CHAPTER III

Campaign Finance Law Enforcement in Canada and the US

Clyde Wilcox

Campaign finance laws that require disclosure or that impose contribution or spending limits do little good without consistent enforcement. Indeed, campaign finance laws that are not enforced probably damage citizen's trust in their government. Designing and operating enforcement agencies are not a straightforward process. Across the hemisphere and across regional governments in some countries, enforcement agencies vary widely in their mandate and resources.

This chapter compares campaign finance enforcement in the U.S. and Canada. The two countries share much in addition to a common border. These two former British colonies are both large nations that have federal systems in which national elections are regulated by the national government, but where state or provincial elections are regulated by those governments. In both nations, political parties are not uniform across jurisdictions, and field candidates who compete in single member districts. Both have well-developed campaign finance regulations, and an independent agency to implement those regulations. Both have Courts that have sought to protect free expression by checking campaign finance regulations (Paltiel, 1989; Sorauf, 1989).

Yet the countries have important differences as well. The U.S. political culture assigns its highest value to individual liberty, whereas the Canadian culture values most equality and good government (Lipset, 1991), and this has resulted in complex regulations in the U.S. case that make enforcement difficult in the best of circumstances. American political parties are relatively weak, allowing individual candidates to define their own political agendas and to raise their own funds by assembling their own financial coalition, whereas Canadian campaign funds are primarily raised by the political parties, which are more disciplined organizations. Weak parties allow U.S. lawmakers to insert special provisions in legislation that can benefit specific narrow interest, and

thus creates an incentive for those interests to provide maximum campaign assistance to key incumbents. Moreover, because elections occur at fixed intervals in the U.S., campaigns have become quite long and expensive. Presidential campaigns often last two years, and House incumbents are always in campaign mode. Canadian election campaigns average 36 days.

Recently in the US the intrusion of cultural issues into politics has led to a polarization of the two political parties. Increasing numbers of party supporters believe that the victory of their preferred candidates is essential to the wellbeing of the republic, and many are willing to bend campaign rules in order to win. Combined with the underlying litigious culture, this creates an atmosphere where the boundaries of campaign finance laws are regularly tested, and where political actors challenge regulations. In Canada in contrast there appears to be widespread acceptance of the value of campaign finance limits and the vigorous and neutral enforcement of these limits.

I. The Campaign Finance Laws

Enforcement and the content of campaign finance laws must be considered in tandem. Vigorous enforcement of flawed laws may do little good and even perhaps do harm, and the best laws will do little good if enforcement is lax. Enforcement is a difficult task, and requires an agency with significant powers. Yet even the best designed enforcement agency will founder in the face of poorly designed or overly complex regulations. Before we can compare regulatory agencies, therefore, it is useful to compare regulatory regimes.

The U.S. campaign finance law comes primarily from the Federal Election Campaign Act (FECA) of 1974, and from the Bipartisan Campaign Reform Act (BCRA) of 2002. In general, these regulations focus primarily on contribution limits and disclosure. Individuals are limited in the sums that they can give to candidates for federal office, and in the amounts that they can give to political parties and the political committees associated with interest groups (PACs). Parties and PACs are also limited in the amounts that they can give to candidates, to PACs, or to party committees. There are source limitations as well: corporations and labor unions are banned from direct contributions of treasury funds to candidates, although they can form PACs and raise money from their members which can then be given to federal candidates and committees.

Two major difficulties have arisen in the regulation of the size of contributions. First, the Federal Election Commission (FEC) allowed in the late 1970s and early 1980s the creation and growth of a special type of contribution called "soft money" that avoided both size and source limitations. There was no limit to the size of these contributions, and they could come from the treasuries of corporations, unions, or other political groups. The money was ostensibly to be used only for party building and state and local elections, but was quickly channeled directly into federal campaigns in violation of the spirit (and most would argue letter) of the law. By 1988 both parties had organized major soft money campaigns that were obviously aimed primarily at electing federal candidates, and some officials admitted this in public. In 1996 Bill Clinton directed millions of dollars of party soft money to bolster his reelection chances in the months leading up to the election, and GOP candidate Bob Dole used millions of dollars of party soft money to maintain his campaign after the end of the primary season.

