June 22, 2012

Via email: maria.littlejohn@courts.gov.bc.ca

British Columbia Court of Appeal
400 - 800 Smithe Street
Vancouver, BC V6Z 2C5

Attention: Maria Littlejohn, Deputy Registrar of the Court of Appeal

Dear Ms. Littlejohn:

Re : IN THE MATTER OF: The *Constitutional Question Act*, RSBC 1996, c. 68
AND IN THE MATTER OF: *The Canadian Charter of Rights and Freedoms*
AND IN THE MATTER OF: A Reference by the Lieutenant Governor in Counsel set out in Order in Council No. 296/12 dated May 16, 2012 concerning the constitutionality of amendments to provisions in the *Election Act*, RSBC 1996, c. 106 regarding election advertising by third parties
Court of Appeal File No. CA39942

In preparation for the case management conference scheduled at 9:30 a.m. on Monday, June 25, 2012, we would be grateful if you could provide Madam Justice Ryan with this letter and its enclosures.

In particular, we enclose the following:

a) Submissions of the Attorney General of British Columbia (outlining the Attorney General's position on the two issues to be dealt with at the case management conference, namely, the scope for extrinsic evidence and the applications for intervenor status);

b) a letter addressed to the Court from Dermod Travis, the Executive Director of IntegrityBC, regarding the case management conference and IntegrityBC's application to intervene, as received by counsel for the Attorney General on June 22, 2012; and

c) a copy of the letter from counsel for the Attorney General to the six persons / organizations who have expressed an interest in participating in the Reference as intervenors, sent in accordance with the Court's direction given at the case management conference held June 12, 2012.

Ministry of Justice

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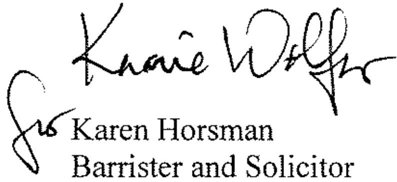
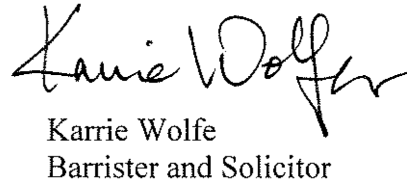
We are also aware that both the Freedom of Information and Privacy Association and the BC Civil Liberties Association have filed materials directly with the Court. Our intention is to deal with those materials on Monday.

Sincerely,



Karen Horsman
Barrister and Solicitor



Karrie Wolfe
Barrister and Solicitor

cc: Mark G. Underhill, Underhill, Boies Parker

Peter A. Gall, Q.C., Heenan Blaikie

Submissions of the Attorney General of British Columbia on the June 25, 2012 Election Act Reference Case Management Conference

1. The Attorney General of British Columbia (the "Attorney General") understands there to be two matters at issue at this case management conference: (i) determining the scope for extrinsic evidence on the Reference, and (ii) considering the applications of the six persons/organizations who have expressed an interest in participating in the Reference as intervenors. We will address each of these issues in turn.

(i) The Appeal Record

Admissibility of Extrinsic Evidence

2. The Supreme Court of Canada addressed the question of the admissibility of extrinsic evidence on a constitutional reference in *Re: Anti-Inflation Act*, [1976] 2 SCR 373, and *Re: Residential Tenancies Act*, [1981] 1 SCR 714. *Re: Anti-Inflation Act* was a reference directly to the Supreme Court of Canada; *Re: Residential Tenancies Act* was a reference to the Ontario Court of Appeal in the first instance.

3. These two cases establish that there is no general prohibition on the admission of probative and relevant extrinsic evidence on a constitutional reference, provided that the evidence is "not inherently unreliable or offending against public policy" (*Re: Residential Tenancies*, at pp. 723). The need for extrinsic evidence, and its permissible scope, is defined by the nature of the question before the court on the particular reference. As stated in *Re: Anti-Inflation Act*:

> ....questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought to adduce such evidence. (at p. 389)

4. While recognizing the flexible nature of the principle of admissibility of extrinsic evidence, the Supreme Court of Canada also approved of the use of a case management process much like the one in which the parties are presently engaged to provide direction on the evidentiary record in advance of the hearing proper:

> We should be loathe, it seems to me, to enunciate any inflexible rule governing the admissibility of extrinsic evidence in constitutional references. The effect of such a rule might well be to exclude logically relevant and highly probative evidence. It is preferable, I think, to follow the practice adopted in the Anti-Inflation Reference and give timely direction establishing the evidence or extraneous materials to be admitted to serve the ends of the Court in a particular reference.
>
> *Re: Residential Tenancies Act,* at p. 722

5. The question then arising is what (if any) extrinsic evidence would "*serve the ends of the Court*" in the present Reference? In answering this question, it is necessary to have regard not only to the question referred to the Court by the Lieutenant Governor in Council, but also to the context in which it arises.

