

CAPPING POLITICAL CONTRIBUTIONS FROM BEYOND THE GRAVE

By Kathryn Balter

Although not a bequest that I often see in my estate planning practice, some people with distinct political leanings have historically taken advantage of an exemption from limits to political contributions in each calendar year by making such contribution in their Wills. Prior to the introduction of Bill C-23, dubbed the *Fair Elections Act*, which received Royal Assent on June 19, 2014, politically-inclined individuals could take advantage of former subsection 405(2) of the *Canada Elections Act*, S.C. 2000, c.9 (the "**Act**"), which permitted unlimited political contributions by way of testamentary disposition.

This provision was replaced by section 367(2) and (3) of the Act, which provides that testamentary dispositions to political entities (as defined below) are only permissible in the following circumstances¹:

1. the contribution can only be made in one calendar year; and
2. the contributions cannot cause the contributor (i.e. the deceased) to exceed the contribution limit during any calendar year, taking into account any contributions that the contributor made before their death.

The *Fair Elections Act* also revised the annual permissible amount of contributions to a particular registered party; registered associations, nomination contestants and candidates of a particular registered party; a candidate for a particular election who is not the candidate of a registered party; and the leadership contestants in a particular leadership contest (which I will collectively refer to as "**political entities**" for ease of reference). Each of these annual contributions is now capped at \$1500 in total in any calendar year, increasing by \$25 on January 1 in each year (following the introduction of these provisions in 2014). As of the date of this article, each category is capped at \$1575².



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¹ Subject to certain exceptions relating to contributions to one's own political campaign set out in subsections 367(5) through (8) of the Act.

² See the chart of limits at <http://www.elections.ca/content.aspx?section=pol&document=index&dir=lim&lang=e>

Offending Testamentary Dispositions

So what happens if your Will includes a gift to a political entity that is greater than the allowable annual contribution? According to section 367(3) of the Act, any non-conforming testamentary disposition "shall be read as if the contribution is for the highest amount that would not cause the contributor to exceed **[the contribution]** limit, and...shall be read as if the contribution is to be made only in the first of **[the]** calendar years" provided for in a Will if such Will provides for the gift to be made over multiple years.

If the offending gift to a political entity is in the form of a bequest, the balance of the gift would lapse and would fall into the residue of the testator's estate; however, if a portion of the residue were left to a political entity, that portion (barring a failure of gifts clause) would pass on an intestacy.

It is not clear from the provisions of the Act whether a bequest is treated as being a contribution payable to a political entity in the year of death of the testator, in the year following the death of the testator (i.e. after the executor's year), or when the estate trustee actually distributes the bequest (or the allowable portion thereof) to the political entity. It has been my experience that the political entity calculates the allowable contribution in accordance with the date the bequest is made; however, this may not be the case across the board.

Contravention of Contribution Limits - Estate Trustee Liability

It is helpful to note that an individual is only guilty of an offence regarding over-contribution if they knowingly exceed the contribution limit³. Therefore, an estate trustee who makes a donation in accordance with a bequest in the same year of a testator's death without knowing that the deceased already made political contributions within that year (and therefore collectively over-contributed to political entities) is unlikely to be prosecuted under the Act⁴.



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³ Paragraph 497(2)(d) of the Act. The term "knowingly" is not defined in the Act.

⁴ Fines are capped between \$20,000 and \$50,000 and prison terms are capped between one and five years depending on whether the offence is pursued as a summary conviction or conviction on indictment (subsection 500(5) of the Act).