Second, because the Courts have ruled that spending limits violate freedom of speech, individuals and groups can spend unlimited amounts to advocate the election or defeat of a candidate, so long as the money is not given directly to the candidate or spent in coordination

with the campaign. This spending could be done through PACs and subject to the contribution size and source restrictions – this kind of spending is called "independent expenditures." But it can also be done directly by groups that do not directly advocate the election or defeat of a candidate, even if they make it quite clear that they support or oppose a candidate. This "issue advocacy" spending is in many cases considered to be non-electoral spending and therefore not subject to disclosure requirements, and the sources of the funds are not subject to contribution limits or source limitations. In other words, wealthy individuals, corporations, and unions can channel unlimited sums into special ad-hoc groups that would then advocate an issue while in spirit advocating a candidate. In the 2004 presidential race, for example, a number of special committees have raised and spent millions on behalf of John Kerry including large sums donated by a few individuals and groups. Republicans formed similar committees to aid George W. Bush. BCRA limits this kind of spending on mass media during the final months of the campaign, although these groups can spend unlimited sums on direct mail, phone mobilization, and personal contact campaigns.

Disclosure is the success story of the U.S. case. Federal candidates, party committees, and PACs must file regular reports on their receipts and spending, and this information is readily available on at the FEC web site. Recently the Commission has required that major candidates and committees file electronically, and these reports are available very quickly on the Internet. Non-profit groups like the Citizens for Responsive Politics and the Campaign Finance Institute work through these reports and make the data available in even more accessible formats. It is possible for journalists or even citizens to determine to which candidates specific individuals or groups have given, or to profile the financial base of candidates and parties. Yet because issue advocacy spending is not covered by FECA, information on the receipts and spending of groups engaged in this activity have until recently been unavailable, and are still available in only limited form.

The U.S. also provides public funding for presidential nomination candidates, although accepting these funds requires the campaign to limit its spending. In 2004 the major candidates in both political parties – Bush, Kerry, and Dean – did not accept these funds. In the general election, major parties receive a flat grant from the federal government to mount their campaigns, and minor parties that receive more than 5% of the vote also receive more limited funding. These public funds are to provide the entire funding of the campaign, although the political parties and interest groups can mount parallel campaigns to assist the candidates.

Canadian law now limits both contributions and spending. There are contribution limits for individuals, corporations, and unions, and these are indexed to inflation. Spending limits are in effect for political parties, candidates, and "third parties" -- non-party organizations that seek to influence election results. These limits apply to contestants seeking the nomination of a party, but there are currently no spending limits for intra-party leadership contests. The combination of contribution and spending limits is an obvious advantage for enforcement, as is the banning of attempts to circumvent the law. The law prohibits circumventing or attempting to circumvent these spending limits.

Candidates that receive at least 10% of the vote are entitled to public reimbursement of up to 60% of all spending, as are parties that receive 2% of the national vote or 5% of the total vote in the constituencies in which they nominate candidates. Canadian law also subsidizes elections by providing an income tax credit for a portion of the contribution. Political parties (but not candidates) are entitled to free broadcast time on television and radio. Finally, Canadian law

requires disclosure of receipts and spending, although this disclosure is required after the campaign and therefore is not timely. Beginning in 2005, however, parties and candidates will be required to file regular reports that will be made available in advance of elections.

II. The Administrative Agencies

Both the U.S. and Canada have a single agency that is primarily responsible for enforcing campaign finance law. In the U.S., the Federal Election Commission (FEC) is generally seen as an ineffective regulatory agency in marked contrast to the widespread support domestic support for Elections Canada. The FEC is generally perceived to be weak by design, although the individual commissioners are also seen as lacking the will to regulate.

