

Increasing Transparency and Levelling the Field: Response to *Election Finances Statute Law Amendment Act, 2016*

Guy W. Giorno

Presentation to Standing Committee on General Government
Queen's Park, Toronto • June 9, 2016



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

The Standing Committee on General Government of the Legislative Assembly of Ontario invited Guy W. Giorno to appear as a witness, June 9, 2016, to speak to Bill 201, the *Election Finances Statute Law Amendment Act, 2016*.

The content of this presentation reflects his personal views as an individual. It does not represent the opinions or position of Fasken Martineau or of any other individual, organization or entity with which he is affiliated.

Consistent Canadian Campaign Finance Principles



- **Transparency**
 - public disclosure of contributors and contributions
- **Integrity**
 - funds must belong to contributor; can't contribute funds given by another
- **Uniformity**
 - nature of contribution (monetary or non-monetary) doesn't affect its treatment; all contributions subject to same rules
- **Fairness**
 - level playing field; disincentives to game the system and circumvent rules



Campaign Finance Design Issues (variation among jurisdictions)



- **Eligibility to Contribute**
- **Spending Limits**
- **Contribution Limits**
- **Sources of Campaign Finance**
- **Third-Party Advertising**



Eligibility to Contribute



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

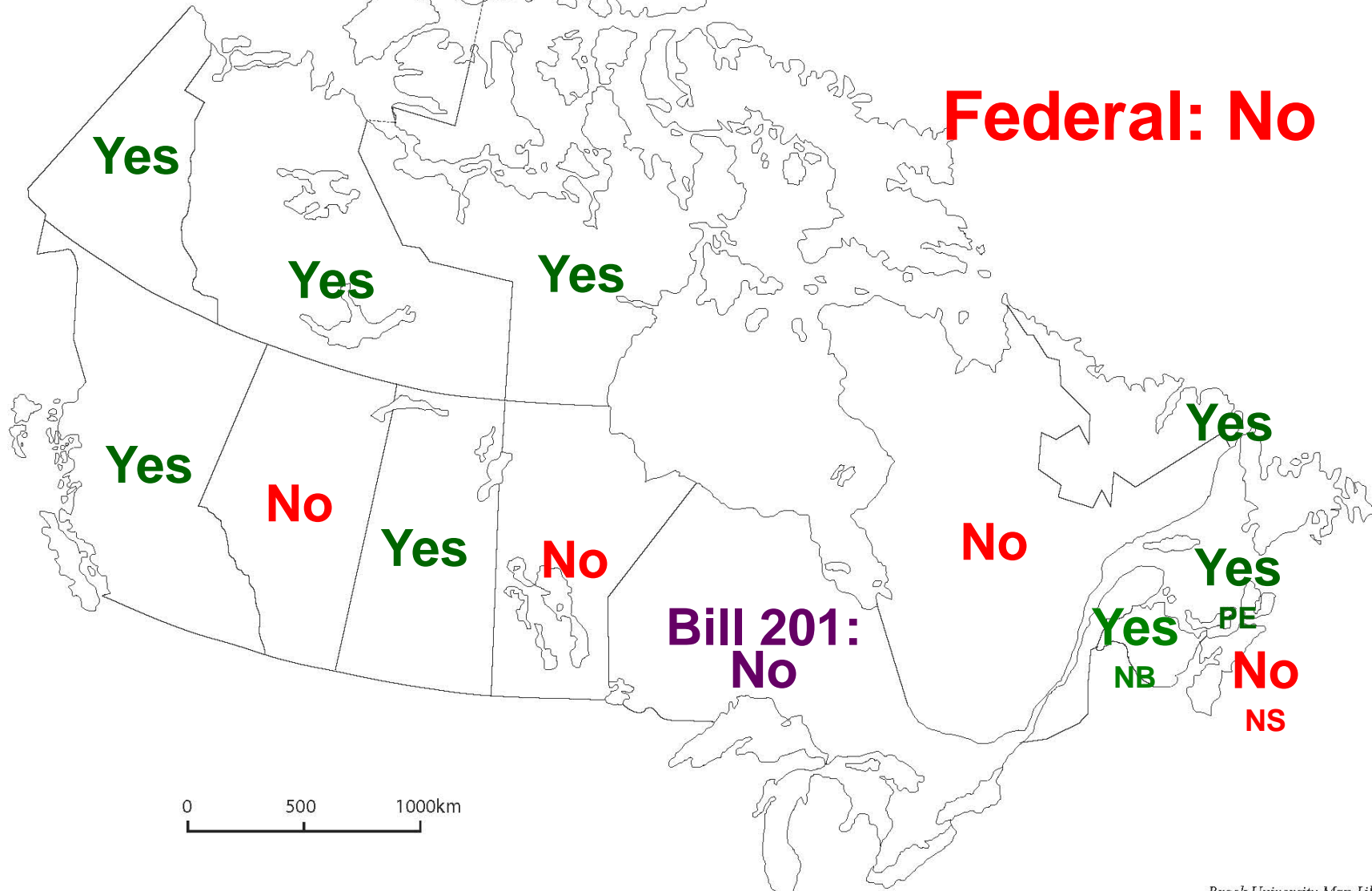
JOHANNESBURG

CONTRIBUTORS OUTSIDE JURISDICTION



CONTRIBUTIONS FROM CORPORATIONS

Federal: No





Eligibility to Contribute

Do we need to replace corporate contributions?



