

Partisan Advertising by Incumbent Governments

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I. INTRODUCTION

The power of incumbency offers up a number of vehicles for government messages to the electorate. In Manitoba, as an example, there is an entire branch of the public sector devoted to communication.¹ In addition to the public service, incumbents can make use of news releases, official government documents like newsletters and glossy periodicals, the government's website and other highly visible media like billboards, bus advertisements and bulk mail outs. The value derived from the exposure of incumbency and patronage further tips the communication balance away from challengers and toward the governing party. As Richard Briffault explains, these "built.in" advantages include:

[T]he free media attention he gets during his term in office, to the opportunity to provide constituency service, to the fact that the incumbent was popular enough to win the last election. These advantages contribute to, and are typically reinforced by, the incumbent's superior ability to raise money.²

Simply put, the government has a massive advantage over its rivals when it comes to getting the word out. Why should exclusive use of the public purse for partisan communication be added to this list? Policy, jurisprudence and basic electoral fairness suggest reform should be undertaken to address the incumbent-challenger communications imbalance. This section of the paper proposes two separate solutions to the problem: first, a total ban on all publicly funded partisan government communication; and second, a comprehensive

Manitoba Civil Service Commission, "Communications Services Manitoba Division" \Manitoba Civil Service Commission online: <<http://www.gov.mb.ca/csc/orientman/communicat.html>>. The division's mandate is to "enhance the quality and cost-effectiveness of government advertising and communications while ensuring consistency with provincial objectives, priorities and expenditure guidelines.»

Richard Briffault, "Public Funding and Democratic Elections" (1999) 148 U. Pa. L. Rev. 563 at 569.

publicly funded political communications regime to be shared by incumbents and challengers alike.

II. THE PUBLIC PURSE AND PARTISAN ADVERTISING

A. The Cost of Communication

With the exception of Ontario/ all Canadian tyovinces are free to use public funds to produce and disseminate partisan political messages. The Manitoba NDP government spent \$3.1 million dollars on government advertising in 2005-06,⁴ ostensibly in the name of providing information to the public both inside and outside the province. However, governments have frequently crossed the line between informational advertising and "sham issue advocacy".⁵ The Doer NDP government's recent "Manitoba Means Business" advertising campaign is illustrative. The billboard, television and print advertisement campaign, touted as promoting the province's export industry, ran less than a year before a general election at a total cost of \$340 000.⁶ Certainly, advertisements like this campaign can play a role in advocating a province as an export trade partner if they are properly targeted to the correct market. The problem with the "Manitoba Means Business" campaign, it was later revealed, was that the advertisements ran exclusively inside Manitoba.⁷ This example of an incumbenes use of public funds for partisan promotion is only one in a lengthy line of questionable campaigns footed by taxpayer dollars. There is a long history of federally funded political advertisements designed to promote partisan federalist issues at the expense of nationalist political opponents.⁸

The responses of government actors who are asked to defend these self.-serving campaigns range are largely unsatisfactory. Questioned about his government's

See the *Government Advertising Act*, S.O. 2004, c. 20, which prohibits publicly funded partisan government advertising.

Mia Rabson, upcs want set election dates" *Winnipeg Free Press* {20 May 2007) A10.

Paul NesbittJLarking & Jonathan Rose, "Political Advertising in Canada" in David A. Schultz, ed., *Lights, Camera Campaign! Media, Politics and Political Advertising* (New York: Peter Lang, 2004) 273 at 289. For a definition of "sham issue advocacy" see Richard Hasen, "The Surprisingly Complex case for Disdosure of Contributions and Expenditures Funding Sham Issue Advocacy" (2000) 48 UCLA L. Rev. 265 at 267: "These are not really advertisements about issues but are a form of electioneering without the words of express advocacy."

Tom Brodbeck, "Costly propaganda" *Winnipeg Sun* (5 January 2007) 5.

Ibid.