There is general consensus on what a strong enforcement agency requires. As one Canadian scholar observed, "Enforcement demands a strong authority endowed with sufficient legal powers to supervise, verify, investigate, and if necessary institute legal proceedings. Anything less is a formula for failure" (Paltiel, 1976, cited in Davidson 2004). An enforcement agency must have the power and the manpower to audit reports, and to conduct investigations of irregularities in those reports. It should be independent of control of the elected officials that it investigates, and operate in a non-partisan manner.

III. The Federal Election Commission

The FEC was designed by legislators who were decidedly reluctant to face an independent regulatory agency that might aggressively enforce the law. The agency is structured to make rapid action difficult – and indeed to make any regulatory action that damages the fortunes of either political party impossible. It is limited by statute in its audits and investigations, and is hampered by severe budget constraints. In 2003 the leading campaign finance reform advocates in the U.S. House and Senate introduced a bill to replace the Federal Election Commission with a new agency.

The FEC is headed by six commissioners appointed by the president but in practice selected by Congress (Jackson, 1990) No more than three can be from any single political party, which in practice has meant three Democratic and three Republican commissioners. Both political parties have in recent years sought to appoint commissioners who would favor their interests, including a Republican member in 2000 who had written that almost all national campaign finance laws were unconstitutional,and another in 2002 who had served as general counsel to George W. Bush's presidential campaign.

Four votes are required for action, and not surprisingly the commission is frequently deadlocked on a partisan basis. Project FEC's task force report in 2002 lists a number of such cases, including:

In 1999 the commission deadlocked 3-3 on a party line vote over whether to find probable cause to believe that the Republican National Committee and an associated policy group worked together to channel foreign contributions into federal elections

In 1999, the commission deadlocked 3-3 on a party line vote over whether to ask the U.S. Solicitor General to participate in a Supreme Court case that challenged the legality of contribution limits

In 2002, the FEC deadlocked along party lines over whether to appeal a lower court ruling that overturned the Commission's definition of "express advocacy".

In 2002, the FEC again deadlocked 3-3 over whether to investigate a group called "Republicans for Clean Air" that served as a front for two brothers who spent more than $2 million in advertising that helped George W. Bush beat John McCain in the New York primary

Even when the Commission does not vote along party lines, it often fails to act despite strong evidence. One case is particularly striking. In its investigations of a 1988 Montana Senate Race in which the GOP appeared to have violated limits on coordinated spending, all five Commissioners who voted on the case agreed that the law had been violated, but none of the specific charges had four votes. The Commission therefore dismissed the case. Two years later, the Commission was ordered by court to proceed with the case. But six years later the Commission dismissed the case as "too stale to pursue."

Thus the FEC is an unwilling regulator, headed by commissioners with partisan interests and in some cases a philosophical aversion to regulation. During the 1980s and 1990s, the FEC allowed both political parties to channel large unregulated contributions to aid federal candidates, although such funds were in theory limited to party building and state and local campaigns. In 1996, the Commission rejected 6-0 a recommendation by counsel and auditors that the Clinton and Dole campaigns be required to repay federal funds because of illegal soft money issue ads by both political parties, thereby allowing unlimited soft money spending by parties on behalf of presidential candidates.

There are many other cases where the Commission has ignored recommendations of its legal staff. In one important case, a district judge ruled against the Commission that the Christian Coalition had not coordinated its efforts with the Bush campaign in 1992. The ruling established a very narrow definition of coordination, and the federal judge invited the Commission to appeal the case to get a more definitive ruling from the Court of Appeals and perhaps eventually the Supreme Court. But the Commission ignored the advice of council and instead codified this narrow account of coordination, thereby essentially making it impossible to prove that supporting campaigns were coordinated.

