restrictions in the CEA, as listed in section 3.27 – issuing news releases, holding news conferences,

¹⁴⁰³ *Harper* (2004), *supra* note 10, at paras. 67-74.

¹⁴⁰⁴ *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, <<https://canlii.ca/t/1ft6g>>.

making public statements, holding debate events, doing media interviews, and communicating with shareholders and employees. All of these communication channels allow business executives ample opportunities to reach and influence voters, especially if the corporation has thousands of shareholders and employees. As well, for-profit corporations would be allowed to continue to advertise during these time periods, but the advertising could not cross the line into either issue advertising (defined clearly, as suggested in proposal #122) or partisan advertising.

Some argue that businesses should not be allowed to spend because they don't vote.¹⁴⁰⁵ It could also be argued that, even if business spending was allowed, because a corporation is only a single legal person, separate from its shareholders and employees, it should only be allowed to spend the amount of one person. However, I argue that not-for profit corporations (citizen groups – including groups that have obtained charitable status) and unions should be allowed to spend money, even though they also don't vote and constitute only one legal person, because they are constituted under different laws that structure and mandate them clearly to represent the interests of citizens (see proposals #129 and #130, and #140 and #141 below for how to ensure this).¹⁴⁰⁶ Based on all of the above reasons, my conclusion is that most businesses, and industry and other associations of businesses,

¹⁴⁰⁵ Gauja and Orr (2015), *supra* note 1372, at 251.

¹⁴⁰⁶ At the federal level, non-profit corporations are incorporated under the *Canada Not-for-profit Corporations Act* (S.C. 2009, c. 23). Unions are incorporated under the *Trade Unions Act* (R.S.C., 1985, c. T-14).

should not be allowed to spend as a third party during the pre-election and election campaign periods.

I say most because, to answer the question raised at the end of section 3.27, I also contend that worker-owned cooperatives should be allowed to register and spend as third parties based on the number of members in the cooperative. The reason for this difference is that, unlike the structure of a corporation established under a business corporation law, there is no separation between management and the workers in a worker cooperative and, as a result, a decision of a cooperative represents its members' interests directly in the same way the position taken by a citizen group represents the interests of its members/supporters.

I don't include consumer cooperatives or member/owner cooperatives in this exception because while they, like worker-owned cooperatives, operate on a one member-one vote basis, unlike worker-owned cooperatives they still have a management-worker structure that disconnects executives (who would make the decision about how the cooperative would spend as a third party) from the interests of the employees, and also from the interests of the consumers who join.¹⁴⁰⁷ There is no need, I contend, to exempt sole proprietorships and other small businesses with less than five employees from the prohibition because the owners can simply spend as individual third parties (and the same reasoning applies for proposals #136, #153 to #156 below).

¹⁴⁰⁷ At the federal level, both types of cooperatives incorporate under the *Canada Cooperatives Act* (S.C. 1998, c. 1).

Proposal 128: Prohibit businesses from paid election activities

The *CEA* should be changed to prohibit for-profit corporations and industry and other associations of for-profit corporations from spending as third parties during the pre-election and election campaign periods, and any advertising they do during these periods must not be issue or partisan advertising. Worker-owned cooperatives should still be allowed to register and spend as third parties given their different organizational structure that means the cooperative clearly represents its workers.

A registered third party is also required to set up a separate bank account to accept contributions and pay for the expenses for all of pre-election period and election period activities.¹⁴⁰⁸ However, as detailed in section 3.29, the loophole in this rule is that, as long as an organization never explicitly solicits contributions for the regulated pre-election and election ads, activities or surveys, and instead only asks for donations to support its general activities, it can accumulate the funds it raises in its bank account and then, when an election happens, transfer them into its “third-party” campaign account as its “own funds” and use those funds to pay for pre-election and election activities (and never have to disclose the identities of the contributors of the funds – a loophole that is addressed in section 6.14 below).¹⁴⁰⁹ As well,

¹⁴⁰⁸ *CEA*, *supra* note 79, section 358.1.

¹⁴⁰⁹ Elections Canada, *Third Party Handbook* (2021), *supra* note 494, pp. 21 and 24. The *CEA* provisions for the first interim return required to be filed by third parties that define “contributions” are in clauses 349.91(1)(b) and (4)(a) to (c) and subsections 349.91(6) to (8) of the law, and the provision allowing spending of “own funds” is in 349.91(4)(d). The *CEA* provisions for the second interim return that define “contributions” are in clauses 357.01(1)(c) and (4)(a) to (c) and subsections 357.01(6) to (8) of the law, and the provision allowing spending of “own funds” is in 357.01(4)(d). The *CEA* provisions for the final third-party return that define “contributions” are in clauses 359(4)(a) to (b.1) and subsections 359(5) to (7) of the law, and the provision allowing spending of “own funds” is in 359(4)(c). Clauses 349.91(4)(d), 357.01(4)(d) and 359(4)(c) of the *CEA* all state that each third-party return is required to list: “the amount, other than an amount of a contribution referred to in paragraph

businesses receive payments for products/services and unions receive dues, and so they never have to solicit contributions in order to have their "own funds" in their bank account already for pre-election and election period activities, ads or surveys (I mention businesses even though proposal #124 above proposes that they be prohibited from being active as a third party).

This loophole allows citizen groups to use money given by corporations, unions, other citizen groups, charitable foundations, foreigners and foreign entities to fund their third-party activities without ever disclosing the source. As mentioned in section 3.29, Elections Canada's March 2022 report shows that in the 2019 election 46 percent of the amount spent by a group with a governing body (i.e. a citizen group), and 28 percent of the amount spent by a charity were from their "own funds".¹⁴¹⁰

The CEO considers this loophole in his June 2022 report and rejects the option of only allowing entities to use money contributed by Canadian citizens for their third-party activities because, he contends, that would limit unions and businesses from spending. I have already suggested prohibiting business spending in proposal #128. As for unions, they receive contributions only from Canadian citizens through union dues, so I don't see any problem with limiting them, and other citizen groups, to using only that citizen-contributed funding for third-party activities.

The question is how to apply this limitation to citizen groups? The CEO has recommended that citizen groups that receive 10 percent or more of their

(a), that was paid out of the third party's own funds for partisan activity expenses, partisan advertising expenses, election advertising expenses or election survey expenses."

¹⁴¹⁰ Elections Canada, *Third Party Report* (March 2022), *supra* note 527 at 25.

funding from contributions from individuals be required to solicit funds into the separate bank account that they are required to set up, and only use those funds for their activities.¹⁴¹¹ All other third parties – businesses, unions, citizen groups that receive less than 10 percent of their funds through contributions from individuals, would be allowed to continue to use their “own funds” without disclosing the source(s) of the funds).

The CEO’s proposal does not align with the egalitarian model for several reasons. First, it allows third-party groups that are not supported by voters to spend without disclosing the sources of their funding. In other words, the CEO’s proposal essentially says to corporations, both domestic and foreign, and foreign political parties and governments, and even Canadian governments, and unions, other citizen groups and charitable foundations – give funding to “astro-turf” organizations in Canada that are not supported by any Canadian voters, and they will be allowed to spend as third parties during elections without being required to disclose that you gave them the money.

Secondly, voters who support citizen groups that advocate only one cause or set of causes know what they are supporting when they donate at any time, including that the group will advocate during pre-election and election periods. As a result, these groups should not be required to set up a special bank account nor be prohibited from spending other funding they have that is not contributed specifically into that bank account, as that is an unnecessary and excessive administrative burden. In contrast to the CEO’s

¹⁴¹¹ CEO, *Recommendations* (June 2022), *supra* note 1229, at 20-22 (Rec. 2.3.1).

proposal, the following proposal addresses the “own funds” problem in a way that aligns with egalitarian principles (along with the proposal below in section 6.14 that third parties be required to disclose their donors and lenders).

Proposal 129: Third parties only spending individuals’ funds

The *CEA* should be changed to only allow non-profit citizen groups from spending funds on third-party activities during the pre-election and election periods that have been donated to them by individual Canadian citizens or permanent residents.

It is a concern that a citizen group may undertake third-party activities about completely different issues than what it has raised funds for from voters. However, as mentioned at the beginning of this section, and detailed in section 3.26, the governing body of any third party is required to pass a resolution authorizing it to undertake third-party activities during the pre-election and election periods.¹⁴¹² For citizen groups that have a broader mandate, for example general community organizations, I think this is enough of a safeguard to prevent them from spending money on causes their members/supporters don’t support. If they did spend money on a cause that was not supported, presumably the members/supporters that didn’t support it would ask for their money back, and the group would then have less money to spend. The governing bodies of unions are also required to pass such a resolution, and both general purpose citizen groups and unions should obviously determine the scope of their resolution after meaningful consultation

¹⁴¹² *CEA*, *supra* note 79, subsection 349.6(5) re: pre-election period, and 352(5) re: election period.

with their members concerning what their third-party activities will focus on and advocate.

It is arguable that it is a contradiction to use the same spending limit calculation for a citizen group that advocates a specific cause or causes which all of its supporters clearly support given they donate to the group as for a - multi-purpose community group or union that likely have members that disagree with some of the positions on issues. However, as the Supreme Court of Canada ruled in effect in *Lavigne* with regard to public sector unions,¹⁴¹³ requiring more than the governing body to approve decisions concerning the organization's advocacy on issues would amount to excessive intervention by the government into the union's operations. The same principle applies, I think, to other citizen groups.

They should all ensure that they stay within the mandate that is supported by their donors/members when undertaking third-party activities. However, to allow for complaints to be filed by individual members or supporters that would stop these organizations' activities until the complaint is adjudicated or resolved would open up citizen groups to being blocked effectively from participating in any election, which would go against the egalitarian principle of equality of opportunity to participate. True, union members are required to pay their dues, and so unlike a citizen group they can't withdraw their money if the union advocates something with which they disagree. However, the limits set on third-party spending, together with the

¹⁴¹³ *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 SCR 211, <<https://canlii.ca/t/1fsjw>>.

union's decisions about how much to spend during any pre-election or election period, mean that very likely only a fraction of the dues paid by each member will be used for this advocacy.

In addition, members who disagree are not prohibited from joining and supporting other organizations that advocate different policy positions, and unions are prohibited (and should still be prohibited) from making direct donations to candidates and political parties. As a result, the conflict of the rights of some individual members to dissent with the rights of all individual members to use their collective resources to have a voice in elections was, I think, properly resolved in *Lavigne* by allowing the union to spend these collective resources as the governing body determines.

At the same time, I think that Elections Canada should be empowered and mandated to review the decision-making processes of the governing bodies of multi-purpose citizen group third parties – the groups that do not advocate for a specific cause or set of causes, such as community organizations, rate-payer organizations, unions etc. – and to issue a report publicly concerning whether they meet basic democratic process standards such as: Is the governing body elected by the members/supporters? Does the governing body consult with members/supporters before taking stands on policy issues? Does the governing body have conflict of interest rules that prevent director's private interests from influencing their policy issue decisions, and a system for enforcing those rules?

I don't propose that Elections Canada would be allowed to prohibit a third party from spending if its internal processes do not meet these

standards. I contend that Elections Canada simply issuing a report at the beginning of each election period, nomination contest or party leadership contest, will be enough of a check to ensure integrity of these processes, when combined with the force of members/supporters wanting to have their views reflected by their leadership, as the agency stating publicly that an organization does not determine its policy positions through a democratic process would greatly undermine the organization's advocacy capacity on behalf of its members/supporters.

Proposal 130: Elections Canada report on third-party processes

The CEA should be changed to require Elections Canada to review and issue a public report on whether third parties that serve a general purpose (community organizations, unions etc.) have an internal decision-making process for passing the resolution approving their spending on third-party activities that fulfills basic democratic good governance standards.

6.13. More egalitarian spending by third parties between elections

As noted in Chapter 2, the conclusion the B.C. courts established in a series of cases from 2009 to 2012,¹⁴¹⁴ a conclusion that the Supreme Court seemed to also support in its 2004 *Harper* ruling,¹⁴¹⁵ and a conclusion that the Ontario Court of Appeal also supported in its March 2023 ruling in the *Working Families II* case, is that it is unconstitutional to have third-party ad spending limits apply for the entire time period in between elections. Some

¹⁴¹⁴ *B.C.T.F. v. B.C.* (2009), *supra* note 102. *B.C.T.F. v. B.C.* (2011), *supra* note 112. *Reference re Election Act (BC)*, 2012, *supra* note 114.

¹⁴¹⁵ *Harper* (2004), *supra* note 10, para. 112.

have argued against regulating spending between elections on the grounds that the election campaign period is exceptional as it is a time during which voters are making a choice whom to support with their vote.¹⁴¹⁶ However, I contend that this contradicts the Supreme Court's own principles that voters should have a relatively equal opportunity to equal participation in all political processes, and that the public's confidence in the appearance of fairness and integrity in all political processes must be ensured.

If limits are needed during election periods to prevent wealthy interests from dominating election debates, then limits are needed in between elections to prevent wealthy interests from dominating policy debates. Voters don't only make choices on election day, they also make choices about which party to support in between elections on policy issues, expressing that choice through writing letters, making calls, sending emails, signing petitions or attending demonstrations. Those choices, I contend, are just as important as voting in an election. Arguably they are more important, as voting just determines who sits in the legislature (and some votes count more than others in that determination given Canada's first-past-the-post vote counting system), while expression in between elections can have a great effect on what exactly those in the legislature decide to do on any issue.

As a result, I contend that through the entire time period between elections, restricting third-party spending on issue and partisan advertising, and on advocacy costs such as organizing and public outreach, aligns with the egalitarian model of politics. To put it in *Charter* test terms, between

¹⁴¹⁶ Feasby (2005), *supra* note 10, at 267-269.

election spending limits have “a valid and theoretical objective” and address a “pressing and substantial concern” just like the election period spending limits that were upheld in *Harper*.

I note here that, as detailed above in Chapter 2, section 2.4, before the third-party limits were struck down Ontario’s election law¹⁴¹⁷ limited (and required registration of) not only third-party ad spending during a much longer pre-election period of 12 months before the writ is dropped (and also during the campaign period) and also continues to limit ad spending by political parties for 6 months before the writ is dropped. The problem with the Ontario limits was not that they apply for such a long period of time, it is that they, like the federal limits, set amounts that are the same for every third party, from one individual to a citizen group with tens of thousands of members.

I mention these limits here because they extend for the longest time period before an election day of any jurisdiction in Canada. The very few jurisdictions that have set pre-election period limits have applied them only to the period two to three months before the election campaign period begins. In fact, though, as explained in section 2.4, the Ontario limits were not really “between election” limits, as the trial court ruled that the definition of “issue advertising” in Ontario’s law means that the limits during the 12-month period do not apply to issue advertising that is not election-related.¹⁴¹⁸ In other words, those limits only apply to partisan advertising.

¹⁴¹⁷ Ontario *Election Finances Act*, *supra* note 539, sections 37.5 and 37.10(2), and 38.1.

¹⁴¹⁸ *Working Families 2*, *supra* note 126, paras. 73-76.

As a result, third parties in Ontario are still allowed to spend an unlimited amount of money, without registering, on paid advertising with regard to any policy-making process that occurs during that 12-month period, as long as the ads do not mention or explicitly support or oppose a political party or candidate. For example, an interest group could spend an unlimited amount of money to run an ad that says “Support the call for X measure in the government’s budget” or “Join the call opposing X measure being included in the government’s budget” and only faces a spending limit for ads that say things like “Join the movement to oppose the government’s budget” or, more explicitly “The Premier’s budget is bad, help stop it”.

Therefore, the Ontario limits did not address the issue that, unlike the election period or pre-election period, government policy-making processes don’t follow a fixed schedule with a pre-defined end date, and different policy-making processes run for different lengths of time, and proceed in different ways. This obviously poses the problem of how to set third-party spending limits during such processes.

As addressed in the previous section, and in section 6.6, with regard to nomination contests, which can also currently run for different periods of time (including outside the current regulated pre-election period), establishing set time periods and trying to regularize policy-making processes in ways that would equalize the opportunity to participate would help establish a solid basis for setting spending limits for third parties’ participation in these processes. The main way I suggest doing this is to require meaningful public consultation, with ample time and opportunities to participate, before any government

institution makes any significant decision. Federal government rules were established in 2002 requiring exactly this, in the *Voluntary Sector Code of Good Practice on Policy Dialogue*. While the *Code* is one of the government's Treasury Board approved policies, directives, standards and guidelines that apply to every federal government institution and employee, and therefore compliance with the *Code* is a legal requirement, it has been generally disregarded and ignored since it was published in 2002, so much so that the link to the *Code* on the Treasury Board's webpage that lists all of the policies in alphabetical order was broken as of May 20, 2023,¹⁴¹⁹ and the *Code* is not even included on the webpage listing all of Board's policies hierarchically.¹⁴²⁰

The *Code* requires government institutions to proactively seek the expertise and input of citizen groups on an ongoing basis, to disclose all the information the government has about an issue early on in a consultation process, to give adequate time and multiple ways to participate, to give full consideration of all submissions, and to disclose the full results of any consultation.¹⁴²¹ In other words, if the *Code* was actually followed, it would establish a more regular time period that every government institution would be required to take for public consultations and policy development

¹⁴¹⁹ Government of Canada, Policies, directives, standards and guidelines, online: <<https://www.tbs-sct.canada.ca/pol/index-eng.aspx>>. The statement that the link to the *Code* is broken is based on search results when searching for publications that start with the letter "V" on July 15, 2022: <<https://www.tbs-sct.canada.ca/pol/a-z-eng.aspx#alpha-V>>.

¹⁴²⁰ Government of Canada, Browse policy instruments hierarchically, online: <<https://www.tbs-sct.canada.ca/pol/hierarch-eng.aspx>>. The statement that the *Code* is not included in the hierarchical list of Treasury Board policies is based on viewing the page on July 15, 2022.

¹⁴²¹ Government of Canada, *A code of good practice on policy dialogue : building on an accord between the government of Canada and the voluntary sector*, (2002), online: <<https://publications.gc.ca/site/eng/236298/publication.html>>.

processes. Of course, after government employees in any department developed a policy, the Cabinet approval process would begin to finalize the policy and turn it into a statute, regulation, spending or other type of government program, and it would be difficult to set a specific time period for that part of the process given Cabinet is the narrow end of the funnel of the entire government's policy-making process, and so the scheduling for any item to be considered by Cabinet table can change suddenly if an emergency, crisis or some other event changes the Cabinet's priorities.

However, having government institutions stop ignoring and start following the *Code's* requirements, perhaps by enacting the *Code* into a federal statute with set timelines for consultations and other steps in the policy development process, would help ensure that at least regularize that part of the process.

Proposal 131: Give force to *Code* on policy dialogue

The federal government should add specific requirements to its *Voluntary Sector Code of Good Practice on Policy Dialogue*, including timelines and required actions for each step of the policy-making process, including the legislative process of Parliament, and issue a directive and establish mandatory training to ensure that everyone in government knows that they are required to, and knows how to, conduct meaningful public consultation as part of every policy-making process. The government should also consider enacting the *Code* as a statute to give it clearer legal force, as well as clearly designating the Public Sector Integrity Commissioner as the entity to which complaints can be filed concerning violations of the *Code's* requirements.

After a comprehensive study is completed, an estimate could be made of the average additional time period for Cabinet approval and any other

government decision-making steps, and this study, along with the study suggested in proposal #33 of the costs of reaching and informing voters across Canada, and the costs of operating as a third party, could inform the limits that should be set for third-party spending during policy-making processes.

Proposal 132: Comprehensive study of policy processes

A comprehensive study of federal government policy-making processes should be undertaken to determine the average length of time of such processes. The results of this study, and the results of the study suggested in proposal #33 of the costs of informing voters and operating as a third party, will help inform the setting of the specific requirements of the *Voluntary Sector Code of Good Practice on Policy Dialogue*, and also the setting of spending limits for third parties participating in policy-making processes.

One common feature of between election periods and the pre-election and election periods is that foreign interference, in terms of campaigns to influence voters in Canada, should be prohibited. I think it makes sense to have the same prohibitions as during elections (as addressed in proposals #120 and #121) apply between elections. However, a new statute should be enacted containing all of the measures suggested through the rest of this section, and sections 6.13 on disclosure, 6.14 on donations and 6.15 on subsidies concerning third parties and policy-making processes between elections, as the *Canada Elections Act* is not the proper home for measures that apply from election day through to the beginning of the next pre-election period. As a working draft, I propose to call this statute the “Equal Opportunity Policy-making Participation Act” (EOPPA).

Proposal 133: Prohibit interference by all foreign entities

Clauses 282.4(1)(b), 349.01(1)(b), 349.4(2)(b) and 351.1(2)(b) in the *CEA* should be adapted and added to the suggested EOPPA to prohibit interference, through spending on public communications and public outreach activities that attempt to influence Canadian voters with regard to federal government policy-making processes, by all corporations and entities that do not do business in Canada, and by foreign individuals, unions, parties and governments.

As suggested in the previous section with regard to pre-election and election periods, to draw clear lines around this prohibition, and also concerning third-party spending on advertising and other communications during policy-making processes, limits should cover spending on all communications, and the definition of issue advertising should be made clearer.

Proposal 134: Limits should cover all communications

Given the definition of advertising has become less clear, the suggested EOPPA should be apply to all third-party communications between elections, not just ads.

Proposal 135: Clarify definition of issue advertising

The suggested EOPPA should clarify the definition of issue advertising between elections using the same criteria as the *CEA*.

Another common feature of between elections and the pre-election and election periods is that the resources available to big businesses for between election advocacy activities are likely much greater than the resources available to citizen groups, mainly because businesses can include in the price of their products and services amounts that will be dedicated to their

advocacy efforts, making citizens pay the full costs of business advocacy activities. For this reason, and all the other reasons given in the previous section concerning proposal #128 which proposes prohibiting paid communications spending by businesses during the pre-election and election periods, I contend that businesses, and industry and other associations of businesses, should also be prohibited from such spending between elections.

As addressed in Chapter 7, section 7.3, this prohibition would not apply to businesses lobbying efforts, so they would still be allowed to communicate with public office holders – it would only prohibit paid public communications (other than, again, communications with shareholders and employees). Again, as with during pre-election and elections periods, worker-owned cooperatives would still be allowed to do paid public communications during policy-making processes.

Proposal 136: Prohibit businesses from paid policy activities

The suggested EOPPA should prohibit for-profit corporations and industry and other associations of for-profit corporations from spending as third parties during government policy-making processes, and any advertising they do during these processes must not be issue or partisan advertising. Worker-owned cooperatives should still be allowed to register and spend as third parties given their different organizational structure that means the cooperative clearly represents its workers.

Also for the same reasons as set out above in the previous section, and section 6.11, third parties should be required to register when participating in policy-making processes, and the spending limits should cover advertising, canvassing, phone calling, surveys and other paid voter outreach

and information activities, and collusion by third parties with other third parties aimed at exceeding spending limits should be prohibited. However, collusion to coordinate strategies should not be prohibited, nor in terms of sharing information, as it is regular practice for citizen groups to work together in coalition when advocating on policy-making processes, and the danger that exists during the pre-election and election periods of third parties overwhelming candidates or parties through collusion is not present between elections.

The spending limits should include collective limits for such coalitions on the same basis of the actual level of voter support. I note here also that I address the registration issue more specifically below in section 7.2 when proposing changes to have more egalitarian lobbying rules, including ensuring that all lobbying (i.e. communications with public office holders, including citizen group lobbying through appeals to the public to communicate with office holders) is registered.

Proposal 137: Require registration for all paid activities

The suggested EOPPA should require third parties to register when undertaking paid activities of advertising, canvassing, phone calling, surveys and other voter outreach and information activities during policy-making processes.

Proposal 138: Collusion allowed for coalition efforts

The suggested EOPPA should allow third parties to work together in coalitions or networks during policy-making processes, and special spending limits should be set for coalitions and networks taking into account the total number of voters who support the groups involved.

Also for the same reasons as set out above in the previous section, different spending limits during policy-making processes should apply to different third parties based on their level of actual voter support.

Proposal 139: Different limits for different third parties

After the comprehensive study of the costs of reaching and informing voters, and operating through a pre-election and election period, suggested in proposal #33, and the study on the average length of policy-making processes suggested in proposal #132, have been completed, in the suggested EOPPA different spending limits should be set for different third parties based on their actual level of voter support and, as noted in the previous proposal, special spending limits should be set for networks and coalitions of third parties that are advocating together during a process.

Also for the same reasons set out in the previous section, because third-party spending limits are suggested to be based on the number of voters who support each third party, it follows that third parties should only be allowed to spend funds that they raise from individuals on their advocacy efforts during policy-making processes. I address below in section 6.16 how public subsidies could be structured to give citizen groups that may have a lot of supporters, but not a lot of donors or wealthy donors, an equal opportunity to participate.

Proposal 140: Third parties only spending individuals' funds

The suggested EOPPA should only allow non-profit citizen groups from spending funds on third-party activities during policy-making processes that have been donated to them by individual Canadian citizens or permanent residents.

As during pre-election and election periods, third-party citizen groups that advocate a specific cause or set of causes should not be required to do more than have their governing body approve their advocacy plan for any policy process. For multi-purpose third parties such as community groups and unions, their governing body should be required to approve any policy position and advocacy plan. Given proposal #130 proposes that Elections Canada issue a public report on whether these general third parties' policy positions are decided through a democratic process, and given that Elections Canada is not overburdened with tasks between elections, I propose that it also issue similar reports for these third parties' when they register to participate in between election policy-making processes.

Proposal 141: Elections Canada report on third-party processes

The suggested EOPPA should require Elections Canada to review and issue a public report on whether third parties that serve a general, multi-faceted purpose (community organizations, unions etc.) have an internal decision-making process for passing the resolution approving their spending on third-party activities that fulfills basic democratic good governance standards.

Two other general third-party rule changes that are needed between elections concern party leadership contests, given they always occur between elections and given the *CEA* currently does not regulate the role of third parties during such contests. As they are required to do during the pre-election and election periods, third parties should be required to register and limit spending on paid activities during party leadership contests, and they should be prohibited from colluding together or with contestants in any way.

As noted above at the beginning of section 6.12, the *CEA* already prohibits collusion between third parties, and between third parties and nomination contestants, candidates and parties to exceed spending limits, and even covers sharing information with candidates or parties in ways that would affect the activities of a third party. As well, proposals #124 and #125 propose requiring registration of, and limiting spending by, third parties during nomination contests, and for a prohibition on colluding by sharing information with another third party or a nomination contestant.

The lack of spending limits and an anti-collusion rule for third parties during party leadership contests are loopholes that can allow third parties to work with, for or against contestants, and other third parties,¹⁴²² in order to have significant, undue influence over who becomes the leader of any party. These are important loopholes to close especially given that if a ruling party holds a leadership contest, the winner automatically becomes the Prime Minister. Given leadership contests are currently governed by the *CEA*, the following proposals suggest changes to the contest rules in the *CEA*.

Proposal 142: Third-party limits during leadership contests

As with pre-election and election periods, the *CEA* should be changed to require third parties to register when spending in party leadership contests, and to set third-party spending limits during contests based on the results of the comprehensive study of campaigning costs suggested in proposal #33.

¹⁴²² Gauja and Orr (2015), *supra* note 1372, at 251.

Proposal 143: Prohibit collusion with leadership contestant

As with candidates, parties (and, as suggested by proposals #124, #125 and #126, nomination contestants), and as addressed above in proposal #65, the CEA should be changed to prohibit third parties from colluding with leadership contestants in any way, including by sharing information.

