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# Striking the Right Regulatory Balance May be Key to Helping Canada Avoid the Creep of “Dark Money” that has Infiltrated Politics and Philanthropy South of the Border

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Author: Benjamin Miller

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Both inside and outside of elections we are bombarded with social media posts, television and radio ads, and articles telling us what to believe about the leading policy issues of the day. Perhaps now, more than ever, we are aware that the information we see may be intentionally false and manipulative. Yet the issues we face are complex and we need to trust somebody. Non-profits and charities are important players, both in meeting this need for information and as tools of disinformation and manipulation.

Jane Mayer, in her book *Dark Money*, has documented how, for decades, a small group of billionaires in the United States have used charities (501(c)(3)s) and social welfare groups (501(c)(4)s) to systematically push issues while concealing their identity, or, where their identity was known, their political objectives.<sup>[1]</sup> According to her research, this network has helped paralyze Congress, fostered distrust, and actively encouraged polarization among lawmakers and society on key issues like healthcare, even where there are shared opinions among Democrat and Republican voters. This has resulted in government shutdowns, social divisions, and general disorder.

In light of our southern neighbour’s current troubles and the recent changes to Canada’s *Income Tax Act* to allow registered charities to engage in unlimited public policy development and dialogue activities,<sup>[2]</sup> this article will take a step back and look at our broader system of charity, non-profit, and election law and regulation to assess whether the factors that

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enabled dark money to thrive in the US are present here. I will look at two kinds of dark money practices: advocating for issues using non-profits while hiding the identity of the donor and funding educational charities and universities to create biased research or recruit students and staff into advocacy networks.

Before beginning, however, I would like to highlight some important sensitivities around this issue.

### **Striking the right balance: transparency over substance**

During our recent election campaign, it was suggested that environmental organizations could lose their charitable status if they spoke out about climate change because Elections Canada would consider it partisan. Many Canadians responded angrily, expressing vocal support for environmental charities.<sup>[3]</sup> On the other hand, a few weeks earlier, the Government of Alberta [launched a public inquiry](#) into environmental charities that it alleged are funded by foreign sources and have made false or misleading claims about Alberta's energy sector.<sup>[4]</sup>

Whether you see a particular charity as a valuable participant in democracy or a destructive tool of powerful interests may depend on what you think of its message. But it is not the substance of a message that makes funding it “dark money,” it is the concealment of who is behind the message or the nature of their aims. This is an important distinction because, as I will discuss, it is often impractical or inappropriate for regulators to judge between the substance of competing political and empirical claims except in the most egregious cases.

When it comes to the extensive grey area around political debate, I will argue that it is better to foster transparency through government databases than to simply tighten rules around what charities and non-profits can do. This is because greater transparency for charities and non-profits makes existing rules more meaningful by “crowdsourcing” enforcement, thus ensuring that subject-matter experts, watchdogs, and journalists have the information they need to source, judge, and respond to claims by non-profits and charities, regardless of who funds them. These sources can provide the research and expertise that regulators often do not have.

### **Astroturfing: Is the grass any greener in Canada?**

Imagine you're looking for more information about a policy issue such as pipeline construction or climate change prevention. A quick Google search turns up groups with inviting names that start with “[Friends of](#)” or authoritative names like “[International Coalition for](#).” You appreciate that everyone has some bias but you're probably going to treat what you find very differently if you believe it is funded by those with a vested interest in the issue and staffed by public relations professionals rather than funded by average concerned citizens and staffed by subject-matter experts.

The practice of passing off a corporate-funded marketing campaign as an independent grassroots advocacy movement is called “astroturfing,” and it's a multibillion-dollar industry in the US.<sup>[5]</sup> Although there may be no laws directly prohibiting it in the political arena,<sup>[6]</sup> astroturfing can have deadly effects, such as when drug or tobacco companies use it to obscure the harmful side-effects of their products.<sup>[7]</sup> Additionally, it lowers trust in non-profit organizations more generally, breeding cynicism, and undermining legitimate grassroots efforts.<sup>[8]</sup>

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My comparison of regulatory environments in Canada and the US has identified three factors that have allowed astroturfing to thrive south of the border. The first is a string of constitutional law cases, culminating in *Citizens United v. Federal Election Commission*, that have given corporations the right to spend an unlimited amount of money during elections.<sup>[9]</sup> The second is the very limited reporting requirements for non-profit organizations, both inside and outside of election periods. The third is political pressure preventing regulators from enforcing the laws that do exist.