In 2003 and 2004 the Commission issued regulations to implement the new Bipartisan Campaign Reform Act, and these rulings almost all served to weaken and undermine the law. The Commission allowed for state and local parties to raise and spend soft money, and to use it to pay a portion of ads that identify federal candidates, and to pay the salaries of consultants who work on federal campaigns. It allowed the formation of "independent" committees set up by the national parties that could raise and spend soft money to attack or support federal candidates. It ruled that the law's ban on federal officeholders soliciting soft money for non-party committees merely meant that they could not explicitly ask for the contribution – although they could organize and speak at the fundraising event. In the spring of 2004, the Commission decided not to rule on the legality of special "527" committees that were raising and spending unlimited sums to help the Kerry campaign until after the election. The authors of the House version of the BCRA, Christopher Shays (R, CT) and Martin Meehan (D, MA) went to federal court in early 2004 to challenge the FEC's rules, while the Commission sought to dismiss the suit.

Even if the commissioners were inclined to vigorously enforce the law, however, Congress has imposed important structural impediments to action. The Commission cannot conduct random audits of campaigns. It cannot respond to anonymous complaints. These two

requirements alone handicap the Commission significantly in enforcing the law. Moreover, the Commission cannot seek a court injunction to halt potentially illegal activity while it investigates.

The procedural requirements for investigations and findings are so cumbersome that it is impossible for the Commission to act in a timely manner. In any investigation, the Commissioners must approve of several key steps, including subpoenas of documents and deposition of witnesses. Individuals who are issued a subpoena can refuse to comply, and the Commission must then go to Court to get an order to comply, for these efforts can take years to resolve. Complex cases routinely take 3-4 years to resolve (Thomas and Bowman, 2000). Indeed, in one case the Commission took 2 years to proceed on a case that began with a voluntary admission of wrongdoing in the form of a letter from a foreign national contacted the Commission.

As a consequence, the Commission has developed an Enforcement Priority System to help it decide which cases to pursue. The commission focuses on cases of serious violations, where the violation had an impact on the electoral process, the topicality of the violation, and the date of the offense. This has led to the dismissal of hundreds of cases, and the development of dispute resolution procedures to deal with many other offenses (Mann, 2003). Although in many cases the cases dismissed have been minor ones, in other cases the Commission has declined to investigate cases that would prove difficult to conclude in a timely manner. In one case of a former Democratic National Committee Finance Vice Chair, a memorandum from the counsel noted that because the individual had close ties to the Vice President and is a prominent fundraiser, he would be unlikely to settle the matter short of litigation (Hendrie, 1998).

Moreover, Congress failed to give the Commission multi-year budgets (as it does to other independent agencies) and has consistently underfunded the FEC. The Commission has many hard-working, committed lawyers, accountants, and other employees, but they lack the capacity to act because of the incredible workload. In the mid 1990s, for example, half or more of FEC cases were inactive because there were not attorneys available to work on the cases. Between 1976 and 2000, spending on federal elections increased by 1000 percent, but allocations for the budget and staff of the FEC increased by less than 100%. Funds are now available for only 45 audits per election cycle, which constitutes fewer than 0.6% of all committees filing reports.

IV. Elections Canada

Elections Canada is charged with a broader range of tasks in addition to campaign finance regulation. Enforcement of campaign finance laws falls to the Chief Electoral Officer, who is appointed by the Cabinet following a resolution of the House of Commons, and can only be removed by a joint resolution of the House of Commons and the Senate. The Chief Electoral Officer appoints the Commissioner of Canada Elections who has the responsibility of enforcing the law. The Commissioner is generally seen by all sides as non-partisan and fair.

Political parties (including local party units), candidates (including candidates for nomination), and party leadership contestants must file returns with Elections Canada. All financial returns must be audited before submitted, but the agency then examines the reports for completeness and accuracy. The Commissioners' office has some 26 investigators under contract, many of whom work part time.