6.14. More egalitarian disclosure requirements for third parties

As in sections 6.9 and 6.10 above for contestants, candidates, parties and EDAs, from the list of 12 general principles and standards for a more egalitarian system set out at the end of Chapter 5, the following two relate to the area of disclosure for third parties:

11. Requirements for contestants, candidates, parties and third parties to disclose donations, loans and spending regularly, as well as before any voting day, to ensure the media and public can easily determine who is bankrolling each campaign during an election and whether each campaign is complying with the donation, loan and spending limits and restrictions, and also to ensure the media and public can easily determine the financial status, sources of funding and use of donations and loans during the time period of any policy-making process (in order to ensure adequate information is provided to voters, and public confidence in integrity), and;
12. Requirements to ensure fully independent, fully empowered auditing of donations, loans and spending – mainly by having Elections Canada do all the auditing for nomination contestants, election candidates, EDAs, parties, party leadership contestants and third parties (in order to ensure public confidence in integrity).

Overall, the disclosure rules for third parties in the *CEA* that apply during the pre-election and election periods align with the egalitarian model because they require regular public disclosure before voting begins of the contributions and spending of third parties who spend more than \$10,000, and they require third parties to identify on all advertising that they sponsored the ad.

However, there are some key flaws and loopholes that hide sources of funds, with the most significant gap being that there are no disclosure requirements for spending between elections (as addressed below in section 7.2, there are disclosure rules for lobbying between elections, although they also have many loopholes).

The first gap is that people and entities in Canada are not required to report paid and unpaid arrangements they have to advocate the interests of foreign governments and other foreign entities through public communications. As detailed in Chapter 4, section 4.5, rules require the disclosure of some paid lobbying efforts that involve direct communication with public office holders. However, public communications generally are exempt. Proposals #120, #121 and #133 above propose comprehensive prohibitions on interference by foreigners and foreign entities in elections and policy-making processes. A corresponding disclosure requirement is needed, I contend, to make it clearly illegal to be a secret agent for a foreign individual or entity pushing their agenda anywhere in Canada.¹⁴²³

¹⁴²³ See federal private member bill proposing a requirement to disclose a more limited range of activities: LEGISinfo, Bill C-282, online: <<https://www.parl.ca/LegisInfo/en/bill/43-2/C-282>>. See also: Tarun Krishnakumar, "Is Canada's first proposed foreign influence legislation ruthless or toothless?" (July 12, 2021), *Policy Options*, online:

Proposal 144: Require disclosure of all foreign interference

The prohibitions on foreign interference suggested in proposals #120, #121 and #133 should be matched with requirements in the *CEA* and the suggested EOPPA that individuals and entities disclose in a registry if they have either a paid or unpaid arrangement to represent the interests of any corporation and entity that does not do business in Canada, or the interests of any foreign individual, union, political party or government, through public communications or any other method of attempting to influence voters or office holders.

The second gap is that third parties that spend less than \$10,000 during the pre-election and election periods are not required to disclose their donors or expenses for each activity before voting begins. Voters have a right to know the details about who is backing all political actors before they vote, and many voters can be reached with \$10,000, especially via social media posts and ads. As suggested in proposal #118, the registration threshold for third parties of spending \$500 should be evaluated given that tens of thousands of voters can be reached for less than \$500 in social media ad spending. The comprehensive study of the costs of informing voters suggested in proposal #33, and the comprehensive study of policy-making processes suggested in proposal #132, can both inform the decision concerning what the registration threshold should be, and also what the threshold should be for third parties disclosing their donors and expenses before voting begins in elections, and before decisions are made in between election policy-making processes.

<<https://policyoptions.irpp.org/magazines/july-2021/is-canadas-first-suggested-foreign-influence-legislation-ruthless-or-toothless/>>.

Another current disclosure loophole detailed above in section 6.13 is that third parties can currently use their own funds for their pre-election and election activities and not be required to disclose the donors of those funds. As detailed in section 3.29, two situations during the 2019 federal election revealed a related loophole that allows third-party donors to remain unidentified. In one situation, the Manning Centre for Building Democracy raised money from unknown donors solely to pass on to other third-party organizations to spend on election advertising, and the organizations disclosed the Manning Centre as the sole source of their funds. In another situation, a group called CS&FN received 83 percent of its funding from the Modern Miracle Network, but who donated those funds to the Modern Miracle Network was not disclosed.

Proposals #129 and #140 propose a solution to this secrecy problem – only allowing third parties to use funds donated by individuals for their election or between election advocacy activities. Correspondingly, third parties should be required to disclose the identities of these individual donors (and lenders, if any), and the amounts each contributed, before voting begins in election periods, and at the halfway point and before the end of any policy-making process. Currently, only the identities of donors who contribute more than \$200 is disclosed, and so it is relatively easy for an individual, business or other organization to split a large donation into multiple donations of \$200 or less (including donations made through an online fundraising/crowdfunding site) and for the donor and the third party receiving the donation to hide the actual amount donated.

As with contestants, candidates, EDAs and parties, low-level donors could be disclosed only to Elections Canada, and the Commissioner of Lobbying, as long as they are required to conduct audits to ensure that groups' donor/supporter lists are accurate, and to publish summaries for each third party of their total members/supporters, total donated and loaned etc. These summaries need to be made public so that the public is informed of how many voters each group represents. Again the proposals below concerning policy-making processes propose measures that should be included in a new statute with the working title of the "Equal Opportunity Policy-making Participation Act" (EOPPA).

Proposal 145: Third-party disclosure before voting begins

The *CEA* should be changed to require third parties that spend whatever amount is determined through the study suggested in proposal #33 that allows a third party, during the pre-election and election periods, to reach 50,000 voters nationally or 1,000 voters in any district to disclose all their donors and lenders (including donors of less than \$200, and donors who donated through a crowdfunding site) and details about their spending before voting begins. Low-level donors and lenders can be disclosed only to Elections Canada, which should be required to audit those lists of donors to ensure they are accurate.

Proposal 146: Third-party disclosure before policy decisions

The suggested EOPPA should require third parties that spend whatever amount is determined through the study suggested in proposal #33, and the study suggested in proposal #132, that allows a third party, during any government policy-making or decision-making process, to reach 50,000 voters nationally or 1,000 voters in any district, to disclose their donors, lenders and details about their

spending at the halfway point of the process, and then again before the process has concluded. Low-level donors and lenders can be disclosed only to the Commissioner of Lobbying, which should be required to audit those lists of donors to ensure they are accurate.

Another current problem with the disclosure of third-party spending during the pre-election and election periods is that Elections Canada does not post the disclosures in its online, searchable database of financial returns.¹⁴²⁴ Instead, third-party returns are only available as PDFs that can only be examined one by one¹⁴²⁵ and, unlike the returns for nomination contestants, candidates, EDAs, parties and party leadership contestants, cannot be downloaded as a database file that allows for easy calculations concerning donation averages and medians, spending averages and medians, etc. For whatever reason that Elections Canada decided to do this, it should be corrected to make third party returns much more accessible and easier to examine, compare and research overall. Between election returns should also be available in an online database, such as the existing Registry of Lobbyists.

Proposal 147: Disclose third-party returns in online database

To make third-party spending returns more accessible, the *CEA* should be changed to require Elections Canada to add third-party returns for the pre-election and election periods to its online database before voting begins (instead of only publishing individual PDFs of each third party's return). The suggested EOPPA should similarly require third-party returns to be added to an online, searchable database by the

¹⁴²⁴ Elections Canada, Financial Returns, *supra* note 293.

¹⁴²⁵ Elections Canada, Third Party Financial Returns, online: <<https://www.elections.ca/content.aspx?section=fin&dir=oth/thi/advert&document=index&lang=e>>.

halfway point of any policy-making process, and also before the end of each process.

As recommended above in proposals #122 and #134, spending limits should apply to all communications, paid and unpaid, during pre-election and election periods, and between elections, and there should be a corresponding requirement that third parties identify themselves in or on each communication as the sponsor of the communication.

Proposal 148: Identify third party in all communications

The *CEA* should be changed to require third parties to identify themselves in or on all their communications during the pre-election and election periods, paid and unpaid, as the sponsor of the communication. The suggested EOPPA should similarly require third parties to do the same for all communications during policy-making processes.

As suggested in section 6.14 concerning proposal #102, to comply with the egalitarian model, more independent and in-depth auditing should be done. I contend that for third parties it would be most efficient to have the auditing of donors/supporters, donations/loans and spending done by Elections Canada for the pre-election and election period, and for nomination contests and leadership contests, and by the Commissioner of Lobbying for policy-making process spending, as they are both independent of all of the political entities (except in one key way addressed below by proposal #151). Doing this would entail simply establishing a division of auditors who would do whatever auditing was needed at any time during any year.

Proposal 149: CEO and Commissioner audit third parties

The *CEA* should be changed to require the CEO/Elections Canada to audit the pre-election and election, and nomination and leadership contest spending of third parties, and the *Lobbying Act* should be changed to require the Commissioner of Lobbying to audit the spending of third parties during policy-making processes.

Proposal #103 in section 6.14 suggested a change to make the CEO and Elections Canada more independent from the ruling party by changing the appointment process for the CEO, Broadcasting Arbitrator, Commissioner of Canada Elections, and the members of the Leaders' Debates Commission. I contend that, if the Commissioner of Lobbying is going to play the role of registrar of disclosures by third parties about their spending during policy-making processes, and the auditor of that spending, and the Ethics Commissioner as the enforcer of some of the rules that apply to the relationship between lobbyists and politicians and public officials, the current system for appointing the Commissioners should also be changed.

Currently, the ruling party Cabinet does its own search for candidates for the positions, without only nominal consultation with other parties required, and then the Cabinet announces each Commissioner who is approved by passage of a resolution in the House of Commons, which can be done easily if the ruling party has a majority. The Federal Court and Federal Court of Appeal (FCA) ruled on this appointment process and approved it, despite the FCA finding that the Cabinet is biased when choosing the watchdogs over

lobbyists and ethics.¹⁴²⁶ Given the Cabinet's bias, this appointment system is far from independent enough to ensure public confidence in the integrity of the system.

The current Commissioners were handpicked by the Cabinet through a secretive, dishonest process in which the Cabinet claimed it only had one qualified candidate for the position when, in fact, it had several qualified candidates.¹⁴²⁷ A better system would be to have a permanent, appointments commission, whose members have no ties to any of the parties, and who are chosen by a committee of representatives from all the parties, do a public, merit-based search for candidates for the Commissioner positions (and, I would suggest, all other officers of Parliament as they all enforce key laws that apply to all the parties and their candidates and politicians), and then make the appointment. This process would help ensure the Commissioners are fully independent and are not tainted by even the appearance of partisanship.

I make this proposal fully aware that I am not focused in this thesis on the enforcement system for the rules, and only because I addressed the appointment of the CEO and other election-related officials above. In addition, such an appointment system would align much more than the current system with the egalitarian principle of ensuring the public can have

¹⁴²⁶ *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291 (CanLII), <<https://canlii.ca/t/hwt56>>, affirmed by: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 28 (CanLII), <<https://canlii.ca/t/j4xp8>>.

¹⁴²⁷ Democracy Watch, Media Release, (January 23, 2020), online: <<https://democracywatch.ca/after-keeping-them-secret-for-almost-two-years-trudeau-cabinet-emails-reveal-they-hid-from-opposition-parties-five-fully-qualified-candidates-for-ethics-commissioner/>>.

confidence in the integrity, and appearance of integrity, of all political processes.

Proposal 150: Independent Lobbying/Ethics Commissioners

The suggested EOPPA, and the *Lobbying Act*, and the *Parliament of Canada Act*, should require that the Commissioner of Lobbying and Ethics Commissioner be appointed after a public, merit-based search by a fully independent commission whose members have no ties to any political party, and who are chosen by a committee with representatives from all registered parties.

6.15. More egalitarian donations and loans to third parties

As noted after the list of principles and standards set out at the end of Chapter 5, I did not address the area of donations and loans to third parties, nor the subject of the next section, subsidies to third parties. I did not do this because these two areas, and specifically the effects of all the changes suggested above on these two areas, raise questions that I think need to be answered before specific measures can be implemented fully. To summarize the parts of the model that I have suggested above that relate to these two areas:

- i. a \$75 annual limit on donations/loans to contestants, candidates, EDAs and parties;
- ii. public subsidies to donors, contestants, candidates, EDAs and parties only on an as need basis, and mainly only to correct systemic disadvantages;

- iii. only individuals, citizen groups and worker cooperatives allowed to spend as third parties, with individuals limited to a low-level amount;
- iv. spending limits for contestants, candidates, EDAs and parties set based on a per voter amount that is established after a study of the actual costs of informing voters and operating, and;
- v. spending limits for third party citizen groups (and worker cooperatives) set based on a specific amount per member/supporter that is established after a study of the actual costs of informing voters and operating, and only allowed to spend money that has been donated by individuals.

Given these characteristics of the system I am proposing, what limits, if any, should be set on donations and loans to third parties? The difficulty in answering this question is that third party citizen groups play a wide variety of roles and undertake a wide variety of activities. Some third parties are created solely for an election cycle and solely do election advocacy, others have ongoing advocacy campaigns between elections, others also conduct research and have programs in public education and other areas (for example, conservation and social services), and of course unions advocate during elections and between elections represent workers in collective bargaining, health and safety and policy-making processes.

Some third parties are funded solely by individual donations (either a few wealthy donors, or some significant donors and many donors who give smaller amounts, or a combination of both); others are funded by individuals and granting foundations, and others solely by governments, with some

funded by a combination of all three sources.¹⁴²⁸ As a result, limits on donations and loans to third-party citizen groups could cut off funding to these between election activities of many groups.

The changes I have suggested above in proposals #127 and #129 concerning pre-election and election periods, and #139 and #140 concerning policy-making processes, are that third parties would only be allowed to spend a specific amount per member/supporter, and also only allowed to spend money they raise from individuals. These changes, I contend, will not only allow for this funding for between election activities to continue, but should also ensure that third parties are only active in advocacy during elections and policy-making processes to the extent that they are actually supported by voters.

For example, third party A has five wealthy donors who donate \$100,000 each annually, and 5,000 other donors/supporters who donate on average \$100 annually, totaling \$1,000,000 annually; third party B has 7,000 supporters who donate on average \$100 annually, totaling \$700,000 annually. Third party A will have significantly more money each year than third party B but, given it has fewer donors/supporters, it will not be allowed to spend as much as third party B during any election or policy-making process. Based on the Lortie Commission's recommendation in 1991, William Cross suggested

¹⁴²⁸ David Lasby and Cathy Barr, *The uneven impact of the pandemic on Canadian charities*, (August 2021), Imagine Canada, online: <<https://imaginecanada.ca/sites/default/files/Sector-Monitor-The-uneven-impact-of-the-pandemic-on-Canadian-charities.pdf>>. Statistics Canada, Satellite Account of Non-profit Institutions and Volunteering, online: <<https://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=5110>>. Statistics Canada, Non-Profit Organizations and Volunteering Satellite Account: Human Resources Module, 2010 to 2019, online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/210430/dq210430d-eng.htm>>.

that each voter be allowed to spend themselves and/or donate to a special bank account of an interest group a combined total of \$1,000 for election advertising, and that interest group spending would not be limited but, instead, a candidate would receive a public subsidy if an opposing candidate was supported by more than \$10,000 in interest group ad spending.¹⁴²⁹

While these suggested measures have some egalitarian elements, I contend that the measures I am proposing are more egalitarian given many people can't afford to spend \$1,000, and are also more workable as a snap election call could make it difficult for a donor to donate in time to help pay an interest group's costs. As well, a clear spending limit based on the number of members an interest group has is easier to administer and enforce than trying to track group spending of each group until it crosses the \$10,000 threshold (which may only happen a few days before election day, and or after advance voting has happened), then determine if the ads support one candidate over another, and then provide a subsidy to the other candidate before election day.

Another aspect of this issue is the concern that large donations or loans will cause conflicts of interest in third parties that will affect the positions their governing bodies take during policy-making processes and elections. While this concern is not as pressing as it is with candidates for public office who, if they win, will make and impose policy decisions on all Canadians, it is still a concern in terms of ensuring egalitarian political processes. If, as I have

¹⁴²⁹ William Cross, "Regulating Independent Expenditures in Federal Elections," (Sept. 1994), Vol. 20, No. 3, *Canadian Public Policy* 253 at 258-262.

suggested, a wealthy individual is limited to spending a low-level amount as an individual third party, but can make a large donation to a third-party citizen group that has thousands of members/supporters, then that group's internal decision-making concerning its policy and electoral decisions could be distorted by this donation, and the group could become a proxy for that wealthy donor, advocating whatever the donor wants, and with a much higher spending limit than the donor has as an individual.

I contend that the proposal made above in proposals #130 and #141 that Elections Canada review the internal processes of third-party groups to ensure they use a democratic good governance process for approving third-party activities during elections and policy-making processes, along with the proposal made in proposal #150 that Elections Canada and the Commissioner of Lobbying should audit the donors/supporters, donations/loans and spending of third parties, should be enough to ensure that third parties with many members/supporters do not take or change positions based on a donation made by only one or a few members. However, I am open to further measures to ensure that large donations to broad-based groups do not distort the positions taken by these third parties.

In addition, the effect of the \$75 donation/loan limit on contestants, candidates, EDAs and parties is not predictable, nor are the results of the comprehensive studies suggested in proposals #33 and #132 of the costs of campaigning, and operating, during elections and policy-making processes, and of the timelines of policy-making processes. As a result, I am also open to further donation and loan limits or other measures that may be needed to

ensure the three key egalitarian principles of equality of opportunity to participate, adequate information for voters, and ensuring the integrity of political processes, are fully upheld in the area of third-party participation.

6.16. More egalitarian public subsidies to third parties

As mentioned in the previous section, and section 6.8, the main reason to offer public subsidies under a more egalitarian model is to correct systemic disadvantages that cause inequalities in opportunities to participate in political processes. Other than these specific subsidies, general subsidies should only be provided if it can be proven that they are needed. The first step in determining what subsidies could be provided to third parties is the comprehensive studies suggested in proposals #33 and #132.

In addition, I propose that a third comprehensive study of the funding and resources of citizen groups across Canada to determine whether there are sectors that face systemic disadvantages, to provide a solid basis for the design and provision of any subsidies that may be needed to equalize opportunities to participate.

Proposal 151: Comprehensive study of third parties

A comprehensive study of third-party citizen groups should be undertaken with the aim of identifying any sectors of groups that face systemic disadvantages, which can inform the design and provision of public subsidies to third parties to equalize the opportunity to participate in political processes.

A key problem to overcome with subsidizing third parties is to ensure that the people who have the decision-making power to grant subsidies

cannot direct subsidies only to organizations they approve of for whatever reason.¹⁴³⁰ As in section 6.8, in which I argued that subsidizing donations from individuals is the most egalitarian way to subsidize contestants, candidates, EDAs and parties, I contend that subsidizing donations is also the most egalitarian way to support third parties. That way, individuals themselves decide which groups receive support, which upholds the fundamental principle of one person, one vote, as opposed to the current system in which public funding in the form of grants and contributions is given to citizen groups based on the preferences of government officials and Cabinet ministers.

Scholars and commentators have suggested various other methods of supporting citizen groups,¹⁴³¹ including: 1. Having a program like the federal Canadian government's Court Challenges Program (which has a somewhat independent committee hand out grants for *Charter* cases). But, I contend, this still leaves the purse strings in control of a small group of people who are chosen by government officials and Cabinet ministers; 2. Giving donors money "vouchers" that they could then "donate" to citizen groups. But, I contend, this amounts to the state setting the public's spending priorities when

¹⁴³⁰ See an historical examination of this problem in Peter Elson and Peyton Carmichael, "A short history of voluntary sector–government relations in Canada (revisited)," (April 12, 2021), *The Philanthropist Journal*, online: <<https://thephilanthropist.ca/wp-content/uploads/2022/04/A-short-history-of-voluntary-sector%E2%80%93government-relations-in-Canada-revisited-The-Philanthropist-Journal-1.pdf>>. See also Susan D. Phillips, "The Snakes and Ladders of Accountability: Contradictions Between Contracting and Collaboration for Canada's Voluntary Sector," (January 2008), Vol. 47(4) *Canadian Public Administration* 451. Rudayna Bahubeshi, "Over-scrutinized, underfunded, and unsupported: How systemic anti-Blackness affects who gets grants and sector workers' well-being," (April 28, 2021), *The Philanthropist Journal*, online: <<https://thephilanthropist.ca/2021/04/over-scrutinized-underfunded-and-unsupported-how-systemic-racism-affects-who-gets-grants-and-sector-workers-well-being/>>.

¹⁴³¹ See a summary of these methods in: Gold (2021), *supra* note 11, at 97-99.

the public may want to use the voucher money for some other priority cost they are facing; 3. Requiring citizen groups that may have very limited resources to sign up a set number of voters and show that they were outmatched in lobbying resources in order to qualify for public funding. But, I contend, this requires too much of citizen groups; 4. Requiring business sectors to fund citizen lobby groups. But, I contend, this would give the groups money but not members, which would make it possible, if not likely, for the groups to advocate unrepresentative policy positions; 5. Establish a government office that lobbies for the public on every issue. But, I contend, this office would also not have a membership base of voters and so would quite possibly also advocate unrepresentative positions or have very limited influence. As well, the staff of such an office would also have the almost impossible task of having to become expert on every public policy issue in a very short period of time.

I propose that the method that most aligns with the more egalitarian model I have developed, and is most effective for subsidizing third parties participating in elections and policy-making processes, and for balancing the resources they have for advocacy and lobbying with the amounts that big businesses have, is the method pioneered and developed first by leading U.S. activist Ralph Nader has been used in four states in the U.S. The method involves government enacting a law or laws to establish a citizen-run and

citizen-funded independent non-governmental organization (NGO) by law for each business and government sector.¹⁴³²

The law gives each NGO the right to include a notice in the emails and mailings sent to the public by the government institutions or businesses in each sector. The notice invites the public to join the NGO for a nominal annual fee, and people who join can run for, and elect, the NGO's board of directors.¹⁴³³ For example, a government would enact a law creating an anti-corruption NGO to watch over government ethics (political finance, gifts, benefits and favours, lobbying, and conflict of interest) and spending and procurement. The NGO would have the right to include a notice in the emails or other electronic communications and mailings that the government sends to the public about taxes, social spending supports etc.

The notice in an email would be a simple one line such as "To join the government ethics and spending watchdog group, click here" and in mailings or handouts the notice would be a brief pamphlet that describes the NGO and invites people to join for a nominal annual fee. The NGO would be run by a board of directors elected from amongst its members, with strict conflict of interest rules ensuring that government officials or their family members, friends or associates are not eligible to be on the board.¹⁴³⁴

¹⁴³² Democracy Watch, Questions and Answers About Using the "Pamphlet Method" and Email Method to Form and Fund Citizen Associations to Watch Over Business Sectors and Government Institutions, online: <<https://democracywatch.ca/questions-and-answers-about-using-the-pamphlet-method-to-form-and-fund-citizen-associations-to-watch-over-business-sectors-and-government-institutions/>>.

¹⁴³³ See the information sheets and other information for how the method can be implemented in various business and government sectors at: Democracy Watch, Citizen Association Campaign, online: <<https://democracywatch.ca/campaigns/citizen-association-campaign/>>.

¹⁴³⁴ Democracy Watch, Questions and Answers About Using the "Pamphlet Method" to Create Citizen Watchdog Groups for Government Institutions, online:

Another example in the business sector would be the government creating an NGO to watch over financial institutions and services. Each financial institution would be required to include the NGO's notice at the top of each email or electronic communication sent to customers, and also in one or two mailings annually sent to customers that still receive mailings. The notice would invite customers to join the financial services watchdog NGO, and the NGO would have a democratic structure with a board elected from among its members.¹⁴³⁵ The potential for this method to create broad-based, well-resourced, self-sustaining NGOs has been shown in the U.S., where groups created in three states in the early 1980s to watch over public energy and water utilities are still going strong with tens of thousands of supporters.¹⁴³⁶

Three to five percent of the public usually join the groups.¹⁴³⁷ At that response rate, for example, in Canada where there are 30 million taxpayers and 25 million financial institution customers, with just a \$20 annual membership fee a government ethics and spending NGO would have between 900,000 and 1.5 million members and an annual budget of \$18 million to \$30 million, and a financial services industry watchdog NGO would have between 750,000 and 1.25 million members and an annual budget of

<<https://democracywatch.ca/questions-and-answers-about-using-the-pamphlet-method-to-create-citizen-watchdog-groups-for-government-institutions/>>.

¹⁴³⁵ Democracy Watch, Questions and answers about the proposed Financial Consumer Organization (FCO), online: <<https://democracywatch.ca/question-and-answers-about-the-suggested-financial-consumer-organization/>>.

¹⁴³⁶ Beth Givens, *Citizens Utility Boards: Because Utilities Bear Watching* (San Diego: Center for Public Interest Law, 1991), online: <https://democracywatch.ca/wp-content/uploads/CUB_Report.pdf> (hereinafter "Givens (1991)"). Bill Jeffrey, *Citizen Utility Boards: Can They Work in Canada?* (Ottawa: Public Interest Advocacy Centre, 1996).

¹⁴³⁷ Givens (1991), *supra* note 1436 at 70.

\$15 million to \$25 million. Part of the funding raised by each NGO could be designated to be handed out in grants to existing citizen groups that watch over the same business or government sector as the new NGO, proportionally based on the number of members/supporters each existing group has.

I propose that this method should also be implemented in Canada because it would establish broad-based, democratically structured groups which no voter is forced to join, and which any voter can join or leave at any time, and which no government institution, political party, government official or politician controls, and would, as addressed in section 7.3, also help balance the resources that big businesses and citizen organizations have for lobbying. As with donation subsidies, only people with low incomes should receive direct subsidies of whatever the amounts are for paying the costs of joining such groups, but they should not be required to use the subsidy amounts to join the groups if they want to use it for some other cost they face.

Proposal 152: Use proven method for funding citizen groups

The federal government should implement the method that has been used in four U.S. states to establish broad-based, citizen-funded and citizen-directed groups to advocate on issues related to each federally regulated business sector (airlines, banking, insurance, telecommunications etc.) and each main federal government sector (ethics, spending, health care, social welfare). Part of the annual budget of each group should be designated to be handed out by the board of the group to existing organizations that watch over the same sector, with the grant amounts proportional to the number of supporters of each existing group. People with low incomes should receive subsidies for paying, if they want, the membership fee to join such groups.

In addition, I think there is an argument for changing the radio and TV broadcast time allocation system described in sections 3.20 and 6.8 above (if it is proven to be needed as a public subsidy for parties) to give third parties access to free and reserved paid broadcast time also. While the airwaves are licensed for use by broadcasters, they are owned by the public, not by political parties, and so any entity that represents the public should be given access to the airwaves that equals its level of representation. As with parties, the number of members/supporters of a third party should be taken into account in allocating them free and paid time, not donors as that would favour third parties who are supported by people who can afford to make donations.

As well, as with other public subsidies suggested in previous sections, more broadcast time should be made available to third parties that are supported by voters who have faced systemic economic or other disadvantages that mean their ability to provide donations and support to the third party is more limited than the capacity of the supporters of other third parties. This broadcast allocation would not apply to businesses because, if proposal #128 in section 6.12, and by proposal #136 in section 6.13, were implemented, then businesses (other than worker cooperatives) would be prohibited from issue and partisan advertising during pre-election and election periods, and during policy-making processes. As a result, as addressed in Chapter 7, section 7.3, this allocation would help equalize the resources available to businesses and citizen organizations for participation in elections and policy-making processes.

