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COURT OF APPEAL
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Court of Appeal File No. CA039942
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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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FACTUM OF THE INTERVENOR FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

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Opening Statement

The Freedom of Information and Privacy Association ("FIPA") appears as an intervenor in this reference. As a non-profit, non-partisan organization, FIPA is affected by the amendments to the *Elections Act*, R.S.B.C. 1996, c.108 (the "BC Act") and it registered as an election advertising sponsor in the last election.

This factum focuses on the absence of a minimum expenditure threshold to trigger registration as an election advertiser. FIPA asserts that without such a threshold, the proposed amendments are not minimally impairing and do not survive a section 1 analysis.

In the *Canada Elections Act*, S.C. 2000, c. 9 (the "Federal Act"), upheld in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 ("*Harper*"), there is no requirement to register until an 'advertiser' has spent at least $500 on "election advertising" (based on a narrower definition of what election advertising expenditures are). In view of the purposes of the Federal Act, this provision shows that exempting small spenders from registration does not compromise electoral fairness. The 2010 report from BC's Chief Electoral Officer ("CEO") recommended a similar minimum threshold be included in the BC Act, citing that this would alleviate "considerable confusion and administrative burden" for small spenders subject to registration.

In the face of this evidence and a breach of s. 2(b), there is a burden on the AGBC as part of its section 1 case to demonstrate why it is reasonable to apply the registration provisions of the BC Act to people who spend minimal amounts, especially in light of evidence of an alternative, less drastic measure that achieves the Province's objective in a real and substantial manner. The AGBC has not tendered any evidence to show that forcing election advertising sponsors who spend less than $500 in the pre-campaign period (let alone the campaign period) is reasonably necessary to support the objectives of the third party advertising limitations established by the BC Act.

Statement of Facts

1. FIPA does not have any additional facts to recite for the purpose of this factum.

Issues on Appeal

2. FIPA accepts the issues as framed by the AGBC and the Amicus.

Argument

A. The Minimum Expenditure Threshold Issue

3. The Province acknowledges that the BC Act infringes s. 2(b) of the *Charter*. FIPA's submissions will focus on why the Province has failed to establish that this breach is minimally impairing of individual rights under s. 1 of the *Charter*.

4. The latest pronouncement on the minimal impairment test comes from the Supreme Court of Canada in *Hutterian Brethren* as follows:

> **55** I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. As I will explain, in my view the record in this case discloses no such alternative.

Alberta v. Hutterian Brethren of Wilson Colony,
[2009] 2 S.C.R. 567, para. 55 (emphasis added)

5. In the April 2010 Report of the CEO (RB v. 1, page 153), he stated as follows in his discussion of issues:

> Election advertising rules do not distinguish between those sponsors conducting full media campaigns and individuals who post handwritten signs in their apartment windows. The *Election Act* does not establish a threshold for registration, resulting in all advertising sponsors being required to register and display disclosure information – including individuals with a simple handmade sign in their window. The *Canada Elections Act* only requires registration by those who sponsor election advertising with a value of $500 or more. Having a consistent threshold would prevent the considerable confusion and administrative burden that currently exists.

Record Book, v. 1, page 173

6. In the recommendations section of the report, the CEO said this:

> **Section 239**
>
> Election advertising sponsors other than candidates, registered political parties and registered constituency associations must be registered under the *Election Act*, regardless of the value of election advertising they sponsor. For example, a handwritten sign posted in an apartment window requires registration by the sponsor. This creates considerable confusion as the *Canada Elections Act* only requires registration if the value of sponsored advertising is $500 or more. The B.C. *Election Act* establishes that election advertising sponsors who sponsor advertising with a value of less than $500 are not required to file an election advertising disclosure report. Significant resources are spent during a general election managing this process due to general misunderstanding of the requirements of the Act.
>
> ➢ *Recommendation:*
>
> Registration should only be required if the value of sponsored election advertising is $500 or more. This is consistent with requirements of the *Canada Elections Act.*

Record Book, v. 1, page 188

7. The minimum expenditure provision the CEO was referring to in the Federal Act is presently s. 353(1). So that the section may be read in context of the scheme as a whole, ss. 350-353 are set out below:

> 350. (1) A third party shall not incur election advertising expenses of a total

amount of more than $150,000 during an election period in relation to a general election.

(2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by

(a) naming them;

(b) showing their likenesses;

(c) identifying them by their respective political affiliations; or

(d) taking a position on an issue with which they are particularly associated.

(3) The limit set out in subsection (2) only applies to an amount incurred with respect to a leader of a registered party or eligible party to the extent that it is incurred to promote or oppose his or her election in a given electoral district.

(4) A third party shall not incur election advertising expenses of a total amount of more than $3,000 in a given electoral district during the election period of a by-election.