<u>The Reference Question and the *BCTF* case</u>

6. The question which has been referred to the Court of Appeal for hearing and determination is stated in the following terms:

> Do sections 80 to 86 of the *Miscellaneous Statutes Amendment Act (No. 2) 2012*, set out in the attached Schedule, which amend sections 1, 183, 198, 204, 228, 235.1 and 244 of the *Election Act*, R.S.B.C. 1996, c. 106, unjustifiably infringe section 2(b) of the *Canadian Charter of Rights and Freedoms*? If yes, in what particular or particulars and to what extent?

7. This reference question must be understood against the backdrop of the judgment of Mr. Justice Cole in *British Columbia Teachers' Federation et al. v. British*

Columbia (Attorney General), 2009 BCSC 436, and of the Court of Appeal in affirming Mr. Justice Cole: 2011 BCCA 408 ("*BCTF*").[1] The Court of Appeal ultimately concluded that the previous restrictions on third party election advertising in the *Election Act*, which the Attorney General had admitted were an infringement of the plaintiffs' s. 2(b) rights, could not be justified under s. 1 of the *Charter*.

8. The *BCTF* case was a broad challenge to the restrictions on third party election advertising, brought by way of an action. The appeal was argued before the Court of Appeal on the basis of an evidentiary record that filled 19 volumes of Appeal Books. The *Election Act* provisions at issue in the *BCTF* case had two features that were the focus of the challenge:

   (i) a definition of "election advertising" that encompassed advertising which directly or indirectly promoted a political party or the election of a candidate, and included "issue advertising", and

   (ii) the extension of the restrictions on third party advertising to a 60-day "pre-campaign" period, in addition to the 28-day campaign period.

9. The primary concern of Mr. Justice Cole in allowing the *BCTF* action at trial was that, because of the fixed-date election regime in BC, the pre-campaign period necessarily covered a period of time when the Legislative Assembly was still sitting, and included the usual timeframe during which the Throne Speech and the introduction of the budget – "*two of the most important events in the legislative calendar*" (trial judgment, at para. 268) – were addressed. That fact, in

[1] For completeness, there are 2 additional decisions related to the *BCTF* case, both of which relate to an unsuccessful application by the Attorney General to stay the effect of the trial judgment: 2009 BCSC 440 (Cole J.) and 2009 BCCA 156 (Lowry JA.).

combination with the definition of "election advertising", meant that the Court was concerned that the restrictions could capture legitimate political speech unrelated to influencing the outcome of an election. For this reason, Mr. Justice Cole concluded that the limitations on freedom of expression could not be justified under s. 1 of the *Charter* because the impugned provisions did not minimally impair the plaintiffs' rights. This finding was affirmed by the Court of Appeal:

> **70** I agree with the trial judge. The effect of the impugned legislation overshoots its overall objective of electoral fairness. It follows that it cannot be said that the infringement minimally impairs the right to freedom of expression. Its deleterious effect – that is captures otherwise constitutionally protected speech commenting on the wisdom of proposed legislation, or legislation left out of the agenda, for example, - far outweighs the salutary effect of equalizing political discourse during the pre-campaign period.

10. It is important to consider both the history of the previous proceedings and the relevant findings of the Courts at both levels which led to the conclusion in the *BCTF* case that the previous legislation failed to meet constitutional muster at the minimal impairment stage of the s. 1 analysis. With respect to the history of the proceedings, it is worth noting that the legislation was challenged as an infringement of sections 2(b), 2(d) and 3 of the *Charter.* However, as the Attorney General and individual defendants conceded that the spending restrictions restricted the plaintiffs' rights under s. 2(b) of the *Charter*, the argument with respect to freedom of expression focused solely on whether the impugned provisions were a justifiable limit under section 1 of the Charter. (*BCTF* trial decision, para. 52)

11. With respect to relevant findings, those findings may be summarized as follows:

    (i) The plaintiffs' claims that the impugned provisions breached ss. 2(d) and 3 of the *Charter* were dismissed at trial, and there was no

appeal from this aspect of the judgment. (*BCTF* trial decision, paras. 53-105)

(ii) The definition of "election advertising" was found not to be too vague to constitute a "limit prescribed by law" for the purpose of s. 1 of the *Charter*. (*BCTF* trial decision, para. 127)