Proposal 153: Broadcasters to provide free time to third parties

If the free broadcasting time allocation can be shown to be needed as a subsidy for candidates and parties during elections, given the airwaves are owned by the public, all broadcasters should be required also to give free broadcast time to third-party citizen organizations and worker cooperatives based on their actual level of voter support indicated by their number of individual members/supporters and, as with the spending limits for third parties, proportional to the time given to parties and candidates. Free time should also be allocated to citizen organizations and worker cooperatives using the same criteria during policy-making processes in which they participate.

Proposal 154: More free time to disadvantaged third parties

If the free broadcasting time allocation continues to operate, more free time should be granted to third parties who supporters or leaders have suffered systemic disadvantages due to discrimination or other factors.

Proposal 155: Allocate paid broadcast time to third parties

For the paid allocation, all broadcasters should be required also to give broadcast time to third party citizen organizations and worker cooperatives based on their actual level of voter support indicated by their number of individual members/supporters and, as with the spending limits for third parties, proportional to the time given to parties and candidates. Paid time should also be allocated to citizen organizations and worker cooperatives using the same criteria during policy-making processes in which they participate.

Proposal 156: More paid time to disadvantaged third parties

More paid time should be granted to third parties who supporters or leaders have suffered systemic disadvantages due to discrimination or other factors.

If, even after the measures suggested above in proposals #128, #136 and #152 to #155 are implemented, further measures are shown to be needed to equalize the resources available to businesses and citizen organizations to participate in elections and policy-making processes, then repealing the tax deductions for advertising and lobbying that businesses are allowed to deduct under Canada's *Income Tax Act* should be considered (see subsection 4.5.3 for details about the deductions).

6.17. More egalitarian influence of media and social media

As detailed in Chapter 3, section 3.32, regulatory agencies and tribunals have rejected applications by advocacy organization Rebel News to be legally approved as a media outlet. However, no agencies or tribunals have ruled specifically on the issue of whether Rebel News, or other similar websites that essentially publish only partisan advocacy articles and audio or video pieces, are third parties that are required to disclose their spending and comply with spending limits. This final political finance problem area to which I am applying the proposed more egalitarian model was highlighted by Ronald Dworkin in 1987 – namely that limiting donations and spending by parties, candidates and third parties does nothing to prevent a wealthy person or entity using a media outlet to get around the limits by simply publishing articles that advocate support or opposition for a party or candidate, instead of using paid advertising.¹⁴³⁸

¹⁴³⁸ Dworkin (1987), *supra* note 201.

I contend that such sites should be designated as third parties to make it clear that this is not a legal way to avoid third-party limits. Of course, this would involve drawing specific lines concerning what is a media outlet. As mentioned in section 3.32, some newspapers almost always endorse one party or another as election day approaches. However, this is a different indicator than the kind of analysis set out in section 3.32 of the websites of Rebel News and Press Progress, both of which overwhelmingly criticize one or more parties while explicitly (through positive articles) or implicitly (through almost never publishing negative articles) supporting another party. This kind of analysis should form the basis of the designation.

Of course, this raises questions concerning whether such a designation would violate *Charter* subsection 2(b) rights. As detailed in Chapter 2, in its ruling in *Harper*, the Supreme Court upheld limits on third-party spending during elections under section 1 of the *Charter*. The designation of an online media outlet as a third party that I am proposing would be based on it acting like a third party by consistently supporting one party significantly more than others. In other words, a “media” site would only be designated as a third party if it did not have the fundamental characteristic of an actual media outlet of, through lengthy time periods (and also through election campaign periods), ensuring overall fairness and balance of the coverage of various parties and viewpoints. If this was the main criteria used, I contend that the courts would uphold under section 1 the designation of a partisan “media” organization as a third party subject to all the regulations that cover third-party activities.

Other criteria that could be used in determining whether to designate a website as a third party could include other basic characteristics of media: the accuracy of the content published on the site; whether and how often the site corrects inaccurate content; whether the site publishes opinion pieces by people with varying viewpoints, and; whether the site allows for readers/viewers to post comments on articles and other content such as publishing letters to the editor.

To put it in terms of the steps in the section 1 analysis, ensuring that third parties posing as media cannot dominate election debates by spending unlimited amounts of money advocating their positions is as pressing and substantial a concern as ensuring all third parties are required to comply with spending limits, and designating such sites as third parties and subjecting them to limits has the same proportional effect as the limits that apply to other third parties. As well, the limits are rationally connected to the goals of the egalitarian model of elections (and egalitarian policy debates between elections), and if the limits are set at egalitarian levels, then the restrictions on this site's expression will be acceptably minimal (as will the disclosure requirements).

Proposal 157: Review if media outlets are actually third parties

Elections Canada should undertake a review of websites that claim to be media outlets to determine, based on an in-depth evaluation of articles published and video and audio pieces produced, whether they should be designated as a third party that is required to register, comply with spending limits, and disclose donors, lenders and expenses.

Beyond this evaluation process, one method for addressing the power of media outlets to support or oppose candidates and parties, and thereby affect elections, was deployed for decades in the U.S. to mitigate the power of any media outlet and was called the Fairness Doctrine. The Doctrine required broadcast outlets to devote time to public affairs, and to give equal time to opposing sides in any debate (not all sides, just allowing space for points and counter-points).¹⁴³⁹ Sunstein suggested that such a rule should apply not just to broadcasters but also to newspapers, again premised not only on the goal of ensuring deliberative democracy but also that government actions set the basis for the operation and profit of media outlets, and as a result government has the right to require certain democracy-enhancing actions from those outlets.¹⁴⁴⁰ I agree with this proposal, as it act as an external check on the claim by new media outlets that they are, internally, ensuring that articles published and pieces broadcast are fair, accurate and balanced.

Proposal 158: Enact Fairness Doctrine for all media

The federal government should enact a Fairness Doctrine that requires broadcast and print media outlets to give equal space to opposing points of view on issues.

Thirty years after Dworkin made his point, the power and role of social media accounts must also be taken into account in any discussion of equality

¹⁴³⁹ Dylan Matthews, "Everything you need to know about the Fairness Doctrine in one post," August 23, 2011, WashingtonPost.com, online: <https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQUAN8CXZJ_blog.html>. D.R. Tucker, "How the Repeal of the Fairness Doctrine Gave Us Donald Trump," July 31, 2017, WashingtonMonthly.com, online: <<https://washingtonmonthly.com/2017/07/31/how-the-repeal-of-the-fairness-doctrine-gave-us-donald-trump/>>.

¹⁴⁴⁰ Sunstein (1993), *supra* note 201, at 36-37 and 107-108.

of opportunity to participate in politics. It is, of course, fully democratic if someone can attract a significant number of followers on social media (provided they do so honestly), and then speak to them (again honestly) and have them amplify the voice of that person through sharing posts, including posts about election or public policy issues. That is conceptually no different than someone starting a citizen group and attracting supporters and sending out broadcasts in various forms to them to share.

However, if a candidate or party or third-party interest group or lobbyist spends on social media advertising, that is not analogous to a person gathering support for their proposals through others sharing and spreading their ideas. As the CEO has recommended, and as endorsed in proposals #122 and #134 above, given it is often difficult to determine the difference between a social media video post and an advertisement, all communications of third parties in pre-election and election periods (#122) and between elections (#134) should be covered by spending limits and disclosure requirements. If this change is made, it will presumably also extend the provisions in the *CEA* that require social media sites that reach a specific threshold number of voters to track and disclose in a publicly accessible registry the details concerning who paid for any election ad, and what the ad says.¹⁴⁴¹ Again, as noted in the previous section, the reference to the “EOPPA” in the proposals below refers to the suggested “Equal Opportunity Policy-making Participation Act”.

¹⁴⁴¹ *CEA*, *supra* note 79, at sections 325.1 and 325.2.

Proposal 159: Limits should cover all social media posts

The *CEA* should be changed to require candidates, parties, EDAs, nomination and leadership contestants, and third parties, to count the costs of producing any social media posts (graphics, videos, audiotapes) as part of their spending that is covered by their spending limit, and all such posts should be added to the registry of online ads that social media companies are required to maintain during elections.

Proposal 160: Registry should cover all processes

The *CEA* should be changed to require social media companies to disclose in the online registry all “produced” posts (graphics, videos, audio pieces) during not only elections, but also during nomination contests and party leadership contests. The suggested EOPPA should also require this disclosure during policy-making processes.

As the CEO notes in his June 2022 report,¹⁴⁴² social media websites and platforms are not required to disclose the details about how they administer election-related posts, and companies’ registries are formatted differently, and also the thresholds mean that many social media sites are not covered by the requirement to post ads in the registry. I agree with the CEO’s recommendations for changes to strengthen these provisions.

Proposal 161: Implement CEO’s social media proposals

The *CEA* should be changed to implement the CEO’s proposals in his June 2022 report to remove the reach threshold so that all social media websites and platforms are required to disclose the details about how they administer election-related posts, and to use a standard, searchable, exportable format for their online registry of ads/produced posts. The *CEA* should also be changed to apply these changes during every contest (currently they only apply during pre-election and

¹⁴⁴² CEO, *Recommendations* (June 2022), *supra* note 1229, at 29-32 (Recs. 5.1.1, 5.1.2 and 5.2.1).

election periods). The suggested EOPPA should also require these same things for all policy-making processes.

However, those extended provisions still won't cover the phenomenon of a person or entity buying social media supporters. I contend that this type of social media spending should also be covered by the limits because, while it is not an advertisement, it allows the person or entity that purchases the supporters to reach more voters with their messages in the same way that paid advertising does.

Proposal 162: Limits should cover buying online audience

As an extension of proposals #122 and #134, the CEA should be changed to require that the cost of purchasing supporters for a social media or other online account be counted as spending that is covered by the spending limits for each political entity (candidate, contestant, EDA, party or third party).

The CEO's report also recommends¹⁴⁴³ that text messages be added to the voter contact calling services (i.e. robocalls) registry that is administered by the CRTC so that the content and reach of text messages sent by political entities can be tracked.¹⁴⁴⁴ Given texting is a new and growing public outreach method, I endorse this recommended change, and also suggest that it be implemented for all political processes.

Proposal 163: Implement CEO's proposal re: texting

The CEA should be changed to implement the CEO's proposal in his June 2022 report to require texts sent by political entities be disclosed in the voter contact calling service registry. The CEA should also be

¹⁴⁴³ CEO, *Recommendations* (June 2022), *supra* note 1229, at 32-33 (Rec. 5.3.1).

¹⁴⁴⁴ CEA, *supra* note 79, at sections 348.01 to 348.19.

changed to require this for all contests. The suggested EOPPA should also require this for all policy-making processes.

As mentioned in section 3.32, surveys are already covered by the spending limits, and disclosure requirements in the *CEA*. However, the one issue that remains a concern, I contend, is the disclosure of survey results during the last day or so before general voting day, the day most people vote. As noted in section 3.32 the Supreme Court of Canada ruled in 1998 that surveys are a benign source of information. However, that was at a time when surveys were reported mainly by mainstream media outlets which have codes of conduct concerning accuracy and fairness.

Since then, the reach of the Internet and social media sites has grown exponentially, and the sites all self-regulate in Canada in terms of the accuracy of information posted (other than being covered by libel laws). As a result, I think there is an argument that the former prohibition on survey results being transmitted just before election day should be re-enacted, given that posting a false or rigged survey result on social media has become, if the post goes viral, an easy way for a party or third party to mislead voters just before they vote, with no effective way to counter the false post until after voters have voted.

Proposal 164: Prohibit survey results just before election day

Given the ability to widely and quickly disseminate false claims via the Internet and social media sites, the *CEA* should be changed to prohibit the release of survey results just before election day, in order to prevent deliberately inaccurate surveys from misleading voters.

6.18. Applying changes to the *Referendum Act*

One final point concerning all of the changes to the *CEA* suggested in the above sections. While the federal *Referendum Act* (S.C. 1992, c. 30) has not been used since the 1992 national referendum on the Charlottetown Accord, it has also not been repealed and, under section 3, the federal Cabinet could proclaim at any time that a referendum will be held nationally, or in one or more provinces, if it “considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada” – with approval required by section 5 of the text of the question by the House and Senate after at least a nominal consultation with the opposition party leaders concerning the wording of the question. Under section 6, the CEO issues the writ, and section 7 states that the referendum is conducted under the rules of the *CEA* as adapted by the CEO to a referendum process.

Despite the *CEA* being amended in 2014 and 2018 in many significant ways, the last time a regulation was enacted under the *Referendum Act* to specify how the *CEA* will be adapted and applied to a referendum was in 2010.¹⁴⁴⁵ Given the fact that Cabinet has not proclaimed a referendum in the past 30 years, and given the focus of this chapter is on the rules as they apply to elections and between elections, I am not in this section specifying exactly how the rules for a referendum process should be made more egalitarian. Generally though, I see no reason why the principles, standards and

¹⁴⁴⁵ *Regulation Adapting the Canada Elections Act for the Purposes of a Referendum* (SOR/2010-20).

measures suggested to the *CEA* in the above sections could not be adapted and applied to a referendum process to make it also more egalitarian that it would be if held under the current *CEA* rules.

Proposal 165: Adapt new *CEA* rules to *Referendum Act*

Any of the changes made to the *CEA*'s registration, donations and loans, spending, subsidies, disclosure, media and social media rules as suggested above in proposals 33-164 should be adapted and adopted in changes made to the federal *Referendum Act*.

7. Proposals for applying the more egalitarian model to Canada's gifts, benefits, favours and lobbying system

7.1. More egalitarian gifts, benefits and ethics rules for politicians, their staff, appointees and employees

As set out at the end of Chapter 5, the following is the list of general principles and standards for a more egalitarian gifts and favours system for politicians, their staff, Cabinet appointees and government employees:

1. Overall, the rule that should apply to all political situations and processes is that public officials are prohibited from being in an apparent conflict of interest (so that the public can have full confidence in the appearance of, and actual, fairness and integrity of all processes);
2. Limits on gifts, benefits and favours, including the combined total limit that applies to a business, union or other entity (including a lobbying firm or collective lobbying effort by more than one business or organization, or a family), at a level that an average low-income voter can afford (to uphold the principle of one person, one vote, prevent wealthy individuals and organizations from having undue, overwhelming influence that undermines relative equality of participation, to prevent even an appearance of a conflict of interest, and thereby ensure the public can have confidence in the appearance of, and actual, fairness and integrity of the system);
3. Comprehensive, loophole-free disclosure requirements for gifts, benefits, hospitality and favours, including the favour of a promised future gift, benefit or job offer, and for conflicts of interest (in order to ensure adequate information is provided to voters to make informed choices in political processes), and;
4. Removing from party leaders the power to promote and demote MPs (to restrict the power of one person to offer or withhold

promotions/demotions as a way of creating a conflict of interest and unduly influencing an MP's substantive equality of participation in representing voters in Parliament), and also regulate MP party-switching so that they do not have unrestricted power to overturn the results of the will of voters in their district (in order to ensure equality of opportunity for participation and influence of voters).

In Chapter 4, sections 4.2 to 4.4, I detailed the gift rules for MPs, Senators, Cabinet MPs and their staff and other Cabinet appointees, and government employees contained in various federal statutes and codes, and I also summarized the conflicting and contradictory standards in these rules (including the lack of rules for staff of MPs and Senators), as well as the conflicting rulings of the Ethics Commissioner and Commissioner of Lobbying concerning these rules. In this section, I generally set out proposals that establish the same rules for all of these people for the following reasons which are reflected in all the points set out in Chapter 5, and the principles set out above.¹⁴⁴⁶

First, I contend, the evidence from clinical studies conducted by behavioural psychologists shows that even small gifts, favours and other benefits and advantages have influence that causes an appearance of a conflict of interest for anyone (as detailed in Chapter 5, subsection 5.2.8),

¹⁴⁴⁶ See a similar set of recommendations based on a similar set of principles, although addressed at changes to rules for municipalities in Ontario, in Associate Chief Justice Frank N. Marrocco, *Transparency and the Public Trust: Report of the Collingwood Judicial Inquiry*, (November 2, 2020), Vol. IV, online: <<https://www.collingwoodinquiry.ca/report/index.html>>, Recommendations 9-42, 145-146, 160-161, 163, 165, 260 and 264 (re: member of council and conflicts of interest and gifts); 86-108, 113-118, 169, 179, 207, 214-218 and 261 (re: city staff and conflicts of interest and gifts); 135-138 (re: city management and conflicts of interest and gifts); 265-272 (re: council appointees and conflicts of interest), and; 1331-34 (post-employment rules for council members and staff) (hereinafter Marrocco, *Collingwood Inquiry*).

including anyone participating in policy-making or decision-making in federal politics. As a result, to align with a more egalitarian model, such gifts at least have to be prohibited to a level that an average low-income voter can afford so that every voter has a relatively equal opportunity to influence policy-makers. Secondly, preventing even the appearance of a conflict of interest in any policy-making process is the overall key objective not only because it is the most effective way to fulfill the key egalitarian model principle of ensuring public confidence in political processes. Third, requiring full disclosure is needed to inform voters.

For ease of reference, when proposing changes to rules that apply to all of these people, I refer through the rest of this chapter to them as federal “politicians and public officials” (and I include as “public officials” the staff of MPs and Senators, who currently are not covered by any rules). Also for ease of reference, I refer to the many sets of rules that apply to these people (*Conflict of Interest Code for Members of the House of Commons (MP Code)*, *Conflict of Interest Act (COIA)*, *Open and Accountable Government (PM Code)*, *Values and Ethics Code for the Public Sector* and *Directive on Conflict of Interest*) as the “federal ethics statute, codes and directives”. Some of the proposals set out in this chapter are for changes to a specific set of rules that apply to one of these groups of people, and in those cases I refer to them specifically. With regard to government policy-making and decision-making processes, and legislative processes to change statutes, regulations, codes, policies, taxes, subsidies or government programs, for ease of reference I refer to all of these as a “policy-making process”.

The first area of concern, as detailed in Chapter 3, section 3.12, and Chapter 4, section 4.2, overlaps both the political finance and gift categories as it is about weak rules in the *CEA* that allow gifts that can have influence to be given essentially in secret to nomination contestants, election candidates and party leadership contestants. These weaknesses need to be addressed because contestants and candidates can be MPs or Cabinet MPs or can become MPs or Cabinet MPs. The first loophole in this area is addressed above in Chapter 6, subsection 6.5.2 by proposal #37 which proposes prohibiting giving gifts etc. (including hospitality) to someone exploring running as a nomination contestant or party leadership, and to require these people to return contributions, gifts etc. that they received if they decide not to run, and also to disclose (even if they decide not to run) what they received publicly in an online, searchable database. These changes are needed to prohibit gifts etc. being used by anyone to bribe someone not to run in order to make it easier for someone else to win.

The second loophole in this area is also addressed in Chapter 6, subsection 6.5.2 by proposal #40, which proposes prohibiting giving gifts etc. to nomination contestants, election candidates and party leadership contestants worth more than \$30 combined total from everyone (as a combined total) connected to the same business, organization or family or lobbying effort, and in section 6.9 by proposal #92 which proposes, as an enforcement mechanism, requiring public disclosure in an online, searchable database of all gifts etc. given to contestants and candidates. These changes

are needed to prevent anyone from bribing a contestant or candidate who may be an MP or may become an MP.

The third loophole in this area is addressed in Chapter 6, section 6.12 by proposals #124 and #125 which propose requiring third parties to register for nomination contests, and to limit their spending during contests and prohibit collusion with contestants, and in section 6.6 by proposal #45 and in section 6.13 by proposals #142 and #143 which propose the same changes for party leadership contests. These changes are needed to prevent potential MPs, and potential party leaders (who are or are likely to become an MP), from owing a third party more than any other voter.

The second area of concern, as detailed in Chapter 4, sections 4.2 and 4.3, is that it is currently unclear when an MP becomes an MP and when a Senator becomes a Senator, and during the time gap between when it becomes public that they will be taking public office and when they actually take office, they can legally be bribed or influenced by gifts, benefits etc. as they are not yet a public official as defined in the *Criminal Code* or the *Parliament of Canada Act*. The following proposals sets out how these time and secrecy gaps could be addressed.

Proposal 166: Rules to cover potential MPs and Senators

Current rules should be changed in the *Criminal Code*, *Parliament of Canada Act* and/or the federal ethics statute, codes and directives to prohibit giving or promising to give anything more than one very low-value gift (including travel), courtesy, hospitality, benefit or advantage to anyone who (based on the initial election results) could become an MP or whom the Prime Minister has announced has been appointed as a Senator, and to prohibit the potential MP or Senator from soliciting or

accepting any gift, benefit, advantage or favour or promise to give to or do anything for them. No more than a combined total of \$30 should be allowed from everyone (as a combined total) who is connected to the same business, organization, family or lobbying effort) or doing or promising to do any favour should be prohibited. These rules should apply to gifts etc. even from a relative or a friend if the relative or friend is lobbying or will be lobbying the federal government, and it should also apply to prohibit inheritances if the person who made the testamentary gift is connected with an ongoing lobbying effort that is happening or will happen while the politician or public official is in office.

Proposal 167: Require disclosure by potential MPs/Senators

Current rules should be changed in the *Parliament of Canada Act* and/or the *MP Code* and *Senate Code* to require potential MPs and Senators to disclose to the Ethics Commissioner (for Senators, the Senate Ethics Officer all gifts, benefits etc. received (or promised to be given) within 30 days of receiving them or the promise to give them. The Ethics Commissioner and Senate Ethics Officer should be empowered and required to audit gifts regularly to ensure compliance with the rules (either the current rules or the rules changed as proposed above in proposal #166). The Ethics Commissioner and Senate Ethics Officer should also be required to disclose within 30 days in an online, searchable database the total number of gifts given to each politician and official, the value of the gifts, and the sources by category (lobbyist/lobbying firm, community organization, business/organization/family connected to a lobbying effort, relative connected to lobbying effort, friend connected to lobbying effort).

As addressed in Chapter 4, section 4.2, the third area of concern is that the staff of MPs and Senators are currently not covered by any rules, which allows them to act unethically in secret.

Proposal 168: Extend rules to cover MP and Senator staff, and change all codes to statutes

All existing rules in the *MP Code* that cover MPs, and in the *Senate Code* that cover Senators, should be extended to cover all staff of an MP or Senator, and should apply from when they are offered the staff position, with the rules adapted as applicable and, unless otherwise specified, all of the changes proposed in the proposals through the rest of this chapter that cover “public officials” should cover the staff of MPs and Senators. As well, the *MP Code*, *Senate Code* and the codes that apply to government employees should be enacted as statutes to ensure they are enforceable (which has been an issue before the courts – see *Peet v. Canada (Attorney General)* (T.D.), 1994 CanLII 3484 (FC), [1994] 3 FC 128) to ensure a full public debate of any changes instead of allowing the current secretive processes (described further below) for making changes.

The fourth area of concern is that prohibition and disclosure rules for gifts like the rules proposed above for potential MPs and Senators need to be implemented to close the loopholes in the current rules covering gifts, courtesy and hospitality given each year to all politicians and public officials. For example, measures are needed to close the loophole detailed in section 4.3 that allows Cabinet MPs and their staff and Cabinet appointees to accept any gift from a relative or friend, even if the relative or friend is lobbying them (a loophole that does not exist in the *MP Code* or *Senate Code*).

The federal Ethics Commissioner proposed in February 2022 a \$30 annual limit on gifts to MPs¹⁴⁴⁷ and the federal Commissioner of Lobbying in

¹⁴⁴⁷ Office of the Conflict of Interest and Ethics Commissioner, *Submission of the Office of the Conflict of Interest and Ethics Commissioner*, (February 7, 2022), online: <<https://www.ourcommons.ca/Content/Committee/441/PROC/Brief/BR11536505/br->

May 2022 initially proposed a \$30 annual limit on gifts to all federal politicians and public officials.¹⁴⁴⁸ Then, after lobbying by various lobbying organizations, the Commissioner of Lobbying increased the proposed amount to a \$40 limit on any single gift or provision of hospitality, and an \$80 annual limit for all gifts, and an \$80 annual limit for all hospitality, given by a lobbyist.¹⁴⁴⁹ Both commissioners initially failed to take into account that if many lobbyists at the same firm, or involved in the same lobbying effort, or many members of the same family or many executives at the same business (and their family members) are each allowed to give a \$30 gift each year to a politician or public official, it will add up to hundreds of dollars or, in some cases, even thousands of dollars in gifts to each politician and public official involved in a policy-making process. Those collective combined total gifts would violate the egalitarian principle of ensuring the appearance of integrity of political processes, as it would not only encourage hiring and involving multiple lobbyists or involving many business executives and their families in wining and dining politicians and public officials, it would also allow this to happen which would favour deep-pocket lobbying efforts.

external/OfficeOfTheConflictOfInterestAndEthicsCommissioner-e.pdf> at 2-3 (Rec. 1) (hereinafter “Ethics Commissioner’s *Submission* (February 2022)”).

¹⁴⁴⁸ Office of the Commissioner of Lobbying of Canada, Consultation on future changes to the Lobbyists’ Code of Conduct, (May 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/consultation-on-future-changes-to-the-lobbyists-code-of-conduct#revised-draft>>, section 3 and “Gifts and hospitality” subsection of “Appendix: Definitions” section.

¹⁴⁴⁹ Office of the Commissioner of Lobbying of Canada, *Renewing the Lobbyists’ Code of Conduct: Updated standards for ethical and transparent lobbying*, (November 2022), online: <<https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/renewing-the-lobbyists-code-of-conduct/>> at 11-13 and 33-34 of PDF version (hereinafter “Commissioner of Lobbying report (November 2022)”).

However, in the May 2022 and November 2022 versions of the Commissioner of Lobbying's proposed new *Lobbyists' Code of Conduct*, the Commissioner added and then clarified a definition of what the prohibition of offering gifts or hospitality "indirectly" meant, making it clear that it is prohibited for a person or entity to offer a gift or hospitality at the request of a lobbyist or for a lobbyist to offer it at the request of a person or entity.¹⁴⁵⁰

As noted above in Chapter 6, section 3.20, through the first half of 2022, the House of Commons Standing Committee on Procedure and House Affairs undertook its required every-five-years review of the *MP Code*, and issued its report to the House in June.¹⁴⁵¹ The Committee heard from only 12 witnesses during three brief public meetings in February 2022, including the Ethics Commissioner, former Ethics Commissioner and commissioners from four other jurisdictions, and the Committee then deliberated behind closed doors for six meetings from March to June.¹⁴⁵²

The result of this process, of MPs reviewing and debating their own ethics rules mostly in secret, was that the Committee's report did not recommend any changes to close any of the loopholes in the *MP Code* that allow for unethical gifts, benefits to MPs or unethical activities by MPs as addressed in Chapter 4, section 4.2. Instead, the report ignored most of the loopholes, including the issue of whether the *Code* should be extended to MP

¹⁴⁵⁰ Commissioner of Lobbying report (November 2022), *supra* note 1449, at 33.

¹⁴⁵¹ Procedure and House Affairs report (June 2022), *supra* note 440.

¹⁴⁵² Procedure and House Affairs report (June 2022), *supra* note 440, at 49-50. House of Commons Standing Committee of Procedure and House Affairs, Review of the Conflict of Interest Code for Members of the House of Commons, online: <<https://www.ourcommons.ca/Committees/en/PROC/StudyActivity?studyActivityId=11467254>>.

staff or a new code established to cover staff, while approving of the currently vague, loophole-filled rules that prohibit furthering family and friend private interests, concern having another job or being involved in other outside activities, and allow MPs to accept the clearly unethical gift of sponsored travel from lobbyists. See more details about how the Committee addressed these four issues further below in this section.

As well, the report went in the other direction, recommending first that the Committee establish a subcommittee to study the *MP Code* further, including “the potential for a values-based code” based on the unenforceable general principles and standards set out in sections 1 and 2 of the current *Code*.¹⁴⁵³ As addressed above in Chapter 5, subsection 5.2.10, the problem with “values-based” or honour-system codes is that general standards contain vague terms, which allows anyone to whom the standards apply to define the vague terms as they desire in various situations, while an enforcement entity or the public may define them differently, which leads to different conclusions concerning alleged violations. As the Conservative Party MPs on the Committee who had “hesitations” about this recommendation stated in their dissent in the report, “we also do not want to see the adoption of a mindset and rules whereby unethical conduct can be excused so long as “your heart is in the right place”.”¹⁴⁵⁴

¹⁴⁵³ Procedure and House Affairs report (June 2022), *supra* note 440, at 9-11.

¹⁴⁵⁴ Procedure and House Affairs report (June 2022), *supra* note 440, at 56-57. MPs on the Committee from the Conservative Party dissented in the report from both the recommendation to establish a subcommittee and to shift to a values-based code.

As well, over time the rulings of the enforcement entity set precedents that specifically define the vague terms as they apply to various situations. As a result, in the end, a set of specific rules develops, so why not have specific rules right from the beginning that make it clear to everyone what the lines are that cannot be crossed? Why wait for years for those specific rules to emerge through rulings about vague rules? As was discussed in section 4.1, many of the current rules in the *MP Code* still contain vague terms that seem to contain loopholes, even though the *Code* was enacted in 2004. As will be seen further below in this section, how the Committee's report responded to calls to make some of those rules more specific (such as to define "family" and "friend" more specifically) reveals the arbitrary, personal-perspective standards that result from vague rules.

Secondly, the Committee recommended adding a new secret benefit loophole in the *MP Code*. The report revealed for the first time that the Ethics Commissioner had sent an advisory opinion to MPs in October 2018 (an opinion that has still not been made public) that said that interns who are sponsored by outside, third-party organizations to work in MP offices are a "benefit" and so could violate the *Code* rules if the organization could reasonably be seen to be trying to influence the MP (i.e. if the organization had any interest in federal political decisions). Instead of taking a position to prevent such conflicts of interest, the Committee's report recommended adding another loophole to the rules concerning gifts and benefits by exempting sponsored interns from the definition of "benefit" in the *Code*, and on March 30, 2023 the House of Commons approved the recommendation

and the *Code* was changed to exempt services provided by interns from the definition of prohibited benefits in subsection 3(1) of the *Code*.¹⁴⁵⁵ While some witnesses recommended that intern sponsorships be disclosed like sponsored travel is under the current *Code* rules, the Committee didn't recommend disclosure, essentially proposing that paid interns should be allowed to be placed in MP offices secretly by entities that lobby MPs.

It seemed in late 2022 that the difficulty of the House approving such a recommendation increased when Global News reported that the Canadian Security Intelligence Service informed Prime Minister Trudeau of not only organizations sponsored by China's government supporting 11 federal election candidates in the 2019 federal election, but also "placing agents in the offices of MPs in order to influence policy."¹⁴⁵⁶ As well, in late November 2022, the *Globe and Mail* reported that the Parliamentary Internship Programme (PIP), one of the main internship programs and an initiative of the Canadian Political Science Association (CPSA) and the Speaker of the House of Commons, is financed by donations from dozens of businesses and other organizations that lobby federal politicians and, if they donate enough, representatives of the businesses and organizations are invited to three annual events with MPs and senior parliamentary staff, an annual reception,

¹⁴⁵⁵ Procedure and House Affairs report (June 2022), *supra* note 440, at 11-16. House of Commons Standing Committee on Procedure and House Affairs, Review of the Conflict of Interest Code for Members of the House of Commons: Report and Government Response, online: <<https://www.ourcommons.ca/Committees/en/PROC/StudyActivity?studyActivityId=11467254>>.

¹⁴⁵⁶ Sam Cooper, "Canadian intelligence warned PM Trudeau that China covertly funded 2019 election candidates: Sources," (November 7, 2022), GlobalNews.ca, online: <<https://globalnews.ca/news/9253386/canadian-intelligence-warned-pm-trudeau-that-china-covertly-funded-2019-election-candidates-sources/>>.

and an annual celebration of the program attended by many MPs and Senators and former interns who now work in government or for an MP, Senator or political party.¹⁴⁵⁷ Representatives of the businesses and organizations also serve on the board of PIP.¹⁴⁵⁸

As a result, the internships are, in effect, a benefit provided by these lobbying businesses and organizations to MPs. As the *Globe* article noted, Parliament is the only legislature in Canada that does not fund its own internship program, and such funding would resolve the conflicts created by privately sponsored interns. However, as noted above, despite the clear conflicts the House approved amending the *Code* to allow for lobbyist/lobby group sponsored interns. I suggest prohibiting this unethical gift in proposal #171 below.

In terms of solutions to prevent other gifts, benefits or hospitality from creating conflicts of interest, the approach could be taken of prohibiting all gifts etc. that create an appearance of a conflict of interest, which is the general rule for federal government employees (which has a few exceptions as detailed in section 4.4. and noted below). However, as sections 4.2 and 4.3 detail, the history of a similar rule in the *MP Code* has shown that MPs would likely use the word “appearance” to claim that, from their perspective, significant gifts do not create such an appearance. For these reasons, I agree

¹⁴⁵⁷ Marie Woolf, “Commons tops up Parliamentary interns’ pay amid questions over ‘cash for access’ by private sponsors,” (November 28, 2022), *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-ottawa-parliamentary-interns-pay-increase/>>.

¹⁴⁵⁸ Parliamentary Internship Programme, Governance, online: <<https://pip-psp.org/governance/>>.

with the approach proposed by the commissioners of setting a reasonable dollar-value limit on gifts (again, as long as it is a combined annual total limit from everyone and every entity connected to any attempt to influence a policy-maker).

As mentioned above in this section, the Ethics Commissioner recommended that an annual \$30 limit be set in the *MP Code* for gifts, although again the Commissioner did not specify that the limit should apply to everyone involved in any collective lobbying effort so, in effect, each person and entity involved could give a \$30 gift. Despite how effectively weak the Ethics Commissioner's recommendation was, the House Committee that reviewed the *MP Code* in 2022 rejected the Commissioner's recommendation as it was concerned "that the addition of a minimum threshold for the acceptability of gifts could complicate an already complex process without substantially increasing transparency or accountability."¹⁴⁵⁹ This not only mischaracterizes the recommendation, which proposed a maximum limit on annual gifts not a minimum threshold, it also ignores the fact that setting a specific limit would obviously clarify a currently vague rule not make it more complex, and also thereby would also clearly increase accountability.

With regard to the specific, currently unlimited gift of sponsored travel that is allowed to be given to MPs and Senators (and their staff and family members), the Ethics Commissioner recommended only that it be reviewed to ensure that the travel gift is not being given to influence an MP,¹⁴⁶⁰ while the

¹⁴⁵⁹ Procedure and House Affairs report (June 2022), *supra* note 440, at 23-25.

¹⁴⁶⁰ Ethics Commissioner's *Submission* (February 2022), *supra* note 1447, at 5-6 (Rec. 4).

Senate Ethics Officer has not made any recommendation to close this loophole, only noting in his 2019-2020 *Annual Report* that the Senate's Ethics Committee had proposed that Senators debate the issue.¹⁴⁶¹ Again, despite the weakness of the Ethics Commissioner's recommendation, the House Committee that reviewed the *MP Code* in 2022 rejected the Commissioner's recommendation as it was "of the view" that the current rule and travel disclosure system "provides sufficient transparency and accountability, and is in-line with current best practices for the prevention of real or perceived conflicts of interest."¹⁴⁶² This response clearly ignores the fact that the current rule does not prohibit sponsored travel that creates real or apparent conflicts of interest.

I contend that the best thing to do is to prohibit sponsored travel gifts and all other gifts that cost more than \$30, including as a combined total of gifts from anyone or any entity involved in a collective lobbying effort. If MPs or Senators want to travel for any purpose related to their positions, then they should be required to apply to a public fund that the Auditor General or other independent body oversees, with approvals based on a list of criteria that ensures the travel is actually necessary to fulfill the position of MP or Senator, and public disclosure of all travel that is paid for by this public fund.

Finally, as detailed in section 4.3, under clause 121(1)(b) of the *Criminal Code* it is legal for the head of a government institution to approve in writing a person or entity that has "dealings of any kind with the government"

¹⁴⁶¹ Senate Ethics Officer, *2019-20 Annual Report*, (June 25, 2020), online: <<https://seo-cse.sencanada.ca/media/bymp5oqh/annual-report-2019-2020.pdf>>.

¹⁴⁶² Procedure and House Affairs report (June 2022), *supra* note 440, at 25-27.

giving, with respect to those dealings, a commission, reward, benefit or advantage directly or indirectly to a government official or employee, or to a member of their family, or to anyone else for the benefit of the official or employee, and clause 121(1)(c) allows the head to approve in writing the official or employee etc. receiving the commission etc.¹⁴⁶³ This exception does not exist in the *COIA*, the *MP Code* or the *Senate Code*, but (as detailed in section 4.4) it does exist in the rules for federal government employees.

It is inconsistent with the gift rules generally to allow such a blanket exemption, especially given that there is no requirement to disclose publicly the written approval to give and accept the benefit. Essentially, this exemption allows the head of a government institution to approve in secret all employees in the institution (including themselves) receiving bribes, which does not comply with the egalitarian model in several ways. The following proposal addresses all of these flaws and loopholes in the current rules for gifts etc.

Proposal 169: Prohibit all but small gifts to politicians/officials

The *Criminal Code* section 121(1)(b) and (c), and the federal ethics statute, codes and directives, should all be changed to prohibit giving or promising to give to all politicians and public officials (combined with their staff) anything more than one very low-value gift or benefit (including sponsored travel or a sponsored intern) or courtesy or hospitality each year (no more than \$30 each year should be allowed from everyone (as a combined total) who is connected to the same business, organization, family or lobbying effort). This rule should apply to gifts, courtesy or hospitality even from a relative or a friend if

¹⁴⁶³ *Criminal Code*, *supra* note 607.

the relative or friend is lobbying or has dealings (or has lobbied or had dealings recently, or will soon in the future) with the federal government, and it should also apply to prohibit inheritances if the person who made the testamentary gift is connected with a lobbying effort that is happening or has happened while the politician or public official was in office.

A sub-area of concern is the giving of a special type of gift which is often given by companies lobbying U.S. politicians, namely donations by individuals and businesses to the favourite charities of politicians and their families.¹⁴⁶⁴ While this phenomenon has not been documented as much in Canada, one example shows the potential extent of the problem. In the two years after Justin Trudeau became leader of the Liberal Party of Canada, donations to the Pierre Elliott Trudeau Foundation, named and endowed by the federal government in memory of his father, increased four-fold, and donations from foreign sources also increasing,¹⁴⁶⁵ including a \$200,000 donation from a businessman from China who was an adviser to the Chinese government, who also donated \$50,000 to placing a statue of Trudeau's father in downtown Montreal.¹⁴⁶⁶ The question is how to address this method

¹⁴⁶⁴ Marianne Bertrand, Matilde Bombardini, Raymond Fisman and Francesco Trebbi, Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence," (March 2018) National Bureau of Economic Research, online: <<https://www.nber.org/papers/w24451>>.

¹⁴⁶⁵ Zane Schwartz, "Conservatives call on Trudeau Foundation to ban foreign donations after 10-fold increase in three years," (December 20, 2016) *National Post*, online: <<https://nationalpost.com/news/politics/conservatives-call-on-trudeau-foundation-to-ban-foreign-donations>>.

¹⁴⁶⁶ Peter Zimonjic, "Trudeau defends fundraiser with Chinese businessman who later donated \$200,000 to father's foundation," November 22, 2016, CBC.ca, online: <<https://www.cbc.ca/news/politics/chinese-fundraiser-trudeau-statue-1.3863266>>. David Cochrane, "8 things to know about the Pierre Elliott Trudeau Foundation," (November 26, 2016), CBC.ca, online: <<https://www.cbc.ca/news/politics/pierre-elliott-trudeau-foundation-questions-1.3868049>>. Robert Fife and Steven Chase, "Trudeau Foundation CEO, board resign after revelation of gift tied to China," (April 11, 2023), *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-trudeau-foundation-ceo-board-resigns/>>.

of influence? Given individuals, businesses and other organizations regularly donate to charities, I suggest starting with disclosure of the connections of politicians and public officials and their families with charities (and also businesses and other organizations that could benefit from donations, grants or loans – see proposal #181 below), and a prohibition on lobbyists making donations, grants and loans to charities, businesses and organizations if it would cause an apparent conflict of interest. I also propose requiring disclosure of such donations, grants and loans by registered lobbyists to help enforce this prohibition (see in section 7.2 below proposals #190 on disclosure and #191 on prohibiting contributions to charities that cause an apparent conflict of interest).

The fifth area of concern is that, as detailed in sections 4.2 to 4.4, not all gifts are required to be disclosed. Currently gifts from one person or entity to Cabinet MPs and their staff and appointees, and to MPs, that are worth a combined total of less than \$200 annually (\$500 annually for Senators) do not have to be disclosed and, again, the staff of MPs and Senators are not covered by any rules even though they are public officials.

Proposal 170: Require disclosure of all gifts etc.

The federal ethics statute, codes and directives should be changed to require all politicians and public officials to disclose to the Ethics Commissioner (for Senators and their staff, the Senate Ethics Officer) all gifts or benefits received (or promised to be given – including

Steven Chase and Robert Fife, “Former Trudeau Foundation head says past leadership misled Canadians on Chinese donation,” (April 28, 2023), *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-former-trudeau-foundation-head-says-past-leadership-misled-canadians/>>.

sponsored travel) within 30 days of receiving them or the promise to give them. The Ethics Commissioner and Senate Ethics Officer should be empowered and required to audit gifts regularly to ensure compliance with the rules (either the current rules or the rules changed as proposed above in proposal #168). The Ethics Commissioner and Senate Ethics Officer should also be required to disclose within 30 days in an online, searchable database the total number of gifts given to each politician and official, the value of the gifts, and the sources by category (lobbyist/lobbying firm, community organization, business/organization/family connected to a lobbying effort, relative connected to lobbying effort, friend connected to lobbying effort).

The sixth area of concern, as detailed in section 4.2, is that the *MP Code* allows MPs to receive the benefit of “a service provided by a volunteer working on behalf of a Member” which means that lobbyists can volunteer for MPs without it being considered to create a conflict of interest for the MP that is prohibited by the *MP Code*. As well, as mentioned above, the *MP Code* was changed on March 30, 2023 to allow lobbyists and lobby groups to sponsor interns in MP offices.

Proposal 171: Prohibit lobbyists volunteering, sponsoring interns

The definition of “benefit” in subsection 3(1) of the *MP Code* should be amended to change the wording of the exemption from “other than a service provided by a volunteer or intern working on behalf of a Member” to “other than a service provided by a volunteer or intern working on behalf of a Member, unless the volunteer or intern is connected directly or indirectly to any registered or unregistered lobbying activities aimed at the Member or anyone in the Member’s political party, in which case the combined total limit of the combined total of volunteering and intern time allowed by all volunteers and

interns connected to the lobbying effort is the market value of their time spent volunteering or as an intern that adds up to \$30 annually.”

A seventh area of concern, as detailed in Chapter 3, sections 3.10 and 3.12, and Chapter 4, section 4.3, is that a Cabinet MP is allowed to accept transfers from their party through their EDA, or from another EDA through their EDA, for their election campaign. This, in effect, allows the party leader or party executive or another MP to give them a gift that can influence the level of loyalty they have to the giver, a gift that an average voter can't give them. To prevent this means of inegalitarian influence over Cabinet MPs, proposals #47, #48 and #49 in Chapter 6, subsection 6.5.2, effectively require a party or other EDA to transfer a portion of the money to an EDA or candidate that comes from donors in their district, and prohibits them from transferring any other money.

However, another loophole, as detailed in section 4.2, is that subsection 3(1) of the *MP Code* allows an MP to accept unlimited secret benefits from their EDA or party. These benefits could include payment of personal expenses and should be prohibited because they could cause the MP to be more loyal to the party or party leader and less dedicated to representing most voters in their district.

Proposal 172: Prohibit EDAs and parties from paying MPs

The definition of “benefit” in subsection 3(1) of the *MP Code* should be amended to align with proposals #47, #48 and #49 in Chapter 6 by changing the wording of the exemption from “does not include a benefit received from a riding association or political party” to “does not include contributions transferred from an EDA or political party to the re-election campaign account of the MP that are required to be

transferred because they come from donors in the MP's electoral district (and these are the only transfers allowed to an MP by an EDA or party)." As suggested in proposals #116 and #117, EDAs and parties should be required to disclose their expenses in much more detail than is currently required, including separate disclosure for any trust funds they maintain, as part of the means of ensuring they are not paying MPs directly or through a trust fund.

The eighth area of concern, as detailed in sections 4.2 and 4.3, is that under section 7 of the *MP Code*, MPs are allowed to do other work, have other jobs, run a business or be on a board without disclosing the details, and also consider other job offers without disclosing them to anyone. As well, Cabinet ministers can receive an exemption from the Ethics Commissioner to be on the board of a business or non-profit or charitable organization if it is not incompatible with their office duties, and are only required to disclose firm job offers.

In contrast, government employees are prohibited from being involved in outside activities that create even an appearance of a conflict of interest or a potential conflict. And, as mentioned in section 4.2, it seems that a new enforcement standard established in June 2022 by the Senate Ethics Officer in his *2021-2022 Annual Report* means that Senators also can no longer engage in outside activities if they cause even an appearance of a conflict of interest. This new standard is based on a combination of three rules that were added to the *Senate Code* in June 2014 that the Ethics Officer has finally decided to enforce that require Senators to dedicate themselves to their Senate duties "over any other duty or activity" (subsection 2(1)) and to act at

all times with dignity, honour and integrity and in ways that will not reflect adversely on the position of Senator or the Senate (sections 7.1 and 7.2), and expectations set out in the original version of the *Code* that Senators will avoid even the appearance of a conflict of interest and always resolve conflicts in the public interest (subsections 2(2)(b) and (c)).

The currently unenforceable section 2 of the *MP Code* says that MPs are “expected” to arrange their private affairs to avoid even the appearance of a conflict of interest, and the Ethics Commissioner recommended in his February 2022 report that this standard essentially be incorporated into section 7 of the *MP Code*, which is enforceable so that change would effectively prohibit many outside activities.¹⁴⁶⁷ The House Committee that reviewed the *MP Code* in 2022 concluded that the current rule was fine because it ensures “outside activities of members do not place them in a conflict of interest”.¹⁴⁶⁸ This conclusion is simply incorrect, given that section 7 allows outside activities as long as the MP is “able to fulfill their obligations” under the *Code* and, as detailed in Chapter 4, section 4.2 and this section, the *Code* allows MPs to be in conflict of interest when exercising almost all of their duties or functions.

I contend that, given their decision-making power, and how they could easily be involved in a policy-making process without the public being aware, Cabinet MPs and their staff and appointees should be prohibited from being involved in any outside activities. MPs and their staff and the staff of

¹⁴⁶⁷ Ethics Commissioner’s *Submission* (February 2022), *supra* note 1447, at 4 (Rec. 3).

¹⁴⁶⁸ Procedure and House Affairs report (June 2022), *supra* note 440, at 20-23.

Senators, like Senators and government employees, should also be required to dedicate themselves to their duties, and at least MPs and Senators should be prohibited from doing outside work, with them and their staff prohibited from doing any activities that cause even an appearance of a conflict of interest. The only exception should be if a politician or public official is a professional (such as a doctor or nurse) and their professional association requires a minimum amount of work activity annually in order to maintain their status. Finally, all job and outside work offers, whether firm or not, should be required to be disclosed.

Proposal 173: Prohibit most outside activities, disclose offers

The rules for Cabinet MPs and their staff and appointees should prohibit all outside activities. The rules for MP and Senators should prohibit outside work and jobs, and for their staff, and government employees, other activities should be allowed only if they don't create an apparent conflict of interest. The only exception for all politicians and Cabinet staff should be work required to be done to remain qualified as a professional. All offers of another job or outside work should be required to be disclosed to the Ethics Commissioner within one week after an offer is received.

The ninth area of concern, as detailed in sections 4.2 and 4.3, is that all politicians and public officials are allowed to have investments in shares in businesses, and to continue to know what they own by placing the investments in a so-called "blind" trust where they get to choose the trustee and give them initial instructions. In 1987, the Parker Commission report recommended that investments be required to be sold, and blind trusts be prohibited because they were a façade that hid from the public the financial

investments of politicians and public officials while not preventing conflicts of interest in any way. Justice Parker concluded that the only investment that should be allowed is if a public official owns or partially owns a family business or farm that, because it is a family operation, cannot be sold, but their interest in the business would be required to be fully disclosed.¹⁴⁶⁹ I contend that they should also be required to recuse themselves from any discussions, debates or votes when that interest causes even an appearance of a conflict of interest.

The salaries for MPs and Senators are in the top five percent of salaries in Canada, and the top one percent for Cabinet MPs and most Cabinet appointees, and their pension plan is one of the most generous in Canada.¹⁴⁷⁰ If federal politicians are dedicated to serving the public interest, I contend that the simple solution to prevent apparent conflicts of interest is to require them and members of their immediate family, as the Parker Report proposed, to sell stock market and other business investments they have and place them into government bonds and guaranteed investment certificates that provide a fixed return over a fixed term and are not connected to any private business or organization. For Cabinet minister staff, and MP and

¹⁴⁶⁹ Parker Commission report (1987), *supra* note 812, at 343-361 (especially 360-361). Margaret Young, *Conflict of Interest: Selected Issues*, (Ottawa: Library of Parliament, November 1993), online: <https://www.toronto.ca/ext/digital_comm/inquiry/inquiry_site/cd/gg/add_pdf/77/Conflict_of_Interest/Electronic_Documents/Cdn_Governments/Federal/COI_selected%20issues.pdf> at 12.

¹⁴⁷⁰ House of Commons, *Frequently Asked Questions: Pension plan, pay and benefits of departing Members of Parliament and during dissolution of Parliament*, (undated), online: <[https://www.ourcommons.ca/Content/Newsroom/Articles/FAQsPensionSalariesBenefits-Dissolution2021-ENG%20\(final\).pdf](https://www.ourcommons.ca/Content/Newsroom/Articles/FAQsPensionSalariesBenefits-Dissolution2021-ENG%20(final).pdf)>. Louis Blouin, “Dozens of MPs stand to lose access to pensions if they’re defeated in an early election,” (May 27, 2021), CBC.ca, online: <<https://www.cbc.ca/news/politics/mps-lose-pension-early-election-1.6042861>>.

Senator staff, their salaries are not necessarily generous by comparison to the private sector, and their jobs are not secure as they all serve at pleasure, and so it is understandable that they would want to have retirement investments. However, like government employees they should be prohibited from having any investments that create even an appearance of a conflict of interest and, as proposed here and further below, to disclose all of their investments publicly. The only exception should be for family businesses and farms that cannot be sold, with full disclosure of the politician's or public official's ownership stake.

Proposal 174: Prohibit almost all investments, and disclose

The rules for Cabinet MPs, Cabinet appointees, MPs and Senators should prohibit all investments except in government bonds and guaranteed investment certificates that are not connected to any business or organization. The rules for Cabinet staff and MP and Senator staff should, like for government employees only allow investments in businesses that do not create an apparent conflict of interest, with full disclosure. The only exception for all politicians and public officials should be if their family owns a business or farm, and that should be disclosed publicly.

Beyond these specific loopholes that allow for unethical gifts, favours, benefits and advantages to be offered to MPs and Senators and their staff, the eighth area of concern is an overriding loophole, as detailed in sections 4.2 and 4.3, that allows MPs and their staff, Senate staff, and Cabinet MPs and their staff and appointees, to participate in policy-making processes when they have a direct, real, financial or other conflict of interest. Senators may also still be allowed to participate in decisions when they have such a conflict

depending, as mentioned above, on how the Senate Ethics Officer will enforce his new June 2022 *Senate Code* interpretation standard in his future rulings.

The loophole is that the rules allow them, their family members and friends to have a “private interest” in a policy-making process, as long as the outcome of the process has a general application, which almost all laws, regulations, codes etc. do given they cover all citizens or all businesses in an industry or all organizations of some type. As noted under the tenth area of concern addressed in section 4.2, the loophole is potentially even larger for MPs, as the *MP Code* says that they can only be in a conflict of interest if they are furthering the interest of a person, and it is unclear whether the definition of “person” includes legal persons (i.e. businesses, interest groups and other entities). This means MPs may be allowed to further the interests of businesses and other entities to which they, their family members or friends are connected.

In contrast, as detailed in section 4.4, federal government employees are prohibited from taking part in decisions when they have an appearance of a conflict of interest, with no exceptions. The rules for all politicians and public officials should include a similar prohibition, including for Senators to ensure the prohibition applies to them. As detailed in section 4.3, the *COIA* arguably already prohibits Cabinet ministers and their staff and appointees from being in an apparent conflict of interest, but the “general application” loophole negates that prohibition in almost every decision-making process. However, also as detailed in section 4.3, Annex B of the *PM Code* clearly

prohibits Cabinet ministers and parliamentary secretaries from being in an apparent conflict, without exception.

All that needs to be done is to close the “general application” loophole and add the apparent conflict prohibition, without other exceptions that allow the furthering of specific private interests, to all the rules for federal politicians and public officials. This raises the obvious questions of: whether politicians and officials would have so many apparent conflicts of interest that they would be required to recuse themselves most of the time from policy-making processes,¹⁴⁷¹ and what would exactly qualify as an apparent conflict of interest?

First, if implementation happens of the measures above in proposals #169-170 to prohibit all but small gifts and require disclosure of all gifts, and in #171 to prohibit lobbyists from volunteering with MPs, and in #173 to prohibit outside activities, and in #174 to prohibit investments, and if the proposals below in section 7.2 are implemented to prohibit lobbying after fundraising or campaigning or assisting a politician or political party, it will remove the possibility of many significant financial, social and political conflicts of interest, real, apparent and potential. Secondly, the problem of a too broad apparent conflict standard can also be solved by carving out an exception, as articulated in proposal #175 below, that allows participation in policy-making processes when the policy change will affect the politician or official or the

¹⁴⁷¹ This concern is raised in: Franks (2009), *supra* note 614, and; Jepson (May 2018), *supra* note 813, at 45-50.

family, friends or associates in the same or similar way as it affects most or all Canadians.

This would allow, for example, participation in changes to the general rules for income tax, pensions, social welfare programs etc., as long as, again, the politician or official does not have an especially affected financial or social interest, and as long as the rule changes do not specifically benefit a politician or public official or their family, friends or associates as part of a small group of people. Justice Parker in his 1987 commission report made it clear that a conflict of interest still exists even if the private interest of the politician or public official aligns with the public interest¹⁴⁷² – this carve out would allow the conflict if the rule changes are uniform and broad enough in their effect(s).

To pick one among many examples from other professions of an effective conflict of interest rule, referees and other officials of the International Ice Hockey Federation (IIHF) are prohibited from refereeing a game if they have an appearance of a conflict of interest, with no exceptions, in order to have fair decision-making in games.¹⁴⁷³ It is equally appropriate to prohibit politicians and public officials, who are referees of what is fair and in the public interest in policy-making, from participating in decision-making processes when they have an apparent conflict of interest. A related issue is

¹⁴⁷² Parker Commission report, *supra* note 812, at 25-26.

