Court of Appeal File No. CA39942

COURT OF APPEAL

IN THE MATTER OF:

The *Constitutional Questions 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.

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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

Ms. Laurence is an average citizen who works in a public sector job where union membership is compulsory. She is required to have dues deducted from her paycheque, and has no control over how those dues are spent.

Like other average citizens, Ms. Laurence does not have the resources to advertise during election campaigns in any effective manner, and therefore the restrictions on election advertising have no real impact on her ability to engage in political advertising. However, they are still of great importance to Ms. Laurence and, we submit, other average citizens, because they impose restraints on election advertising by corporate and union organizations, thereby minimizing the harms suffered by average citizens like Ms. Laurence to their rights under sections 2 and 3 of the *Charter*.

From the perspective of the average citizen, limitations on third party election spending serve 3 purposes: (1) They prevent corporate and union organizations who spend a large amount of money on elections from exerting undue influence on officeholders; (2) They serve an anti-distortion function to the unfair influence exerted by corporate and union organizations in the election process, and their ability to marginalize and drown out non-corporate voices; and (3) They provide some protection to union members and shareholders from financially supporting and being identified with political views and parties which they do not support.

Ms. Laurence submits that all three of these factors must be taken into account in determining the constitutionality of the restrictions on election advertising. It was the third factor, though, that caused Ms. Laurence to get involved in the initial Elections Act case. Individual union members and shareholders in public corporations have little if any ability to influence the political stances of these organizations.

Ms. Laurence submits that the constitutional rights of average Canadian citizens such as herself under sections 2 and 3 of the *Charter* must be balanced against the rights of those who can afford to spend more on election advertising than is permitted under the *Election Act*. The restrictions on election advertising during a statutorily defined, pre-campaign period are justified under s. 1 of the *Charter*. They simply extend the protections of a constitutionally valid system of regulation to account for the newly arising harm posed by fixed election dates.

PART 1—STATEMENT OF FACTS

1. Gloria Laurence is a special education assistant who is required, as a condition of maintaining her employment with the Surrey School District, to be a member of CUPE BC, Local 728, and to have union dues deducted from her pay cheques and remitted to her union.

British Columbia Teachers' Federation et al. v. British Columbia (Attorney General), 2009 BCSC 436 ("Trial Reasons") at para. 10;

2. Ms. Laurence is opposed to her union "using her mandatory dues to advance political agendas with which she disagrees." Ms. Laurence has constitutional interests that are protected by the *Election Act*, R.S.B.C. 1996, c 106 ("*Election Act*"), in that limits on third party spending also limit the forced identification and financial support of dissenting union members with the political messages and positions promoted by her union.

Trial Reasons, paras. 11 and 280.

3. Ms. Laurence otherwise adopts the Statement of Facts set out in the factum of the Attorney General.

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. Ms. Laurence submits that the amendments to the *Election Act* are constitutionally valid. They represent an adjustment to the constitutionally recognized

right on the part of the government to place limits on the political spending of third parties, in light of the move in British Columbia to fixed election dates.

6. Ms. Laurence is in favour of the preservation of a level playing field for third party election spending. However, the effectiveness of third party spending limits – 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 placed in jeopardy by the introduction of fixed election dates. As such, the British Columbia Legislature was required to act, in order to preserve the effectiveness of the constitutionally valid system, and to ensure the continuity of a level playing field in the lead up to fixed election dates.

7. Ms. Laurence will focus her submissions on the contextual factors relevant to this Court's s. 1 analysis, and on the minimal impairment and proportionality stages of the *Oakes* test.

PART 3—ARGUMENT

A. The Context Relevant to the Section 1 Analysis in this Case

8. The general context in which the analysis of whether a *Charter* infringement is justified must reflect the entire social context, including the interests advanced by the legislation, whether or not the legislature had them in mind. When considering the constitutionality of legislation, and whether it can be saved by s. 1 of the *Charter*, courts must look not only to the intended purpose and effects of the legislation, but also to its unintended or incidental effects, regardless of the legislature's stated purpose. In other words, courts must examine what is happening "on the ground" with respect to the application of a particular statute or statutory provision. Indeed, in *Charter* cases generally, the claimant may or may not be someone whose constitutional rights the legislature intended to affect. *Charter* rights are no more or less valid because an

alleged infringement is inadvertent, rather than intentional. These interests must be considered throughout the section 1 analysis.

Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086 at paras. 26-32
McKay v. Manitoba, [1989] 2 S.C.R. 357 at paras. 8-10

9. The contextual factors set out in the *Thomson Newspapers* case assist in identifying the objective of the impugned legislation, and the nature and sufficiency of the evidence required for s. 1 purposes. Context in this sense includes consideration of all of the interests at stake, and not only those of the claimant and the government. It requires the consideration of the interests of all those affected by the legislation whether or not they were consulted or considered by the government.