(iii) The impugned provisions were directed at objectives – promoting equality in political discourse, protecting the integrity of the financial regime applicable to candidates and parties, and ensuring voter confidence in the electoral process (in short, electoral fairness) – that were sufficiently pressing and substantial to justify limiting a *Charter* right. (*BCTF* trial decision, paras. 110-182)

(iv) The impugned provisions were rationally connected to the objectives. (*BCTF* trial decision, paras. 183-188)

(v) The broad definition of "election advertising" in combination with the extension of the restrictions into a pre-campaign period that included the sitting of the Legislature, the Throne Speech and the introduction of the budget, meant that the impugned provisions did not minimally impair the right to freedom of speech. (*BCTF* trial decision, paras. 189-27; *BCTF* appeal decision, paras. 65-70)

(vi) For the same reason, the impugned provisions failed the proportionality analysis under section 1 of the *Charter*. The salutary effects of the impugned legislation were outweighed by the deleterious effect of limiting political speech at that particular time in the sitting of the Legislature. (*BCTF* trial decision, paras. 271-283; *BCTF* appeal decision, paras. 65-70)

12. The present Reference in effect picks up where the Court of Appeal in *BCTF* left off. The government of British Columbia was content to accept the findings of the Court of Appeal and amend the third party spending restrictions in the *Election Act* to address the identified constitutional deficiency. On this Reference, the Attorney General concedes, as it did in the *BCTF* case, that the restrictions on third party election advertising *prima facie* infringe s. 2(b) of the *Charter*. The question posed on the Reference is whether the amendments <u>unjustifiably</u> infringe s. 2(b) – that is, are the amendments sufficient to save the provisions under s. 1?

13. It is unnecessary for the Court of Appeal on the Reference to address the first two stages of the section 1 analysis: whether third party spending restrictions are directed at sufficiently pressing and substantial objectives to justify a breach of *Charter* rights, and whether the impugned provisions are rationally connected to those objectives. The same questions have already been determined in the *BCTF* case and cannot be revisited in the present Reference as a matter of the simple application of principles of *stare decisis*.

14. The questions which do arise for determination on the Reference are whether the amendments constitute a minimal impairment of rights under section 2(b) of the *Charter*, and whether the salutary effects of the amendments outweigh any deleterious effects. Any direction with respect to the scope of admissible extrinsic evidence should, in the submission of the Attorney General, be guided by those inquiries.

<u>The Amendments and the Admissibility of Extrinsic Evidence</u>

15. The amendments to the *Election Act* address the concern identified by the Courts in the *BCTF* case regarding the interference with legitimate political speech in two primary ways:

(i) a shortening of the pre-campaign period during which the restrictions on third party advertising will apply; and

(ii) the creation of a buffer zone to ensure that the restrictions do not apply at any time during the sitting of the Legislative Assembly, or indeed for a 21-day period following any sitting of the Legislative Assembly.

16. This is effected through a statutory definition of "pre-campaign period" that is the shorter of (a) the period 40 days prior to the campaign period, or (b) the period beginning 21 days following any sitting of the Legislative Assembly.

17. The Attorney General anticipates that the minimal impairment analysis will require the Court of Appeal to address (at least) two questions:

a. is it justifiable to extend the third party spending restrictions into the pre-campaign period?; and
b. is any concern with minimal impairment and proportionality sufficiently addressed by the 21-day buffer period which ensures that the restrictions do not apply while the Legislature is sitting?

18. Assuming this to be the relevant inquiry, the Attorney General submits that extrinsic evidence relevant and probative to those two issues would be of assistance to the Court on the present Reference.

(ii) Intervenor Applications

19. The Attorney General notes that the *Constitutional Question Act* provides only limited direction with respect to the conduct of a reference. The only person with a *prima facie* right to be heard on a question referred by the Attorney General of BC is the Attorney General of Canada, who, under s. 3 of the *Act*, must be given

notice. The court to which the question is referred also has the authority, under s. 5 of the *Act*, to direct that certain persons or a representative of a class of persons be given notice, and any person so notified is entitled to be heard.

20. At a hearing for directions before this Honourable Court on May 22, 2012, the Attorney General proposed a process for the Reference, which included having identified the proposed persons and organizations to be given notice pursuant to s. 5 of the *Act*, as well as those persons and organizations who would be invited to apply for intervenor status. The Attorney General's proposal was approved by this Honourable Court at the hearing, and in a subsequent Memorandum for Directions from Madam Justice Bennett dated May 25, 2012.

21. Six persons / organizations have expressed an interest in participating on the Election Act Reference pursuant to the invitation to apply for intervenor status, and, as noted above, the Attorney General takes no position with respect to those applications.