NesbittJLarking & Rose, *supra* note 5 at 290: "[I]n 1992 when Canada celebrated its 125ch anniversary, the federal government began an aggressive advertising campaign whose goals seemed innocuous, but whose real purpose was to prime a federalist vote in the referendum on a set of constitutional changes in the same year."

television campaign, which touted the province's attractiveness to young people during a by election, Saskatchewan Youth Minister Glen Hagel said:

Most of Saskatchewan really does believe in the future of Saskatchewan, feels it's appropriate to have a positive message about Saskatchewan, and that it's quite appropriate to be continuing to say that.⁹

In Ontario, the McGuinty government defended a colour change in a government produced newsletter from green to Liberal red-and then back to green to avoid further embarrassment-as "simply internal communications".¹⁰ The blue ribbon for justification of publicly funded partisan advertising, however, is reserved for then Manitoba Health Minister Tim Sale. In response to complaints about a government advertising campaign touting the benefits of nursing thanks to NDP improvements, Mr. Sale replied that: "We had to tell Manitobans now nursing has decent wages, it's an exciting career and they should undertake that career."¹¹ These are all examples of partisan communication campaigns that have been unjustifiably funded by public money.

B. Spending and Contribution Limits: Compounding the Problem

Arguably, any form of publicly funded partisan government advertising is repugnant. However, recent electoral financial reform has further exacerbated the power imbalance between incumbents and challengers.

First, consider the effect of spending limits on parties and third parties during elections. The 2000 amendments to the *Canada Elections Act*,¹² which passed constitutional muster in 2004's *Harper v. Canada*,¹³ severely limit the amount third parties can spend during an election. The vigorous dissent in *Harper* acknowledged that, since meaningful speech during a campaign requires the expenditure of sums of money that far exceed the spending limits, the *Canada Elections Act* effectively prevents third parties from having their voices heard: "The evidence shows that the effect of the limits is to prevent citizens from effectively communicating their views on issues during an election campaign."¹⁴

"Saskatchewan Party says NDP should halt ads during byelection" Canadian Press (8 February 2007) (QL).

¹⁰ Richard Brennan, "Slipping propaganda through the loopholes" Toronto Star (1 May 2004) H04.

¹¹ Frank Landry, "Gerrard accuses NDP of ad abuse" *Winnipeg Sun* (26 April 2003), 6.

¹² Bill C2, *An Act respecting the election of Members to the House of Commons, repealing other acts relating to elections and making consequential amendments to other Acts*, 2nd Sess., 36th Pari., 2000, (assented to 31 May 2000), S.C. 2009, c. 9.

¹³ [2004] 1 S.C.R. 827 [Harper].

¹⁴ *Ibid.* at para. 3.

Similarly, new spending limits have been imposed on political parties themselves. In Manitoba, for example, the *Elections Finances Act* sets expense limits for parties and candidates that are calculated by a formula that involves the number of electors in a given district and inflation adjustments.¹⁵ The *Canada Elections Act* also imposes similar spending limits for federal elections.¹⁶ As Scalia J. of the United States Supreme Court has argued, in some settings money *should* receive the same expression rights protection as speech. Referring to American political contribution limits imposed by the *Bipartisan Campaign Reform Act*,¹⁷ Scalia J. said:

[W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.¹⁸

As a result, the spending limits imposed by provincial and federal legislation work to stifle political speech. Lower expense limits reduce the amount of political speech parties and candidates can produce and disseminate. Less political speech inherently favours incumbents, who can ride voter apathy or ignorance to another term. As Bruce Ackerman has noted:

Restricting the flow of cash may also skew the balance of power between incumbents and their challengers. Incumbents go into each campaign with the accumulated reputation they have generated through years of great visibility. Challengers need lots of cash to offset this advantage. By placing an overall limit on funds, aren't we allowing old-timers to tighten their grip on office under the banner of reform?¹⁹

Scalia J. puts it more bluntly in *McConnell*: "The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech."²⁰

The effect of political contribution limits introduced at both the federal and provincial levels must also be considered. In Manitoba, a recent amendment to the *Elections Finances Act* banned all corporate and union contributions to

¹⁵ C.C.S.M. c. E32, ss. 50-52. Using 1999 registered voter numbers and including the inflation index, each political party would have been able to spend \$1.264 million in the recent Manitoba general election. Additionally, ss. 50(2) and 51(2) of the *Elections Finances Act* set advertising expense limits that are about one-half of the total expenditure amount prescribed by the legislation. See Elections Manitoba, "Spending Limits", online: Elections Manitoba <<http://www.elections.mb.ca/main/election/39gen/candidates/spendlimits/>>.

¹⁶ S.C. 2000, c. 9, s. 440.

¹⁷ Pub.L. No. 107-155, 116Stat.81 (2002).

¹⁸ *McConnell* v. *Federal Elections Commission*, 540 U.S.93 (2003) at 252 [*McConnell*].