The landmark 2010 US Supreme Court *Citizens United* decision drastically changed the landscape of campaign finance. Mayer estimates that the political fundraising of the Koch brothers (owners of an oil business and the second largest corporation in the US) alone jumped from \$13 million prior to *Citizens United* to \$900 million afterwards, leading up to the subsequent election.

In Canada, on the other hand, our Supreme Court has stated firmly that federal and provincial election spending limits and reporting requirements are constitutional.<sup>[10]</sup> At the federal level, third parties, including charities and non-profit organizations, must register with Elections Canada if they spend \$500 or more on elections advertising.<sup>[11]</sup> The absolute limit on election spending in Canada is \$150,000. There is no limit on political contributions, but the identity of contributors who give more than \$200 must be disclosed. Third parties that spend more than \$5,000 must appoint an auditor. Most importantly, given the network-based nature of dark money, collusion to avoid the above rules is prohibited. These are very strong rules compared to many of our international peers, including Australia, New Zealand, and the United Kingdom.

So, when it comes to election periods, Canada has strong case law. Yet case law from BC suggests that spending limits outside of election periods are not constitutional.<sup>[12]</sup> In an era of perpetual campaigning, this seems to be a serious vulnerability. However, it should be noted that those cases dealt with spending limits and not reporting requirements. When it comes to dark money, as I've mentioned, it's not necessarily about preventing people from exercising their free speech rights but ensuring they do so transparently.

In the US, non-profit entities that engage in national partisan electoral spending face two regulators: the Internal Revenue Service (IRS) and the Federal Electoral Commission (FEC). 501(c)(4)s, a name that refers to the relevant section of the tax code, also known as social welfare organizations, are the tool of choice for dark money practices. 501(c)(4)s are "not organized for profit but operated exclusively for the promotion of social welfare." However, a 1959 Treasury regulation made it so that "exclusively" only means "primarily," which has since been interpreted as a mere 51%. Because of this, all kinds of issue advocacy groups, like the National Rifle Association, qualify under this section.<sup>[13]</sup> What makes 501(c)(4)s so attractive for the purpose of dark money spending is the fact that donors' identities do not have to be disclosed to the public. In fact, because of the timing of annual reporting (five months after year end) a group can time its formation and disbanding over an election period without ever having to report to the IRS.

In Canada, the closest equivalent to 501(c)(4) organizations are NPOs under section 149.1(1) of the *Income Tax Act*. The rules here are even more permissive than for 501(c)(4)s: NPOs can pursue any legal purpose other than profit. While NPOs do have to file an information return under some circumstances, the return does not require them to disclose the identity of anyone, other than a contact person. Furthermore, while many of these organizations are provincially

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incorporated non-profits, provinces have serious issues providing even a publicly accessible and easy to navigate [list of corporations](#), much less transparent information on who funds and controls these corporations. This lack of transparency is a weakness and can easily be exploited outside of elections. During elections, however, NPOs are subject to the robust election laws mentioned above.

In the US, political chill and internal divisions have significantly hampered the IRS and FEC, respectively. In the case of the IRS, in 2013 it created an internal list of red flags to determine if 501(c)4s were involved in politics. This was followed by an outcry of political bias against right-wing groups, which has since paralyzed the IRS.[\[14\]](#) Its leaders have apparently seriously questioned their role as a charities regulator at all, and the IRS now reportedly approves 99% of all charity applications without review.[\[15\]](#)

The CRA has faced no such scandal of this magnitude, although political activity audits of charities that began in 2012 drew some controversy that, in many ways, led to the recent changes to rules governing public policy dialogue and development.[\[16\]](#) There's no question that the legislation and regulation is now more permissive, but there is no reason to think that the CRA will become passive. Furthermore, there has been no suggestion that this rule change has led to a change in the CRA's practices of vetting charities more broadly.