22. The Attorney General does, however, submit that the participation of these persons should be guided by the principles that traditionally govern the participation rights of intervenors. In particular:

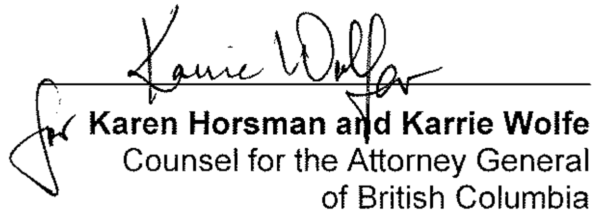
- the submissions of the intervenors should bring a different and useful perspective to the resolution of the issues and not be merely repetitive of the submissions of the Amicus (*Faculty Assn. of University of British Columbia v. University of British Columbia*, 2008 BCCA 376, at para. 4; *Vancouver Rape Relief Society v. Nixon*, 2004 BCCA 516, at paras. 14-15);

- the intervenors are limited to making arguments that fall within the scope of the *lis* and the issues as defined by the parties – it is not open to an intervenor to raise new issues. (*Canada (Attorney General) v. Aluminum Co. of Canada Ltd.* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.)); and

- decisions with respect to whether intervenors will be permitted to make oral submissions are left to the discretion of the division hearing the matter, and are generally not made in advance of the receipt of written materials.

23. The Attorney General proposes that each of the six interested persons or organizations be permitted to file a written factum in the present Reference not to exceed 15 pages, and that a decision on requests to provide oral submissions be deferred until after the factums are filed.

Dated: June 22, 2012



Karen Horsman and Karrie Wolfe
Counsel for the Attorney General
of British Columbia

IntegrityBC.ca

21 June 2012

Madame Justice Ryan
B.C. Court of Appeal
800 Smithe St.
Vancouver, BC

Re: **A Reference by the Lieutenant Governor in Counsel set out in Order in Council No. 296/12 dated May 16, 2012 concerning the constitutionality of amendments to provisions in the Election Act, RSBC 1996, c. 106 regarding election advertising by third parties.**

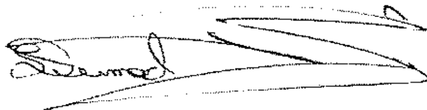
While I am unable to attend in person on Monday, June 25th, I will be available by telephone should you have any questions for me or regarding IntegrityBC. I can be reached at 250-590-5126.

Founded in 2011, IntegrityBC is a non-governmental organization focused on electoral finance reform in British Columbia.

We would seek the Court's leave to intervene in the above stated reference. The nature of our participation would be to file a factum.

While withholding an opinion on the government's specific Reference at this time, IntegrityBC will argue that reasonable limits on third party spending are constitutional, while reserving the right to draw issue with specific aspects of the Reference.

Sincerely,



Dermod Travis
Executive Director

June 13, 2012

VIA EMAIL

To the Attention of Interested Persons:

Re: A Reference by the Lieutenant Governor in Counsel set out in Order in Council No. 296/12 dated May 16, 2012 concerning the constitutionality of amendments to provisions in the *Election Act*, RSBC 1996, c. 106 regarding election advertising by third parties

You are in receipt of this letter as a person or organization which has expressed interest in participating in the Election Act Reference to the British Columbia Court of Appeal.

The parties, and the British Columbia Civil Liberties Association, appeared at a case management conference before Madam Justice Ryan on June 12, 2012. One of the issues on the agenda was the need to establish a procedure for determining the participation rights of interested persons. The Attorney General takes no position on the applications of any of the interested persons or organizations.

Madam Justice Ryan directed that there should be a further hearing at **9:30 am on June 25, 2012**, at the Court of Appeal, 800 Smithe Street in Vancouver. Her ladyship invites each of you to attend this hearing, either in person or through counsel. At the June 25 hearing, you may make a submission to the Court with respect to:

- The nature of your organization.
- The nature of your interest in the Reference.
- The participation rights you seek.

If you are unable to attend on June 25, 2012 and wish to express these points to the Court in the form of a written submission, please submit your written submission to us in advance of June 25, 2012 and we will ensure it is brought to the attention of Madam Justice Ryan.

Ministry of Justice

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Please feel free to contact us directly with respect to any questions you might have about this process, or the Reference generally.

Yours truly,

Karen Horsman
Barrister and Solicitor

Karrie Wolfe
Barrister and Solicitor

cc: Mark G. Underhill, Underhill, Boies Parker

Peter A. Gall, Q.C., Heenan Blaikie