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

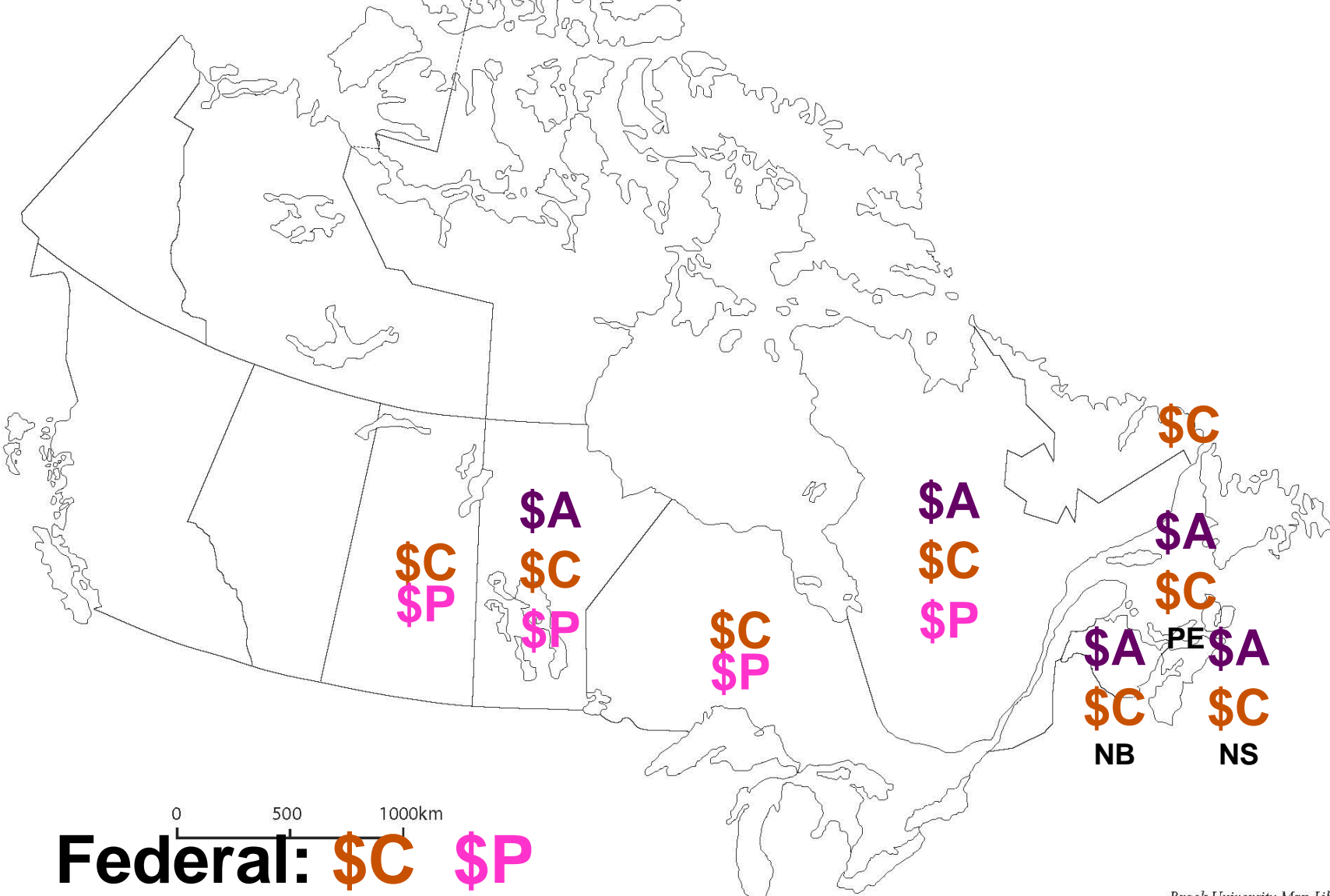
QUÉBEC CITY

LONDON

JOHANNESBURG

PUBLIC FUNDING

\$A Allowance to Parties
\$C Reimburse Candidates
\$P Reimburse Parties



Party Subsidies



- Based only on past vote share:
 - New Brunswick
 - Nova Scotia
 - Prince Edward Island
- Allowance based on vote past share, plus limited matching contributions:
 - Quebec
- Based on combination of vote share and number of candidates fielded (and party can decline):
 - Manitoba

Is a Per-Vote Subsidy Fair?



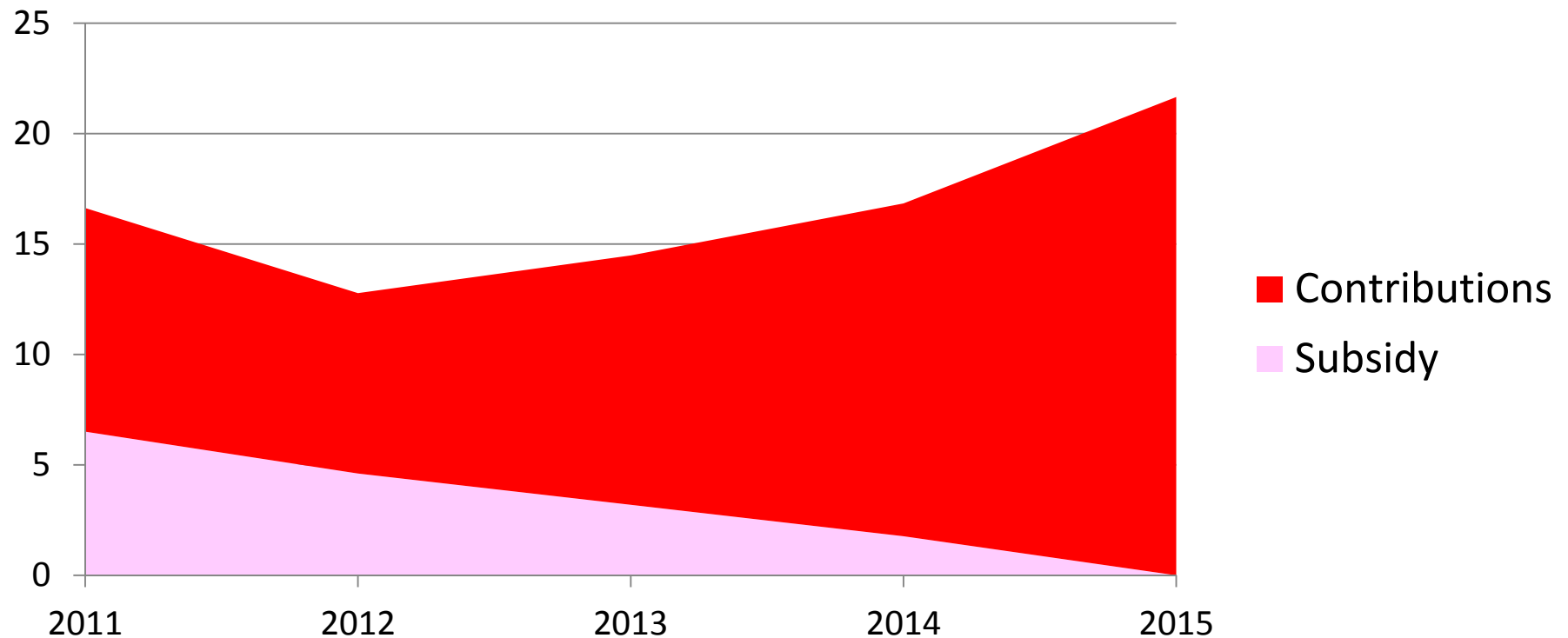
- Democracy means office must be (re-)earned at regular intervals
- In the eyes of the system all candidates and parties are equal
- Should votes earned last time create a financial head-start to earn votes next time?
- Should a vote to put an individual in office be interpreted as a decision to award money to the party that nominated that individual?

Is a Per-Vote Subsidy Needed?