A panel of six politically appointed commissioners oversees the FEC. These commissioners have been notably split 3-3 along political lines, thus blocking any efforts to start enforcement actions. Among other things, they are divided over such fundamental issues as whether they are constitutionally allowed to enforce their own definition of "express advocacy."[\[17\]](#) Canada's Elections Commissioner, meanwhile, is a career public servant. There are no reports of internal divisions and, as my discussion of election law above suggests, there is much more clarity on the scope and content of the commissioner's authority.

In sum, Canada maintains strong protections against dark money practices during elections and by registered charities but is somewhat vulnerable to the non-transparent use of non-profit organizations outside of election periods. Hopefully, with the introduction of Ontario's Not-for-Profit Corporations Act and its corresponding database, we will start to see greater transparency in this area.

### **Beachheads: the thin line between charity, politics and dark money networks**

Dark money practices are not just about hiding a donor's identity, they're also about legitimizing political objectives by cloaking them in charity. Broadly speaking, the US and Canada have similar legal standards when it comes to distinguishing between advancing education (which is charitable) and merely promoting a point of view (which may further other charitable purposes but is not charitable in itself).[\[18\]](#) However, this has not stopped some philanthropists from marshalling educational institutions in service of their point of view.

From the 1970s until his death in 2014, Richard Mellon Scaife pioneered what has since been called "political philanthropy." He saw academia and the judiciary as increasingly ideologically left-wing and anti-business and sought to systematically fund a "counter-intelligentsia" through family foundation supports for academic programs, research fellows, and think tanks.[\[19\]](#) The [Heritage Foundation](#), the [American Enterprise Institute](#), and the [Cato Institute](#), with a combined budget of \$150 million in 2015, are likely the best-known examples of this kind of think tank

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philanthropy.

While it is quite natural for charities to reflect the values of their donors (and of course a donor's motives do not make something that is otherwise charitable non-charitable), the trouble is when organizations fail to live up to the standards of rigour and impartiality required of genuine education (as opposed to mere advocacy). Systematic evidence from the US shows an alignment between the “empirical findings” casting doubt on climate change across networks of organizations over many years and the apparent financial interests of their funders.<sup>[20]</sup> While I am not qualified to judge the methodology and data of the many studies involved, these patterns could suggest the possibility of a non-charitable collateral purpose on closer inspection and highlight the need to take a systems-wide approach to analyzing specific charities' purposes. Unfortunately, this is often impractical for centralized regulators; researchers and watchdog organizations are better placed to shine a light on questionable research.

The line becomes even blurrier when US charities are embedded within networks of the kind of non-profit organizations previously discussed. Political philanthropists, most notably John M. [Olin](#), Lynde and Harry [Bradley](#), [Scaife](#), and the Koch brothers, have also systematically – directly and indirectly – influenced universities through the creation of what they have sometimes referred to as “beachheads.” The term describes both independent think tanks on or near university campuses (such as [the Mercatus Center](#) near George Mason University) and programs within universities like the Olin Fellowships in Law and Economics at Harvard.

The closeness of these think tanks allows them to recruit and influence students and staff. In and of itself, this may seem like exactly what an educational charity should do. However, in 2015, senior staff working for the Koch brothers were recorded telling a room full of donors that “the [Koch] network is fully integrated, so it's not just work at the universities with the students, but it's also building state-based capabilities and election capabilities and integrating this talent pipeline.”<sup>[21]</sup>

Canadian universities are also exposed to the risk of students being recruited into advocacy networks and academic programs with underlying political motives. In both cases, however, it is the universities, not the charities regulator, who are best placed to actively police these entities and those who offer funding for academic programs. For instance, Toronto's York University made headlines in 2012 for accepting, and then rejecting, \$30 million from the private Centre for International Governance Innovation (CIGI).<sup>[22]</sup> Public pressure from the academic community over fears that independence and autonomy might be compromised is likely much stronger and more demanding than the more amorphous demands of charity law.