¹⁹ Bruce Ackerman, "Crediting the Voters: A New Beginning for Campaign Finance" in Walter Dean Burnham, ed., *The American Prospect Reader in American Politics* (Chatham, New Jersey: Chatham House Publishers, 1995) 218 at 220 [Ackerman].

²⁰ *Supra* note 18 at 263.

political parties and candidates.²¹ Individual contributions, meanwhile, were limited to \$3 000 annually.²² The new *Federal Accountability Act* has similarly eliminated union and corporate political contributions and set an annual \$1 000 individual contribution limit.²³

Restrictions on political contributions, combined with election time spending limits, add up to shut down *all* meaningful channels of political speech. Consider the position of a challenger-subject to election spending limits, they must rely on getting their message out to the electorate in non election periods. In Manitoba, this challenger would also be subject to an annual \$50 000 non election advertising spending limit.²⁴ Now, consider a challenger who has complied with the relevant legislation and managed to get their message out, albeit in a reduced and less meaningful form. That challenger still needs to find a way to pay for that message, but contribution limits have clamped down on traditional fundraising nurces. The net result is that contribution limits have combined with expenditure limits to create a political deficit for potential challengers. Simply put, it has become very difficult to break through and convince voters to switch their support from a challenger to an incumbent. This is a powerful advantage for governing parties.

Electoral reform to date has not addressed this power imbalance. While the justification for electoral reform thus far has been the creation of a level playing field,²⁵ it has failed to accomplish this goal and perhaps even worsened the problem. While challengers are left with fewer means to disseminate their messages, incumbents--subject to the same restrictions--can still rely on the perks and privileges of incumbency. Comprehensive electoral reform requires further measures to address the imbalance between incumbents and challengers. The elimination of publicly funded government advertisements is one such measure.

²¹ *Elections Finances Act*, *supra* note 15 at s. 41(1), as am. by *The Elections Finances Amendment Act*, S.M. 2000, c. 9.

²² *Ibid.*

Bill G2, *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, 1st Sess., 39th Parl., 2006, d. 43 and 46(1) (assented to 12 December 2006), S.C. 2006, c.9.

²⁴ *Elections Finances Act*, *supra* note 15 at s. 54.1(1): "[T]he total advertising expenses incurred by a registered political party in a calendar year, outside an election year, shall not exceed \$50,000."

²⁵ See *Harper*, *supra* note 13 at para. 62: "The Coures conception of electoral fairness reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the election process."

III. ADDRESSING THE IMBALANCE

This paper proposes two independent solutions to the incumbent challenger communications imbalance in Canadian politics. The first solution is a total ban on all publicly funded partisan government communication, while the second solution calls for a comprehensive publicly funded political communications regime to be shared by incumbents and challengers alike. The mechanics of both solutions and their relative merits will be addressed, as well as their potential shortfalls. The fundamental difference between them is that one seeks to "level down" advantaged parties while the other seeks to "level up" marginalized challengers.²⁶ The rationale underlying each solution is shared, however, and it is firmly rooted in the concept of electoral fairness. This rationale will now be discussed.

A. Attacking Unfairness: Reasons for Reform

As Canadian courts and commentators have both pointed out, recent developments in election law have been justified on the basis that they promote an egalitarian electoral process. As Andrew Geddis has said, commenting on *Harper*, "[T]he majority of the Court agrees that a legitimately constituted electoral system requires rules to limit the participation of some in order to promote the overall _____ of the process."²⁷ The Supreme Court of Canada first raised this view in *Libman v. Quebec (Attorney General)*, where it held that third party spending limits for the duration of a referendum campaign could be constitutional despite their intrusion on freedom of expression rights.²⁸ While the court in that case found the scheme in question was too repressive to justify the infringement, it nevertheless left the door open to future, less restrictive third party limits on that basis.²⁹ When the Supreme Court upheld Parliament's

²⁶ Hasen explains the distinction between reforms that "level up" and "level down" in "Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers" (1996) 84 Cal L. Rev. 1 at 5 [Hasen]. Programs that level up "increas[e] the ability of those shut out of the political system to participate". Programs that level down "decreas[e] the ability of those with disproportionate political capital to exercise greater influence over the political system."

²⁷ "Liberte, Egalite, Argent: Third Party Election Spending and the Charter" (2004) 42 Alta. L. Rev. 429 at para. 58. See also Colin Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48 McGill L.J. 11 at para. 1: "[M]itigation of the effect of uneven financing is a constitutionally valid objective of election regulations in Europe and Canada".

²⁸ [1997] 3 S.C.R. 569 at para. 42, where the court concluded "the pursuit of an objective intended to ensure the fairness of an eminently democratic process, namely a referendum on a question of public interest, is a highly laudable one".

²⁹ *Ibid.* at para. 77.

2000 *Canada Elections Act* third party spending limit regime in *Harper*, it tied its approval to the *Libman* line of reasoning:

The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*.³⁰

The same rationale should be extended to support either of the two proposed solutions. The problem sought to be addressed by limits on election spending is the same problem sought to be addressed by the proposed solutions: electoral unfairness. Unlimited election spending is problematic because it can tip the balance in favour of those who have the means to spend more:

[U]nlimited political expenditures not only perpetuate the unequal distribution of wealth and put the poor at a disadvantage in the political arena but may also have the effect of silencing the poor. The rich may ... so dominate advertising space in the media and other public domains that the public will, in effect, hear only their message.³¹

Incumbents carry an enormous advantage into an election period, and it should not be assumed that simply "leveling the field" for the length of the electoral process will address this much broader problem.

B. Eliminating Public Funding for Partisan Political Communication

Current electoral law creates an imbalance that cannot be overcome within the constraints of campaign spending limits that apply equally to all parties.³²

Ontario has already addressed the need to reset this imbalance. The McGuinty Liberal government's *Government Advertisement Act*, passed in 2004 and in force as of 2006, eliminates public funding for advertisements whose primary objective is "to promote the partisan political interests of the governing party".³³ The legislation applies to advertisements released by government ministries, the

³⁰ *Harper*, *supra* note 13 at para. 63.

³¹ Owen Fiss, *The Irony of Free Speech* (Cambridge, Massachusetts: Harvard University Press, 1996) at 16.

³² Current political spending and contribution limits are facially neutral, yet they fail to acknowledge the patent imbalance between incumbents and challengers. As Scalia J. noted in *McConnell*, *supra* note 18 at 249 [emphasis original], "[T]his is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quality of electioneering, incumbents are favoured."

³³ *Supra* note 3 at s. 6(3).

Cabinet Office and the Office of the Premier.³⁴ It requires the office of the auditor general to review all government advertising in advance of its release to the public.³⁵ Advertisements that the auditor general decides are non partisan are prohibited and sent back to the government for optional revision.³⁶ There are exceptions to the ban on publicly funded government advertising: the *Government Advertisement Act* does not apply to notices required by law, urgent advertisements about public health or safety, job advertisements, or advertisements about the provision of goods and services to a government office.³⁷ The political party in power is also free to engage in its own partisan promotion, provided the communication is not paid for by the public purse.³⁸

1. *Drawing the line*

Ontario's regime could be used to inform a similar legislative model in Manitoba. Eliminating public funding for partisan government advertisements is not contentious, but, as Ontario has already shown, the crucial component of the regime lies in where the line is drawn between what is viewed as "informational" and what is viewed as "partisan". Manitoba should thus follow Ontario's lead and ban the latter, but legislators must take care not to set the net too wide or too narrow. As Colin Feasby indicates, in the context of casting the election advertising regulatory net,

The neutrality of [an] advertisement indicates that: it does not threaten to destabilize the balance of resources among candidates and political parties. Indeed, this is the type of advertisement that should be viewed as agenda, setting and intrinsically valuable to the political process.³⁹

The same reasoning could be applied to the distinction between informational and partisan advertising: if the content upsets the balance between the parties without adding any intrinsic value to the political process, it should be viewed as partisan and subjected to a public funding ban. This view is consistent with the recommendations of the *Lortie Commission*, which proposed a broad

³⁴ *Ibid.* at s. 1(1).

³⁵ *Ibid.* at s. 2(3).

³⁶ *Ibid.* at s. 2(4).

³⁷ *Ibid.* at s. 2(5).

³⁸ See *ibid.* at s. 1(1): the *Government Advertising Act* applies to government office but would not apply to politicians acting outside that office. Government MPPs are still allowed to advertise outside the scope of the statute. See also: Ontario Ministry of Government Services, News Release, "McGuinty government bans partisan advertising" (6 December 2004), online: MGS <<http://www.gov.on.ca/MGS/en/news/052979.html>> .

