Court of Appeal File No. CA039942
Vancouver Registry

COURT OF APPEAL

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 Council 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

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REPLY FACTUM OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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Overview

1. The AGBC is providing one factum in reply to the facta of the Amicus and intervenors, each of whom challenge the constitutionality of various aspects of the Amendments. Certain common themes emerge from the arguments of the opposing participants, and the AGBC has organized its reply around these themes:

(i) The alleged overbreadth of the definition of election advertising (particularly its extension to issue advertising);

(ii) The lack of a monetary threshold for registration as a third party advertiser;

(iii) The AGBC's alleged failure to demonstrate harm requiring advertising restrictions in the pre-campaign period (particularly with regard to the lack of such regulation in other jurisdictions); and

(iv) The concept of deference to legislative choices as applied in the context of this reference.

The Definition of Election Advertising

2. As a starting point, one must remember that the Amendments do not restrict speech *per se*; rather, what they restrict is spending on speech. The Lortie Report recognized the importance of this distinction:

> *...the capacity to spend money on advertising campaigns to publicize an individual's or group's views on election issues, parties, or candidates is not an appropriate measure of whether individuals or groups have sufficient opportunities to exercise their right to freedom of expression.*[1]

3. The Amicus and various intervenors raise the spectre that the advertising restrictions will preclude "any commentary on matters of public importance",[2] and that a broad range of otherwise non-partisan materials will suddenly be "transformed" into election advertising.[3] The definition of "election advertising", of course, applies equally to

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[1] Lortie Report, Vol 1, p 325, in Affidavit #1 Sally Yee, Ex. B, Joint Reference Book (JRB) Vol 2, p 711.
[2] Consolidated Factum of Amicus Curiae (Amicus' Factum), para 37.
[3] Amicus' Factum, paras 43, 46, 47, 59; Integrity BC Factum, para 42; Freedom of Information and Privacy Association (FIPA) Factum, para 23; Fair Voting BC (FVBC) Factum, para 25.

the campaign and pre-campaign period – the definition is neither more nor less restrictive in the pre-campaign period. The arguments of overbreadth were rejected both in *Harper*, where, as the Amicus admits, the primary definition was the same,[4] and in the *BCTF Case*. In both instances, the definition was upheld insofar as it relates to the campaign period. The Amicus has properly conceded that the application of the restrictions to the campaign period is not at issue.[5]

4. What the Amendments restrict that is in issue before this Court is the ability of a third party to spend in excess of the defined limits on election advertising during a period of time that is, at most, an additional 40 days every four years. The restrictions will only apply for the additional pre-campaign period where the election is held pursuant to the fixed date provisions of the *Election Act* and *Constitution Act*. This means that third parties will be aware of the timing of the maximum pre-campaign restriction for years in advance. It cannot be that a model that allows those affected to plan their advertising activities around known dates is more restrictive than the model upheld in *Harper* where the restrictions took effect virtually without warning.

5. The current definition of "election advertising" was adopted in British Columbia following the 2006 recommendation of the Chief Electoral Officer that the province move to a definition similar to the federal one.[6] A number of other jurisdictions have since adopted definitions of "election advertising" that are modelled on the federal example.[7] In *Harper*, the Supreme Court found that, even during the campaign period, the definition did not restrict all public commentary on issues of public importance, since not all issues would be "associated with" a political party or candidate, and the definition specifically exempts many forms of communication.[8] More to the point, *Harper* expressly decided that the extension of third party advertising limits to "issue" advocacy was not unconstitutionally vague, a fact

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[4] Amicus' Factum, para 72.
[5] Amicus' Factum, para 49.
[6] *Report of the Chief Electoral Officer: Recommendations for Legislative Change* (March 2006), pp 17-18, in Yee Affidavit, Ex. A, JRB Vol 1, p 360-361.
[7] See, for example, s.44.1 of Alberta's *Election Finances and Contributions Disclosure Act*, RSA 2000, c. E-2; s.2 of the Nova Scotia *Elections Act*, SNS 2011, c.5; and s.84.1 of New Brunswick's *Political Process Financing Act*, SNB, c. P-9.3, in Volume of Legislation.
[8] *Harper*, 2004 SCC 33, paras 114-115.

that forecloses a challenge based solely on the extension of spending limits to advertising on issues associated with a party or candidate.