## **Election 2019 and beyond**

How to respond to climate change is one of many pressing questions that voters were asked to answer this past federal election. Voters need the best and most reliable information possible to both decide who to elect and how best to hold them to account. They need to know they can trust that information. Charities, non-profits, and their regulators have a vital role to play in ensuring the quality and availability of this information. Regulators can foster transparency through publicly available registries, but they are poorly placed to police the line between objective education and advocacy on their own, except in the most egregious cases. Rather, regulators should ensure that experts, civil society organizations, watchdogs, and journalists have the information they need to do their own research into what others are saying, both to



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inform the public and the regulator. If we can get that balance right, we'll have a civil society empowered to not only lead democratic dialogue but protect it too.

[1] Jane Mayer, *Dark money: the hidden history of the billionaires behind the rise of the radical Right*, (Toronto: Anchor Books, 2016)

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[3] Muriel Draaisma, "Elections Canada 'wrong' to say climate change ads could be partisan, expert says," (August 20, 2019) CBC. online:

[4] Government of Alberta, "Public inquiry into anti-Alberta energy campaigns" (July 4, 2019) Government of Alberta. online: .

[5] Sharyl Attkisson, "A news consumer's guide to 'astroturf' sources", *The Hill* (September 10, 2018). online:

[6] It's different for customer reviews. See Government of Canada "Don't buy into fake online endorsements", (July 28, 2014). online:

[7] David A Tomar. "Deadly Disinformation: How Drug Companies Use Astroturfing to Get Us Hooked", (2019), The Quad. Online:

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<https://www.tandfonline.com/doi/full/10.1080/02650487.2015.1094858> >.

[9] *Citizens United v. Fed. Election Comm'n*, 558 US 310 (2010).

[10] *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827 ("Harper").

[11] Canada, Elections Canada, *Political Financing Handbook for Third Parties, Financial Agents and Auditors*, (Ottawa: Elections Canada, 2019) at online:  
<https://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/ec20227&lang=e> >

[12] *BCTF v British Columbia (Attorney General)*, 2009 BCSC 436 ("BCTF"); *Reference re Election Act (British Columbia)*, 2012 BCCA 394 ("BC Reference").

[13] Daniel Kirby, "The legal quagmire of irc sec. 501(c)(4) organizations and the consequential rise of dark money in elections" (2015) 90:1 *Chicago-Kent L R* 223.

[14] Linda Sugin, "Politics, Disclosure, and State Law Solutions for 501(C)(4) Organizations" (2016) 91 *Chi.-Kent L Rev* 895 at 896.

[15] Ruth M. Madrigal, "Charities Regulation on the International Front: Emerging Issues in Globalization." (Webcast of Masterclass at Columbia University, New York, US, November 15, 2018).

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[16] Dean Beeby, “Political activity audits of charities suspended by Liberals,” (May 4, 2017) CBC. online:

[17] Kristy Eagan, “Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending” (2012) 40 *Fordham Urb. L.J.* 801 at 857. online:

[18] Canada, CRA. Research as a charitable activity, CSP-029 (Ottawa: CRA, 2009) at para 11. online: [. As with the IRS, it is unlikely but possible that an organization missing a factor is still charitable. This view is based on e.g. \*McGovern v Attorney General\*, \[1981\] 3 All ER 493, \[1982\] Ch 321 \(Ch.\); \*Vancouver Society of Immigrant and Visible Minority Women v Canada \(Minister of National Revenue\)\*, \[1999\] SCJ 5, \[1999\] 1 SCR 10 \(SCC\) at para 163.](#)

[19] Mayer, *supra* note 1 at 77.

[20] Robert Brulle, “Institutionalizing delay: foundation funding and the creation of U.S. climate change counter-movement organizations”, online: (2013) *Climatic Change*, 122:4, 681–694.

[21] David Levinthal, “Koch Brothers Higher-Ed Investments Advance Political Goals” (2015), Center for Public Integrity (website). online:

[22] Tristin Hopper, “York University rejects RIM co-founder Jim Balsillie's \$60-million deal”, *National Post* (April 3, 2012). online: