

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*, RSCBC 1996, c. 106 regarding election advertising by third parties.

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

2001/05/16: The 37th Provincial Election, the last prior to the introduction of fixed-date election legislation, is held.

2001: Legislature amends Constitution Act, R.S.B.C. 1996, c. 66, to provide for fixed-date elections every four years on the second Tuesday in May.

2005/05/17: The 38th Provincial Election, the first fixed-date election, is held.

2008/04/30: The Attorney General introduces Election Amendment Act, 2008, S.B.C 2008, c. 41 ("Bill 42") into the Legislature.

2008/05/27: Bill 42 is amended, reducing "pre-campaign period" from 120 days to 60.

2008/05/29: Bill 42 Receives Royal Assent.

2008/07/23: The Respondents file Action S085226 (the "Action") challenging the constitutionality of the amended Election Act, R.S.B.C. 1996, c. 106 ("Election Act").

2008/11/07: Justice Cole orders that individual union members Gloria Laurence and Wendy Weis be added as defendants to the Action, with conditions (2008 BCSC 1599).

2008/11/26: Justice Cole orders that three paragraphs of the Statement of Defence of Laurence and Weiss be struck as exceeding the conditions of his prior order (2008 BCSC 1626).

2008/12/08: Justice Rice rules that most of the plaintiffs' requests for disclosure, discovery and examination of government officials in the Action should be refused (2008 BCSC 1699).

2008/12/08: The Action is heard by way of summary trial, along with the plaintiffs' application for a stay or injunction of the enforcement of the impugned provisions.

2008/12/19: Justice Cole dismisses plaintiffs' application for a stay or injunction (2008 BCSC 1769). Judgment on the trial proper is reserved.

2009/02/13: The 60-day "pre-campaign period" for the 2009 Election begins.

2009/03/30: Justice Cole renders judgment in the Action, declaring s. 235.1 and related aspects of s. 228 of the Election Act unconstitutional (2009 BCSC 436).

2009/03/31: Justice Cole gives further reasons, declining to suspend the effects of his earlier judgment (2009 BCSC 440).

2009/03/31: Notice of Appeal is filed by Attorney General.

2009/04/03: The Attorney General applies before Lowry J.A. of the Court of Appeal for a stay of Justice Cole's judgment pending appeal; the application is dismissed (2009 BCCA 156).

2009/04/14: The writ is issued and the 28-day "campaign period" begins.

2009/05/12: The 39th Provincial Election is held.

2012/10/12: A division of the Court of Appeal – Ryan, Lowry, and Chaisson JJ.A. – hear the appeal from the decision of Cole J. over the course of two days.

2011/10/19: The Court of Appeal renders judgment dismissing the appeal (2011 BCCA 408).

2012/05/16: The Miscellaneous Statutes Amendment Act (No. 2) (2012) receives Third Reading in the British Columbia Legislature, making amendments to provisions of the Elections Act as they relate to election advertising by third parties.

2012/05/16: Pursuant to Order in Council 296/12 the Lieutenant Governor in Council refers the question of the constitutionality of amendments to the Elections Act to the British Columbia Court of Appeal for hearing and consideration.

OPENING STATEMENT

The issue before the Court of Appeal is simply whether the amendments to the *Elections Act*, passed following the decision of the British Columbia Court of Appeal in *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2011 BCCA 408 (“Court of Appeal Reasons”), unjustifiably infringe on S. 2 (b) of the *Canadian Charter of Rights and Freedoms* (“Charter”)?

While IntegrityBC supports equitable and reasonable third party spending limits that are compliant with *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827, we submit that the amendments that form the basis of this Reference unjustifiably infringe on S. 2 (b) of the “Charter,” and that, furthermore, the existing rules for third party spending in British Columbia also unjustifiably infringe on S. 2 (b) and S. 2 (d) of the “Charter.”

Eight provinces now have a fixed election date law, but only one – British Columbia – has felt it necessary to create and legislate a “pre-campaign” period distinct from the “election” period. It would seem that this has been done for no other justifiable reason than to find an additional means to further restrict the spending limits of third parties.