³⁹ *Supra* note 27 at para. 18.

definition of election expenses that would capture "all spending that directly or indirectly promotes or opposes a candidate or political party's policies".⁴⁰

Manitoba already has statutory provisions that forbid government advertising. These provisions can also help shape the contours of a new regime. Section 56(1) of the *Elections Finances Act* prohibits all government advertising during an election period, with the exception of publications that are required: by law, for employment contracts or applications, or are in continuation of existing Crown corporation advertisements in support of ongoing Crown corporation programs. This law could be extended to all periods of a government's life based on the rationale discussed above: if a provision can alleviate unfairness temporarily, it is sound policy to make that relief permanent.

Another section of Manitoba's *Elections Finances Act* is also helpful. Section 1 of the act defines election expenses as money spent, liabilities incurred and the value of donations in kind accepted "... to support or oppose, directly or indirectly, a candidate or registered political party in the election". Advertising is explicitly included in this definition: "If these are the type of expenses that are currently regulated in the name of electoral equality, it is somewhat puzzling that they would not continue to be regulated throughout non-election periods as well."

A ban on publicly funded election advertising based on a fusion of Ontario's law and an extension of existing Manitoba laws on government advertising and election spending would provide the missing piece in an otherwise comprehensive political communications regulatory scheme.

C. A Publicly Funded Communications Regime

The problem with the current incumbent communications advantage is that it prohibits challengers from engaging in effective dialogue with voters. Instead of eliminating publicly funded government partisan advertising, electoral reform could move in the opposite direction by funding advertising from incumbents and challengers alike.⁴² A public funding regime is currently in place at the federal level.⁴³ This system, combined with elements of the "voucher" public funding system proposed by two American professors, could be used to "level up" Manitoba political challengers during non-election time. Challengers, along

⁴⁰ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol. 1 (Toronto: Dundurn Press, 1991) at 341 (Chair: Pierre Lortie).

⁴¹ *Ibid.* at s.1(c).

⁴² A broad publicly funded regime would be considered a "level up" program, while a total ban on publicly funded partisan advertising would be a "level down" program. See Hasen, *supra* note 26.

⁴³ Section 435.01 of the *Canada Elections Act*, *supra* note 16, provides political parties with funding based on votes received in the previous general federal election.

with incumbents, could be provided with funds to spend on communication throughout the duration of the government's life. This would allow all parties to expend an equal amount of money on promotion, thus addressing the imbalance the current spending regime has left in place.

1. *Quarterly Allowances-the Federal Funding Regime*

Registered federal political parties are entitled to quarterly public funding as a result of changes to the *Canada Elections Act* that took effect in 2004.⁴⁴ Parties are now eligible for funding based on their support in the previous general federal election. To be eligible, a party must secure either at least two per cent of the valid votes cast in the election or at least five per cent of the valid votes cast in the electoral districts in which it endorsed a candidate. The allowance is calculated based on a formula that, subject to inflation, pays out \$0.4375 per vote received.⁴⁶ While the regime is still in its infancy, it has already been credited as a major accomplishment in electoral reform that has given a new voice to non-traditional sources.⁴⁷ In that sense, the funding regime has helped to address an imbalance between traditional and nontraditional political parties. Applied in Manitoba--where no similar regime currently exists--it could address the analogous incumbent-challenger communications imbalance. It should be noted this federal funding regime operates along with other public funding initiatives like free broadcast time for parties during federal elections and expense reimbursement.⁴⁸

2. *The Voucher System*

Ackerman and Richard Hasen have both proposed innovative public finance reforms for the American federal political scene. Both systems operate as a publicly directed voucher model. Ackerman's "Patriot" system gives each voter a card with 10 "red-white, and blue" dollars to self distribute either directly to political parties or to political brokers who can do the same on their behalf.⁴⁹

⁴⁴ Bill C24, *An Act to amend the Canada Elections Act and the Income Tax Act (Political Financing)*, 2⁰⁰ Sess., 37th. Parl., 2003 (assented to 19 June 2003), S.C. 2003, c. 19.

⁴⁵ *Canada Elections Act*, *supra* note 16 at s. 435.01(1).

⁴⁶ *Ibid.* at s. 435.01(2).

⁴⁷ See "Chief Electoral Officer of Canada Announces First Quarter Allowances to Be Paid to Registered Political Parties" *Canadian Corporate Newswire* (4 April 2007) (QL). The Green Party, for example, received over \$310 000 in federal funding for the first quarter of 2007. However, the act's requirement that a party must receive a minimum number of votes before funding is triggered has been challenged in Ontario: *Longley v. Canada* (Attorney General), [2007] O.J. 929 (Ont. CA). The case was recently argued before the Ontario Court of Appeal after an applications judge found the act's funding provisions were unconstitutional based on differential treatment of political parties.

⁴⁸ See the *Canada Elections Act*, *supra* note 16 at ss. 345 and 435.

⁴⁹ *Supra* note 19 at 218-19.

These Patriot dollars, under his proposal, will become the exclusive currency for all election expenses, to the point where the use of conventional money would be akin to illegally purchasing votes.⁵⁰ Hasen's voucher system, meanwhile, would similarly supplant current federal campaign finance system.⁵¹ Voters would have the opportunity to contribute these vouchers to candidates or interest groups, with an added financing twist that would see the value of larger contributions reduced to encourage a wider spread of each voter's contribution.⁵² Like Ackerman, Hasen also recommends nearly exclusive use of voucher funds in the campaign financing sphere.⁵³ These proposals are aggressive methods geared toward the same objective: the promotion of an egalitarian electoral funding system.⁵⁴

Manitoba's campaign finance legislation allows reimbursement for eligible election expenses,⁵⁵ but this fails to provide challengers with any meaningful resources to counter the visibility advantage enjoyed by the incumbent party. Challengers remain subject to stringent election and non-election advertising and spending limits, thus reimbursement is only a part of the overall solution—if a party is barred from spending the amount of money required to fund a comprehensive communications campaign, reimbursement of whatever resources that party is allowed to extend becomes largely irrelevant. Simply put, reimbursement of not enough is still not enough. A new public funding regime independent of Manitoba's non-election advertising spending limit would allow challengers to add a fresh perspective to the otherwise government dominated communications sphere.

IV. LEVELING THE FIELD-ADVANTAGES OF ADDRESSING THE IMBALANCE

Several policy reasons support a move to address the incumbent, challenger communications imbalance.

⁵⁰ *Ibid.*

⁵¹ *Supra* note 26 at 5.

Ibid. at 21. Hasen proposes reducing the value of each voter's donation to its square root. A \$100 donation—the entire value of the voucher—would thus be reduced to \$10, whereas six \$16 donations would be reduced to \$4 each.

⁵³ *Ibid.* at 24-26. Volunteer time and media commentary would be excluded from regulation.

⁵⁴ See Hasen, *ibid.* at 42; Ackerman, *supra* note 19 at 221.

⁵⁵ *Elections Finances Act*, *supra* note 15 at s. 71.

A. The Benefit of More Voices

The most basic benefit relates to the core values of *Canadian Charter of Rights and Freedoms*⁵⁶ expression rights addressed in *R. v. Keegstra*.⁵⁷ In that case, the Supreme Court of Canada laid out the three pillars of s. 2(b) of the *Charter*, including the "Value of fostering a vibrant and creative society through the marketplace of ideas"⁵⁸. In other words, having more voices expressing more viewpoints on a given issue is a good thing. Contrary to what some may argue, a law limiting a political player's ability to monopolize the airwaves can complement-not contradict-core expression values. The Supreme Court has accepted that the infringement of one group's expression values is an acceptable byproduct of the larger goal of leveling the overall electoral communications field.⁵⁹ The same reasoning supports reform in the area of non election communications.

If the voucher system was adopted, no incumbent methods of speech would be eliminated. Instead, the challengers would be raised to the same resource level incumbents enjoy. As Briffault notes, courts may view limits on speech suspiciously when no alternative forms of communication are left open, but "public funding promotes equality without limiting participation ... [it] increases voter equality while providing new funds for campaign communications."⁽ⁱ⁾

As a final note on constitutionality, *Harper and Irwin Toy v. Quebec (Attorney General)*⁶¹ are prime examples of the Supreme Court's hesitation to second-guess Parliament when it draws a line in an attempt to set up a law that is neither too narrow or overbroad. Reform to address the incumbent challenger communications imbalance necessarily involves drawing a line between content that is partisan and content that is neutrally informative. As long as Parliament "has made a reasonable assessment as to where the line is most properly drawn"⁶², the courts should afford such regulatory legislation a healthy dose of deference.

⁵⁶ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. Section 2(b) of the *Charter* guarantees the universal right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

⁵⁷ [1990] 3 S.C.R. 697.

⁵⁸ *Ibid.* at 704.

⁵⁹ *Harper, supra* note 13 at para. 62.

⁶⁰ *Supra* note 2 at 578.

⁶¹ [1989] 1 S.C.R. 927 at para. 74, where the court said: "There is sufficient evidence to warrant drawing a line ... and we would not presume to re-draw the line." See also *Harper, supra* note 13 at para. 111.

⁶² *Ibid.*

B. Better Governance

Reform to address the incumbent, challenger communications imbalance, especially a publicly funded voucher system, should lead to better governance. Stripped of their traditional support base at the polls, incumbents will have to work harder to gain the public's trust. *AB Briffault* notes,

Public funding reduces the role of large private donors and, thus, their potential for leverage over the decisions of elected officials. The more campaign funds come from the public fisc, the less elected officials need to be sensitive to the views of large private donors, and the more they can act on their view of what the public interest requires.⁶³

Vouchers, combined with the contribution limits that are already in place, can work to get the government increasingly focused on the overall public good. Individually controlled funding from all segments of society also forces the government to consider a variety of interests, according to Hasen, and not just in the context of vote-getting:

[T]he voucher system will provide the incentive to explore the entire market for campaign contributions as well. Just as she does in the actual election, the politician will have to pursue contributions from the population at large and all the interest groups that represent the voters.⁶⁴

C. Learning from the Past

The Gomery Report⁶⁵ into allegations of a federal sponsorship scandal recommended several measures specifically related to government advertising:

- Management of all federal advertising should be moved to a more neutral federal government location. This would avoid conflicts between those managing advertising and the government itself.⁶⁶
- Ontario's model of a total prohibition on all partisan advertising enforced by the auditor general's office should be adopted. This would provide significant separation between partisan and administrative government functions.⁶⁷

Other provincial governments, including Manitoba, should learn from the sponsorship scandal and the commission's subsequent recommendations by adopting the measures argued for in this paper.

⁶³ *Supra* note 2 at 582-83.

⁶⁴ *Supra* note 26 at 30.

⁶⁵ Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability*, vol. 1 (Ottawa: Public Works and Government Services Canada, 2006) (Commissioner: John H. Gomery).

⁶⁶ *Ibid.* at 164.

⁶⁷ *Ibid.* at 165: "[Ontario's] system appears to have added an extra level of independence that is not present in the current federal system."

D. Increased Interest in Electoral Process

Canada's falling voter participation rates have been well-documented. In the last Manitoba general election, for example, only 56.75% of eligible voters cast ballots,⁶⁸ up only slightly from the previous election, in which 54.17% cast ballots.⁶⁹ Public participation in the electoral system through a voucher program has the potential to provide dividends at the ballot box. Unfortunately, public cynicism has sucked the excitement out of elections in Canada. Given the skeptical view many have toward politics in general it is not surprising that voter participation is flagging.⁷⁰ We can cut through the cynicism by offering voters a fresh outlook on the political scene by creating a process where equality is the touchstone.

V. CONCLUSION

Incumbent political parties have a massive advantage over their challengers. Exclusive use of the public purse for partisan political advertising further upsets the balance between these political players. Competitiveness is a crucial component of good governance and thus any reform that operates to restore a measure of fairness to the electoral process should be welcomed. Reform to address the incumbent.-challenger communication imbalance offers the potential for widespread benefits, ranging from basic fairness to increased participation in the electoral process.

As the recent Manitoba general election has demonstrated, there is a pressing need for reform in this area.⁷¹ Canadian governments should either follow Ontario's lead and ban publicly funded partisan government advertising, or consider instituting a broad public funding regime that allows equal access to this type of communication.

⁶⁸ Elections Manitoba, "Official Election Results", online: Elections Manitoba <<http://www.elections.mb.ca/main/election/past/elect03/results/results.asp>>.

⁶⁹ Elections Manitoba, "Official Results: 38th General Election", online: Elections Manitoba <<http://www.elections.mb.ca/main/election/past/elect03/results/results.asp>>.

⁷⁰ See Henry Milner, "Fixing Canada's Unfixed Election Dates" (2005) 6:6 IRPP Policy Matters 1 at 23, where the author argues that a reduction of cynicism toward politics can help to increase turnout.

⁷¹ It should be noted this is hardly a recent development in either Manitoba or Canadian politics in general. Manitoba's Filmon Progressive Conservative government spent \$3.5 million on advertisements in its last year in office, 1997-98. See *supra* note 4.