6. The definition of "election advertising" involves three steps: 1) is the material "advertising"[9]?; 2) if yes, is it "election advertising" – i.e. "an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate" including "issue advertising"?; and finally, 3) is it communication that is specifically exempted? Of particular note, an individual's ability to express his or her personal views on the internet is expressly exempted from the definition. On a plain reading of the definition, and contrary to the assertions of the intervenors,[10] it is clear that not all political speech and not all personal expressions of political views are caught as "election advertising". This is true both in the pre-campaign and campaign periods.

7. As a related point, the Amicus also places considerable importance on the purported "chill" that election advertising restrictions have on electoral discourse by discouraging charitable and non-profit groups from participating in debates on policy matters.[11] The theory appears to be that charities, in particular, will be fearful of losing their registered status under the federal *Income Tax Act* as a consequence of having to register as third party advertisers under the British Columbia *Election Act*. These concerns are largely hypothetical[12], and of course would arise in any event during the campaign period where spending limits have been upheld.

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[9] Since there is no definition of "advertising" in the *Election Act*, reference can be made to a dictionary definition. Black's Law Dictionary defines advertising as: 1. the action of drawing the public's attention to something to promote its sale. 2. The business of producing and circulating advertisements. *Black's Law Dictionary*, 7th ed, *sub verbo* "advertising".

[10] FIPA Factum, para 23; British Columbia Civil Liberties Association (BCCLA) Factum, para 85 (asserting the public is "deprived of debate").

[11] Amicus' Factum, paras 43-48, 94.

[12] The only evidence adduced on the reference on this issue is a report co-published by the BCCLA – "Election Chill Effect: The Impact of BC's New Third Party Advertising Rules on Social Movement Groups" (2010) (the "Daub Report") – and financed by the unions who were plaintiffs in the *BCTF Case*. See Affidavit #1 Shannon Daub, Ex A, JRB Vol 1, p 237. The conclusions in the report are drawn from 60 "valid" responses to a survey emailed to a "purposive sample" of 380 "social movement" groups in British Columbia. The report does not explain the statistical reliability of the 60 responses, nor of the original sample of 380. Daub reports that 4 charities in total advised they had "altered their activities" in an unspecified manner to avoid having to register as a third party advertiser (Daub Report, pp 13 and 28).

8. More to the point, registration as a third party advertiser under the British Columbia *Election Act* is irrelevant to charitable status under the federal *Income Tax Act*. To secure the considerable tax advantages that come with charitable status, a charity's purpose and activities must meet the common law tests that have developed over many years.[13] It is the nature of those purposes and activities as viewed by Revenue Canada, on the application of the common law tests, that governs.

9. Finally, the Amicus asserts not only that the restrictions insulate government from criticism, but also that government is not bound by them.[14] Neither assertion is correct. The third party advertising restrictions do not "silence" public debate. Important avenues for debate and communication are expressly exempted from the definition, and the level of spending on other election advertising is regulated; there is no ban. More importantly, however, government considers itself bound by the restrictions, and for the 2009 election, implemented a government-wide ban on all non-essential advertising for the four months before voting day.[15]

Registration Requirements

10. The Amicus and a number of the intervenors argue that the lack of a minimum monetary threshold for registration as an election advertising sponsor in the *Election Act* is in itself an infringement of s. 2b of the *Charter*. The existence of a $500 minimum threshold for registration in the *Canada Elections Act* is offered as proof that requiring all advertising sponsors to register is not necessary to ensure electoral fairness. Both the Amicus and the Freedom of Information and Privacy Association (FIPA) rely on the comments of Bastarache J. in *Harper* in support of the assertion that the registration requirement itself interferes with freedom of expression.[16]

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[13] *Vancouver Society of Immigrant and Visible Minority Women v. Canada (MNR)*, [1999] 1 SCR 10.
[14] Amicus' Factum, para 61.
[15] Affidavit #3 Nancy Reimer, Ex. A, Supplemental Joint Reference Book (SJRB), p. 168.
[16] Amicus' Factum, paras 26, 85; FIPA Factum, entire factum, but note paras 9, 10, 23; FVBC Factum, opening statement, paras 16-18, 21, 41; BCCLA Factum, para 82. See also Daub Affidavit, Ex. A, SJRB Vol 1, p 237. It is worth noting that for Bastarache J. in *Harper*, it was the combination of the "attribution, registration and disclosure" requirements that prompted concerns about interference with freedom of expression (paras 137-139). Here, the arguments centre only on the universal requirement to register as a stand-alone source of infringement.

11. The requirement to register as an election advertising sponsor is found in s. 239 of the *Election Act*, and has existed since 1995.[17] Section 239 does not form part of the Amendments, nor was it among the Former Provisions challenged in the *BCTF Case*. While it would be open to a person to challenge the registration requirements on a constitutional or other basis, those requirements are not properly part of the legislative provisions referred to this Court on this proceeding. Absent such a challenge, this Court ought not to rule on those arguments in providing its opinion on the matter referred to the Court by the Lieutenant Governor in Council.

12. Although it is not necessary to respond to the merits of the arguments, it bears note that the registration requirement is neither "onerous" nor "abusive". It is a simple, one-page form (with a covering page of instructions) which requires the sponsor to provide contact information and make a solemn declaration witnessed by a commissioner of oaths or authorized official.[18] For the 59% of registered advertising sponsors in the 2009 election who spent less than $500, that one-page form was the extent of their obligation. If the *Election Act* had a minimum threshold for registration, as advocated, the sponsors would simply be relieved of that one-page burden. Once a sponsor spends more than $500, a disclosure report must be filed, and that requirement has not been identified as an infringement.[19]

Evidence of Harm and Advertising Restrictions in Other Jurisdictions

13. A persistent theme in the factum of the Amicus and intervenors is the AGBC's purported failure to adduce evidence of harm warranting the extension of advertising limits into the pre-campaign period.[20] This criticism must, of course, be assessed against the recognition in *Harper* that the harm of election spending is "difficult, if not impossible" to

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[17] This section came into force in 1995, with the enactment of Bill 28: *Election Act*, SBC 1995, c. 51.
[18] Affidavit #1 Nancy Reimer, Ex. A, SJRB, p 64-65. Many provincial government offices provide a free service for witnessing declarations. Otherwise, there may be a nominal cost involved.
[19] While the federal scheme has a $500 minimum threshold for registration, similar to BC, once a third party spends $500 or more, there is also a requirement federally to appoint a financial agent to accept contributions for election advertising: Canada *Elections Act*, s.353. There is no similar obligation on third party advertisers in British Columbia who exceed the $500 threshold.
[20] Amicus' Factum, para 87; BCCLA Factum, para 92; Integrity BC Factum, para 34; FIPA Factum, para 13.

measure because of the subtle ways in which advertising influences human behaviour.[21] As such, a reasoned apprehension of harm is all that must be demonstrated. Further, a government need not wait for the harm to materialize before enacting measures to prevent it.[22]

14. To the extent that evidence beyond the Lortie Report (and its endorsement in *Harper*) is required to support the reasoned apprehension of harm in the pre-campaign period it is provided by the reports of actual spending by third parties following British Columbia's move to a fixed date election.[23] This evidence is buttressed by the Amicus' admissions not only that third parties advertise significantly in the pre-campaign period but do so for the very purpose of influencing the vote.[24] This in itself provides a basis in logic and reason for the government's apprehension of harm in the pre-campaign period.[25]

15. The Amicus, again joined by some intervenors, also points to the experience with advertising restrictions in other jurisdictions that have moved to fixed date elections. It is argued by these participants that a majority of jurisdictions in Canada have moved to fixed date elections with no accompanying spending restrictions prior to the campaign period, and no evidence of overwhelming third party spending in the absence of such restrictions.[26]