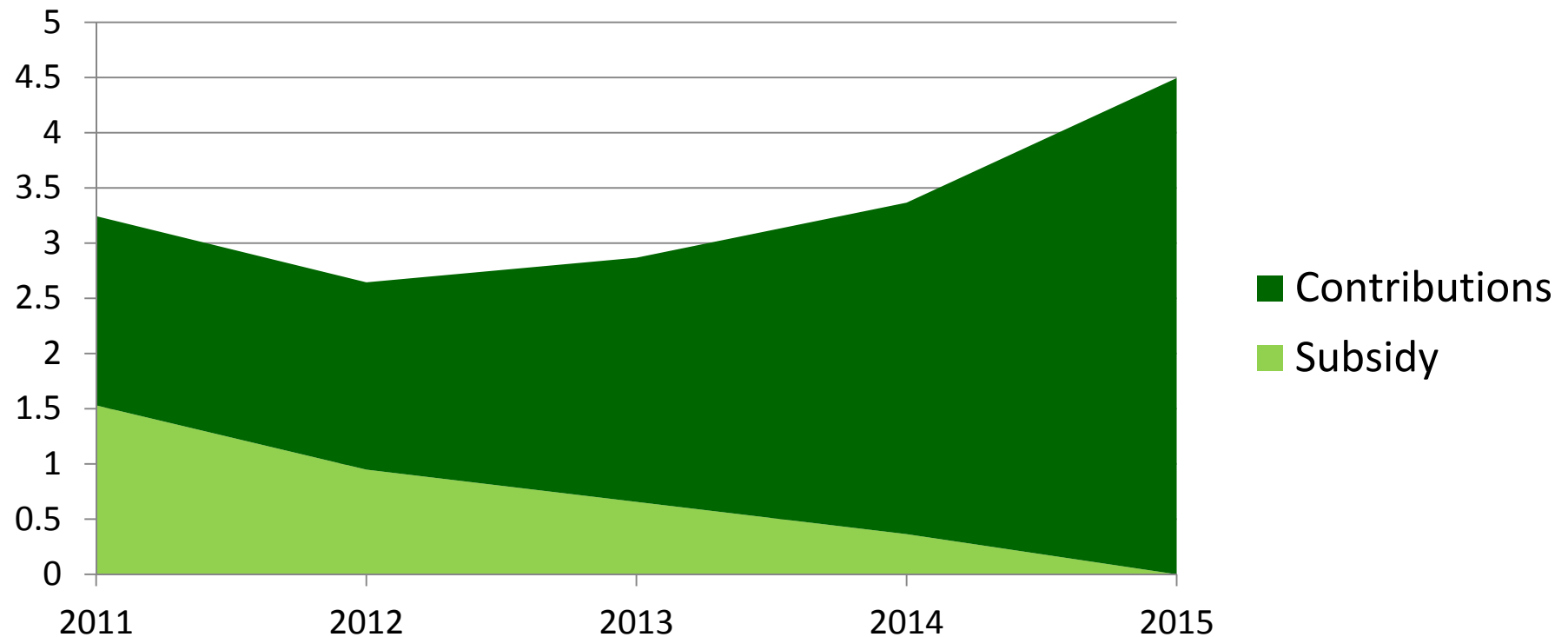


- Federal subsidy phased out between 2011 and 2015
- The parties adapted and are doing fine

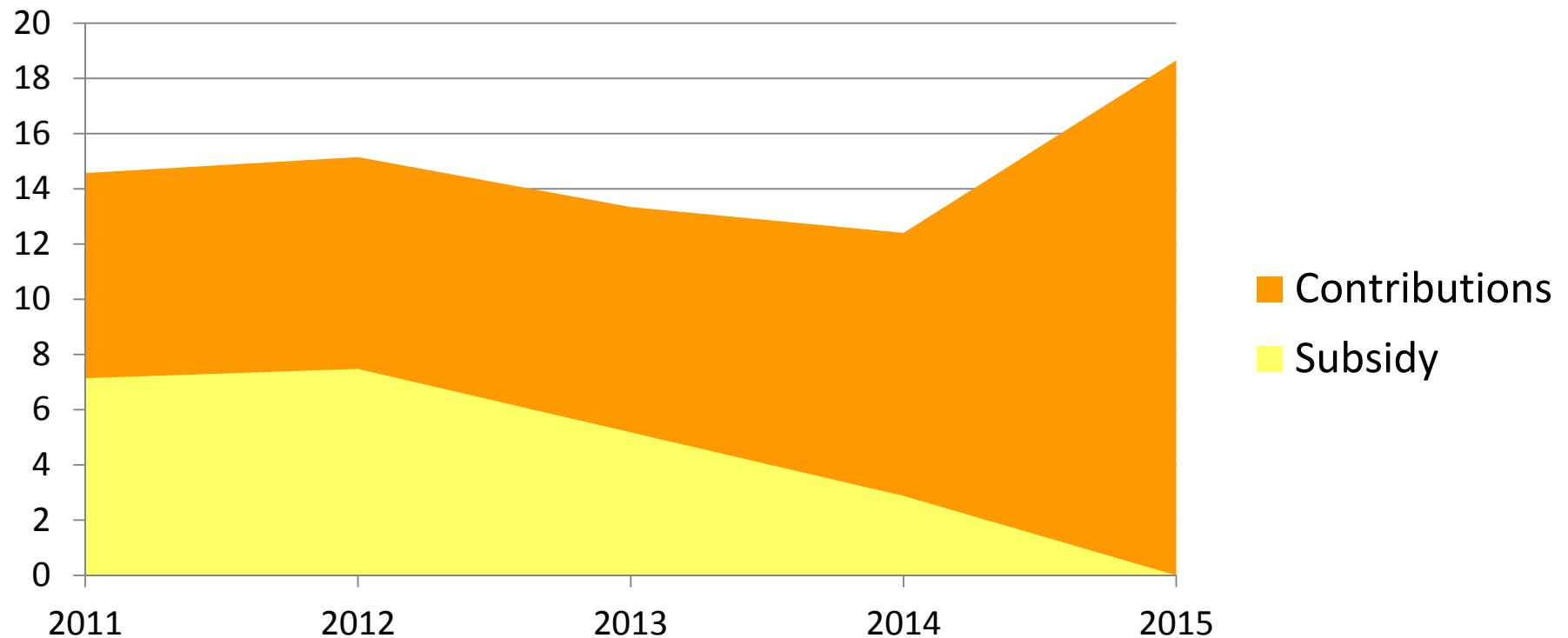
Loss of Federal Subsidy: Liberals (millions of dollars)



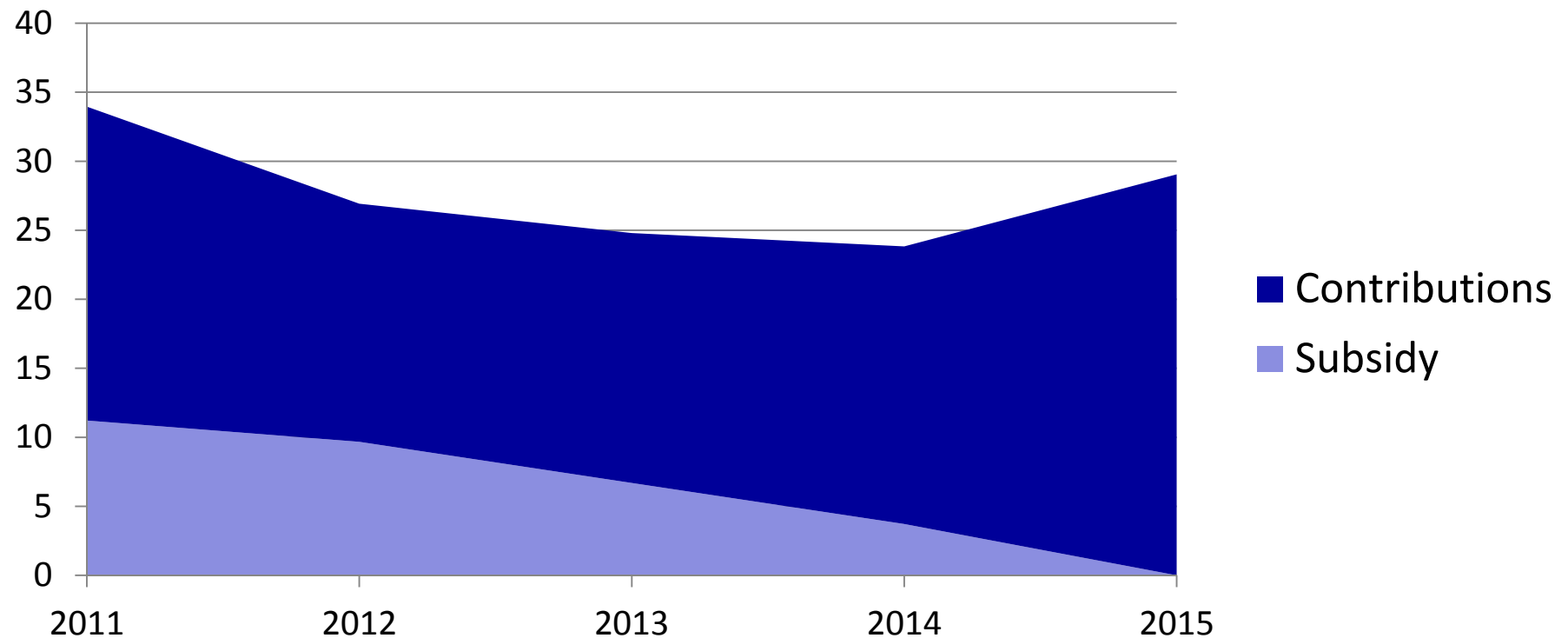
Loss of Federal Subsidy: Greens (millions of dollars)