As is well set out in the affidavit of SHANNON DAUB, the rules regarding third party spending in British Columbia are also so convoluted so as that the interpretive confusion regarding the rules is almost sufficient as to unjustifiably infringe on S. 2 (b) and S. 2 (d) of the “Charter.”

As an example, the limit of \$3,000 per electoral district to a maximum of \$150,000 provincially that may include:

an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated.

The ambiguity of the rule in itself can effectively render most, if not all, third parties eunuchs

during a “pre-campaign” period or an “election” period.

PART 1 – STATEMENT OF FACTS

1. Integrity British Columbia Society (“IntegrityBC”) is a non-partisan, registered non-profit organization based in Victoria, British Columbia, whose mandate includes, but is not limited to, issues of electoral reform in British Columbia.
2. IntegrityBC otherwise adopts the arguments as set out in the affidavit of SHANNON DAUB.
3. IntegrityBC supports the principle of third party spending limits in an election period – recognized as constitutionally valid by the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827. Such limits are justifiable when there are no additional limits during a “pre-campaign” period.

PART 2 – ISSUES ON APPEAL

4. This reference involves the determination of whether amendments to the *Elections Act*, passed following the decision of the British Columbia Court of Appeal in *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2011 BCCA 408 (“Court of Appeal Reasons”), are compliant with the requirements of the *Canadian Charter of Rights and Freedoms* (“Charter”).
5. IntegrityBC submits that the amendments to the *Election Act* regarding third party spending restrictions as they apply in a “pre-campaign” period are not constitutionally compliant. [BC Elections Act, RSBC 1996]
6. Furthermore, IntegrityBC submits that regardless of British Columbia's 2001 move to a fixed election date, the amendments as they apply during a “pre-campaign” period and as they then apply during an “election” period, represent an infringement on freedom of expression and freedom of association under the “Charter”

PART 3 – ARGUMENT

7. The Constitution Act, 1982 enshrines the right of every Canadian to “to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” (Section 3) and that “No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.” (Section 4 (1))

8. Third-party spending limits in an election period – recognized as constitutionally valid by the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827 – are not put in jeopardy by the introduction of fixed election date laws.

9. In *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827, the Supreme Court of Canada did not address the issue of restricting third party spending in a “pre-campaign” period, as there was and is no constitutional requirement for, constitutional recognition of, or reference to a “pre-campaign” period in the CONSTITUTION ACT, 1982 (1) or the Court's judgment in *Harper v. Canada* .

10. In *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827, the Supreme Court of Canada only addresses spending by third parties in an “election” period.

11. When the Supreme Court of Canada rendered its judgment in *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827, only one province in Canada had a fixed election date (British Columbia).

12. British Columbia was not an Intervenor in *Harper v. Canada (Attorney General)*, 2004 SCC 33,, {2004} 1 S.C.R. 827.

13. British Columbia was the first province in Canada to adopt fixed election dates (2001). The *Constitution Act (B.C.)* called for an election on May 17, 2005, and the second Tuesday in May every four years afterwards.

14. Today, Canada and seven provinces (British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, and Prince Edward Island) have fixed election dates which fall on a set date four years following the preceding election. [BC Constitution Act, Canada Elections Act, Bill 40: An Act to amend the house of assembly act and the elections act, Bill 75: An Act to Amend the Legislative Assembly Act, Manitoba Elections Act, The Legislative Assembly and Executive Council Act, PEI Election Act, Ontario Elections Act]

15. One province (Alberta) has a fixed election date range where a general election would be held between March 1 and May 31, 2012, and in the same three-month period in the fourth calendar year thereafter. [Alberta Elections Act, 2011]

16. One province (Newfoundland and Labrador) requires that when a premier leaves office during his or her government's term the new premier is required to advise the Lieutenant Governor that an election will be called within 12 months.

Where the leader of the political party that forms the government resigns his or her position as leader and as Premier of the province before the end of the third year following the most recent general election, the person who is elected by the party to replace him or her as the leader of the party and who is sworn in as the Premier of the province by the Lieutenant-Governor shall, not later than 12 months afterward, provide advice to the Lieutenant-Governor that the House of Assembly be dissolved and a general election be held.

[House of Assembly Act, 1990. 2004, c.44, s.1]

17. One province (Ontario) allows that the fixed election date can be moved forward to any of the following seven days in the event of religious or culturally significant holidays. [Ontario Elections Act, 2005]

18. Of these eight provinces (and Canada), only the *Elections Act* of British Columbia has and defines a “pre-campaign” period and limits spending by third parties within that period, which then form part of the overall spending limit for the “pre-campaign” and “election” period.

19. Under the existing limit and current rules, British Columbia has by far the most severe restrictions on third parties of any province with a fixed election date. These rules and restrictions are well discussed in the affidavit of SHANNON DAUB.

20. Of those provinces (and Canada) with fixed election dates that do restrict third party spending (other than British Columbia), they do so only during an “election” period.

21. Newfoundland and Labrador places no limits on third party spending, but third party spending may be attributed to an individual candidate if it is done with the knowledge and consent of the candidate. [Newfoundland and Labrador Elections Act, 1991. 1998 c.13 s.5]

22. Prince Edward Island restricts third party expenses when they are spent with the knowledge and consent of a registered political party or candidate by considering such expenses to be expenses of the registered party or candidate under the *Election Expenses Act*. [Prince Edward Island Election Expenses Act, 1996, c.13, s.17]

23. New Brunswick restricts third party spending to 1.3 per cent of the election expense limit of a registered political party that presents a full slate of candidates in the 55 electoral districts or \$11,271. In an electoral district a third party is restricted to ten per cent of the limit for a local candidate or \$1,127 in 2008.

Only those third parties who incur more than \$500 in election advertising expenses must register with Elections New Brunswick; however, the disclosure provisions for advertisements apply to any third party who advertises during a campaign period.

Under the Act, “election advertising” means “a message transmitted to the public by any means during a campaign period that promotes or opposes a registered political party or the election of a candidate or takes a position on an issue with which a registered political party or a candidate is associated....”

The Act establishes a limit on the amount of money a third party may spend on election advertising:

- In a general election, the province-wide limit is calculated as 1.3% of the election expenses limit of registered political parties that present a full slate of candidates in the 55 electoral districts.
- Election advertising expenses relating to a single electoral district are limited to 10% of the province-wide limit.
- For election advertising transmitted during the campaign period for a by-election, a third party shall not incur expenses for election advertising that relates to a single electoral district that in total exceed the amount calculated for the most recently held

general election.

[New Brunswick Political Process Financing Act, 1978. 2008, c.48, s.1]

24. Ontario does not restrict third party spending, but requires third parties that incur expenses of more than \$500 in advertising to register; to appoint an auditor where more than \$5,000 in expenses are incurred; and to file an advertising report within six months after polling day listing all third party election advertising expenses. [Ontario Election Finances Act, 1990. 1998, c.9, s.61]

25. Manitoba has passed legislation in the first session of its 40th Legislature (October 20, 2011 to June 14, 2012) that includes the following in regards to third party spending:

A third party is a person or group (other than a political party, candidate or constituency association) that promotes or opposes a registered party or a candidate during an election. A third party must not spend more than \$5,000 on communications with the public during an election, and must identify itself in the communications it places. Once a third party spends \$500, it must register with the CEO, appoint a financial officer and make a financial report to the CEO.