(5) The amounts referred to in subsections (1), (2) and (4) shall be multiplied by the inflation adjustment factor referred to in section 414 that is in effect on the issue of the writ or writs.

351. A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

352. A third party shall identify itself in any election advertising placed by it and indicate that it has authorized the advertising.

353. (1) A third party shall register immediately after having incurred election advertising expenses of a total amount of $500 and may not register before the issue of the writ.

8. The fact that s. 353(1) is present in the Federal Act indicates that Parliament considered it to be a meaningful component of the scheme.[1] In FIPA's view, the purpose of s. 353(1) is to ensure that the requirements of registration do not capture conduct that is technically election advertising, but which is of an amount unnecessary to monitor for the purposes of ensuring a fair electoral process.

9. The BC Act does not contain a provision equivalent to s. 353(1) of the Federal Act. Instead, the BC Act requires that before engaging in conduct that falls within the meaning of election advertising, third parties must register as election advertising sponsors under Division 3 of the Act. If they do not, they are subject to sanctions under the enforcement sections of the Act.[2]

10. The Supreme Court of Canada in *Harper* recognized that legislation violates s. 2(b) of the *Charter* if it makes registration with an administrative regime a precondition of exercising the right of free political expression. Justice Bastarache explained as follows:

> The attribution, registration and disclosure provisions infringe s. 2(b) as they have the effect of limiting free expression. Even where the purpose of the impugned measure is not to control or restrict attempts to convey a meaning, the effect of the government action may restrict free expression; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976.
>
> As discussed, the attribution, registration and disclosure provisions require third parties to provide information to the Chief Electoral Officer. Where a third party fails to provide this information, they are guilty of a strict liability offence under s. 496 and are subject to a fine, imprisonment or any other additional measure that the court considers appropriate to ensure compliance with the Act (ss. 500-501). In this way, the attribution, registration and disclosure obligations have the effect of restricting the political expression of those who do not comply with the scheme.

Harper, paras. 138-1339

[1] FIPA has not located any discussion about the provision in the Hansard debates leading to its enactment along with other amendments in May 2000, so the inference is being drawn from the presence of the provision in the legislation.

[2] Other provinces that have limits on third party advertising (Alberta, Ontario, New Brunswick, and Nova Scotia) have a provision similar to section 353 with $500 registration thresholds, except Alberta where the threshold is $1000.

11. Although Bastarache J. went on to find that the violations of s. 2(b) by the registration requirements in the Federal Act were saved by s. 1, there was no discussion in the reasons as to whether the same result would have been reached absent s. 353(1).

Harper, paras. 142-146

12. In *BCTF*, the absence of a minimum expenditure threshold was not addressed by Justice Cole or by this Court, as the focus was on the application of the upper expenditure limits during the pre-campaign period.

***British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 440; 2011 BCCA 408**

13. As the proposed amendments do not contain a minimum expenditure threshold, the Province must demonstrate why such a provision is not an alternative, less drastic means of achieving its objectives in a real and substantial manner. In the context of laws that limit political speech, the Province's margin of discretion for crafting a different legislative response to achieve a rights-restricting objective is narrow.

14. As a contextual point, it is notable that the early cases addressing provincial limits to political expression struck down provincial legislation on federalism grounds, holding that free political speech was a fundamental constitutional principle of the British Parliamentary system embedded in Canadian law through the *British North America Act*. While the BC Act is not challenged on federalism grounds, when federal Parliament has deemed a less restrictive measure to be adequate for purpose of obtaining the same objective as is sought by the Province, and in view of the long constitutional history of treading carefully where political expression is concerned, the Province should articulate cogent arguments and provide compelling evidence in support of a more restrictive approach than the Federal Act.

See e.g. _Re Alberta Legislation_, [1938] S.C.R 100, per Duff C.J. (QL p.28-29) and Cannon J. (QL p. 39-40)

Saumur v. City of Quebec, [1953] 2 S.C.R. 299, per Rand J. (QL p. 26-29), Kellock J. (QL p. 45-49) and Locke J. (QL p.63-66)

Switzman v. Elbling, [1957] S.C.R. 285, per Rand J. (QL p.18-19), Kellock J. (QL p.19-20) and Abbott J. (QL p.33-35)

15. The CEO's comment in his 2010 report put the government on notice that given the presence of s. 353(1) in the Federal Act, it was not necessary in order to ensure a fair election process to regulate election advertising of a value under $500, and that people were experiencing "considerable confusion and administrative burden" in exercising their right to freely express their political views notwithstanding their expenditures were minimal. Moreover, the CEO's example of a person who made "a simple handmade sign in their window" is evocative of the kind of highly personal conduct that is caught by the BC Act. Other examples might be a person wearing a T-shirt stating the person's view on an issue, or a person standing on the side of the road with a sandwich board containing a political message of some kind.