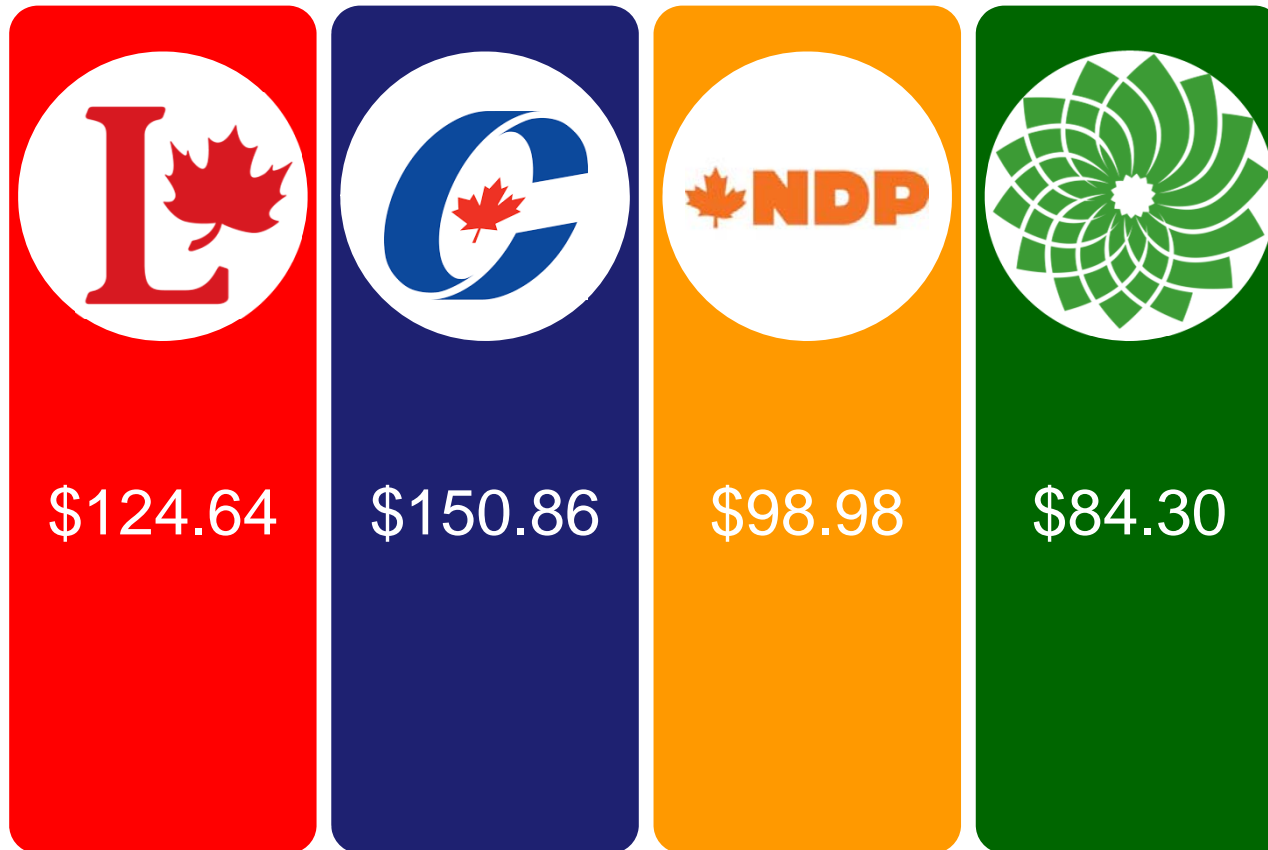
Loss of Federal Subsidy: NDP (millions of dollars)



Loss of Federal Subsidy: Conservatives (millions of dollars)



Average Political Contributions (Federal) (2015)



**FASKEN
MARTINEAU** 

VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG



Contribution Limits



VANCOUVER

CALGARY

TORONTO

OTTAWA

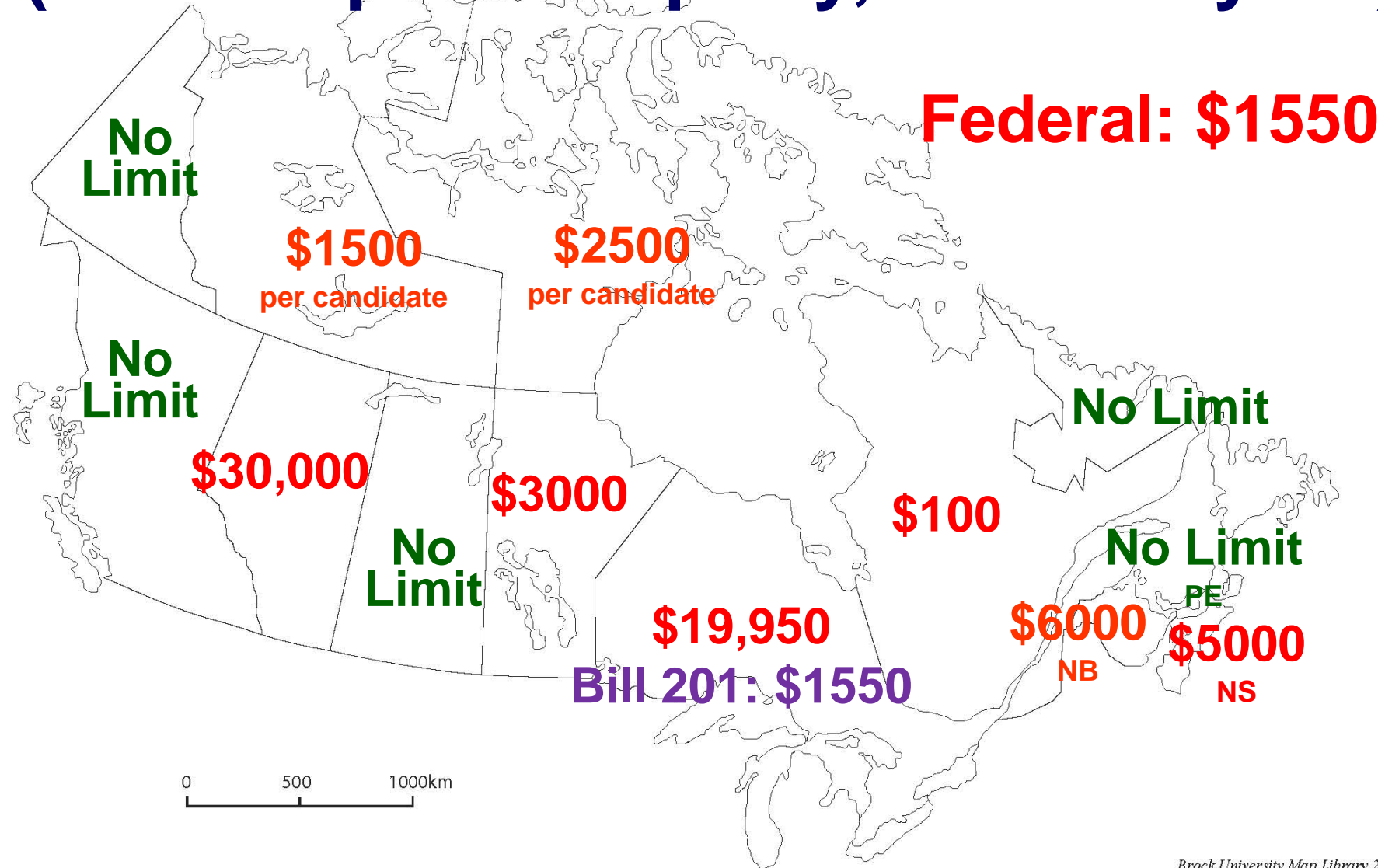
MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

2017 CONTRIBUTION LIMITS (to each political party, election year)





Contribution Transparency and Fairness

Paid time off



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Revised “contribution” definition, subsection 1(1)



“contribution” does not include ...