16. It must be remembered that British Columbia was the first jurisdiction in Canada to adopt fixed-date elections and thus has the most extensive experience with the impact of fixed date elections on advertising spending. Alberta had its first fixed date election in 2012; Manitoba, Saskatchewan and Prince Edward Island in 2011; New Brunswick in 2010; and Canada, Ontario, Newfoundland and Labrador and the Northwest Territories in 2007.[27] The British Columbia *Election Act* did not impose any spending limits for third

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[21] *Harper*, para 79.
[22] *Harper*, para 98.
[23] Reviewed in the AGBC's main factum at paras 61-62.
[24] Amicus' Factum, paras 41-42.
[25] *Harper*, para 106.
[26] Amicus' Factum, para 78; Integrity BC Factum, paras 14-28, 46.
[27] The Volume of Legislation filed with the AGBC's Reply Factum includes the relevant fixed date election provisions from the other jurisdictions in Canada.

party advertisers when the first fixed date election was held in 2005. The Former Provisions were introduced in 2008 only after the extent of third party spending became evident in the post-election reports by the Chief Electoral Officer.

17. Other jurisdictions in Canada have, in any event, adopted a variety of legislative measures to address the harm of election advertising, with a distinct trend towards increased regulation. Over the course of only the past two years, Alberta, Manitoba, New Brunswick and Nova Scotia for example, have enacted (or have pending) statutory provisions to regulate third party advertising.[28] Canada, which had already enacted the third party spending limits at issue in *Harper*, is considering further amendments to capture expenses incurred prior to the issuance of election writs.[29]

18. A review of election spending regulation in other jurisdictions evidences no uniform solution. Other jurisdictions are both more and less severe than British Columbia, depending on the regulatory aspects that one is considering. Québec (which does not have fixed date elections, and therefore no pre-campaign period) provides an extreme example in generally prohibiting third parties from incurring any "election expenses" during an election campaign.[30]

19. Québec's prohibition on third party advertising was subject to a constitutional challenge in *United Steelworkers of America, Local 7649 v. Québec (Chief Electoral Officer)*, 2011 QCCA 1043.[31] The Québec Court of Appeal dismissed the challenge. In so doing, the Court rejected the same arguments advanced by the Amicus and the intervenors on the present reference – that the government had not justified the restrictions with proof of empirical harm, and that the existence of less restrictive regimes in other jurisdictions necessarily meant the restrictions were not minimally impairing. The Court stated:

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[28] The Volume of Legislation includes the relevant election advertising restrictions from all other jurisdictions, with the exception of the *Canada Elections Act* which is included elsewhere in the reference material. Alberta and Manitoba have fixed date elections, Nova Scotia does not.
[29] Affidavit #1 Nancy Reimer, Exs. C and D, SJRB, p 110 and 158.
[30] *Election Act*, RSQ c. E-3.3, ss. 402 and 413, in Volume of Legislation, Tab 6. Section 404(13) of the *Act* does permit an "authorized private intervenor" to incur up to $300 in expenses during an election period to publicize the intervenor's views on a matter of public interest, provided the publicity does not directly promote or oppose a party or candidate.
[31] Leave to appeal refused: [2011] SCCA No. 363.

> **46.** Admittedly, when the *Charter* is involved, comparison with other legal regimes and case law from elsewhere is often relevant and helps to properly understand the issues in cases involving freedom of expression. Even so, to compare the choices made by the Québec legislature with those made elsewhere concerning a subject as political as the electoral system may create a perverse effect by distorting the consideration of the minimum nature of the impairment. The measure need not be the most minimally impairing measure that can be imagined, but rather one that falls on a reasonable spectrum of measures in light of the legislative objectives.

Deference to the Legislature

20. The concept of deference to legislative choices articulated by the Québec Court of Appeal is of particular importance in the present case. The harm addressed by advertising restrictions – that the wealthy may influence the outcome of elections by controlling electoral discourse – is one notoriously difficult to prove in an empirical sense. The range of remedial responses available to address the harms of third party spending is evident in the overwhelming volume of material filed on this reference. Much as with a review of other Canadian jurisdictions, the present record discloses no uniform solution.