16. As is discussed below, despite being made aware of this deficiency in the BC Act, the AGBC has not introduced any evidence explaining why her objectives would not be met in a real and substantial manner if such a provision were included.

B. Evidence has not been put Forward to Justify the Absence of a Minimum Threshold

17. The Lortie Commission report does not discuss minimum expenditure thresholds, nor does any of the evidence put forward in *BCTF*. There is some evidence here, however, that bears upon the issue.

18. First, as noted above, there is the inference to be drawn that Parliament thought it unnecessary to regulate election advertising expression under a $500 threshold, and there is no evidence that the presence of the threshold has caused any problems for the fairness of the federal electoral process.

19. Second, also as noted above, there is the statement of the CEO of BC recommending that a minimum threshold be added to the BC Act. Clearly he does not consider it necessary either from a fairness or an administrative efficacy point of view to require registration of minimal advertising expenditures.

20. Third, the October 2010 report by Shannon Daub and Heather Whiteside called *Election Chill Effect: the Impact of BC's New Third Party Advertising Rules on Social Movement Groups* (the "Daub Report"; RB v.1, page 237) touches upon the issue. The Daub Report analyses the effects of the registration requirements on small spenders and charities, noting that more than half of the third parties who registered with the CEO spent less than $500 on election advertising in the 2009 election campaign period. Through interviews and surveys, the Daub Report found that the definition of election advertising and the application of the rules were confusing, administratively burdensome and put small organizations at risk of sanction under the BC Act. As a result, some organizations chose not to express views that they otherwise would have expressed, hence the "chill effect" identified in the report. The Daub Report concludes that, "regardless of whether concern and confusion abate over time, certain features of the rules remain highly problematic in relation to the over-regulation of small spenders and charities, in particular the zero-dollar registration threshold and the inclusion of volunteer labour as an election advertising expense" (page 40). The Daub Report recommended that the legislation be amended to include minimum spending thresholds and registration only when the minimum was reached.

21. Political expression is a right, not a privilege, and its violation demands justification with some evidentiary support. As the Supreme Court of Canada noted in *RJR-MacDonald*:

> 128 ... to meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of <u>demonstration</u>. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

RJR-MacDonald, para. 128 (emphasis in original)

22. Here, despite bearing an evidentiary burden that has been variously described as "rigorous" or "onerous" by the Court, the Province has led no evidence to justify why a minimum threshold would interfere with obtaining its objective in a

real and substantial manner. It seems the Province has simply ignored the issue altogether notwithstanding the comments of the CEO noted above.

C. *The Absence of a Minimum Threshold is Oppressive and not Minimally Impairing*

23. Regulating free speech at this personal level is problematic, and not just from the perspective of each individual who is caught by the legislation and required to register as a precondition of expressing him or herself. It is also problematic on a broader, public policy level. Any regulatory scheme that regulates and monitors small, personal expressions of political views has a smothering, potentially oppressive, chilling effect on society.

24. This oppressive effect was described by the majority Supreme Court of Canada in *R. v. Zundel* where the majority of the Court found that s.181 of the *Criminal Code* was not minimally impairing under s.1 of the *Charter*. The majority reasoned that s.181 was "broad in contextual reach" and was concerned about the "chilling effect" of s.181. The majority noted that s.181 "may catch a broad spectrum of speech, much of which may be argued to have value. I add that what is at issue is the value of all speech *potentially limited* by the provision at issue."

R. v. Zundel, [1992] 2 S.C.R. 731, [1992] S.C.J. No. 70, paras. 64-66 (emphasis added)

25. It also has the potential to suppress election speech by marginalized people who are expressing their perspectives of marginalization. Such a chilling effect is particularly offensive as it undermines one of the core values underlying freedom of expression, namely, self-fulfillment and human flourishing.

R. v. Zundel, para. 22

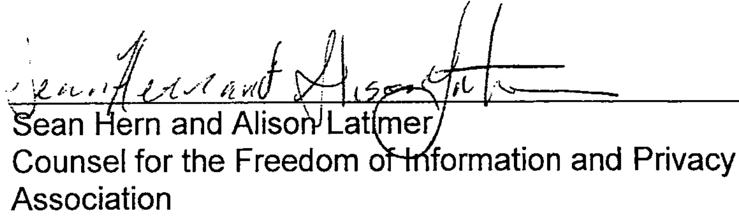
Nature of the Order Sought

26. FIPA submits that the proposed amendments infringe s. 2(b) rights and do not minimally impair those rights. The amendments should be held not to be reasonable limits prescribed by law in a free and democratic society. The Reference question should be answered "yes".

27. FIPA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated: August 15, 2012



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