¹⁴⁷³ International Ice Hockey Federation (IIHF), *IIHF Game Officials' Handbook (2021 IIHF Championship Season): Guidelines for the IIHF Game Officials* (Zurich: IIHF, November 2020), online: <https://blob.iihf.com/iihf-media/iihfmvc/media/downloads/officiating%20files/game%20officials%20handbook/2021-iihf-game-officials-handbook_november-2020.pdf> at 12-13 and 34-37.

that while many ethics codes, including the rules for government employees, including a prohibition on being in a “potential” conflict of interest, I contend that this is not a workable standard, or at least is redundant, as it requires projecting into the future beyond the scope of an appearance of a conflict of interest. In other words, as Justice Parker also pointed out in his 1987 commission report,¹⁴⁷⁴ if a potential conflict becomes an apparent conflict, then that is the point at which it should be cause for concern and the official should begin recusing themselves.

Finally, as addressed in sections 4.2 and 4.3, the fact ethics rules for MPs and Senators (though not their staff), and Cabinet ministers, their staff and appointees, prohibit acting when it would “improperly” further another person’s or entity’s interests may, in effect, prohibit being in an apparent conflict. However, it is unclear and relies on an enforcement policy and interpretation to make that connection. The House of Commons Ethics Committee recommended in a June 2021 report that a clear prohibition on participating in decisions and votes when in an apparent conflict of interest be added to the *COIA*.¹⁴⁷⁵

Given, as mentioned as part of the thirteenth area of concern addressed in Chapter 4, section 4.3, the list of five purposes of the *COIA* include to “encourage experienced and competent persons to seek and accept public office” and “facilitate interchange between the private and public

¹⁴⁷⁴ Parker Commission report (1987), *supra* note 812, at 29-30.

¹⁴⁷⁵ House of Commons Standing Committee on Access to Information, Privacy and Ethics, Questions of Conflict of Interest and Lobbying in Relation to Pandemic Spending (June 2021), online: <<https://www.ourcommons.ca/DocumentViewer/en/43-2/ETHI/report-2/>>, Recommendation 17 at 79 (hereinafter “Ethics Committee report (2021)”).

sector” such an interpretation of the word “improperly” in the ethics rules is far from clear. As a result, these two purposes should be removed from the *COIA*, and the word “improperly” should be defined more clearly.

Proposal 175: Prohibit being in an apparent conflict of interest

The rules for all federal politicians and public officials should prohibit them from participating in a policy-making process if they have an apparent conflict of interest (and the rules should make it clear that an apparent conflict exists whether or not they know about the conflict, and whether or not the interest aligns with the public interest), with the only exception being if they are participating in process concerning a law, regulation, code, policy etc. that applies to themselves in the same way as it applies to a broad group of people, and does not apply in any way that especially furthers the specific financial, social or political interests of themselves, their family, their close friends or associates or entities to which these people have direct connections. An example of when the exception would apply is if a politician or public official is considering changes to general rules for income taxes, pensions, social welfare benefits or other general financial rules that apply to themselves, their family, friends or associations in the same way as they apply to many or all Canadians. As well, the two purposes in the *COIA* that contradict the objective of preventing apparent conflicts of interest should be removed, and the word “improperly” should be defined in all ethics rules broadly as, essentially, an anti-avoidance clause that prohibits all activities that appear to be unethical and overrides any technical loopholes in the rules.

The ninth area of concern is a series of changes needed to close six technical loopholes that, like the very significant loophole addressed immediately above, essentially allow MPs (and their staff) and Cabinet MPs (and their staff and appointees) and, possibly, also Senators and their staff to

participate in decisions when they have an appearance of a conflict of interest. The first technical loophole is that section 5 of the *MP Code* states that if an MP's activity "is one in which members normally and properly engage on behalf of constituents" then the MP cannot violate the *Code*, and the Ethics Commissioner has never defined the activities that qualify under this exemption. In contrast, subsection 2(2)(a) of the *Senate Code* requires senators to serve "the public interest" and the Senate Ethics Officer's new enforcement standards requires senators to always act with dignity and integrity. Cabinet MPs and other public officials also do not have such a blanket exemption to their ethics rules as MPs do.

Proposal 176: Delete section 5 from *MP Code*

Because it is a vague rule that exempts from all the other rules in the *MP Code* anything an MP does that s/he "normally and properly" does on behalf of their constituents, section 5 should be deleted from the *Code*.

The second technical loophole, as mentioned in sections 4.2 and 4.3, is that the *MP Code* and the *Senate Code* cover only cover financial conflicts of interest, not political or social relation conflicts, while the *COIA* for Cabinet MPs and their staff and appointees, and the rules for government employees, cover all conflicts of interest. All of these types of conflicts, and gifts and favours that are political or social in nature, can undermine an MP or Senator's capacity to make a decision in the public interest as much as a financial conflict, so they should also be covered in the codes.

Proposal 177: Cover all conflicts in *MP Code* and *Senate Code*

As the *COIA* and rules for government employees do, the *MP Code* and *Senate Code* should be extended to cover political and social conflicts of interest.

The third technical loophole, as detailed in section 4.3, is that while Cabinet ministers and their staff and appointees are prohibited in the *COIA* from furthering the interests of their extended family, MPs and Senators and their staff are only prohibited from furthering the interests of their spouse and dependants. The MP and Senator prohibition should at least extend to all members of their immediate family, as it does in their spending rules, as the Ethics Commissioner recommended for the *MP Code* in his February 2022 report¹⁴⁷⁶ (the Senate Ethics Officer has not made such a recommendation). As the Ethics Commissioner notes, this would also entail requiring disclosure of the interests of these other family members that could cause a conflict of interest for an MP or Senator, so the public and media can track when they should be recusing themselves from policy-making processes.

The House Committee that reviewed the *MP Code* in 2022 concluded that “most witnesses” did not favour expanding the definition of “family” but, in fact, the six ethics/integrity commissioners who appeared before the Committee did not express an opinion on the issue, they just reported what the rules were in their jurisdiction, and only a couple of the other witnesses were even asked about the issue.¹⁴⁷⁷ The Committee also concluded that the rule that prohibits “improperly furthering another person’s or entity’s interests”

¹⁴⁷⁶ Ethics Commissioner’s *Submission* (February 2022), *supra* note 1447, at 3-4 (Rec. 2).

¹⁴⁷⁷ Procedure and House Affairs report (June 2022), *supra* note 440, at 16-19.

would cover furthering any other relatives' interests. However, this leaves the extent to which the prohibition applies unclear – for example, does it apply to one's second cousin, twice removed?

Given MPs and Senators can have close relationships with more than just their nuclear family, and can use their positions to further the private interests of those relatives, extending the rules to cover a specific list of those relatives (along with any others they have close relationships with under the definition of "friend") simply makes sense to make the rules clear to everyone, and to prevent this from happening.

Proposal 178: Cover extended family in MP and Senate codes

The *MP Code* and *Senate Code* should be changed to cover conflicts of interest caused by the interests of more of their family members (e.g. their parents, grandparents, aunts and uncles, and their siblings' families), with public disclosure of the main interests of those members.

The fourth technical loophole is that the *MP Code* and *Senate Code* do not prohibit furthering the interests of friends, while the *COIA* does prohibit this but doesn't define "friend" which gives the Ethics Commissioner the discretion to change the definition from ruling to ruling, which the Commissioner has done. The Ethics Commissioner recommended in his February 2022 report that this change be made for the *MP Code* to include not only close personal friends but also close professional and business colleagues, evaluated by duration of and motive for the relationship; the nature, frequency and exclusivity of interactions; the sharing of meals and

gifts in a personal setting; and mutual displays of trust, respect, affection or admiration.¹⁴⁷⁸

The House Committee that reviewed the *MP Code* in 2022 concluded that defining “friend” would “create issues with the definition of friendship, which will differ from person to person.”¹⁴⁷⁹ This is a classic example of how a vague rule can easily be narrowed by someone who faces an allegation of wrongdoing in order to clear themselves. It is also an example of how a vague term necessitates specific rulings by the enforcement entity to define the term which will, in the end, clarify the line drawn by the vague rule, which is why the Ethics Commissioner recommended adding the definition to the *MP Code*.

The private interests of close friends can undermine an MP or Senator’s capacity to make a decision in the public interest as much as relatives’ interests can. By defining “friend” in the *COIA* and the codes, everyone will know the definition and enforcement will be more consistent. Given that a person can have a broad circle of close friends and colleagues, I do not suggest that their interests be disclosed publicly. However, I think it is workable for politicians and public officials to disclose to whomever enforces their rules a list of their close friends and colleagues and their main interests (e.g. their employer, their significant financial interests etc.).

Proposal 179: Cover friends’ interests in ethics rules

As the Ethics Commissioner recommended for the *MP Code*, the rules for all politicians and public officials should be changed to cover

¹⁴⁷⁸ Ethics Commissioner’s *Submission* (February 2022), *supra* note 1447, at 4 (Rec. 2).

¹⁴⁷⁹ Procedure and House Affairs report (June 2022), *supra* note 440, at 16-20.

conflicts of interest caused by the interests of their friends, with all required to disclose a list of friends and their main interests to the Ethics Commissioner, Senate Ethics Officer or, for government employees, their deputy head.

The fifth technical loophole, as detailed in sections 4.2 to 4.4, is that only the rules for government employees prohibit giving preferential treatment to any person or entity. MPs, Senators and their staff have no rules, and Cabinet MPs and their staff and appointees are only prohibited on giving preferential treatment based, essentially, on who is lobbying for an individual or entity. Of course, the decisions of politicians and public officials always favour someone or some entity, so what should the scope of a prohibition on preferential treatment be?

The idea, as expressed in the government employee rule, is to prohibit preferential treatment during policy-making processes so that everyone and every stakeholder has a substantively equal opportunity to influence the decision. As discussed above in Chapter 6, section 6.13 on third party spending between elections, this does not mean that one voter receives the same time and consideration of a policy-maker as a citizen group that has 100,000 voters as members or supporters, it means that citizen group receives essentially the same time and consideration as a business with 100,000 employees. I suggested in proposal #131 requiring meaningful public consultation before all significant federal government and parliamentary decisions as the way of ensuring equal communication with all stakeholders before final decisions are made. The proposal set out below relates to, and supplements, that proposal.

Proposal 180: Prohibit preferential treatment in policy process

As proposed in Chapter 6, section 6.13, proposal #131, the *Voluntary Sector Code of Good Practice on Policy Dialogue* should be strengthened by adding key measures, and then enacted as law, along with changing the *MP Code*, *Senate Code* and *COIA* to prohibit all federal politicians, and Cabinet staff and appointees from giving preferential treatment to anyone during a policy-making process before the decision is made.

The sixth and final technical loophole, as also detailed in Chapter 4, sections 4.2 to 4.4, is that only federal government employees are required to disclose all assets and liabilities that could cause an apparent conflict of interest, while all politicians and top Cabinet staff and appointees are allowed to hide anything worth less than \$10,000 even if it causes an apparent conflict. If proposal #174 is implemented, most of these people will be prohibited from having investments that cause conflicts of interest, but still a \$1,000 disclosure requirement threshold and disclosure of all assets and liabilities that cause an apparent conflict would be more effective at prohibiting everyone hiding large gifts, profits etc. that may be given by or develop through their relations with lobbyists.

As noted above in proposal #178, only the main financial and other interests of extended family members of politicians and public officials would be required to be disclosed publicly, and proposal #179 suggests that only the main interests of close friends, colleagues and associates would be required to be disclosed to the enforcement agency. As well, as mentioned just before proposal #170, to help prevent the use of donations to the favourite charities

of politicians and public officials and their families as a means of influence, their connections with charities, and also businesses and other organizations that could benefit from donations, grants or loans should be disclosed to their ethics enforcement agency (see also in section 7.2 the proposals to prohibit lobbyists making such donations, grants and loans if it would cause an apparent conflict of interest, and to require disclosure).

Proposal 181: Require disclosure of assets/liabilities \$1,000+

The rules for federal politicians and public officials and their immediate families should be changed to lower the threshold for requiring disclosure to assets and liabilities worth \$1,000 or more (including cryptocurrencies, NFTs and other digital/intangible assets) with the disclosure document filed with whomever enforces the rules that apply to them. Still, assets and liabilities worth more than \$10,000, and all assets and liabilities that create an apparent conflict of interest, of all politicians and public officials and their extended family members should be disclosed publicly. As well, the connections of politicians and public officials and their immediate family members to charities, businesses and other organizations that can benefit from donations, grants and loans should be disclosed to whomever enforces their ethics rules.

The tenth overall area of concern, as detailed in section 4.3, is that the Ethics Commissioner has established “conflict of interest screens” that override the provisions in the *COIA* that clearly require Cabinet MPs and their staff and appointees to issue a public notice each time they remove themselves from a policy-making process because of a conflict of interest, with the notice containing details about the reasons for the removal. As a result, the screens do not comply with the egalitarian model because they

deny voters key information they need to assess the integrity of each process. Government employees are also not required to disclose when they are recusing themselves due to conflicts nor, again, are the staff of MPs and Senators because no ethics rules apply to them. In contrast, MPs and Senators are required to disclose publicly and recuse themselves when they have a conflict.

Proposal 182: Require public recusal for all conflicts

The rules for federal politicians and public officials should be changed to require public disclosure at the time, and within one week in a searchable online database, every time they recuse themselves from a policy-making process because of a real or apparent conflict of interest.

The eleventh overall area of concern is the gift/favour of a job promotion or demotion given by a party leader to an MP, as detailed in section 4.2, which is similar to the favour of appointing an election candidate in an electoral district which was detailed in Chapter 3, sections 3.5 and 3.6. I contend that these promotions, like appointing a candidate, do not comply with the egalitarian model because they allow one person the sole power to give someone an unequal opportunity to participate in political processes, which creates a conflict of interest for the person who is appointed as they now owe the party leader who promoted them.

In terms of demotions by the party leader, including kicking an MP out of the party's caucus, they give one person the power to diminish the voice of an MP, and then to increase it again by allowing the person back into caucus or promoting them to some other position, again creating a conflict of interest for the MP. In Chapter 6, subsection 6.4.1, the issue of appointing candidates

was addressed with proposals for changes to ensure that voters in each party's electoral district association (EDA) have the power to choose their candidate.

Who should have the power to decide promotions and demotions of MPs – voters, MPs or a combination? One of the results of a national survey of 1,000 adult Canadians in November 2014 was that 73 percent of those surveyed said that a majority vote of MPs in a party caucus should be needed to expel an MP from the caucus, while only 17 percent supported allowing a party leader to make a unilateral decision to expel an MP (10 percent were unsure).¹⁴⁸⁰ While demoting an MP by expelling them is not the same as promoting them, I contend that the survey provides some indication that a large majority of voters want MPs in caucus to have these powers, not party leaders.

As detailed in Chapter 6, subsection 6.4.1, the survey was conducted while a private member bill called the *Reform Act* was being considered by the House of Commons, and the bill changed the *Parliament of Canada Act* to require each party caucus to vote through secret-ballot votes after each election on whether to give the caucus the power, until the next election is called, to choose and remove the caucus chair, expel and re-admit an MP, and to cause a caucus review of the party leader and vote on whether to replace the leader which, in effect, causes the party to launch a party leadership contest.¹⁴⁸¹ The Conservative Party caucus became the first to

¹⁴⁸⁰ Nanos, *Democratic Renewal* (2014), *supra* note 1193, at 2, 5 and 7.

¹⁴⁸¹ *Reform Act 2014*, *supra* note 1194. *Parliament of Canada Act*, *supra* note 329, sections 49.8 (re: required vote by party caucus after each election on whether to change caucus

adopt any of the changes when it voted after the 2021 federal election in favour of giving the caucus the power to review the leader,¹⁴⁸² and then initiated a review, voted to replace the party's leader in early 2022, and voted in an interim leader for the period of the party's leadership contest.¹⁴⁸³ The *Reform Act* did not address who makes the decisions concerning who is appointed as a Cabinet minister and Parliamentary Secretary, House leader, opposition party critic or House committee member, nor removing anyone from any of those positions.

I suggest that empowering party caucuses to make at least the decisions concerning caucus chair, expelling MPs from caucus and re-admitting them, initiating a review of the leader, and appointing and removing committee members, aligns with a more egalitarian model. It would be even more egalitarian to give members of each party the power to make these decisions, but it would take a lot of time and resources to hold such votes, and I think that MPs can serve as an effective proxy for the members in making these decisions.

It would also be more egalitarian to give party caucuses the power to choose and remove (for the governing party caucus) Cabinet ministers and

decision-making processes), 49.2 and 49.3 (re: decision-making process for expelling and readmitting an MP), 49.4 (re: decision-making process for electing and removing caucus chair), and 49.5 and 49.6 (re: decision-making process for causing a leadership review and party leadership contest).

¹⁴⁸² Stephanie Taylor, "O'Toole says Conservative caucus 'fully united' as MPs vote on power to oust him," (October 5, 2021), GlobalNews.ca, online: <<https://globalnews.ca/news/8243738/tory-leader-erin-otoole-face-conservative-caucus-first-time-after-election/>>.

¹⁴⁸³ John Paul Tasker and Nick Boisvert, "Candice Bergen voted interim Conservative leader after caucus ousts O'Toole," (February 2, 2022), CBC.ca, online: <<https://www.cbc.ca/news/politics/otoole-leadership-vote-1.6336336>>.

Parliamentary Secretaries and (for the opposition party caucuses) opposition critics/shadow ministers, and the House Leader for each caucus. However, making this change crosses over into affecting the separation of powers in Canada's system of government, as the Prime Minister and Cabinet are the leadership of the executive branch of the federal government. In contrast, it aligns with the separation of powers to allow caucus, not the party leaders, to choose MPs for committees (and for each committee to choose its chair, which is already done) as the committees are part of the legislative branch which is supposed to hold the executive branch to account.

Based on these principles, similar changes were made in 2011 to the selection process for committee members and chairs in the British House of Commons.¹⁴⁸⁴ However, if MPs in the governing caucus chose Cabinet ministers, it would create an incentive for those MPs to support those ministers instead of holding them to account, which goes against the separation of powers and the main constitutional legislative role of MPs. As well, allowing opposition leaders to choose their team of critics is part of their leadership performance, and I am proposing that MPs in each caucus the power to cause a review of, and vote on whether to replace, the leader. As a result, whom the leader appoints as ministers or critics, and whether they remove them for poor performance, is one aspect that all MPs in the caucus

¹⁴⁸⁴ The main difference is that committee chairs are chosen by vote of the entire House of Commons, not just by the members of each committee. Meg Russell, "‘Never Allow a Crisis Go to Waste’: The Wright Committee Reforms to Strengthen the House of Commons," (July 2011), Vol. 64, No. 4, *Parliamentary Affairs* 612. Institute for Government, "Election of select committee chairs and members in the House of Commons," (April 27, 2020), online: <<https://www.instituteforgovernment.org.uk/explainers/election-select-committees>>.

can take into account when deciding whether to support a review and vote on their leader.

Proposal 183: Give party caucuses power to appoint/remove

The *Parliament of Canada Act* should be changed to give MPs in each caucus the power, through secret-ballot majority votes, to choose and remove the MPs for each House committee, and their caucus chair, and to expel an MP from caucus and re-admit them, and to cause a caucus review of their party leader and a vote on whether to replace the leader.

The twelfth overall area of concern is MP switching parties for a reward. This practice is not only inequalitarian in terms of another party leader having the power to offer the reward, but also because it calls into question the integrity of political processes. It is not a significant problem as party-switching does not occur that often.¹⁴⁸⁵ As well, there is evidence that, to the extent a causal connection can be determined, voters penalize MPs who switch for a reward.¹⁴⁸⁶

However, I still contend that even if MPs only switched parties or left caucus to sit as an independent for policy reasons, it aligns with an egalitarian model to regulate switching formally by requiring MPs to justify their decision,

¹⁴⁸⁵ Desmond Morton, "A Note on Party Switchers," (Summer 2006), Vol. 29:2 *Canadian Parliamentary Review*, online: <<http://www.revparl.ca/english/issue.asp?param=174&art=1186>>.

¹⁴⁸⁶ Feodor Snagovsky and Matthew Kerby, "The Electoral Consequences of Party Switching in Canada: 1945–2011," (June 2018), Vol. 51(2), *Canadian Journal of Political Science* 425, especially 431, 441. Semra Sevi, Antoine Yoshinaka and André Blais, "Legislative Party Switching and the Changing Nature of the Canadian Party System, 1867–2015" (September 2018), Vol. 51(3), *Canadian Journal of Political Science* 665, especially 676-677 and 682-684. See also John R. McAndrews, Feodor Snagovsky and Paul E.J. Thomas, "How Citizens Judge Extreme Legislative Dissent: Experimental Evidence from Canada on Party Switching" (April 2020), Vol. 73(2), *Parliamentary Affairs* 323; Diane Z. O'Brien and Yael Shomer, "A Cross-National Analysis of Party Switching," (February 2013), Vol. 38(1), *Legislative Studies Quarterly* 111.

given that switching overturns the results of the election in which thousands of voters made a choice concerning which party they wanted to represent them.

Formally regulating party switching can also allow MPs to dissent from a party leader without being penalized for their justifiable dissent if the leader has acted clearly unethically (i.e. violated the law or any ethics code) and/or broken significant promises that were part of the party's election platform. Regulating party switching would also allow MPs to dissent if a new party leader has been elected by the party in between elections and set out a complete new agenda for the party.

As well, formally regulating party switching will help prohibit rewards (such as Cabinet or other appointments) being offered for switching. As Heather MacIvor details in critiquing a private member bill (PMB) that required floor-crossers to resign and run in a by-election, more than just requiring reasons and prohibiting rewards needs to be considered to effectively prevent party-switching that unjustifiably thwarts the will of voters:

1. What is the definition of party and, therefore, of switching parties? (I suggest that the way to work around this is simply to require a valid justification for switching);
2. When has the switch actually been completed? (MacIvor and the PMB suggest that the receiving leader confirm it, but that doesn't cover a situation in which the MP becomes an independent – I suggest it should be confirmed in writing by the MP and MP's party caucus executive (subject to the proposed change above in proposal #183 that gives the power to expel an MP to the entire caucus));

3. Will switching to become an independent be penalized by being required to resign and run in a by-election? (I suggest again no if the switch can be justified using the above reasons).¹⁴⁸⁷

As well, I suggest that the Ethics Commissioner rule on whether an MP has a valid justification for switching or leaving caucus. While it may seem inequalitarian to allow one person, the Ethics Commissioner, to make such a ruling, the Commissioner's adjudication of the situation could be designed to require taking into account how many voters from the district file complaints or communicate in some other way their opposition to the switching, so that voters would have a direct avenue to influence the results of the adjudication.

Proposal 184: Allow party switching only for justifiable reasons

The *Parliament of Canada Act* should be changed to allow MPs the right to switch parties, or leave caucus and sit as an independent, only if the party leader or party itself has violated the law or a code and/or the party leader fails to keep clear, significant promises that were in the party's platform for the previous election, or if a new leader elected by the party between elections sets out a significantly different agenda than the previous election platform. Otherwise, if an MP decides to switch parties or leave caucus, they should be required to resign their seat so that a by-election can be held (in which they can be a candidate). Anyone disputing whether an MP has valid justification to switch parties or leave caucus without having to resign their seat should be allowed to file a complaint with the Ethics Commissioner who should be empowered to rule on the situation, taking into account how many voters from the district communicate their opposition to the MP's decision.

¹⁴⁸⁷ Heather MacIvor, "Federal Bill C-208 of 2006 and 2007: A Legislative Proposal on Floor Crossing," (March 2009), 2 *Journal of Parliamentary and Political Law* 329.

The final overall area of concern in this section addressing more egalitarian ethics rules for candidates and public officials is in the rules that apply to politicians and public officials after they leave office. As in Chapter 4, because these rules are most pertinent when a former federal politician or official is lobbying someone in federal politics or a federal government institution, and because they overlap with the federal lobbying rules, I propose changes in this area below in section 7.2 which addresses lobbying disclosure and issues.

7.2. More egalitarian rules for lobbying of politicians, their staff, appointees and employees

As set out at the end of Chapter 5, the following is the list of general principles and standards for a more egalitarian lobbying system for the federal government:

1. Overall, the rule that should apply to all political situations and processes is that lobbyists are prohibited from doing or proposing anything that places any public official in an apparent of conflict of interest, and from lobbying in any way that is improper (so that the public can have full confidence in the appearance of, and actual, fairness and integrity of all processes);
2. Comprehensive, loophole-free requirements to require registration of, and public disclosure of, all lobbying and lobbying spending and sources of funding (in order to ensure adequate information is provided to voters to make informed choices), and;
3. Relative, substantive equality of opportunity for relative, substantive equality of participation and influence in the government and political decision-making system (with no more than a 10 percent

variation in the equality of opportunity and influence), in order to ensure public confidence in the integrity of decisions.

Despite receiving a ranking of “medium robustness” that was second only the U.S. overall compared to the laws in other 14 other countries and the EU (European Parliament) as of 2017,¹⁴⁸⁸ the federal Canadian lobbying rules do not comply in several ways in all three areas of the extended egalitarian model summarized above.¹⁴⁸⁹ As detailed in Chapter 4, subsection 4.5.1, the first general area of concern is the *Lobbying Act* does not comply with the egalitarian model’s objective of informing voters because it does not require all lobbying to be registered and disclosed.

Unpaid lobbying, lobbying by business employees of less than 20 percent of their work time, lobbying by business and organization board members who are not paid more than their expenses, lobbying by a business or organization less than 20 percent of the collective work time of all employees, and lobbying concerning the enforcement of laws, for tax credits and for contracts (all of which are significant areas of big business lobbying) can all be done in secret, without registering in the Registry of Lobbyists. As well, for business and organization lobbying, while research and preparation for lobbying are counted in the 20 percent of work time calculation, arranging meetings with politicians and public officials is not included in that definition of lobbying and so does not have to be counted. In addition, lobbying of political party officials, no matter how much they communicate or collaborate with

¹⁴⁸⁸ Chari et al (2019), *supra* note 613, at 160-169, especially Table 5.5.

¹⁴⁸⁹ See a similar set of recommendations in Marrocco, *Collingwood Inquiry*, *supra* note 1446, Recommendations 183-201 and 229-298.

Cabinet ministers, MPs and senators, can also be done in secret as none of those people are included in the *Lobbying Act*'s definition of public office holders.

I do not see a reason, under a more egalitarian model, to allow for secret lobbying. If the person is doing the communicating or arranging a meeting is someone who the politician or public official owes, even if they volunteer with a small community organization, even one minute of lobbying can influence a policy-making process. The changes to the political finance, gifts, benefits and favours rules set out in Chapter 6, sections 6.5 to 6.17, and above in section 7.1, should help to reduce the ability of one person to give anything to or do anything for a politician or public official that causes a sense of obligation to return the favour. However, even if that ability is reduced or even negated, voters still have a right to know that the lobbying conversation has occurred so that they are fully informed about how the decision is made.