... (b) any service actually performed for any political party, constituency association, **nomination contestant**, candidate or leadership contestant by an individual voluntarily, so long as such individual does not receive from his or her employer or from any person, corporation or trade union pursuant to an arrangement with the individual’s employer, compensation in excess of that which he or she would normally receive during the period such service was performed ...



Company/Union Gives Employees Paid Time Off to Campaign



Elections
Ontario

We Make Voting Easy.

Election Finances

CFO Handbook for Political Parties

Page 25:

“Employees are given time off work with pay in order to work for a registered political party; this is not a contribution so long as the employees agree to work for the political party and do not get paid extra to do so.”

Company/Union Gives Employees Paid Time Off to Campaign



ILLEGAL

- Federal
- Manitoba
- Nova Scotia
- Quebec

LEGAL CONTRIBUTION SUBJECT TO CONTRIBUTION RULES

- British Columbia
- New Brunswick
- Newfoundland and Labrador
- Saskatchewan

NOT A CONTRIBUTION AT ALL: UNDISCLOSED AND UNLIMITED

- Ontario
- Alberta*
- Prince Edward Island

*Services aren't contributions in Alberta





Contribution Transparency and Fairness

Government resources



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Government means of transmission



Federal

No person shall knowingly conduct election advertising or cause it to be conducted using a means of transmission of the Government of Canada.

Bill 201

-



Spending Limits



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

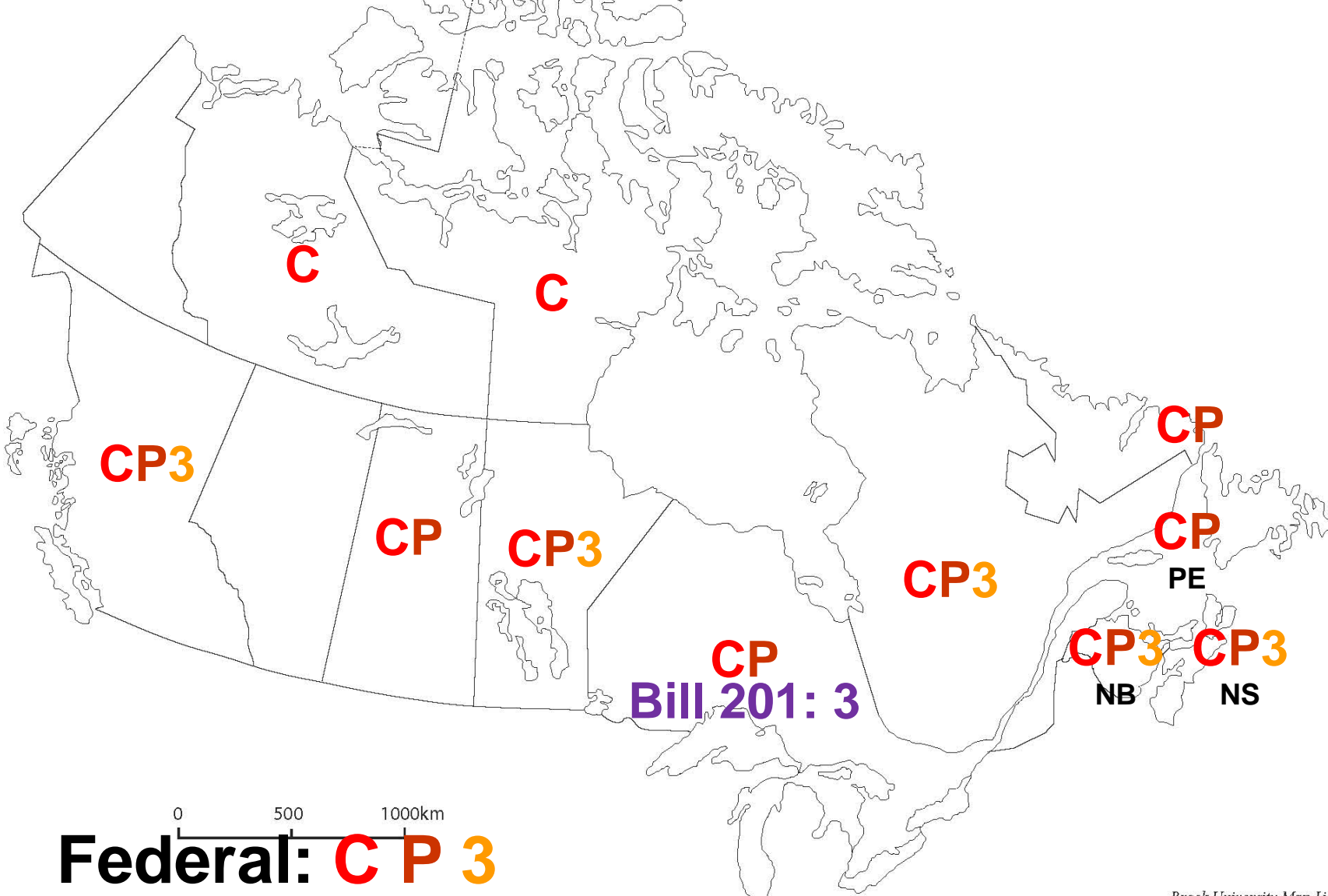
QUÉBEC CITY

LONDON

JOHANNESBURG

SPENDING LIMITS

C Candidate Limits
P Party Limits
3 Third-Party Limits





Spending Limits

Are the limits applied to a uniform and fair base?



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

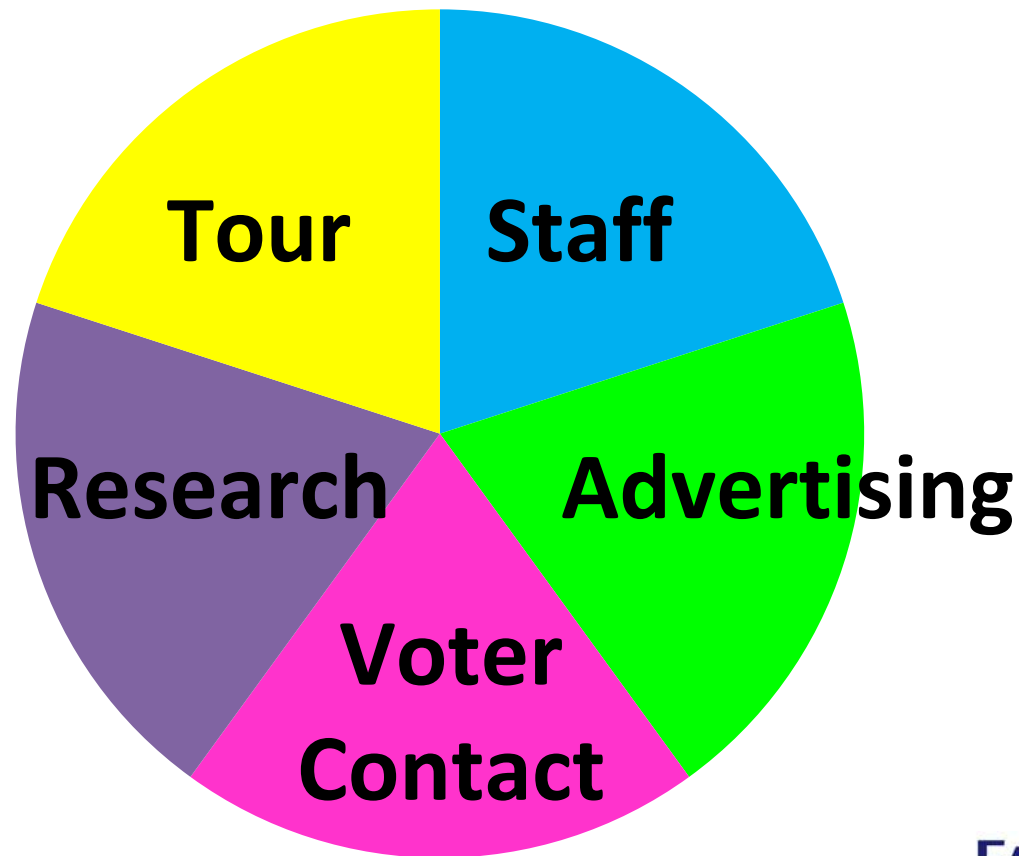
JOHANNESBURG

Exemptions from “campaign expense” definition, subs. 1(1)



- (a) expenses incurred by a candidate in seeking nomination in accordance with the Election Act
- (b) a candidate's deposit as required under the Election Act
- (b.1) expenses that are incurred by a candidate with disabilities and that are directly related to the candidate's disabilities
- (c) auditor's and accounting fees
- (d) interest on loans authorized under section 35
- (e) expenses incurred in holding a fund-raising activity referred to in section 23
- (f) expenses incurred for “victory parties” held and “thank you” advertising published after polling day
- (g) expenses incurred in relation to the administration of the political party or constituency association
- (h) transfers authorized under section 27
- (i) fees paid in respect of maintaining a credit card facility
- (j) expenses relating to a recount in respect of the election
- (k) child care expenses of a candidate and other expenses not of partisan value that are set out in guidelines provided by the Chief Electoral Officer under clause 2 (1) (j)
- (l) expenses relating to research and polling
- (m) travel expenses

Top Categories of Central Campaign Expenditure



**FASKEN
MARTINEAU** 

VANCOUVER

CALGARY

TORONTO

OTTAWA

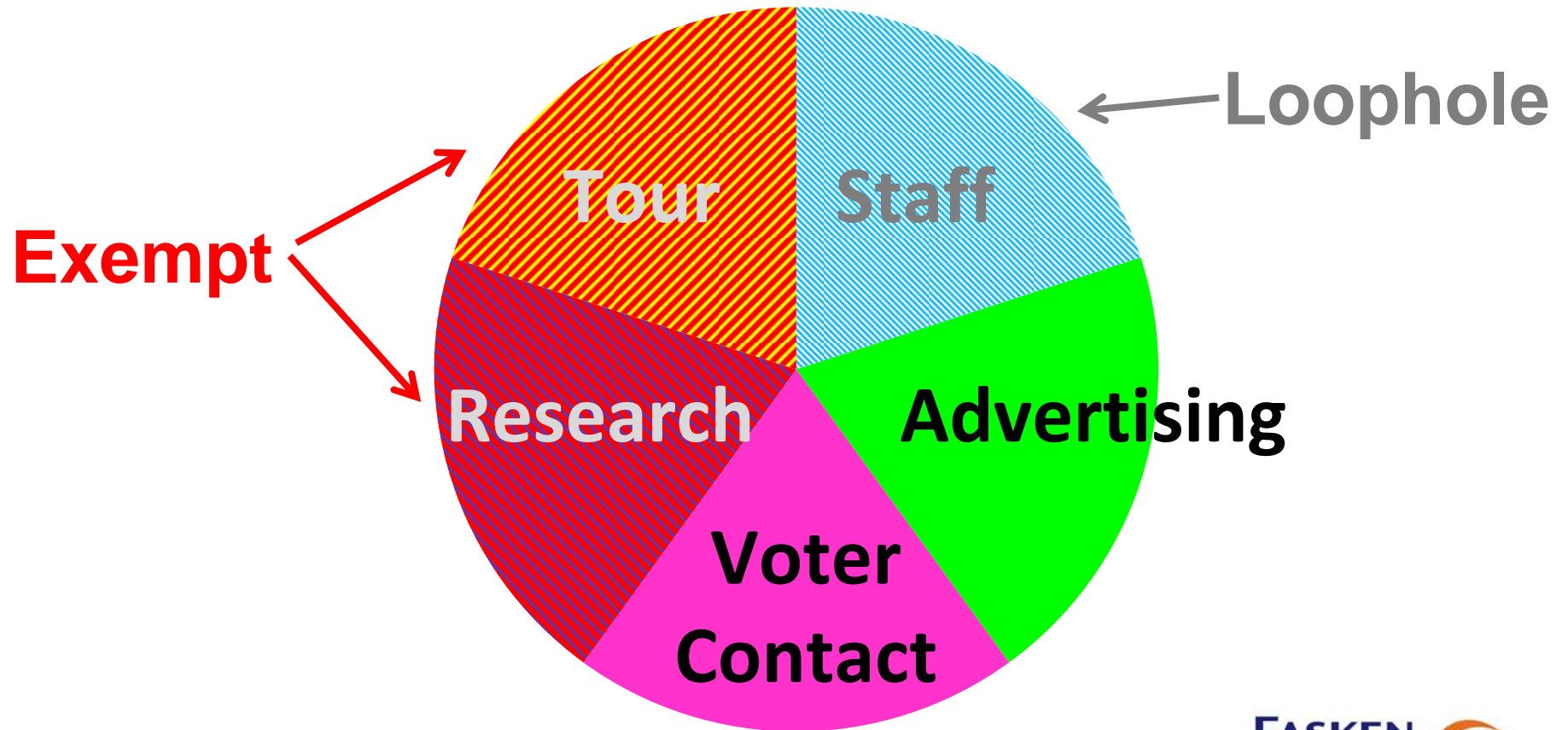
MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Top Categories of Central Campaign Expenditure





Fairness and Level Field

Political advertising



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Revised “political advertising” definition, subsection 1(1)



Current

means advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or the election of a registered candidate

...

Bill 201

means advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or the election of a registered candidate **and includes advertising that takes a position on an issue with which a registered party or candidate is associated ... but for greater certainty does not include,**

- (a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news,**
- (b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value,**
- (c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be,**
- (d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views, or**
- (e) the making of telephone calls to electors only to encourage them to vote**

**FASKEN
MARTINEAU** 

Revised “political advertising” definition, subsection 1(1)



Federal (“election advertising”)

means the 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, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include

(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;

(b) 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;

(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be;

(d) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views; or

(e) the making of telephone calls to electors only to encourage them to vote

includes union

Bill 201

means advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or the election of a registered candidate and includes advertising that takes a position on an issue with which a registered party or candidate is associated ... but for greater certainty does not include,

(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news,

(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value,

(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be,

(d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views; or

(e) the making of telephone calls to electors only to encourage them to vote

includes corporation

includes union

does not include corporation

Revised “political advertising” definition, subsection 1(1)



- Union’s communications with members exempt from political advertising definition
- Corporation’s communications with
 - employees
 - shareholders
 - customersnot exempt from definition of political advertising
- However, parallel federal exemption treats unions and corporations the same



Fairness and Level Field

Advertising as contribution



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Advertising as contribution, subsection 22(1)



Current

Political advertising constitutes a contribution for the purposes of this Act if,

- (a) it promotes a registered party or the election of a registered candidate;
- (b) it is provided or arranged for by a person, **corporation or trade union** with the knowledge and consent of the party or candidate; and
- (c) its value as determined under section 21 is more than \$100.