[Bill 33: The election financing act]

26. Saskatchewan does not limit third-party advertising expense. [Saskatchewan Election Act, 1996]

27. Alberta has no limits on third party spending; however, an election advertising report must be filed within 6 (six) months of the polling day which includes the name and address of each person who donated more than \$365 during the year, the total amount of advertising contributions that were received, and a financial statement. A third party that incurs more than \$100,000 in advertising expenses must file an audited financial statement within six months of polling day. Third party election advertising contributions made by any person, corporation, trade union, employee organization to third parties cannot exceed, in aggregate: \$15,000 in any calendar year in which there is not a general election and \$30,000 in any calendar year in which there is a general election. [Alberta Election Finances and contributions disclosure act, 2000. 2010 c.8 s.89]

28. Canada restricts third party spending to a maximum of \$3,000 per electoral district and no more than \$150,000 nationally in an “election” period. [Canada Elections Act, 2000. S.C. 2001, c. 27, s. 212]

29. By its very nature – and the Government of British Columbia's own definition under the *Elections Act* – a “pre-campaign” period will exist in some – *but not all* – election scenarios. It will not exist in a by-election nor in the event of a minority government that falls on a confidence vote, or where a government loses sufficient support of its own MLAs in a confidence vote. It may not exist when the governing party changes leaders and the new Premier chooses to seek his or her own mandate.

30. An example of this very scenario: there was considerable speculation throughout the spring and summer of 2011 that the new Premier of British Columbia (and leader of the British Columbia Liberal Party) Christy Clark would call a snap general election, despite the province's fixed election date law. This speculation came to an end on August 31st, 2011, when Premier Clark formally announced that there would be no fall election in the province, stating:

There appears to be no public appetite for an election at this time. [CBC news. *Christy Clark rules out fall BC election.*]

31. Had Premier Clark called a snap election at that time, in all likelihood a “pre-campaign” period would not have existed.

32. Furthermore, the British Columbia *Recall and Initiative Act* does not specify or define a “pre-campaign” period, a “pre-recall” period or a “pre-initiative” period where third party spending restrictions would apply. [British Columbia Recall and Initiative Act, 1996]

33. In the 2011 HST referendum there was no “pre-referendum” period, no “referendum” spending limits nor disclosure requirements regarding the identity of donors and the amount of their donations. Any individual or third party was free to spend as much as they chose and wherever they chose. [HST (Harmonized Sales Tax) Referendum Act, 2011]

34. At best the Government of British Columbia's concept of a "pre-campaign" period under the *Elections Act* is nebulous, exists solely at the pleasure of the government of the day, and has no constitutional recognition or protection under the Constitution Act, 1982.

35. Under the *Elections Act*, third party spending in British Columbia is limited in a province-wide general election to \$3,000 per electoral district and \$150,000 in the province overall. In a by-election (s) it is limited to \$3,000 per electoral district.

36. These limits do not provide for a level playing field between electoral districts. According to 2009 statistics from Elections BC, the largest provincial riding in British Columbia (Comox Valley) has 47,772 registered voters (April 21, 2009); the smallest riding (Stitkine) has 12,291 registered voters. Therefore – based on current legislated limits for third party spending of \$3,000 per electoral district – a third party can spend a maximum of 24.4 cents per registered voter in the electoral district of Stitkine, while in the electoral district of Comox Valley a third party can only spend a maximum of 6.3 cents per registered voter. Effectively, a third-party choosing to engage the electorate in Stitkine will have close to four times more capacity to do so than a third-party doing so in Comox Valley. [Elections BC – Voting Turnout for the 2009 general election]

37. The scenario in paragraph 36 may be further restricted – or enhanced – based on how any one third party chooses to allocate its limit of \$3,000 per electoral district or the \$150,000 between electoral districts province-wide.

38. Limits on third party spending in British Columbia also do not take into account whether an electoral district is urban or rural, the potential cross-over among a number of electoral districts in local advertising buys, or the potential impact and reach of other voter outreach efforts.

39. Based on comparable variables and the current rules of British Columbia, it is conceivable that third parties could have a disproportionate influence by strategically focusing their efforts at those electoral districts with the least number of registered voters or solely in those electoral districts which are considered to be "in play" in any general election.

40. Further examples of the confusion regarding third party spending rules in British Columbia are well documented in the Affidavit of SHANNON BAUD which IntegrityBC adopts.