21. In striking down the Former Provisions, this Court posited that a legislative fix might consist of narrowing the definition of election spending, extending the campaign period, or changing the fixed date election to a different time of the year. The parties and intervenors to this reference have provided their own shopping list of suggested legislative measures that might meet (or at least move closer to) constitutional requirements, depending on the unique perspective and interests each brings to the courtroom. The Amicus suggests that the legislature could have extended the election campaign as an alternative to restrictions in the pre-campaign period.[32] The intervenors propose a range of alternatives from creating a minimum threshold to trigger the requirement to register as a third party advertiser,[33] to drafting a "reasonable exemption clause" for smaller and less wealthy third party advertisers,[34] to narrowing the definition of election advertising,[35] to exempting

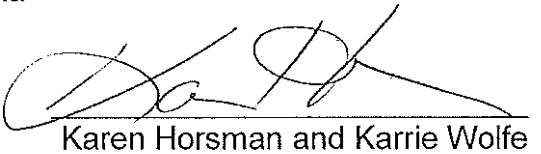
[32] Amicus' Factum, para 62. See also, BCCLA Factum, para 84, to the same effect.
[33] FIPA Factum, entire factum; Amicus' Factum, paras 84-85.
[34] FVBC Factum, para 21, 37.

volunteer labour from the restrictions.[36] Contrary to the submission of the Amicus and the prior decision of the Court of Appeal in the *BCTF Case*, three intervenors appear to advocate for no spending limits at all, even in the campaign period.[37]

22. The disparity between the solutions put forward even by those united in opposition to the Amendments simply underscores the challenge faced by the Legislature of British Columbia in fashioning a response. In these circumstances, the choice of remedy is, as noted by the Court of Appeal in the *BCTF Case*, up to the Legislature.[38] This does not mean, as suggested by the Amicus, that the court must accept any legislative scheme limiting speech "simply because elections are involved."[39] It does mean that where the Legislature has acted in the face of a reasonable apprehension of harm and in accordance with the explicit direction of the judiciary, the legislative choice is entitled to judicial deference. That is the very essence of the dialogue that governs the evolution of *Charter* rights in Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: August 29, 2012 at Vancouver, British Columbia



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[35] FVBC Factum, para 37; Amicus' Factum, para 63.
[36] FVBC Factum, para 40.
[37] BCCLA Factum; Garry Nixon submissions; Integrity BC Factum.
[38] *BCTF Case*, 2011 BCCA 408, para 72.
[39] Amicus' Factum, para 88.

LIST OF AUTHORITIES

	Paragraph in Factum
Caselaw	
British Columbia Teachers' Federation v. British Columbia (Attorney General), 2009 BCSC 436, upheld 2011 BCCA 408	3,11,21,22,FN12,FN38
Harper v. Canada (Attorney General), 2004 SCC 33	3,4,5,10,13,14,17,FN8,FN16, FN21,FN22,FN25
United Steelworkers of America, Local 7649 v. Québec (Chief Electoral Officer), 2011 QCCA 1043; leave to appeal refused: [2011] SCCA No. 363	19,FN31
Vancouver Society of Immigrant and Visible Minority Women v. Canada (MNR), [1999] 1 SCR 10	FN13
Legislation	
Canada Elections Act, SC 2000, c.9, s. 353	10,FN19,FN28
Constitution Act, RSBC 1996, c.66	4
Election Act, RSBC 1996, c. 106	4,7,8,10,11,12,16
Election Act, SBC 1995, c.51	FN17
Election Act, RSQ c. E-3.3, ss.402 and 413	18,FN30
Elections Act, SNS 2011, c.5, s.2	FN7
Election Finances and Contributions Disclosure Act, RSA 2000, c. E-2, s.44.1	FN7
Income Tax Act, RSC 1985, c.1 (Supp. 5)	7,8
Political Process Financing Act, SNB, c.P-9.3, s. 84.1	FN7
Other Materials	
Black's Law Dictionary, 7th ed, *sub verbo* "advertising"	FN9
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK),* 1982, c.11, s. 2b	10,19,22
Report of the Chief Electoral Officer: Recommendations for Legislative Change (March 2006)	FN6