In cases of violations, the Commissioner may seek a criminal prosecution through the regular court system, using attorneys who are on retainer for Elections Canada. The law makes distinctions

about the degree of intent involved in a criminal act, and also prohibits attempts to circumvent the law. The Chief Electoral Officer can also issue administrative incentives and sanctions, including the forfeiting of candidate's nomination deposits, and the suspension of a political party. Finally, the Commissioner can negotiate compliance agreements that include sanctions, with considerable discretion on the type of penalties to impose. These latter two powers are relatively new, and as yet there is little data to evaluate their functioning. The Commissioner has negotiated a number of compliance agreements since gaining the new power, including one with a candidate who exceeded the spending limit. All compliance agreements are available to the public, and can be viewed at the web page:
www.elections.ca/content.asp?section=loi&document=index&dir=agr&lang=e&textonly=false.

Many of these compliance agreements focus on "third parties" – non-party actors such as individuals and interest groups who did not file reports.

The Commissioner can also seek injunctions during the election campaign, although this power was created in 2000 and none were issued in that election. Injunctions can only be sought during the brief campaign period, which limits the usefulness of the tool. Elections Canada also has undertaken a program of campaign finance research, both within Canada across the provinces, and cross-nationally. It has offered advice to other nations seeking to build an effective enforcement agency.

Although there have been challenges to various elements of the Canadian law at the national and provincial level, the Courts have generally been supportive of limits to both contributions and spending. This creates many fewer "grey" areas for regulation than in the U.S. case where spending is not controlled. There is a generally high level of support for the autonomy of the Commissioner, and for the highly professional staff of Elections Canada. The major political parties support the regulatory regime. For this reason, Elections Canada has been held forth as a model by U.S. reformers seeking to design an effective regulatory agency.

V. A Canadian Model for US Reform?

Many of those who have followed the FEC closely over the years propose scrapping the agency and replacing it with one headed by one or a few non-partisan commissioners who would have expanded enforcement powers. In his insightful book Broken Promise, for example, longtime FEC watcher Brooks Jackson recommends replacing the Commissioners with a five member panel headed by a strong chair who would have non-partisan credentials. Jackson suggests that the president be required to nominate the chair from outside his own party, forcing him to pick a judicious and non-partisan regulator. He suggests that the chair be someone who is not affiliated with either major party – a retired judge, university president, or member of the clergy.

This change at the top would be coupled with a substantially increased budget, a staff of trained investigators, and an increased audit team. It would be permitted to investigate based on the chair's decision, and could investigate anonymous complaints and conduct random audits.

A bill introduced by the four authors of BCRA would replace the FEC with a new agency with three commissioners, with a chair serving a 10 year term and two commissioners (one from each party) serving six year terms. The chair would have no connection to either political party. The new agency would have expanded powers much as Jackson had proposed.

The bipartisan task force of Project FEC recommended scrapping the FEC (though probably employing many of its able staff) and replacing it with a system that resembles the Canadian model. They suggest a single agency headed by a single administrator with responsibility for civil enforcement of the law. This new agency would be independent of the executive, and would have the authority to act quickly and to impose penalties subject to review by the courts. They recommend a system of adjudication before administrative law judges to handle appeals. The agency should be guaranteed sufficient funding in a multi-year budget. The task force also recommended a limited right to private action when the new agency ignores a case.

There are reasons to believe that the organizational structure of Elections Canada might be less effective in the US than it is in Canada. Although in Canada there seems to be general agreement by the political parties on the value of campaign finance limitations, US parties are far less supportive of campaign finance restrictions. Many Republicans oppose all restrictions on spending and contributions in principle and for political reasons, and many Democrats pay lip service to supporting these regulations while secretly working to weaken them. The current US Presidential election is a case in point, where a frenzied money chase has led to huge increases in fundraising and spending. An entire industry exists in the US of legal experts who game the loopholes in laws and advise clients on how to exceed limits without violating the law.