When a voter is communicating on their own behalf about an issue of concern, or someone is lobbying for someone else or for a business or organization, they always have an opportunity to influence the office holder's decision, so again in order to inform voters fully of how decisions are made, and to stop undue influence, all lobbying must be disclosed, even if the person lobbying has not been paid. The Commissioner of Lobbying repeatedly, and most recently in February 2021,¹⁴⁹⁰ and the Canadian House

¹⁴⁹⁰ Commissioner of Lobbying, *Improving the Lobbying Act: Preliminary recommendations* (February 2021), online: <<https://lobbycanada.gc.ca/en/reports-and-publications/improving-the-lobbying-act-preliminary-recommendations/>>, Recommendation 1 at 1-6; Recommendation 3 at 10-13; Recommendation 7 at 24-26 (hereinafter "Commissioner of Lobbying (2021)").

of Commons Ethics Committee in a report issued in 2012,¹⁴⁹¹ and in another report issued in June 2021,¹⁴⁹² have recommended eliminating the 20 percent threshold for registration of in-house lobbyists' lobbying for businesses and organizations, but did not recommend closing the many other secret lobbying loopholes.

While their rules also have several loopholes that allow for secret, unregistered lobbying, the City of Toronto and at least eight other Ontario municipalities require unpaid/voluntary lobbying to be registered and disclosed,¹⁴⁹³ and I don't see any justifiable reason why the federal rules should allow it to remain secret. The only exception to the disclosure requirement that is justifiable, I contend, is if a voter signs on to an interest group's petition or letter-writing initiative that is aimed at policy-makers – the

¹⁴⁹¹ House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Statutory Review of the Lobbying Act: Its First Five Years* (May 2012), online: <<https://www.ourcommons.ca/DocumentViewer/en/41-1/ETHI/report-3/>>, Recommendation 2 at 15-16 and Recommendations 3-4 at 16-17 (hereinafter "Ethics Committee report (2012)").

¹⁴⁹² Ethics Committee report (2021), *supra* note 1475, Recommendation 10 at 77.

¹⁴⁹³ Toronto Municipal Code, Chapter 140, Lobbying, section 140-1, definition of "lobbyist", online: <https://www.toronto.ca/legdocs/municode/1184_140.pdf>. City of Ottawa, *By-law Number 2012-309*, section 1, definition of "lobbyist", online: <<https://ottawa.ca/en/living-ottawa/laws-licences-and-permits/laws/laws-z/lobbyist-registry-law-no-2012-309>>. City of Hamilton, *By-law Number 14-244*, section 1, definition of "lobbyist", online: <<https://www.hamilton.ca/sites/default/files/2022-06/14-244.pdf>>. City of Brampton, *By-law Number 149-2015*, clause 5(g)(iii) and subsection 18(b), online: <<https://www.brampton.ca/en/city-hall/bylaws/all%20bylaws/lobbyist%20registry%20by-law.pdf>>. The Regional Municipality of Peel, *By-law Number 47-2016*, section 1, definition of "lobbyist", online: <<https://www.peelregion.ca/council/bylaws/2010s/2016/bl-47-2016.pdf>>. City of Vaughan, *By-law Number 165-2017*, clause 1(e)(iii), online: <[https://www.vaughan.ca/cityhall/by_laws/Bylaws/165-2017%20\(Consolidated\).pdf](https://www.vaughan.ca/cityhall/by_laws/Bylaws/165-2017%20(Consolidated).pdf)>. Town of Collingwood, *Lobbyist Registry By-law Number 2020-001*, section 1, definition of "lobbyist", online: <<https://www.collingwood.ca/council-government/lobbyist-registry>>. City of Burlington, *Corporate Policy CL-28-21*, Definitions section, definition of "lobbyist", online: <<https://www.burlington.ca/en/council-and-city-administration/resources/Corporate-Policies/Lobbyist%20Registration.pdf>>. The Regional Municipality of Niagara, *By-law Number 2022-24*, section 1, definition of "lobbyist", online: <<https://www.niagararegion.ca/government/accountability/pdf/by-law-2022-24.pdf>>.

group would be required to register the lobbying, and so there is no need to register every voter who signs or sends a letter.

The current system has other flaws, which are first that only oral, pre-arranged communications that are arranged by someone who is required to register as a lobbyist (with one exception, if the communication concerns financial benefits) are required to be disclosed in the monthly communications part of the Registry. The Commissioner of Lobbying and the House Ethics Committee (in 2012) have both recommended that all oral communications be disclosed, whether pre-arranged or not.¹⁴⁹⁴ Secondly, while the identities all the politicians and public officials involved in each communication are disclosed, only the senior officer of a business or other organization is disclosed, even if they are not involved in the communication.

Thirdly, the Commissioner of Lobbying has issued two rulings that concluded that lobbying an official in a department does not amount to lobbying the minister,¹⁴⁹⁵ which creates a system that allows any lobbyist to lobby a lower-level official and then have that official pass their communication up to the deputy minister or the minister's office, or a staff person pass it on to an MP or Senator, or a party official pass it on to a senior party official, while claiming that they are not lobbying the higher level official. The default assumption built into the registration system should be that lobbying communications with lower-level public officials will be passed onto

¹⁴⁹⁴ Commissioner of Lobbying (2021), *supra* note 1490, Recommendation 5 at 17-20. Ethics Committee report (2012), *supra* note 1491, Recommendation 5 at 17-18.

¹⁴⁹⁵ Commissioner of Lobbying: *Bergen Report*, *supra* note 808. Commissioner of Lobbying: *O'Born Report*, *supra* note 808.

the deputy minister or minister, unless the lower-level official has been delegated in writing complete control and discretion concerning the decision-making or policy-making process. This is important as well to ensure that ethics rules prevent lobbyists from lobbying politicians and parties after they have assisted with their election campaign.

Finally, the current system under the *Lobbying Act* is that lobbying is defined, and then lobbyists are required to register their lobbying. I suggest that not only should the loopholes that allow for secret lobbying all be closed, but also that the registration system should be reversed to require politicians and public officials to register the details about anyone who lobbies them, for a few reasons. First, politicians and public officials are required by their ethics rules and other rules to uphold the public trust and be transparent in their decision-making, and so it is consistent with the current regime to place the responsibility to register on them.

Secondly, while it is not difficult to register, it still is a burden for small citizen groups, and would be even more of a burden for individuals, some of whom may not be computer literate. In contrast, politicians and public officials all have assistants, paid for by the public, who are already tracking their communications, and so it would be relatively easier for them to register lobbying communications. Thirdly, educating all citizens and citizen groups about their registration requirements is an ongoing, monumental task. In contrast, educating politicians and public officials as part of their initial and ongoing job training would be relatively much easier, in part because they

would also be able to draw on the expertise of their colleagues concerning how to register properly.

Proposal 185: Require all lobbying to be disclosed

The *Lobbying Act* should be changed to require that every communication in respect of each political and government decision-making and policy-making process be disclosed in the Registry of Lobbyists, including unpaid communications of any kind about any decision, arranging meetings, and communications with and through senior officials of political parties including their caucus research bureaus. The only exception should be if a voter signs on to an interest group's petition or letter-writing initiative, as the group would disclose the initiative on behalf of everyone who signs.

Proposal 186: Require politicians and officials to disclose

The *Lobbying Act* should be changed to require that politicians and public officials, including staff of MPs and Senators, and senior officials of political parties, and staff in party caucus research bureaus, disclose every communication in respect of each political and government decision-making and policy-making process.

Proposal 187: Lobbying lower level = lobbying higher level

The *Lobbying Act* should be changed to make it clear that the assumption of the Commissioner of Lobbying is that lobbying communications with lower-level public officials are passed onto the deputy minister or minister, unless the lower-level official has been delegated in writing complete control and discretion concerning the decision-making or policy-making process.

In terms of what is required to be disclosed in each lobbying registration, other key information is missing that is important to inform voters of the relative resources of stakeholders involved in lobbying efforts

concerning any policy-making process. I suggested above that politicians and public officials be required to register and disclose all lobbying communications. However, they would not know the extent of the funding and other resources that any individual, business or organization is devoting to a lobbying effort. As a result, a parallel registration requirement should exist for lobbyists to disclose these key details, and they should be linked in the Registry of Lobbyists to the disclosure of lobbying communications so that the Registry can easily be searched to produce a report detailing all the communications and resources for each lobbying effort, and overall all lobbying efforts connected to each policy-making process.¹⁴⁹⁶

Lobbying businesses and organizations should be required to disclose their overall spending on any lobbying effort, including the amount spent on fees for lobbyists, and the amount spent on each staff person or board member involved in the lobbying (which will assist the public and the media to track how much value former politicians and public officials have as either consultant lobbyists or in-house lobbyists). For example, while the value ranges are too broad, provincial- and municipal-level lobbyists in Quebec are required to disclose within the range of the total amounts they have received or will receive as “financial or other compensation” for their lobbying (e.g. less than \$10,000; \$10,000 to \$50,000 etc.).¹⁴⁹⁷

¹⁴⁹⁶ See a similar recommendation in Timothy M. LaPira and Herschel F. Thomas, *Revolving Door Lobbying: Public Service, Private Influence, and the Unequal Representation of Interests* (Lawrence, Kansas: University of Kansas Press, 2017) at 189-190 (hereinafter “LaPira and Thomas (2017)”).

¹⁴⁹⁷ *Lobbying, Transparency and Ethics Act*, S.Q. 2002 (c. T-11.011), subsection 9(9).

Other key information to determine the integrity of a policy-making process is how much lobbyists have supported the politicians or parties they are lobbying. The U.S. federal law, for example, requires registrations to disclose how much is being spent on a lobbying effort, including the amount spent on fees for consultant lobbyists and, if it is a coalition lobbying, the amount that each member of the coalition has donated to the lobbying effort, as well as a semi-annual disclosure of the amount donated to candidates and political committees (which are roughly equivalent to third parties in Canada).¹⁴⁹⁸ If proposal #34 proposed in Chapter 6, subsection 6.5.1 to lower the donation, loan and volunteer labour limit to \$75 annually, and the proposals proposed above in section 7.1 to limit gifts, hospitality and other benefits to \$30 combined total annually, are implemented it will lessen the need for disclosure of donations, gifts etc. at the federal level in Canada.

However, as noted above in section 7.1, the Commissioner of Lobbying's final proposal in November 2022 to change the *Lobbyist's Code* increased the proposed amount to a \$40 limit on any single gift or provision of hospitality, and an \$80 annual limit for all gifts, and an \$80 annual limit for all hospitality (for a \$160 total annual limit), given by a lobbyist directly or indirectly (with "indirectly" meaning that it is prohibited for a person or entity to offer a gift or hospitality at the request of a lobbyist or for a lobbyist to offer it at the request of a person or entity). The House of Commons Standing Committee on Access to Information, Privacy and Ethics reviewed the

¹⁴⁹⁸ Craig Holman and William Luneburg, "Lobbying and transparency: A comparative analysis of regulatory reform," (2012), Vol. 1(1), *Interest Groups and Advocacy* 75 at 83-84 and 87-88.

Commissioner's proposals (mostly in secret) and requested that the Commissioner increase both limits to \$200, and also exempt the gift of sponsored travel from that limit.¹⁴⁹⁹ As proposed above, such valuable benefits should be prohibited, but if lower limits are not set then disclosure of all gifts and hospitality offered or given by lobbyists is needed to inform voters of this means of influencing political processes.

As well, donations linked to lobbying efforts have been documented in both the U.S. and Canada,¹⁵⁰⁰ and so disclosure of whether donations are being used as one collective means of influence as part of a lobbying effort, as well as whether any lobbyists that are part of any effort are acting as fundraiser "bundlers" for a candidate or party, is very relevant information for voters to assess the integrity of any lobbying effort. As a result, I suggest, as recommended in section 7.1. concerning gifts etc., requiring disclosure of the combined total of donations from each the executives and family members of each business and organization, and their employees if the business or organization has appealed to them in any way to donate.

As well, connecting with proposal #181 above, lobbyists should be required to disclose their donations, grants and loans to charities and other

¹⁴⁹⁹ Commissioner of Lobbying report (November 2022), *supra* note 1449, at 11-13 and 33-34 of PDF version. House of Commons Standing Committee on Access to Information, Privacy and Ethics, Letter to the Commissioner of Lobbying regarding the study of the third edition of the Lobbyist's Code of Conduct, (March 20, 2023), online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/ETHI/related-document/12301427>> (hereinafter "House Ethics Committee (March 20, 2023)").

¹⁵⁰⁰ In Song Kim, Jan Stuckatz and Lukas Wolters, "Strategic and Sequential Links between Campaign Donations and Lobbying," (October 11, 2021), MIT Political Science Department Research Paper No. 2021-2, online at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937466#>. Democracy Watch, List of sham political donations systems, *supra* note 307.

organizations, as donating to the favourite charities of politicians and their families is a well-documented means of influence used in the U.S., and is possibly also being used in Canada (see also related proposal #191 below on prohibiting such contributions if they cause an apparent conflict of interest).

Connecting with proposals #95, #98 and #99 in Chapter 6, section 6.9 requiring disclosure by contestants, candidates, EDAs and parties of anyone who has fundraised, worked or volunteered for them during their campaign, and the current rules in the *Lobbying Act* that require lobbyists to disclose former work they have done for the federal government, lobbyists should also be required to disclose in the Registry of Lobbyists the details of any fundraising, volunteering, work or other assistance they provided to a campaign or between elections for an EDA, party, party leadership contestant or prospective candidate, and any gifts they have provided to a politician or other public official. Whether a lobbyist (or a client of a consultant lobbyist) has made donations to candidates, parties and third parties, as well as details about gifts provided to politicians and other public officials, are required to be disclosed by lobbyists each month in the B.C. lobbying registry.¹⁵⁰¹

The federal Commissioner of Lobbying recommended in a February 2021 report that these types of “contextual information” be required to be disclosed in the Registry.¹⁵⁰² The Registry should also be re-worked so that it can be searched by any of these categories (it can’t even be searched now to

¹⁵⁰¹ *Lobbyists Transparency Act*, SBC 2001, c. 42, clauses 4.2(2)(f) and (g).

¹⁵⁰² Commissioner of Lobbying (2021), *supra* note 1490, Recommendation 6 at 21-23.

find out exactly how many currently registered lobbyists worked for the federal government in the past).

In terms of coalitions, I think it makes sense, as in the U.S., to require disclosure of funding provided to the coalition by each coalition member. An extension of that rule that I think also makes sense is to require businesses and other organizations to disclose funds that they have received from other businesses and organizations, to prevent them from acting as a front for others. The phenomenon is most prevalent in the form of “astro-turf” groups who pretend to be grassroots citizen groups but are funded by a big business to push their agenda and are not actually supported by many citizens.¹⁵⁰³

This proposal connects back to proposal #129 in Chapter 6, section 6.12 and proposal #140 in section 6-13 proposing to only allow third-party citizen groups to spend funds donated by individual Canadians and permanent residents on advocacy activities during pre-election and election periods, and during policy-making processes.

Proposal 188: Require disclosure of spending on lobbying

The *Lobbying Act* should be changed to require lobbyists to disclose in the Registry of Lobbyists how much is being spent on a lobbying effort, including the amount spent on fees for consultant lobbyists, and the amount spent on gifts and hospitality and which public officials were offered or given any gift or hospitality. If it is a coalition lobbying, the amount that each member of the coalition has donated to the lobbying effort should be disclosed. If a business or organization has received

¹⁵⁰³ Jane Akre and Steve Wilson, “Modern media’s environmental coverage: what we don’t know can hurt us,” (2006), Vol. 33(3), *Boston College Environmental Affairs Law Review* 551 at 558.

funding from another organization, it should be required to disclose that funding.

Proposal 189: Require disclosure of lobbyist fees/incomes

The *Lobbying Act* should be changed to require consultant lobbyists to disclose in a separate listing in the Registry of Lobbyists how much their fees received from each lobbying effort they assisted. Businesses and organizations should be required to disclose how much they pay each staff person involved in lobbying. This information will inform the public and media whether former politicians and public officials have higher market value than other lobbyists.

Proposal 190: Require disclosure of donations, fundraising, gifts

The *Lobbying Act* should be changed to require lobbyists to disclose in the Registry of Lobbyists every quarter how much they have donated, granted, loaned and fundraised (as also suggested in proposal #95) for each political party, EDA, candidate, nomination contestant and/or party leadership contestant, and also to charities, business and other organizations that are connected to politicians, public officials and their families. For a business or organization, this would require disclosing how much its lobbyists, executives and family members have contributed in any of those ways, and also its employees if they have been asked in any way to donate. As well, details concerning gift and other benefits given to politicians and other public officials should be disclosed in these quarterly reports.

Proposal 191: Prohibit charity donations that cause conflicts

In line with the proposals in previous sections to limit donations, loans and gifts to low levels, the *Lobbying Act* should be changed to prohibit lobbyists (and lobbying businesses and organizations) from donating, granting or loaning to charities, business and other organizations that are connected to politicians, public officials and their families if they are

lobbying the politician or official and their contribution will, therefore, create an apparent conflict of interest.

Proposal 192: Require disclosure of political work/volunteering

The *Lobbying Act* should be changed to require lobbyists to disclose in the Registry of Lobbyists every quarter how much they have worked or volunteered for each political party, EDA, candidate, nomination contestant and/or party leadership contestant. For a business or organization, this would require disclosing how much its lobbyists, executives and family members have worked and volunteered, and also its employees if they have been asked in any way to do work or volunteer.

Proposal 193: Registry produces complete lobbying reports

The *Lobbying Act* should be changed to require that the Commissioner of Lobbying re-work the Registry of Lobbyists so that an online search can easily produce a full report of the identity of each lobbyist involved in the lobbying effort, and the spending (including on fees for consultant lobbyists and staff salaries), donations, grants, loans and fundraising connected to the effort, and past volunteering or work by any lobbyists involved for political parties, EDAs, contestants and candidates, and government institutions. The Commissioner should also be required to allow the Registry to be searched by every field so that overall statistics can be easily found concerning total spending, fees, salaries, donations, grants, loans, volunteering and work and former work with the government.

As detailed in Chapter 4, subsection 4.5.2, the second general area of concern is that the ethics rules for lobbyists allow for influence that could undermine the public's confidence in the integrity of public processes. The first problem in this area is the weak cooling-off periods for former politicians and public officials. If the changes to the *Lobbying Act* are made as proposed

above in proposal #185, then essentially any communications by a former politician and senior public official with people in federal politics or government will be considered lobbying that has to be registered and, therefore, they will be prohibited from doing those communications for five years under the prohibition in the *Lobbying Act*. In other words, the one-year and two-year cooling-off periods on lobbying that apply to Cabinet ministers and their staff and appointees will be overridden by the five-year period in the *Lobbying Act*.

However, former designated public office holders who worked for the federal government through its employee exchange Interchange Canada program, which benefits mainly big businesses as it is their employees who mainly participate in that program, would still have no cooling-off period, nor would the staff of MPs and Senators, as both are exempt from this provision in the *Act*. As well, government employees will still only have a one-year period (which they can be exempted from), and Cabinet ministers and their staff and appointees will still be allowed after one to two years to take a job with any business or organization they had significant dealings with during their time in government, as long as they didn't have those dealings during their last year of office. In addition, because the Ethics Commissioner doesn't enforce the rules prohibiting such actions, Cabinet ministers and their staff and appointees will still effectively be allowed to give advice sharing secret information they learned on the job with anyone or any entity they work with after leaving their government position, which will give an advantage to those people and entities.

The key questions to be answered are, in order to comply with a more egalitarian model: How long should the cooling-off period for various politicians and public officials last after they leave their position? To what activities should the cooling-off period apply? First, the five-year cooling-off period on lobbying was established without any advance study of whether that time period was adequate to resolve conflicts of interest, and it was applied arbitrarily only to Cabinet ministers and their staff and appointees from 2007 on until it was extended arbitrarily in 2010 to apply also to all MPs and Senators, and the staff of the Office of the Leader of the Official Opposition. This happened as part of the Conservative government's response to a scandal in which the lobbying efforts of a former MP for the Conservative Party were assisted unethically by his spouse who was still a Conservative Cabinet minister, and by another Conservative minister.¹⁵⁰⁴ In other words, the cooling-off period was not established or extended through an evidence-based policy-making process.

Secondly, there is evidence that not only former politicians, but also the former staff of politicians, have at least a perceived advantage over other lobbyists. For example, studies in the U.S. have found that lobbyists who

¹⁵⁰⁴ Office of the Commissioner of Lobbying, *Report on Investigation: The lobbying activities of GPG-Green Power Generation Corp. and Patrick Glémaud and Rahim Jaffer*, (December 2011), online: <<https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/the-lobbying-activities-of-gpg-green-power-generation-corp-and-patrick-glemaud-and-rahim-jaffer/>>. Conflict of Interest and Ethics Commissioner, *The Paradis Report*, (March 22, 2012), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Paradis%20Report.pdf>>. Conflict of Interest and Ethics Commissioner, *The Guergis Report*, (July 14, 2011), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Guergis%20Report.pdf>>

were a member of the legislature or worked for a member have higher incomes than other lobbyists, with higher incomes for those who had more connections to more powerful members.¹⁵⁰⁵ Such information is not available in Canada because the *Lobbying Act* does not require that the fees and salaries paid to lobbyists be disclosed.

Another factor in the calculation of the length of a cooling-off period is turnover in politics and government. If a different party wins an election and a politician loses their seat in the House, and their former close colleagues are all out of office and their party leader changes, as well as deputy ministers and associate deputy ministers they may have interacted with also changing, it makes sense that their cooling-off period could be reduced. Alternately, if a long-serving opposition MP who is close to the party leader decides not to run in an election, and their party wins power so they are now close to the Prime Minister, and their former close colleagues are now Cabinet ministers, it makes sense that their cooling-off period should be increased. This points to the need for cooling-off periods of different lengths for former federal politicians and public officials, based on their connections.

To connect with the issue detailed in section 4.5.3, the aim of these changes is to equalize the opportunity for equal participation in policy-making

¹⁵⁰⁵ LaPira and Thomas (2017), *supra* note 1496, at 88-102. Joshua McCrain, "Revolving Door Lobbyists and the Value of Congressional Staff Connections," (2018), Vol. 80(4), *The Journal of Politics* 1369. James M. Strickland, "The Declining Value of Revolving-Door Lobbyists: Evidence from the American States," (January 2020), Vol. 64, No. 1, *American Journal of Political Science* 67. See also another study that found lobbyists who formerly worked for a member of Congress suffered a significant decrease in their annual revenues after their former boss left Congress, with a more significant decrease if their former boss was a high-ranking member: Jordi Blanes i Vidal, Mirko Draca and Christian Fons-Rosen, "Revolving Door Lobbyists," (December 2012), Vol. 102, No. 7, *The American Economic Review* 3731.

processes by equalizing the resources available to lobbyists. Subsection 4.5.3 mainly focuses on the unequal financial resources of various lobby groups, specifically citizen groups compared to big businesses, and proposals further below address how to equalize resources – but unequal people resources can also give an advantage to one lobbying effort over another.

I propose that the first step in changing these rules is to study how much such connections in Canada create the perception that a lobbyist is worth hiring because their connections increase the chance of obtaining a favourable decision or support for a favourable decision from policy-makers (including from opposition party politicians), and how much their relationships and connections create a conflict of interest and bias in the decision-making of the politicians and public officials for whom the lobbyist formerly worked or assisted in some way. After that study is completed, a sliding scale of cooling-off periods can be set for former politicians and public officials.

True, it will involve a significant amount of work for the Commissioner of Lobbying to assess the effects of relationships each former politician and official has to determine what their cooling-off period should be. However, as detailed in section 4.5.2, that assessment already has to be done in order for Cabinet ministers and their staff and appointees to determine what businesses and other organizations they are allowed to work for or represent in policy-making processes during their one- to two-year cooling-off periods. All that is proposed below is to extend the assessment from its current very restrictive, unrealistic scope to cover each former politician's or public official's actual set of connections and relationships, in order to prohibit them from

participating in policy-making processes in every situation in which they have an apparent conflict of interest. In other words, the current system allows for unethical lobbying by former politicians and public officials, and the proposals below are aimed at preventing all unethical lobbying.

Proposal 193: Comprehensive study of lobbying connections

To inform the setting of the length of cooling-off periods, a comprehensive study should be conducted by a fully independent commission of the number of registered lobbyists each year for the past decade who were formerly a politician or formerly worked for a federal government politician or as a public official or volunteered at a senior level or worked for a political party, EDA, contestant or candidate (on a campaign or between elections in any role, including fundraising), and to compare their fees and salaries based on which role they had in their past government or political volunteer or work, and with other lobbyists who do not have that volunteer or work experience. The study should also examine and take into account behavioural psychology evidence concerning the effects of relationships on decision-making (in addition to the evidence concerning the effects of gifts and favours on decision-making, as summarized in Chapter 5, subsection 5.2.8). The study should also take into account the difficulty of establishing whether lobbyists' past assistance to policy-makers, connections and relationships produce desired results, given that policy-makers can help individuals, businesses and organizations in many cases as much through inaction as through actions.

Proposal 194: Sliding scale of cooling-off periods

Based on the comprehensive study of the market and influence value of lobbyists who have former work experience as a federal politician or public official (including participants in employee exchange positions between the government and the private sector through Interchange

Canada) and/or former volunteer or work experience with parties, EDAs, etc., a sliding scale of cooling-off periods should be set for former politicians and public officials taking into account their connections with whomever is still working in government and/or political parties and the positions and policy-making powers those people have, and the relationships those people have with others who have policy-making powers. To ensure that the Commissioner of Lobbying does not grant favours in setting cooling-off periods, the *Lobbying Act* should be changed to set specific time periods for each type of relationship/connection. The study suggested in proposal #193 should also be used to inform setting a sliding scale of cooling-off periods prohibiting people from lobbying after assisting parties, EDAs, candidates or contestants.

In terms of what activities should be covered by a cooling-off period, some scholars have proposed defining lobbying as including “strategic advice” given that a former politician or public official giving such advice to a client can assist their lobbying efforts significantly.¹⁵⁰⁶ As noted above, and in section 4.5.2, the current rule in the *COIA* prohibits forever former Cabinet ministers and their staff and appointees from giving advice based on secret information they learned on the job. However, although that rule would seem to prohibit them from ever advising anyone or any entity concerning dealings with the federal government, the Ethics Commissioner has refused to enforce the rule unless clear evidence is presented showing that they have actually given advice based on the secret information.

¹⁵⁰⁶ LaPira and Thomas (2017), *supra* note 1496, at 188-189 and 194-195.

Given this evidence will not likely ever be disclosed, and given such advice can be given verbally with no trace, and given that all advice from these former politicians and public officials is based on secret information they know that they learned on the job, I reach the conclusion that giving advice to anyone on dealing with or lobbying anyone in federal politics or the government should be one of the prohibited activities during a cooling-off period.

Proposal 195: Prohibit giving advice during cooling-off period

The *Lobbying Act* should be changed to prohibit, during a cooling-off period, not only lobbying but also advising anyone or any entity that is lobbying.

As mentioned above, if all lobbying is required to be registered and disclosed as suggested in proposal #185, all former politicians and public officials will be prohibited by the *Lobbying Act* from lobbying and advice-giving for a cooling-off period – either a five-year period or, if the proposals above are implemented, for a period based on their connections and relationships with politicians and public officials.

There are also lobbyists who are not former politicians or public officials and, as detailed in subsection 4.5.2, the *Lobbyists' Code* rules apply to them and also establish cooling-off periods and prohibitions on lobbying based on past activities assisting parties, EDAs, contestants and candidates, and also based on relationships they have with politicians and public officials who are still in office. Changing the *Act* to close the loopholes that currently allow for secret lobbying, again as proposed by proposal #185, will also mean that anyone or any entity that lobbies will be required to register and comply

with the rules in the *Code*. Those changes, along with setting an annual combined total limit of \$75 on donations, loans and volunteer labour, and \$30 for gifts, benefits etc., should help reduce the amount of unethical lobbying that currently occurs.