Bill 201

Political advertising constitutes a contribution for the purposes of this Act if,

- (a) it promotes a registered party, **the nomination of a registered nomination contestant**, the election of a registered candidate or **the leadership of a registered leadership contestant**;
- (b) it is provided or arranged for by a person with the knowledge and consent of the party, **contestant** or candidate; and
- (c) its value as determined under section 21 is more than \$100.

Advertising as contribution, subsection 22(3)



Current

A contribution described in subsection (1) that is made during an election campaign constitutes a campaign expense of the party or candidate promoted.

Bill 201

A contribution described in subsection (1) that is made during an election campaign constitutes a campaign expense of the party or candidate promoted.

- *Except now subsection (1) does not apply to advertising by corporations and trade unions*

Advertising as contribution, section 22



- Under Bill 201, advertising* provided or arranged for by a corporation or trade union is no longer considered a contribution
 - Nor is such advertising a campaign expense of the party/candidate/contestant that benefits
- New subsection 37.10.1(4) makes it illegal for the corporation or trade union to provide/arrange such advertising
 - However, there is no consequence for the party/ candidate/contestant being promoted even though it consented and had knowledge

*If it promotes a party/contestant/candidate/contestant with knowledge and consent of the party/candidate/contestant



Advertising as contribution, section 22 (more)



- Bill 201 expands definition of “political advertising” to include advertising on issue with which a party/ candidate is associated
- But Bill 201 does not expand scope of section 22 to treat such issue advertising as a contribution to party/candidate that benefits
- And the Act has never treated advertising against an opponent as a contribution to party/candidate that benefits
- Opportunity for abuse is obvious
 - Remember, section 22 deals with advertising provided or arranged with knowledge and consent of party/candidate



Fairness and Level Field

Third-party advertising



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Collusion with third parties



Federal

Third Party Spending Limit:

351 A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

Party Spending Limit:

431(2) No registered party and no third party, as defined in section 349, shall act in collusion with each other for the purpose of circumventing the maximum amount referred to in subsection (1).

Candidate Spending Limit:

477.52(2) No candidate, official agent of a candidate, person who is authorized under paragraph 477.55(c) to enter into contracts or third party, as defined in section 349, shall act in collusion with each other for the purpose of circumventing the election expenses limit calculated under section 477.49.

Bill 201

Third Party Spending Limit:

37.10.1(3) No third party shall circumvent, or attempt to circumvent, a limit set out in this section in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined political advertising expenses exceed the applicable **limit or by colluding with a registered political party, registered constituency association, registered candidate, or registered nomination contestant** for the purpose of circumventing the limit.

Party Spending Limit:

-

Candidate Spending Limit:

-

Collusion with third parties



- Collusion with third parties to avoid party and candidate spending limits is a federal offence
- It is not an Ontario offence
- Bill 201 does nothing to correct this

In the United States, the test is “coordination” not “collusion”



- U.S. Federal Election Commission says any of these is coordination:
 - Third-party communication created, produced or distributed at request or suggestion of agents of party/candidate
 - Party/candidate materially involved in decisions regarding content, intended audience, means or mode of communication, specific media outlet, or timing, frequency, size or prominence
 - Third-party communication created, produced or distributed after substantial discussion between agents of third party and agents of party/candidate or agents of opposing party/candidate
 - Third party and party/candidate use common vendor to create, produce or distribute communications
 - Former employee or contractor of party/candidate conveys material information to third party about party/candidate plans or needs
- Formal agreement/collaboration between third party and party/candidate is not required.

Transparency of third-party advertising, subsection 22(5)



No person, ~~corporation, trade union~~, registered party or registered constituency association shall cause a political advertisement to appear without providing the following information to the broadcaster or publisher, in writing:

1. The name of the person, ~~corporation, trade union~~, registered party or registered constituency association who is causing the political advertisement to appear.
2. The name, business address and telephone number of the individual who deals with the broadcaster or publisher on behalf of the person or entity mentioned in paragraph 1.
3. The name of any other person, ~~corporation, trade union~~, registered party or registered constituency association who is sponsoring or paying for the political advertisement.



Transparency of third-party advertising, subsection 22(5)



- Section 37.4 of the Act, as amended by Bill 201:
Subsections 22 (5) to (9) apply, with necessary modifications, with respect to third parties and ~~third party election advertisements~~ third party political advertisements during a period referred to in section 37.10.1.
- In other words, subsection 22(5) is a transparency provision for third-party advertising.
- However, subsection 22(5) will not apply to corporations and trade unions.
- Which raises the question of whether corporations and trade unions that conduct third-party advertising will be subject to the transparency measures in subsection 22(5).



Integrity

Fundraising, lobbying and pay-to-play



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

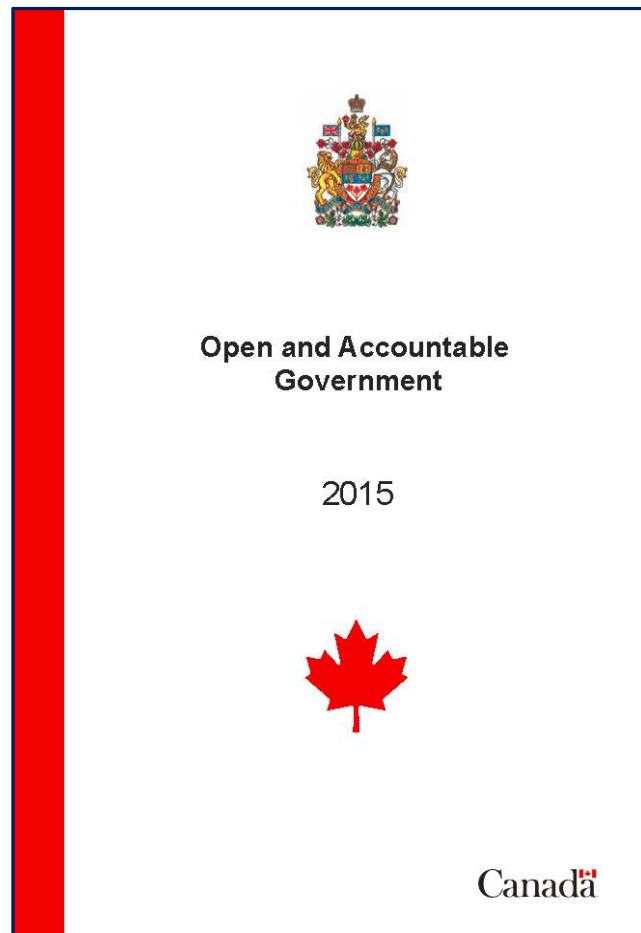
Political fundraising and lobbying (Federal)



- Restricted by *Lobbyists' Code of Conduct*
- Rule affirmed by Federal Court of Appeal in *Democracy Watch v. Campbell*
- Two investigation reports by Commissioner of Lobbying
- Prime Minister's guidelines for Ministers and Parliamentary Secretaries
- Impact of *Conflict of Interest Act* and *Conflict of Interest Code for Members of the House of Commons*



Political fundraising and lobbying (Federal)



Annex B

Fundraising and Dealing with Lobbyists: Best Practices for Ministers and Parliamentary Secretaries

Ministers and Parliamentary Secretaries must avoid conflict of interest, the appearance of conflict of interest and situations that have the potential to involve conflicts of interest.