Moreover, the highly litigious nature of US society makes it unlikely that enforcement would be so simple in the US. As Nassmacher (2004) notes, campaign finance regulations work less well in societies where regulations are regularly challenged in courts. Finally, the distinction made by the Supreme Court between contributions (which can be limited in the interest of preventing corruption or its appearance) and spending (which cannot be limited because of free speech guarantees) opens up many potential difficulties in regulating campaign finance that any agency must face.

Still, it seems likely that a single administrator or a smaller Commission with a strong chair would be a substantial improvement over the currently constituted FEC. Even in the US political climate, other regulatory bodies (such as the California Fair Political Practices Commission and the New York City Campaign Finance Board) have earned bipartisan praise for their enforcement efforts. The FEC has many excellent attorneys, auditors, and data analysts who support disclosure and vigorous enforcement of current law, and who would be an asset to a new agency. There is general consensus that the FEC is a broken agency, and Elections Canada constitutes one promising model for its replacement.

VI. References

AuCoin, Peter. 2003. "Comparative Analysis on Financing Political Parties and Campaigns: Canada." Report prepared for Organization of American States.

Davidson, Diane R. 2004. "Enforcing Campaign Finance Laws: What Others Can Learn from Canada." Forthcoming, Election Law Journal.

Frandsen, Jon. 2002. "Campaign Reform Focuses on Enforcement." Detroit News, March 24. *http://wwww.detnews.com/2002/politics/0203/24/a13-447632.htm accessed 3/26/04*

Hendrie, Paul. 1998. "No Controlling Legal Authority" FEC Drops Probe of Prominent Fundraiser." Capital Eye 5: 2. *www.opensecrets.org/newsletter/ce52/52text/04fec.htm accessed 3/13/04*.

Jackson, Brooks. 1990. Broken Promise: Why the Federal Election Commission Failed. New York: Twentieth Century Fund.

Koszczuk, Jackie, 1998. "Money Woes Leave FEC Watchdog with More Bark than Bite." CQ News. *http://www.cnn.com/ALLPOLITICS/1998/03/02/cq/fec.html accessed 3/26/04*.

Lipset, Seymour Martin. 1991. Continental Divide: The Values and Institutions of the United States and Canada. New York: Routledge. Reprint Edition.

Malbin, Michael J., and Thomas L. Gais. 1998. The Day After Reform: Sobering Campaign Finance Lessons from the American States. Albany: Rockefeller Institute Press.

Mann, Thomas E. 2003. "The FEC: Administering and Enforcing Campaign Finance Law." Chapter 9 of The New Campaign Finance Sourcebook. *http://www.brookings.edu/gs/cf/sourcebk01/InternetChap9.pdf accessed 5/13/04*.

Nassmacher, Karl-Heinz. 2004. "Monitoring, Control, and Enforcement of Political Finance." Chapter 9 of IDEA Handbook on Funding of Political Parties and Election Campaigns http://www.idea.int/publications/funding_parties/index.cfm accessed 5/13/04.

Paltiel, Khayyam Zev. 1976. Party, Candidate and Election Finance: A Background Report. Ottawa: Royal Commission on Corporate Concntration.

Paltiel, Khayyam Zev. 1989. "Canadian Election Expense Legislation, 1963-85: A Critical Appraisal or Was the Effort Worth It?" in Herbert E. Alexander (ed.) Comparative Political Finance in the 1980s. New York: Cambridge University Press.

Project FEC, 2002. No Bark, No Bite, No Point. Task Force Report *http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{B4BE5C24-65EA-4910-974C-759644EC0901}.pdf Accessed 5/13/04*.

Public Citizen, 2002. "Public Citizen's Analysis of How the FEC is Undermining the Bipartisan Campaign Reform Act (BCRA) of 2002. *http://www.citizen.org/documents/BCRATables.pdf accessed 5/21/04*.

Thomas, Scott E., and Jeffrey H. Bowman. 2000. "Obstacles to Effective Enforcement of the Federal Election Campaign Act." Administrative Law Review 52: 578-608.