41. A practical example of the confusion that arises from these rules is found in the definition of “election advertising” in British Columbia compared to the definition of “political advertising” in Ontario under the respective provincial Acts governing elections in both provinces:

In British Columbia:

"election advertising" means the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include

(a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,

(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, or

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

[BC Elections Act, RSBC 1996]

In Ontario:

“political advertising” 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 “political advertisement” has a corresponding meaning;

Advertising with respect to an issue of public policy during an election for which one or more registered political parties or candidates may also have taken a position does not constitute political advertising unless the advertisement specifically connects it to a

political party or candidate.

[Elections Ontario – Election Finances CFO Handbook for third parties]

42. Under the definition in British Columbia does a third-party group apply the full cost of a pre-existing issue-orientated web page that is subsequently considered “election advertising” during a “pre-campaign” or “election” period because it might “indirectly” promote or oppose a political party in one electoral district or does it track and apportion those costs among the various electoral districts where individuals – who may or may not be registered voters in those districts – visit the page in question? Does it only apportion the cost for additional visits to that page during a “pre-campaign” or “election” period that are above historical traffic patterns for the same page if it was a page that existed before the “pre-campaign” or “election” periods? [BC Elections Act, RSBC 1996]

43. The various rules and legislation in British Columbia that govern elections (local and provincial), recalls, referenda, and initiatives could at best be described as a hodge-podge of possibly well-meaning measures that are often contradictory, ill-defined and varying in application while others are so without merit they are not worthy of the electoral process.

44. Effectively, if this Reference succeeds, third party spending would be restricted during a “pre-campaign” and “election” period in some electoral contests at the provincial level, but not all; and would not be restricted at the civic level whatsoever, where a fixed election date is already in place across the province. [Voter’s Guide – Local Elections in British Columbia]

CONCLUSION

45. IntegrityBC supports third party spending limits during an “election” period that are reasonable, equitable and constitutional. The amendments to the *Elections Act* of British Columbia, as they apply to third parties, do not meet these tests.

46. The move to a fixed-election date by provincial governments across Canada and in Canada do not require further restrictions on third party spending outside of the “election” period. A clear demonstration of this is the fact that only the Government of British Columbia

has introduced such an additional restriction during a “pre-campaign” period on third parties and then only in some electoral scenarios.

47. Even if limiting third party spending in a “pre-campaign” period is deemed constitutional, it would only apply in a province-wide general election called under the fixed election date law, and would not apply in other possible election scenarios such as a general election resulting from a vote of non-confidence in the government or when the leader of the government changes and the new leader chooses to seek their own mandate despite the fixed election date law.

48. Third parties will have a disproportionate spending limit in a by-election than they would in the same electoral district during a general election due to the absence of a “pre-campaign” period in a by-election.

49. Third party spending restrictions do not exist in civic elections in British Columbia, in recalls, referenda or initiatives. A fixed election date currently exists in civic elections in British Columbia. [British Columbia Recall and Initiative Act, 1996, Local Government Elections Task Force: Third Party Advertising Discussion Paper]

50. Due to the ambiguity of British Columbia's rules in regards to third party spending, additional restrictions on third party spending during a “pre-campaign” period or an “election” period may and will impact on the capacity of third-parties to speak out on issues relevant to their members or on issues of a federal nature that do not pertain to a province-wide election or by-election or on matters that have shared jurisdiction between the province and federal government.

51. Limits on third parties spending must provide a level playing field for third parties and afford equal expression based on limits per registered voter and not per electoral district.

52. Confusion over the rules even at Elections BC – the very umpire of those rules – seriously impacts the capacity of individuals or third parties to involve themselves in the electoral process. (see affidavit of SHANNON BAUD)

53. Third parties must enjoy the same rights in all conceivable election scenarios.

PART 4 – NATURE OF ORDER SOUGHT

54. IntegrityBC opposes the Order sought by the Attorney General.

55. IntegrityBC submits that the constitutional question referred to this Court (“do the amendments unjustifiably infringe s. 2 (b) rights?”) should be answered in the affirmative.

56. IntegrityBC seeks clarity from the Court on existing rules regarding third party spending during an election period, including but not limited to the definition and restriction of spending limits and how those limits may be applied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August 2012.

Dermod Travis

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