Thomson Newspapers Co. v. Canada (Attorney General),
[1998] 1 S.C.R. 877 at para. 87

10. The four contextual factors identified in the *Thomson Newspapers* case are:

a) The nature of the harm and the inability to measure it;
b) The vulnerability of the group protected;
c) Subjective fears and apprehension of harm;
d) The nature of the infringed activity.

Thomson Newspapers, at para. 88;
Harper v. Canada (Attorney General), at paras. 75-76;
Trial Reasons, at para. 160.

11. Ms. Laurence will focus these submissions in particular on the second *Thomson Newspapers* factor: the vulnerability of the group protected.

(i) Section 3 of the *Charter* and the right to effective representation:

12. Section 3 of the *Charter* protects the right to vote:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

13. On numerous occasions, the Supreme Court of Canada has affirmed that s. 3 of the *Charter* is not limited to the "one person-one vote" principle. Rather, s. 3 guarantees the right to "effective representation", and requires that the participation by citizens in the electoral process be meaningful:

> This Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the *Charter*.
>
> *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 2 SCR 912, at para 25;
> *Reference re Prov. Electoral Boundaries (Sask)*, [1991] 2 S.C.R. 158.

14. Therefore, the s. 3 *Charter* rights are participatory in nature. In order for participation in the electoral process to be meaningful, all citizens must have a real opportunity to participate in the debate, on a level playing field (emphasis added):

> [62] The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation; see C. Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999), 44 *McGill L.J.* 5. Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways; see O.M. Fiss, *The Irony of Free Speech* (1996), at p. 4. First, the state can provide a voice to shoes who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focused on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another. In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.
>
> *Harper v. Canada (Attorney General),* at para. 62.

15. The Supreme Court has held that one of the specific harms that Parliament or the legislatures seek to address when enacting campaign or election spending limits is the un-level playing field created when the wealthy are able to dominate the political and electoral arena with their political messages and advertising campaigns. The Supreme Court, in *Libman*, thus endorsed the principle of equal dissemination of points of view, which is rooted in fundamental concerns over fairness:

> If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate… To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving opponents of a reasonable opportunity to speak and be heard"
>
> *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47.

16. Justice Stewart of the United States Supreme Court, in his dissenting opinion in *Citizens United v. Federal Election Commission*, 558 US 50 (2010), referred to three similar rationales for restricting electoral advertising by third parties: (1) It prevents money spent on elections from exerting undue influence on an office holder's judgment; (2) It serves an anti-distortion function to the unfair influence played by big spenders in the election process, and their ability to marginalize and drown out non-corporate voices; and (3) It protects dissenting or minority union members and shareholders.

Citizens United v. Federal Election Commission, 558 US 50, 130 S. Ct. 876 (2010) at p. 929 ff.

17. In the context of political expression, the nature, content, and purpose of s. 3 of the *Charter* are necessarily linked to the freedom of expression protected by s. 2(b), as confirmed by the Supreme Court of Canada in *Figueroa v. Canada (Attorney General)*:

> To be certain, the electoral process is the means by which elected representatives are selected and governments formed, <u>but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy.</u>
>
> *Figueroa*, at para. 29, emphasis added.

18. Indeed, as the Supreme Court of Canada noted in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 763, "[f]reedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons".

19. Therefore, while both the British Columbia Supreme Court and this Court in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (collectively "the *BCTF* proceedings") concluded that the previous iteration of these amendments to the *Election Act* did not violate s. 3, the interests *protected* by s. 3 are clearly engaged in this case. Meaningful participation in the electoral process is not only a question of freedom of expression. It is about ensuring that all segments of the Canadian electorate are able to participate fully and meaningfully in the electoral process.

20. In *Harper*, the Supreme Court of Canada affirmed that the Canadian electorate – made up of individual voters like Ms. Laurence – represents a vulnerable group, for the purposes of s. 1 analysis:

> 80. Third party spending limits seek to protect two groups. First, the limits seek to protect the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote. Generally, the Canadian electorate "must be presumed to have a certain degree of maturity and intelligence"; see *Thomson Newspapers, supra,* at para. 101. Where, however, third party advertising seeks to systematically manipulate the voter, the Canadian electorate may be seen as more vulnerable; see *Thomson Newspapers*, at para. 114.
>
> *Harper v. Canada (Attorney General)*, para. 80.

21. The intended purpose of election advertising spending limits for third parties is, in part, to protect the vulnerable Canadian electorate from the domination of political messaging by those entities with the ability to spend large amounts of money. Put another way, to borrow Justice Bastarache's words from *Harper*, the purpose of third party spending limits is to "create a level playing field".

Harper v. Canada (Attorney General), para. 62.