However, the issues of what cooling-off periods should apply to people who have fundraised, worked for or volunteered parties, EDAs, contestants and candidates, and what other relationships with politicians and public officials should entail a prohibition on lobbying them, and what the scope of the lobbying prohibition should be, will still remain. As detailed in subsection 4.5.2, the current Commissioner of Lobbying Nancy Bélanger has arbitrarily reduced the length of the cooling-off periods that were set by former Commissioner Karen Shepherd – from five years down to four years for significant past political activities – while continuing to apply arbitrary cooling-off periods of indeterminate lengths for less significant past activities (the time periods cannot be determined because the Commissioner establishes them through giving secret advice to lobbyists who request it).

Also as detailed in subsection 4.5.2, the Commissioner has also issued rulings interpreting and applying key ethics rules in the *Code* that essentially allow people to do significant political work for candidates, help them win election as an MP, and then lobby people who work for them soon afterwards. In fact, the Commissioner's rulings also stated that the *Code* only prohibits such activities by registered lobbyists. If a person does those activities before registering as a lobbyist then, according to the Commissioner, the *Code* does not prohibit them from lobbying any politician or official right afterwards.

If the change proposed above in proposal #187 is made to the *Act*, it will help prevent part of this kind of ruling from the Commissioner because it will be made clear that if a lobbyist lobbies a lower-level politician or public official who works for a higher-level politician or official, it will be considered as lobbying the higher-level person unless the lower-level person has clear and full decision-making power in the area about which they are being lobbied. But that change will not establish clear cooling-off periods to prevent lobbying of a politician or public official when there is an ongoing apparent conflict of interest due to past favours the lobbyist did for them (including before they became a lobbyist) or another form of relationship that causes a conflict.

The first steps in determining what the length of these cooling-off periods should be is the comprehensive study proposed above in proposal #193, leading to the setting of a sliding scale of cooling-off periods (as suggested in proposal #194) that prohibit lobbying after providing assistance to a party, candidate etc. Another helpful step, I suggest, would be to require lobbyists to disclose to office holders they are lobbying the identities of other office holders who may become involved in the policy-making process and have a bias/conflict of interest because the lobbyist has assisted them (or their party) directly or indirectly in the past. This would make it clear to the office holder how careful they may have to be to ensure a fair policy-making process.

Proposal 196: Require disclosure of conflicts when lobbying

The *Lobbying Act* or *Lobbyists' Code* should be changed to require lobbyists to disclose to any politician or public official they are lobbying the identities of others who may become involved in the policy-making process and have a conflict of interest because the lobbyist has assisted them (or their party) directly or indirectly in the past.

Unfortunately, Commissioner Bélanger has instead proposed changes to the *Lobbyists' Code* that weaken some of the key rules preventing unethical lobbying, including by arbitrarily shortening even further, without providing any evidence or valid justification, the cooling-off periods that prohibit lobbying after political activities that assist parties, EDAs, contestants and candidates.¹⁵⁰⁷ As of May 20, 2023, Commissioner Bélanger was proposing to strengthen the gifts and hospitality rules by, as set out above in section 7.1, setting a limit of \$40 per gift, and \$80 annually for gifts, and the same amount for hospitality (although the Commissioner also proposes to give herself the power to grant exemptions to these limits in secret).¹⁵⁰⁸ These limits are based on the Objectives and Expectations of the *Code* of preventing lobbyists from “placing officials in real or apparent conflict of interest situations.”

Strangely then, the Commissioner completely contradicted these new gift and hospitality rules, and the overall objectives and expectations, by proposing (as of May 20, 2023) to remove current Rule 6 from the *Code*, which is the key ethics rule that prohibits lobbyists from proposing or undertaking any action that places an office holder in a real or apparent

¹⁵⁰⁷ Commissioner of Lobbying report (November 2022), *supra* note 1449.

¹⁵⁰⁸ Commissioner of Lobbying report (November 2022), *supra* note 1449, at 11-13 and 33-34.

conflict of interest. To replace this rule, the Commissioner then proposes a new Rule 6 that states:

Never lobby an official or their associates where the official could reasonably be seen to have a sense of obligation towards you because of political work – paid or unpaid – you have done for the benefit of the official, unless the cooling-off period has expired.

The Commissioner uses the phrase “sense of obligation” in a few other rules in the proposed new *Code*, prohibiting lobbying anyone who has a sense of obligation because you have a close relationship with them (proposed Rule 5), or your employer or client has a close relationship to them (proposed Rule 7.2), or because of any other reason (proposed Rule 7.1).

All of these changes are fine, as is the definition of what constitutes a close relationship as it covers close family, personal, work, business and financial relationships.¹⁵⁰⁹ However, the problem is that the Commissioner defines “sense of obligation” in a very limited way, suggesting strongly that the only things that create this sense are employing a politician or public official before they entered office, or employing a close family member of a politician or official, or “having provided frequent or valuable gifts to an official in advance of them becoming an official.” Again, this is a much weaker standard than prohibiting lobbying someone when your relationship creates an “apparent conflict of interest” for them.

Proposal 197: Keep current Rule 6 in the *Lobbyists’ Code*

As the Objectives and Expectations sections of the Commissioner of Lobbying’s propose new *Lobbyists’ Code* state, a key overall goal is to

¹⁵⁰⁹ Commissioner of Lobbying (November 2022), *supra* note 1449, at 14 and 35.

prevent lobbyists from “placing officials in real or apparent conflict of interest situations”. As a result, current Rule 6 should be kept in the Code because it explicitly prohibits from doing just that. As well, the words “apparent conflict of interest” should be added to proposed new rules 5, 7.1 and 7.2 to ensure they all prevent lobbying when there is an appearance of a conflict of interest (and cooling-off periods during which lobbying is prohibited should be set to prevent such apparent conflicts).

Proposal 198: Ensure Code applies to pre-lobbying activities

It should be made clear in the *Lobbyists’ Code* that if a person does any of the activities listed in the Code that mean they have a cooling-off period that prohibits them from lobbying whichever person or entity they assisted (and everyone who works for that person or entity), the prohibition applies whether or not the person was a registered lobbyist when they did the activities.

Also unjustifiably, the Commissioner was then proposing (again, as of May 20, 2023) only a two-year cooling-off period after serving as a full-time top campaign official for a party or candidate, only a one-year period after serving up to “nearly full-time” essentially as an assistant campaign official (including as an assistant fundraiser, researcher or office coordinator), and no cooling-off period if any of those activities are done less than nearly full-time or without significant contact with the candidate or an official in the party – these measures were opposed by more than 40 lawyers and professors, and 26 citizen groups from across Canada.¹⁵¹⁰ If these changes are implemented,

¹⁵¹⁰ Commissioner of Lobbying (November 2022), *supra* note 1449, at 15-18 and 36-38. Democracy Watch, News Release, (April 6, 2023), online: <<https://democracywatch.ca/41-lawyers-and-professors-call-on-house-ethics-committee-to-reverse-its-position-and-reject-commissioners-gutting-of-key-ethical-lobbying-rules/>>.

lobbyists will be allowed, in secret, to raise tens of thousands of dollars for a political party or politician and/or play a significant role in helping a politician or party win an election, and then lobby the politician or any politician or official in the party right afterwards, one year later or at most two years later, even if the politician is or has become the Prime Minister or a Cabinet minister or has been appointed by the Prime Minister or Cabinet as a top government official. As discussed above concerning the cooling-off periods for former politicians and public officials, it makes sense to reduce the period when there is a change of government that removes the party and people in politics and government that the lobbyist knows, worked with or has assisted in some way. But that is the only justifiable reason for reducing a cooling-off period.

The Commissioner's proposed changes go against all three of the key principles of the egalitarian model in that they provide an unequal opportunity to participate in political processes as not everyone can afford to leave their current job and temporarily work or volunteer full-time or nearly full-time on an election campaign for a candidate or party, and then provide an even further unequal opportunity by allowing those campaign workers to become lobbyists and sell their inside access and relationships with politicians they have helped win election to whomever is willing can afford to pay them for their lobbying assistance. Allowing this trading of favours between lobbyists and politicians is also likely to undermine the public confidence in the integrity of policy-making processes, which also does not comply with the egalitarian model.

As well, Commissioner Bélanger sets out in proposed new Rule 6 that this fundraising and campaigning by lobbyists will not be required to be

disclosed publicly, and that she will be empowered to secretly reduce for any lobbyist these already very short cooling-off periods even further, “taking into account any circumstances that the Commissioner considers relevant” although the Commissioner stated in somewhat misleading letter March 3, 2023 letter to the House Ethics Committee that she may disclose some reductions¹⁵¹¹ Allowing the Commissioner to secretly reduce the cooling-off period for any lobbyist for any reason, which the Commissioner’s proposed new *Code* does, is inequalitarian because it violates the principle of informing voters, and will also likely undermine the public’s confidence in political processes.

Proposal 199: Maintain current cooling-off periods, no reductions

After the comprehensive study recommended in proposals #193 and 196, set cooling-off periods to prohibit lobbying after various levels of political activity if the lobbying would cause even an apparent conflict of interest. As well, the Commissioner should be prohibited from reducing the period for any lobbyist except for one reason – that another election or retirements or resignations have occurred that result in the politicians and public officials who the lobbyist assisted no longer being in office. The Commissioner should be required to disclose any reduction granted to any lobbyist.

In addition, the Commissioner does not make it clear in her proposed changes to the *Lobbyists’ Code* that assisting a party’s central campaign places all the politicians elected under that party’s banner in an appearance of

¹⁵¹¹ Commissioner of Lobbying (November 2022), *supra* note 1449, at 16 and 31. Commissioner of Lobbying, Letter from the Commissioner of Lobbying of Canada, (March 3, 2023), online: <<https://www.ourcommons.ca/DocumentViewer/en/44-1/ETHI/related-document/12286567>>. Democracy Watch, News Release, (March 21, 2023), online: <<https://democracywatch.ca/commissioner-of-lobbying-sends-letter-to-house-ethics-committee-for-secret-meetings-on-her-proposed-gutting-of-key-ethical-lobbying-rules/>>.

a conflict of interest, given that extensive research shows that almost all voters cast their ballot based on the party and/or the party leader, not the local candidate.¹⁵¹² As a result, if a party assists party headquarters or the party overall (for example, through fundraising), the person should be prohibited from lobbying every politician and their staff, and every official in the party, for whatever their cooling-off period is.

Proposal 200: Assisting a party = assisting the party's MPs

The *Lobbyists' Code* should state clearly that if a person assists party headquarters or a party overall in any way, the person should be prohibited from lobbying every MP and Senator in the party, and their staff, and all party officials, for the duration of their cooling-off period. As well, as proposed above in proposal #187, it should be made clear in the *Lobbying Act*, and the *Lobbyists' Code* (including in the definition of "associates") that lobbying a lower-level politician or public official is considered to be lobbying a higher-level person unless the lower-level person has full decision-making power concerning the lobbying issue.

As mentioned above in section 7.1, the changes to the *Lobbyists' Code* proposed by the Commissioner of Lobbying are just that, proposals, which the the House of Commons Standing Committee on Access to Information, Privacy and Ethics reviewed in February-March 2023. The Committee initially ordered the Commissioner to stop implementing the changes until it reviewed them, but then after reviewing the proposals (again mostly in secret) it sent a letter endorsing the proposed drastic and unethical reductions of the cooling-off periods (the NDP MP on the Committee dissented from this position) and, as mentioned above, requested that the Commissioner increase the amounts

¹⁵¹² Party vs. local candidate effects studies, *supra* note 1182.

allowed for various gifts, including exempting the gift of sponsored travel from any limit.¹⁵¹³ As of May 20, 2023, the proposed changes had not been implemented, but the Commissioner stated that she wanted to enact the changes by summer 2023.

7.3. More egalitarian resources for lobbying of politicians, their staff, appointees and employees

As detailed in Chapter 4, subsection 4.5.3, the third general area of concern is that various lobbyists have unequal resources for lobbying, and this undermines the equality of opportunity to participate in policy-making processes. I set out in that subsection the little information available concerning the much more significant funding and resources that big business lobbyists in some sectors have compared to citizen groups. The changes to the disclosure requirements and the Registry of Lobbyists suggested in proposals #185 and #188 to #190 and #192 will provide detailed information about all lobbying, including spending by each lobbyist, which will close this information gap. Proposals #126 and #138 set out in Chapter 6, sections 6.12 and 6.13, propose prohibiting business spending on advertising during the pre-election and election periods, and also during policy-making processes.

¹⁵¹³ Bill Curry, “MPs step in to delay new lobbying code of conduct following complaints,” (December 1, 2022), *Globe and Mail*, online: <<https://www.theglobeandmail.com/politics/article-mps-step-in-to-delay-new-lobbying-code-of-conduct-following-complaints/>>. House of Commons Standing Committee on Access to Information, Privacy and Ethics, Third Edition of the Lobbyists’ Code of Conduct, online: <<https://www.ourcommons.ca/Committees/en/ETHI/StudyActivity?studyActivityId=11997889>> . Democracy Watch, News Release, (March 27, 2023), online: <<https://democracywatch.ca/liberals-conservatives-and-bloc-approve-commissioner-of-lobbyings-proposal-to-gut-key-ethical-lobbying-rules/>>. House Ethics Committee (March 20, 2023), *supra*, note 1499.

The key question in this area is: Why not also prohibit businesses from lobbying?¹⁵¹⁴ The reason not to is that, unlike spending on advertising and other political communication activities, there is a fundamental right even for a business (meaning the executive, whether they are accurately representing the interests of the employees or shareholders) to petition government for policy changes. As well, lobbying itself by all stakeholders – communicating information and proposals for changes to laws, regulations, taxes, subsidies and government programs – is a legitimate activity that can assist politicians and public officials to make decisions in the public interest, as long as all stakeholders are given access to have a chance to be heard (if not listened to fully). Unethical or unequal lobbying are the problem activities that can distort policy-making processes so that they instead protect private interests or harm the public interest in other ways.

I set out proposals for how to ensure ethical lobbying in the previous two sections, through stronger, more comprehensive disclosure and ethics rules for lobbying. That leaves the question of how to ensure more equal resources for lobbying?¹⁵¹⁵ As set out at the end of Chapter 5, and in the above section, the third key element of an egalitarian system for lobbying is:

3. Relative, substantive equality of opportunity for relative, substantive equality of participation and influence in the government and political decision-making system, based on actual level of voter support (with no more than a 10 percent variation in the equality of opportunity and influence).

¹⁵¹⁴ See a discussion of this issue in: Gold (2020), *supra* note 11, at 572-579.

¹⁵¹⁵ See general proposals that align, and in some ways overlap, with the specific proposals I am making in: Gold (2021), *supra* note 11, at 80-100.

The first steps to ensure this equality of resources based on actual level of voter support are, I contend, the comprehensive studies suggested in proposal #132 (re: the usual characteristics of policy-making processes) in Chapter 6, section 6.13, and in proposal #151 (re: the characteristics of citizen groups, especially concerning systemic disadvantages faced by specific groups) in section 6.16, and in proposal #193 above (re: the number of lobbyists who have done past work or have ties to governments and political parties). These studies should provide key information that will assist in designing public funding and other subsidies to assist particularly citizen groups that have faced systemic disadvantages to participation in policy-making processes.

Another key step is, I contend, to require government institutions to use meaningful consultation processes for most decisions, as suggested in proposal #131 in section 6.13. Another key step is, as mentioned above re: proposal #136 in section 6.13, to prohibit businesses from issue and partisan advertising and public outreach activities during policy-making processes. Again, there is a right for a business to petition government for changes but, I contend, no clear right for the business to spend to mobilize voters in support of its cause (other than communicating with its own employees and shareholders).

I understand that some would argue that big businesses will simply put the funds they would have spent on advertising and other communications with voters into lobbying which will overwhelm citizen organization lobbying and tilt decision-making processes in favour of the businesses. I contend

three things: 1. That if the measures suggested above to require meaningful public consultation before all significant decisions have been made, then a balance of access and time to be heard for both big business and citizen organizations and the public would be maintained; 2. That if the measures suggested above are implemented to require full disclosure of lobbying, more lobbying by big businesses during any policy-making process could easily hurt its cause, as it would appear that politicians and public officials are being pressured and bought off by all the lobbying, and that would cause them to want to show through their decisions that, instead, they were listening to citizen concerns, and; 3. That if big business lobbying increased, then the subsidies to citizen organizations so that they have substantive equality of opportunity to participate could simply also be increased.

With regard to those subsidies, another very important step is to establish broad-based, democratically structured, citizen-run and funded groups for every business sector and government sector using the method that has been proven to work in four U.S. states, as suggested in proposal #152 in section 6.16. If these groups are created using the proposed method for each federal business and government sector, it will significantly equalize the opportunity of citizens to participate in policy-making processes and other political and legal processes, and likely hundreds of thousands of voters will join each group and provide likely millions of dollars in membership fees to cover the costs of advocacy and other activities that will increase the resources that citizen organizations have for lobbying to a level that much more closely matches the resources of big businesses. The method can be

used to establish groups not only at the federal level, but also at the provincial and municipal level to cover business sectors that are regulated by provincial governments, and also provincial and municipal government institutions. This leads to one final proposal encompassing all of the above points in this section:

Proposal 201: Steps to equalize lobbying resources

Proposals #131-132, 136, 151-152 and 196 should be implemented fully in order to equalize the resources available to businesses and citizen organizations for lobbying. If these proposals are not fully implemented and, as a result, the resources available to businesses and citizen organizations to participate in policy-making processes are still unbalanced, then repealing the tax deductions for lobbying and advertising concerning policy-making processes that businesses are allowed to deduct under Canada's *Income Tax Act* should be considered (see above in subsection 4.5.3 for details about the deductions).

8. Conclusion

8.1. General conclusions

As detailed in Chapter 2, the Supreme Court of Canada's egalitarian model is based on three key principles – the principle of one person, one vote (relative equality of opportunity for relatively equal, meaningful participation and influence not only during elections but also during government public policy-making processes) so as to ensure that, as much as practically possible, no voter has more influence than any other voter; the principle that voters must receive adequate information in order to be able to participate in political processes, and; the principle that political processes must not only be fair and have integrity, but also appear to the public to be fair and have integrity (in terms of process, not in terms of outcomes).

However, also as set out in Chapter 2, in its rulings on various statutory provisions in the area of political finance, the Supreme Court and other Canadian courts have developed nine inconsistencies in its model. The nine inconsistencies have developed mainly because the Supreme Court and other court rulings have not consistently upheld the principle of one person, one vote, but instead have been based mainly on the party-democracy model, which prioritizes the interests of parties and candidates (and mainly the interests of the dominant parties and their supporters) over the interests of all voters, and the interests of third parties. Not surprisingly, the dominant political parties also favour the party-democracy model, and have largely fashioned the political finance system to protect their interests and the interests of their wealthy supporters (who provide significant portions of the

dominant parties' annual donations). Following the deference to Parliament approach taken in many constitutional cases, the Supreme Court has deferred to the statutory choices made by the dominant parties in the area of political finance even when they are inequalitarian.

As a result, the Supreme Court and other courts have approved of statutory provisions that: provide public funding only for some parties; provide more public funding for dominant parties; limit spending by third parties to a fraction of the amounts allowed for parties and candidates, and; allow for an individual wealthy supporter of a party to spend the same amount during an election as a citizen group supported by tens of thousands of people with low incomes is allowed to spend. In addition, as detailed in Chapter 3, the dominant parties have developed other statutory provisions that give party leaders and party executives essentially complete control over who runs as a candidate for their party, and that favour nomination contestants, candidates, electoral district associations (EDAs), parties and party leadership contestants that are supported by wealthy individuals and interest groups, including allowing for annual donations of amounts that far exceed what many voters can afford, and allowing for loans by financial institutions of unlimited amounts, and also keeping open a significant loophole that effectively allows for donations by businesses and other organizations that exceed the annual donation limit.

As detailed in Chapter 4, when the federal Canadian gifts, benefits, favours, conflicts of interest and lobbying rules that are part of the broader political finance system are evaluated based on the three fundamental

principles of the Supreme Court's egalitarian model, the conclusion is also that the rules do not align with the model. Under the current rules, secret, unethical gifts are legal, as is secret, unethical lobbying. Politicians and public officials are allowed to participate in policy-making processes even when they have a direct, financial conflict of interest. As well, based on rulings by the federal Ethics Commissioner and Commissioner of Lobbying, lobbyists have been allowed to do favours for politicians and then lobby them for favours, and the Commissioner of Lobbying is proposing (as of May 20, 2023) to gut key ethical lobbying rules in ways that will allow lobbyists to secretly fundraise unlimited amounts of money, and campaign nearly full-time, for politicians and party leaders at the same time as lobbying them.

The more egalitarian model I propose in Chapter 5 is based in part on the open-democracy model that gives more weight to the interests of voters, taking into account the actual level of support voters provide to contestants, parties, candidates and third parties. Canada's democratic system can function without parties (as Nunavut and the Northwest Territories prove) but it cannot function without voters. Starting with the basis of the Supreme Court's model, John Rawls' theoretical framework for protecting the interests of the most vulnerable, I incorporated into the proposed model other theoretical approaches to political processes, international standards and international law requirements, Canadian case law on the issue of appearance of integrity, behavioural psychology research, as well as Amartya Sen's approach of focusing on real evidence when developing theoretical

frameworks for proposing solutions to social problems – evidence of both the reality of the problem and also the real effects of any proposed solution.

I present evidence in Chapter 2, section 2.10, of how Supreme Court and other court rulings are inconsistent with the Court's egalitarian model in nine ways, and also extensive evidence through chapters 3 and 4 and 6 and 7 of the problems with the current rules, and the real effects of the solutions I propose to the extent that can be determined (including in the 28 charts contained in these and later chapters). I note in Chapter 5, subsection 5.2.12, that there is not extensive evidence of the public's standards and expectations concerning integrity in political processes, as not many surveys of the attitudes of Canadians in this area have been done. As a result, the more egalitarian model that I propose is based somewhat on my projection of what fundamental systemic changes would give the public confidence in the integrity of politics using the Supreme Court's technique of applying logic and common sense.

I conclude in Chapter 5 that fully upholding the first key principle of the egalitarian model of one person, one vote (substantive equality of participation) in all political processes is necessary in order to uphold fully the second fundamental principle of ensuring the integrity of political processes, and that fully ensuring the appearance of integrity is necessary to ensuring substantive equality of participation. I also conclude that strictly limiting donations, loans and other contributions (including by party leaders and executives), providing public funding and supports to address systemic disadvantages, and more access to the public airwaves, are the egalitarian

ways of ensuring fulfillment of the third fundamental principle, that is, ensuring voters are adequately informed to participate in political processes that have integrity. In other words, I conclude that large donations, loans and other forms of support by private wealthy interests, and by party leaders and executives, systemically undermine the integrity of political processes.

The more egalitarian model I propose in Chapter 5 based on a framework of 19 general standards that, I contend, resolves the nine inconsistencies in how the Supreme Court's model has been applied by the Court and other Canadian courts. The standards are consistently based on the three key principles, in order of priority, of ensuring integrity, substantive equality, and equality in the provision of information to voters to make informed choices. The framework expands on these three key principles and extends them consistently through all the areas of political finance, gifts, benefits, conflicts of interest and lobbying.

The result is that the model I propose includes additional key principles and standards: to allow voters to choose their candidates through controlling their EDA; to allow party caucuses choose their own representatives for parliamentary committees; to prohibit interference and favouritism by party leaders and party executives; to limit donations, loans, gifts, benefits and favours to a level an average voter can afford; to limit spending based on actual level of voter support, and; to use targeted public subsidies to address structural inequalities based on systemic disadvantages caused by past and ongoing discrimination. As well: to ensure equality of opportunity to participate in all political processes based on actual level of voter support; to

ensure more equal access to media and social media based on actual level of voter support; to prohibit participation in policy-making when there is even an appearance of a conflict of interest; to require full, regular and timely disclosure of donations, loans, gifts, benefits, favours, assets, liabilities and other financial interests, conflicts of interest and lobbying; to prohibit unethical lobbying, and; to ensure fully independent oversight and enforcement to ensure fairness and integrity, and the appearance of fairness and integrity, in every part of the system, including oversight of political parties given they are in so many ways clearly public entities not private clubs.

In section 5.4, I set out a general argument why this framework and the 19 general standards, based as they consistently are on the Supreme Court of Canada's three key egalitarian principles, should be upheld as constitutional.

Based on this more egalitarian model and the extensive evidence I present of the problems with the current rules, along with examples of solutions proposed or implemented at the international level and in other jurisdictions, Chapter 6 proposes that the federal Canadian political finance rules for registration, donations and loans, spending, public subsidies and disclosure for nomination contestants, candidates, EDAs, parties, party leadership contestants and third parties, and the rules for media and social media, should be changed in 165 ways in order to align with a more egalitarian model.

And, as set out in Chapter 7, I propose that the federal Canadian rules for gifts, benefits, favours, conflicts of interest and lobbying for politicians,

public officials and lobbyists should be changed in 36 ways to align with a more egalitarian model. I also call for five comprehensive studies to provide answers to key questions needed to determine the specifics of some of the changes I am proposing:

1. a comprehensive study of the actual costs of informing voters and operating as a candidate, EDA and party (proposal #33, to inform the setting of spending limits, and to determine if any generally applicable public subsidies are needed);
2. a comprehensive study of the average time period of a federal government policy-making process, as much as that can be determined (proposal #132, to inform the setting of spending limits for participation in policy-making processes);
3. a comprehensive study of third parties (proposal #151, to identify sectors of groups that face systemic disadvantages, to inform the setting of subsidies for these groups);
4. a comprehensive study of number of lobbyists who are former politicians and public officials (proposal #193, to inform the setting of cooling-off periods), and;
5. a comprehensive audit of donations going back to 2004 to determine the extent of funneling of donations, and also any connections between donations and government contracting (proposal #105, to inform changes to the political finance system, including enforcement).

At times in some of the above categories of rules, I propose a newly developed measure because there are no examples to draw on from other jurisdictions. As a result, I am projecting a solution onto the problem, and trying to anticipate unintended consequences, but it is entirely possible that there could be consequences I haven't anticipated. If there are unintended

consequences I have not anticipated, there may be better solutions to these problems.

Ensuring actual integrity and the appearance of integrity in all political processes is the focal point of the changes I propose. Essentially, I am extending to everyone who runs for public office, or who is a politician or public official, and to anyone who tries to influence their decisions, and all of the political processes in which these political actors are involved, the principle articulated by the Supreme Court in *Harvey v. New Brunswick* that “If democracies are to survive, they must insist upon the integrity of those who seek and hold public office”¹⁵¹⁶ and the principles set out in *R. v. Hinchey* (some of which I have cited in subsection 5.2.9) that:

“our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question

...

“it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern

...

“given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe. For the public, who is the ultimate beneficiary of honest government, it is not so easy to sort out which benefits are legitimate and which are laden with a sinister motivation. Moreover, it is inefficient for a government to be paralyzed by rumour and innuendo while an inquiry is made into the motivation behind a certain benefit or advantage conferred on an official.”

¹⁵¹⁶ *Harvey*, *supra* note 37, at paragraph 61.

...

“The magnitude and importance of government business requires not only the complete integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole.”¹⁵¹⁷

The more egalitarian model I set out, and the changes I propose, extend these principles to all political actors to prevent harms to the appearance of integrity of all political processes so that the processes are not paralyzed by appearances of conflicts of interest, and to help ensure the public can have confidence in the actual integrity of all of these processes.