The following is a summary of best practices that Ministers and Parliamentary Secretaries are expected to follow to maintain appropriate boundaries between their official duties and political fundraising activities. It is important that Ministers and Parliamentary Secretaries familiarize themselves with these practices and apply them in all appropriate circumstances. In addition, they must ensure that their staffs are well acquainted with the practices and that adequate processes are in place in their offices to ensure compliance.

The practices complement, and do not replace, other rules that Ministers and Parliamentary Secretaries must observe, including the *Conflict of Interest Act*, the *Conflict of Interest Code for Members of the House of Commons* and the *Lobbying Act*. Ministers and Parliamentary Secretaries should communicate with the Office of the Conflict of Interest and Ethics Commissioner if they have any questions or concerns relating to their obligations under the *Conflict of Interest Act* or the *Conflict of Interest Code for Members of the House of Commons*, and should familiarize themselves with the Commissioner's *Guideline on Fundraising and the Conflict of Interest Act*.

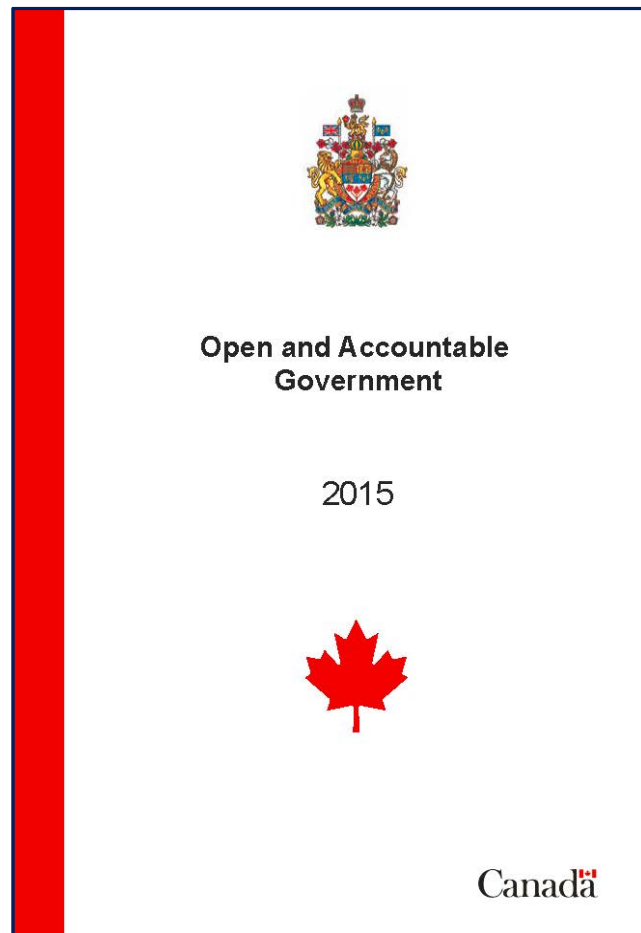
General Principles

- Ministers and Parliamentary Secretaries must ensure that political fundraising activities or considerations do not affect, or appear to affect, the exercise of their official duties or the access of individuals or organizations to government.

23



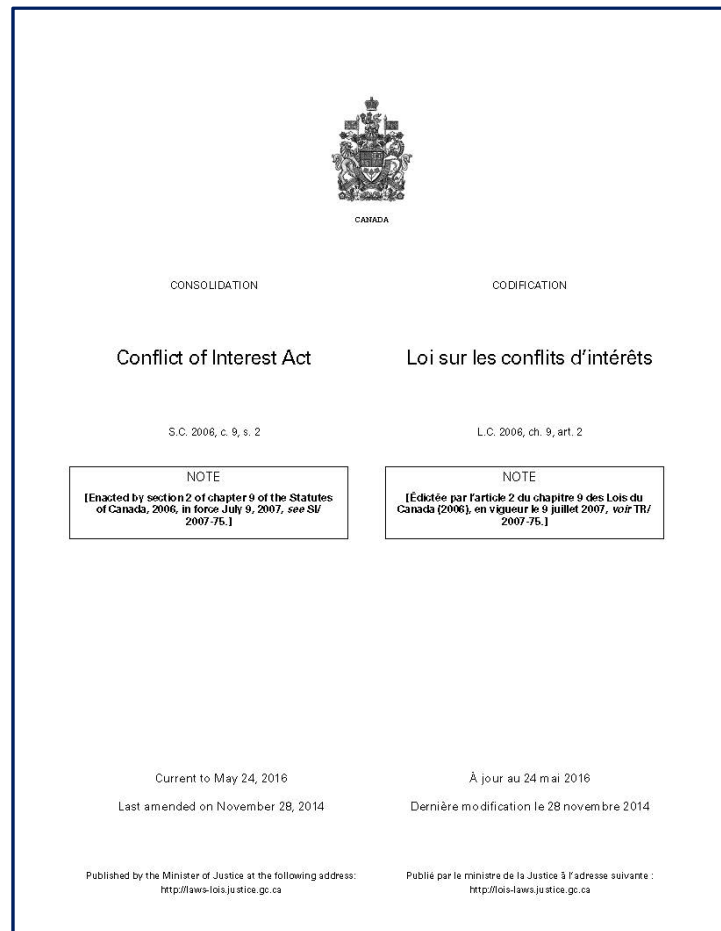
Political fundraising and lobbying (Federal)



- Broad “stakeholder” definition
- No stakeholders on riding campaign teams, executives, fundraising teams
- Don’t use stakeholder lists for fundraising
- Don’t target stakeholders or lobbyists
- Don’t discuss government business or lobby at fundraising events



Political fundraising and lobbying (Federal)



- *Conflict of Interest Act* affects riding fundraising: Commissioner (April 2016)
 - Recusal from decision-making involving former contributor
 - Don't accept funds from anyone that has lobbied or is likely to lobby you
 - Don't solicit funds from anyone in organization or company that deals with your House committee

**FASKEN
MARTINEAU**

Political fundraising and lobbying (Ontario)



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

U.S. Restrictions on Lobbying and Political Fundraising



- Three-fifths of states (29) restrict political contributions while legislature is in session:
 - 15 prohibit contributions from anyone
 - 14 prohibit contributions from lobbyists
- California and four other states do not allow lobbyists to make political contributions at any time

“Pay-to-Play”



- When political contributions are made (in an attempt) to secure government business or favour
- United States: Pay-to-play subject to high degree of restriction and scrutiny
- Canada: Pay-to-play permitted or tolerated, and never mentioned
 - Canadian law-makers slow to address pay-to-play activity

U.S. Examples of Restrictions on Pay-to-Play

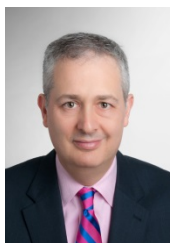


- Many states: No political contributions by principals of companies holding state government contracts (and their spouses and dependent children)
- Some states: similar restrictions on company executives and employees whose commissions or bonuses are tied to government contracts
- Several states: Principals of companies that hold or seek government contracts cannot contribute to political committees (what we would call third-party advertisers)
- Some states: Government cannot award contract to a company whose employee(s) or family member(s) raised campaign funds for a state official

U.S. Examples of Restrictions on Pay-to-Play (more)



- Many states: Companies bidding on government contracts must disclose political contributions by officers, directors and family members
- As of Jan. 1, Virginia prohibits political contributions by officers and directors of companies applying for or receiving economic development grants and loans
- Securities and Exchange Commission: investment advisor cannot provide advice to government clients for two years after it, or certain executives or employees made political contributions to certain candidates



Guy W. Giorno

Partner

613 696 6871

ggiorno@fasken.com

**FASKEN
MARTINEAU** 

VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