The dominant federal parties, namely the Liberals and Conservatives, both backed to a significant degree by wealthy individual donors including big business executives (as detailed in Chapter 3), have shown little interest in recent years in closing all the many loopholes that allow those wealthy interests to support them and their candidates and EDAs at a level that causes apparent conflicts of interest, and actual conflicts of interest. The leaders of these two parties have also shown little interest in recent years in closing the loopholes that allow themselves and all other public officials to hide their financial interests from the public, and to participate in policy-making processes when they have real financial conflicts of interest, and to be lobbied in secret by people who have helped them win and maintain power, and their parties prosper financially, or given them gifts or other benefits or done favours for them.

¹⁵¹⁷ *R. v. Hinchey*, *supra* note 35, at paragraphs 14, 17, 18 and 94.

Meanwhile, as mentioned in chapters 6 and 7, the main federal opposition parties the New Democratic Party, Bloc Québécois and Green Party, while complaining about and criticizing these kind of actions of the ruling party Conservatives and Liberals since 2007, have in the past 15 years only introduced a couple of private member bills aimed at closing any of the loopholes, and mainly to provide federal parties with guaranteed annual per-vote public financing which is in their parties' interests but not necessarily in the public interest. The next section proposes a possible avenue for getting around the interests of these politicians and parties to make at least some changes to rules so that they align more with a more egalitarian model.

8.2. Structural and positive rights court cases and rulings as a way forward?

Richard Katz and Peter Mair developed and set out in 1995 as a counter argument to the proposal of public subsidies a concern that the main political parties would tend to act as a “cartel” to design any public funding system to favour themselves and discourage new parties.¹⁵¹⁸ While the main parties have not always done this, for example the Liberal government of Prime Minister Chrétien established a per-vote subsidy in 2004 designed in a way that greatly assisted the Green Party, the Bloc Québécois and the NDP in the following 11 years, they have at other times made changes that support the cartel theory. The subsidy was decreased annually and then eliminated

¹⁵¹⁸ Richard S. Katz and Peter Mair, “Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party,” (1995) 1 *Party Politics* 5. See also Katz (2011), *supra* note 1295.

by the Conservatives from 2011 to 2015, a move that, at the time, was opposed by the Liberals as they were having difficulty raising money through private donations. However, after expressing openness in late 2016 to reinstating the per-vote subsidy, the Liberal government of Prime Minister Justin Trudeau ultimately rejected in early 2018 proposals from the Green Party and Bloc to reinstate it, and the Conservatives supported that rejection, likely in no small part because both the Liberals and Conservatives were having success in fundraising through private donations while the Green Party and Bloc Quebecois were not having as much success.¹⁵¹⁹

Despite the exception to the rule of Chrétien enacting the per-vote subsidy, as I documented in Chapter 3 the Conservatives and Liberals have largely structured, changed and maintained Canada's political finance system to benefit themselves, most specifically by maintaining a high donation limit. As Chart 6 in subsection 2.2.9 shows, a higher average percentage of donors to the Liberals and Conservatives made an annual donation of \$1,000 or more total from 2016 to 2020 (6.6% of donors to the Liberals and 4.4% to the Conservatives) than the three other main parties (2.6% to the NDP; 2.1% to the Greens; 0.86% to the Bloc). As well, Chart 6 shows that the Liberals and Conservatives received a significantly higher percentage on average of their

¹⁵¹⁹ Laura Ryckewaert, "Should federal election laws be amended to disallow cash-for-access events with government ministers?" (October 31, 2016), HillTimes.com, online: <<https://www.hilltimes.com/2016/10/31/federal-election-laws-amended-disallow-cash-access-events-government-ministers/85660>>. Abbas Rana, "Liberal MPs want per-vote subsidies for political parties back," (December 5, 2016), HillTimes.com, online: <<https://www.hilltimes.com/2016/12/05/liberal-mps-want-per-vote-subsidies-political-parties-back/89818>>. The Canadian Press, "Report says reviving political subsidies costs \$44M per year, Liberals shut door," (January 30, 2018), CTVNews.ca, online: <<https://www.ctvnews.ca/politics/report-says-reviving-political-subsidies-costs-44m-per-year-liberals-shut-door-1.3781846>>.

total annual donations in donations of \$1,000 or more (41.9% of donations to the Liberals, and 26.7% of donations to the Conservatives) compared to the other three main parties (18.8% to the NDP; 16.3% to the Greens; 8.5% to the Bloc). Also, as detailed in Chart 26 in Chapter 6, section 6.8, the tax credit system for donations likely also benefits the Liberals and Conservatives more than the other parties, as people in the highest income brackets (whom, I project, are more likely making donations of \$1,000 or more) make up 32.2 percent of the claimants and receive 42.8 percent of the total public funding handed out.

In addition, as detailed in Chapter 3, section 3.20, while the candidate election expenses reimbursement system benefits all the main parties as other than a few exceptions each election only their candidates receive reimbursements, it benefits the Conservatives and Liberals more as they almost always (with only one except in recent elections) have significantly more candidates who meet the threshold requirement to receive the reimbursements. Meanwhile, all the main parties and their candidates benefit more than smaller parties and their candidates from the party election expenses reimbursement system. As also detailed in Chapter 3, section 3.20, in the six federal elections from 2004 to 2019 inclusive, the five main parties were the only parties that received reimbursements.

The main parties also benefit most from the fact that unlimited loans are allowed, as their ability to meet the threshold to receive election expense reimbursements gives financial institutions the security they need to extend loans to them to pay for their election expenses (all the main parties obtain

loans to pay for 30 percent up to 100 percent of their election expenses, as detailed in Chart 10 in Chapter 3, subsection 3.9.1). All the main parties also benefit most from the fact that independent candidates are prohibited from raising funds until a federal election campaign period begins.

As a result, overall while I agree with the conclusion that the main parties have maintained many key parts of the political finance system as a cartel that benefits them all, I also contend that the Liberals and Conservatives have maintained some parts of the system as a duopoly – the donation limit, tax credit for donations, and candidate reimbursements for election expenses – that benefits themselves the most.

In addition, given that either the Liberals and Conservatives have been in power since 1985 when the first comprehensive ethics and lobbying rules began to be enacted, and that they have held majority power for 27 of the past 38 years, they have benefited more than the other parties from the loopholes detailed in Chapter 4, and addressed in Chapter 7, that allow for secret investments by Cabinet ministers and their staff and participating in policy-making even when in a financial conflict of interest (i.e. even when you will profit from the decision you make), and allow for secret lobbying and gifts and favours from lobbyists (who are most likely to lobby and try to buy influence with ministers and their staff, given their decision-making powers). These loopholes and secrecy have reduced the possibility of unethical activities being disclosed, as well as allowed for clearly unethical activities to receive a stamp of approval by the federal Ethics Commissioner and Commissioner of Lobbying and their predecessors several times (as detailed

in Chapter 4, sections 4.3 and 4.5), thereby likely reducing the impact of these activities on the public's impression concerning the integrity of both parties and their leaders and top politicians.

As a result, moving forward to make changes so that Canada's political finance and policy-making systems are more egalitarian becomes a question of either waiting for the Liberals or Conservatives to change their dominant, duopoly policy stance as Chretien did in 2003 by enacting the per-vote subsidy, or finding another way to make these changes, for example through obtaining proactive court rulings. The Supreme Court itself stated in 2002 in *Sauvé* that:

...it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.¹⁵²⁰

Colin Feasby proposed in 2005 that the Supreme Court and other Canadian courts should not be as deferential to the legislature in cases involving democratic process issues and should, instead, take into account the “electoral context and the problems that face actual participants in the electoral process” as well as process theory and political markets theory, which both contend that politicians have a self-serving interest in shaping political process rules to protect the status quo or even enhance their power and position.¹⁵²¹ As a result, the courts should proactively deploy democratic

¹⁵²⁰ *Sauvé*, supra note 1115, at para. 15.

¹⁵²¹ Feasby (2005), supra note 10, at 237-239 and 273-277, referring to John Hart Ely's process theory, and the political markets theory of Samuel Issacharoff and Richard Pildes.

and human rights principles as the basis to overturn self-serving statutory measures enacted by politicians.¹⁵²²

Yasmin Dawood echoed that proposal in 2006, and argued that the courts should not defer (as the Supreme Court of Canada did in *Harper*) to legislatures concerning the design of political finance statutes but should instead review the statutes by focusing on the overall goal of fair distribution of power in a democracy, and should require the legislature to make the case that it has achieved this goal by balancing three competing objectives: preventing the domination of the electoral process by the wealthy; allowing citizens to criticize the government, and; enabling challengers to compete effectively against incumbents.¹⁵²³ In effect, this is an argument for the Supreme Court to base its evaluations of these statutes on the open-democracy model.

In 2011 Michael Pal,¹⁵²⁴ and 2012 and 2013 Yasmin Dawood,¹⁵²⁵ expanded on this approach, both outlining the “structural theory” and “rights theory” approaches deployed in U.S. scholarship for critiquing statutory changes made by the main political parties to the laws of democracy, and how the approaches had also been up to that time somewhat deployed in Canada also to critique changes to the laws of democracy, and also somewhat by the

See this point made also in Feasby (2006), *supra* note 2, at 266-267, and in Feasby (2007), *supra* note 3, at 543-545.

¹⁵²² Feasby (2005), *supra* note 10, at 278-282 and 289.

¹⁵²³ Dawood (2006), *supra* note 2, at 271-273 and 291-293.

¹⁵²⁴ Pal, “Breakdowns,” (2011), *supra* note 205.

¹⁵²⁵ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review,” (2012), Vol. 62, *University of Toronto Law Journal* 499 (hereinafter “Dawood (2012)”). Dawood (Fall 2013), *supra* note 10.

Supreme Court of Canada and other courts to some extent in their rulings.¹⁵²⁶

Pal then argues that the structural theory approach is better than the rights theory approach for critiquing the law of democracy and challenging “breakdowns” in democratic process that lead to partisan and incumbent self-dealing and entrenchment of interests.¹⁵²⁷ Dawood proposes a “structural rights” approach that calls on the courts to design fundamental democratic rights that can be used as the basis for evaluating and rejecting statutory measures that establish institutional and process parts of Canada’s democratic system that are designed by governments (or legislatures) to protect partisan self-interests or to undermine the rights, as some U.S. scholars have argued the U.S. Supreme Court has done in some cases.¹⁵²⁸

I propose that the academic argument over which approach is more effective for critiquing laws of democracy does not have to be resolved in favour of one or another approach for the purpose of using both approaches as a basis for court cases that challenge statutory provisions. Arguments based on all three approaches – structural, rights and structural rights – can be submitted to the courts, and the courts will decide which approach to use in ruling on each case.

I agree with Dawood’s conclusion that the Supreme Court of Canada has established four key bases for the “law of democracy” – 1. the right to effective representation; 2. the right to meaningful participation; 3. the right to

¹⁵²⁶ Pal, “Breakdowns,” (2011), *supra* note 205, at 304-319. Dawood (2012), *supra* note 1525, at 508-519. Dawood (Fall 2013), *supra* note 10, at 270-289.

¹⁵²⁷ Pal, “Breakdowns,” (2011), *supra* note 205, at 319-328 and 344-347.

¹⁵²⁸ Dawood (2012), *supra* note 1525, at 519-525, 530-537 and 550-561. Dawood (Fall 2013), *supra* note 10, at 262-269.

equal participation; and 4. the right to a free and informed vote¹⁵²⁹ and that these can and should be used as the fundamental grounds for court cases challenging problem areas of the current rules. However, as outlined in Chapter 5, subsections 5.2.7 and 5.2.9, I contend that the Court has also established a fifth democratic right to political processes that have integrity, and appear to have integrity, so that the public can have confidence in them. I propose that this fifth right should also be used as a ground for challenging current problem areas in the laws of political finance, gifts and benefits, conflicts of interest and lobbying.

To be clear, by “integrity” I do not mean the same thing as Patrick Monahan in 1987 proposed as the basis for judicial review under the *Charter*, as he meant democratic process integrity, most especially ensuring participation rights and equal access to political processes, including access to information for participation, which essentially cover the same areas as the four rights identified by Dawood.¹⁵³⁰ Instead, what I mean is ensuring that apparent conflicts of interest caused by unethical or corrupt activities are not allowed to undermine political processes. As mentioned in subsection 5.2.7, Pal¹⁵³¹ and Dawood¹⁵³² and many other scholars who deploy the democratic process framework in analyzing Canadian law talk about preventing abuses of power, and the self-interest of politicians, but essentially only in terms of preventing them from abusing their powers in order to advance their partisan

¹⁵²⁹ Dawood (Fall 2013), *supra* note 10, at 269-279.

¹⁵³⁰ Monahan (1987), *supra* note 1133 at 89, 92, 137-151 (esp. 146) and 155-158.

¹⁵³¹ Pal, “Breakdowns,” (2011), *supra* note 205, at 328-343.

¹⁵³² Dawood (2012), *supra* note 1525, at 526-528 and 537-550.

self-interest when they design democracy laws, in order to ensure fair and legitimate democratic (mainly electoral) processes.¹⁵³³

Instead, I am talking about preventing abuses of power by preventing those who seek public office, and politicians and public officials, from receiving donations, loans, gifts, benefits and other forms of support that create an apparent conflict of interest that could influence them in any political or policy-making process, and could lead them to advance a private interest over the public interest, including by designing the laws of democracy in ways that undermine the rights to equal, meaningful participation, and adequate information to participate effectively, in political processes.

In addition, as set out in Chapters 3 and 4, and 6 and 7, I contend that the political finance, gifts and benefits, conflict of interest and lobbying rules must ensure substantive, not just formal, equality of opportunity for substantive equality of participation in all political processes. Many of Canada's current federal rules favour wealthy individuals and interest groups, including the rules that allow nomination contestants to donate \$1,000 to their own campaign, and candidates to donate \$5,000 and party leadership contestants to donate \$25,000, and the rules that allow one individual or a private corporation that has only few shareholders to spend as a third party as much as citizen organizations with thousands or tens of thousands of

¹⁵³³ Dawood (2012), *supra* note 1525, at 527-530. Although again, as mentioned in section 5.2.7, this is puzzling given that Dawood summarizes how the right to equal participation is a part of the framework of government integrity scholarship fully in the U.S. context in Dawood, Corruption (2014), *supra* note 21, esp. at 123-127. See also Dawood (2015), *supra* note 1047, at 334-338. See also Dawood (2006), *supra* note 2, esp. at 277-282.

members, and the rules that allow for unlimited spending on advocacy and lobbying efforts during policy-making processes.

As a result, I agree with David Baker's proposal that court cases challenging various rules should also be based not only on section 3 (and) but also on subsection 15(1) *Charter* rights, and should argue not only to strike down inegalitarian rules, but also that the government has a positive duty to amend current rules and enact new rules to ensure the country's political finance system is consistent with the principle of "one person one vote" pursuant to section 3 of the *Charter* (based in part on upholding the unwritten constitutional principles of the rule of law and democracy, as elucidated by the Supreme Court of Canada in the *Secession Reference*),¹⁵³⁴ and to ensure that political donation, loan, spending and lobbying rules do not undermine substantive equality in Canada by allowing wealthy interests to dominate election and policy debates through spending in ways that marginalize economically disadvantaged people, given that their equal participation is a matter of "exceptional importance".¹⁵³⁵ Kerri Froc has made a similar argument that section 3 (and section 28) of the *Charter* should be used as the

¹⁵³⁴ *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, <<https://canlii.ca/t/1fqr3>>, paras. 49, 61-69 (re: democracy), 70-78 (re: constitutionalism and the rule of law).

¹⁵³⁵ David Baker's arguments were expressed in the application to intervene filed by Democracy Watch, and ruled on, in *O'Leary v. Canada (Attorney General)*, 2019 ONSC 6057 (CanLII), <<https://canlii.ca/t/j2whp>>. The argument that the participation of economically disadvantaged people in political processes is a matter of "exceptional importance" is part of an argument that the courts should not defer to Parliament when assessing under the section 1 *Charter* test whether a statute's objectives are pressing and substantial, and whether its effects are proportional (*Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at para. 97).

basis for challenging the fact that Canada's election system does not guarantee gender parity in the House of Commons.¹⁵³⁶

In several rulings, the Supreme Court of Canada has left open the possibility of positive rights rulings that require government to protect rights and/or issued orders mandating government action. For example, the Court has left it open to order, under section 2 *Charter* rights, changes to statutes to prevent "certain conditions which muzzle expression" or to ensure "public access to certain kinds of information"¹⁵³⁷ or to give rights to people currently denied rights that others have (i.e. to correct "underinclusion").¹⁵³⁸ The Court ruled in *Dunmore* that such a positive rights claim must fulfill three criteria: 1. the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; 2. the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression, and; 3. the government must be responsible for the inability to exercise the fundamental freedom.¹⁵³⁹

A strong dissent in the Court's 5-4 split ruling in *City of Toronto* made it very clear that almost half the Court at the time (two justices have retired and

¹⁵³⁶ Kerri A. Froc, "No Parity, No Problem? Women's Underrepresentation in Parliament as a Charter Violation," (Spring 2015) 2015 *Journal of Parliamentary and Political Law* 483.

¹⁵³⁷ *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, 1993 CanLII 58 (SCC), [1993] 2 SCR 995, at p. 1039, as quoted in *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 SCR 673, online: <<https://canlii.ca/t/1rw0g>>, at para. 26 (hereinafter "*Baier*").

¹⁵³⁸ *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 SCR 1016, online: <<https://canlii.ca/t/dlv>>, paras. 24-26 (hereinafter "*Dunmore*"), as quoted in *Baier*, paras. 27-29.

¹⁵³⁹ *Dunmore*, *supra* note 1538, paras. 24-26.

been replaced since)¹⁵⁴⁰ felt that characterizing a negative right as a positive right is a choice, and that the Court should generally favour treating positive rights cases as negative rights cases in order to not place the barrier in front of *Charter* litigants of having to fulfill the three-part Dunmore test.¹⁵⁴¹ The Court has also issued positive rights rulings ordering government action to correct discrimination, including discrimination due to economic disadvantage even though that ground is not specified in subsection 15(1).¹⁵⁴² All of these precedents make it clear that cases seeking to expand rights to equal participation, key information and integrity in political processes have a chance of succeeding.

Given the resistance of the main parties, especially the Liberals and Conservatives, to making egalitarian changes to Canada's federal political finance, gifts and benefits, conflict of interest and lobbying laws, I propose that the five democratic rights mentioned above (which have been established by the Supreme Court of Canada under sections 2 and 3 of the *Charter*), and section 15(1) *Charter* rights, and structural theory, rights theory and structural rights approaches, and the Sauvé doctrine that the courts should not defer to Parliament when it makes legislative choices that "threaten to undermine the foundations of the participatory democracy" should all be used as the basis for the court cases proposed in the list set out below. Some of the proposed

¹⁵⁴⁰ Justice Rosalie Abella, who wrote the dissent, retired on July 1, 2021, and was replaced by Justice Mahmud Jamal, who became the first person of colour appointed to the Court. Justice Michael Moldaver retired on September 1, 2021, and was replaced by Justice Michelle O'Bonsawin, who became the first Indigenous justice appointed to the Court.

¹⁵⁴¹ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII), online: <<https://canlii.ca/t/jjc3d>>, paras. 86-186, esp. 152-156.

¹⁵⁴² *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII), online: <<https://canlii.ca/t/jb370>>, esp. paras. 132-136.

cases challenge the constitutionality of various aspects of the laws, and some would also request that the courts issue positive rights rulings setting out the positive duties of the government and Parliament to amend the current rules in key, egalitarian ways.

It should be noted that I propose these cases fully aware that some commentators, such as Gerald Rosenberg, have concluded that the courts offer a “hollow hope” – at least for movements seeking change in the U.S., based on the fact that it took governments 20 years to desegregate schools after the U.S. Supreme Court ruled segregation in education unconstitutional.¹⁵⁴³ Other commentators argue that PIL can help mobilize a movement and legitimize its claims or the personal claims of its members¹⁵⁴⁴ and that strategic, “impact” cases can destabilize institutions and increase accountability¹⁵⁴⁵ and raise awareness, change public opinion, and threaten institutions with legal costs.¹⁵⁴⁶ Cummings and Rhode argue the history shows that to be effective, pursuing such cases must be: one part of a multi-

¹⁵⁴³ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University of Chicago Press, 1991) as cited in Nancy Nicol and Miriam Smith, “Legal Struggle and Political Resistance: Same Sex Marriage in Canada and the USA” *Sexualities* (2008) 11: 667 at 668.

¹⁵⁴⁴ Stuart Scheingold “Constitutional Rights and Social Change: Civil Rights in Perspective” in Michael W. McCann and Gerald L. Houseman (eds) *Judging the Constitution: Critical Essays on Judicial Lawmaking* (Glenview, IL: Scott, Foresman, 1989), at 73–91, and; Alan Hunt, “Rights and Social Movements: Counter-Hegemonic Strategies” *Journal of Law and Society* (1990) 17(3) Autumn: 309–28 – cited in Nancy Nicol and Miriam Smith, “Legal Struggle and Political Resistance: Same Sex Marriage in Canada and the USA” *Sexualities* (2008) 11: 667 at 669.

¹⁵⁴⁵ Charles F. Sabel & William H. Simon, “Destabilization Rights: How Public Law Litigation Succeeds” (2004) 117 Harv. L. Rev. 1015, 1021 as cited in Scott L. Cummings and Deborah L. Rhode, “Public Interest Litigation: Insights from Theory and Practice” (2009) 36 *Fordham Urban Law Journal* 603 at 608 (hereinafter “Cummings and Rhode (2009)”).

¹⁵⁴⁶ Michael W. McCann, “How Does Law Matter for Social Movements?” in *How Does Law Matter? Fundamental Issues in Law and Society Research* (1998) Bryant G. Garth & Austin Sarat eds., at 83-84 as cited in Cummings and Rhode (2009), *supra* note 1545 at 608.

pronged social change effort that is fully supported by a cohesive movement for social change; adequately funded to ensure comprehensive litigation efforts are possible (especially in ensuring enforcement of court orders), and; evaluated systematically and continuously to ensure strategic litigation decisions and efforts over the long-term.¹⁵⁴⁷

Orly Lobel posits that, when pursuing either legal reform or extralegal activism aimed at transformative changes, one should be concerned about and monitor the possibility of “cooptation” that can essentially neutralize efforts aimed at winning changes.¹⁵⁴⁸ Lobel’s review of the literature leads her to conclude that the following six key causes of cooptation can undermine PIL: 1. lack of the resources and energy needed to win the changes fully (echoing the concern of Cummings and Rhode); 2. that filing one specific case in specific legal forums like courts can undermine comprehensive calls for change, and as a result fragment a social movement; 3. that lawyers handling the PIL can control the agenda of the movement, not always in the movement’s best interests; 4. that the effects of court rulings are inherently limited because they do not enforce themselves, nor necessarily change public opinion or actions; 5. that becoming involved in PIL, and the legal system generally, can undermine other social change tactics (in part because of the resources required for PIL), and; 6. that existing social arrangements can use legal rules set out in statutes, regulations or court rulings (if a PIL case is lost), and also social and cultural norms, to resist, restrict or reject

¹⁵⁴⁷ Cummings and Rhode (2009), *supra* note 1545.

¹⁵⁴⁸ Orly Lobel, “The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics” (2007) *Harvard Law Review* 120: 937.

change efforts. No matter what, Lobel argues, political and market powers are always forces that can undermine efforts.¹⁵⁴⁹

With these caveats in mind, and especially taking into account the advice that such cases should be pursued only when backed by a cohesive, well-resourced citizen movement, here is the list of proposed cases:¹⁵⁵⁰

1. Case challenging donation limits: under section 15(1) on the basis that they discriminate against people with low incomes; under section 3 on the basis that they allow wealthy individuals to participate more in politics, and to have undue influence that undermines the public's confidence in the integrity of political processes, and; on the basis that they undermine the foundations of participatory democracy and further the interests of the Liberals and Conservatives more than other parties;
2. Challenge to third-party spending limits: under section 15(1) on the basis that they discriminate against people with low incomes; under section 3 on the basis that they allow wealthy individuals to participate more in politics and to have undue influence that undermines the public's confidence in the integrity of political processes (as they allow one voter to spend the same amount as a citizen group with thousands of members),¹⁵⁵¹ and; on the basis that they undermine the foundations of participatory democracy;

¹⁵⁴⁹ Lobel, "The Paradox," *supra* note 1548 at 949-958.

¹⁵⁵⁰ Colin Feasby discusses a similar list of possible cases concerning political finance issues, but in the context of the 2006 changes to the federal political finance rules, in: Feasby (2007), *supra* note 3, at 565.

¹⁵⁵¹ The majority of the Ontario Court of Appeal very briefly considered and rejected (in only two paragraphs) this argument in its *Working Families II* ruling, but did so by mischaracterizing the argument as being based on a claim that some third-party voices are more valuable than others. The argument is, instead, based on the egalitarian principle that all voters have an equally valuable voice and, therefore, one voter who is wealthy should not be able to speak more, or more loudly, than any other voter, nor louder than a citizen group that represents thousands of voters. *Working Families 2 (Appeal)*, *supra* note 131, paras. 73.

3. Challenge to party and candidate election expense reimbursement thresholds: under section 3 on the basis that they violate the principle of one person, one vote by requiring candidates and parties to meet a threshold in order to receive the funding, and; on the basis that they undermine the foundations of participatory democracy and further the partisan interests of the main parties;
4. Challenge to lack of public subsidies that are aimed at correcting systemic disadvantages faced by certain contestants and candidates: a positive rights case under section 3, section 15(1) (and, in the case of women, also under section 28) on the basis that the lack of targeted subsidies amounts to “underinclusion” that discriminates against women, people with low incomes, and visible minorities who are disadvantaged due to historic and ongoing discrimination;
5. Challenge to prohibition on independent candidates raising funds before the election campaign period begins: under section 3 on the basis that the prohibition violates the egalitarian principle of equal opportunity to equal participation; on the basis that it undermines the foundations of participatory democracy and furthers the partisan interests of the main parties, and; also as an “underinclusion” case;
6. Challenge to loopholes that allow for conflict of interests: on the basis that they undermine the public’s confidence in the integrity of political processes, and; on the basis that they undermine the foundations of participatory democracy and further the interests of the Liberals and Conservatives more than other parties;
7. Challenge to secret investment loopholes: on the basis that they deny voters the right to adequate information to participate in political processes; on the basis that they undermine the public’s confidence in the integrity of political processes, and; on the basis that they undermine the foundations of participatory

democracy and further the interests of the Liberals and Conservatives more than other parties;

8. Challenge to secret lobbying loopholes: on the basis that they deny voters the right to adequate information to participate in political processes; on the basis that they undermine the public's confidence in the integrity of political processes, and; on the basis that they undermine the foundations of participatory democracy and further the interests of the Liberals and Conservatives more than other parties.

One can only hope, through a breakdown of the duopoly practices of the federal Liberal and Conservative parties, and of the cartel practices of all of the main political parties and/or through rulings in the court cases outlined above, that significant egalitarian changes will be made to Canada's federal political finance, gifts and benefits, conflict of interest and lobbying laws sooner than later so that many more Canadians have a substantively equal opportunity for substantively equal participation in our elections and policy-making processes, and more complete information to participate effectively, and so that the public has more reasons to have confidence in not only the appearance of integrity, but also the actual integrity of all our political processes.

As for the important question of whether nomination contestants, candidates, EDAs, parties, party leadership contestants, politicians, public officials and lobbyists would comply with more egalitarian rules, that is a matter of effective enforcement and, as I have mentioned a few times in previous chapters, a matter for another thesis.

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