22. At issue in this Reference is the democratic principle, its values, and how it informs the interpretation of s. 3 and the extent of s. 2(b), in the context of elections. Spending limits on election advertising infringe the s. 2(b) and s. 3 rights of some, while promoting and protecting the s. 2(b), s. 2(d), and s. 3 rights of others. Therefore, these competing interests must be balanced. As the Supreme Court of Canada has held on many occasions, "competing constitutional considerations must be balanced with particular care." This contextual factor should drive this Court's analysis of the constitutional validity of the pre-campaign period third party spending limits at issue in this case.

R. v. O'Connor, [1995] 4 SCR 411 at para. 129;
Dagenais v. Canadian Broadcasting Corp., [1994] 3 SCR 835 at pp. 877, 891.

(ii) Unions and political spending in British Columbia:

23. Within the Canadian electorate there are subsets of vulnerable individuals who are also protected, if perhaps incidentally, by the presence of election spending limits on third parties. Ms. Laurence represents one of these subsets: dissenting union members who disagree with the political issues and campaigns to which their mandatory union dues are being put.

24. Therefore, an additional, important, and related contextual factor relevant to this Court's consideration of the *Election Act* amendments concerns the specific example of one type of third party election spender: unions, and their ability and desire to spend union dues on election advertising. Union members who are compelled to belong to unions and pay dues as a condition of employment but who disagree with the political positions taken by their unions in their election advertising, as does Ms. Laurence, are at further risk of having their individual views drowned out. It sends a distorting message when unions, who purport to represent all of their members, use their members' dues to support particular political agendas or parties that some of their membership does not support.

25. In *R. v. Advanced Cutting and Coring*, a majority of the Supreme Court of Canada – 8 judges[1] – recognized that being forced to join a union could constitute the type of ideological compulsion that would amount to a breach of s. 2(d) of the *Charter*. However, with respect to the content of that right, or what was required to establish a breach of that right, the Supreme Court split 4-4.

R. v. Advance Cutting and Coring, [2001] 3 S.C.R. 209.

26. Justice Bastarache endorsed a broad, contextual interpretation of the notion of compelled ideological conformity. Unions are participatory bodies and play political and economic roles in society, which translates into ideological positions:

> [28] This case is one that shows how interrelated Charter rights and values can be. It is not necessary to have more independent evidence of the ideological views of the specific unions involved in this case. This is not novel since such was the case in *Lavigne*. I disagree with LeBel J.'s views at para. 227 of his reasons and would affirm that it is in fact sufficient that adherence is required to a scheme advocating state-imposed compulsory membership which affects freedom of conscience and expression, as well as liberty and mobility interests, for it to have a negative impact on the right to work, because such adherence itself is a form of ideological coercion. Ideological constraint exists in particular where membership numbers are used to promote ideological agendas and, as noted in *Lavigne*, at p. 322, this is so even where there is no evidence that the union is coercing its members to believe in what it promotes…
>
> *Advanced Cutting,* para. 28.

27. Justice Bastarache's broader view of ideological conformity seems more in line with the views of Justice La Forest, for the majority of the Court who accepted the existence of a negative right not to associate in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 330 and 332, when he wrote (emphasis added):

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[1] Justice L'Heureux-Dubé held that there was no negative constitutional right not to associate, and therefore joined the 4 judge opinion authored by Justice LeBel (that found there was no infringement of s. 2(d) or, assuming an infringement, it could be justified by s. 1) in the disposition of the appeal. The combined opinions of Justice LeBel and Justice L'Heureux-Dubé created the five judge majority in *Advanced Cutting*.

> When, however, the Union purports to express itself in respect to matters reflecting aspects of Lavigne's identity and membership in the community that go beyond his bargaining unit and its immediate concerns, his claim to the protection of the *Charter* cannot as easily be dismissed. In regard to these broader matters, his claim is not to absolute isolation but to be free to make his own choices, unfettered by the opinion of those he works with, as to what associations, if any, he will be associated with outside the workplace.
> …
> In my view, it is more consistent with the generous approach to be applied to the interpretation of rights under the *Charter* to hold that the freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit.

28. Even then, there was evidence in the *BCTF* proceedings that would satisfy the narrower test for ideological conformity endorsed by Justice LeBel in his reasons in *Advanced Cutting*. He held that, in order for ideological conformity to exist, there must be evidence of an imposition of union values or opinions on the member, evidence of a limitation of the member's free expression, or evidence that the union participates in causes and activities of which the member disapproves.

Advanced Cutting, para. 232.

29. Unions in British Columbia are mandated by law to represent every member of the bargaining unit for which they are certified, and are authorized to bargain for terms and conditions of employment that compel union membership and the payment of union dues. The reason for extending to unions the power to compel membership and the collection of dues is to enhance the union's effectiveness in collective bargaining, not to promote or protect union political activity. Thus, the spending of union dues on election advertising falls outside the justification for compulsory dues.

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 27(1)

Weiler, *Reconcilable Differences* (1980, Toronto: Carswell) pp. 144-146

Adams Mine (1982), 1 C.L.R.B.R. (NS) 384 (Ont. LRB) pp. 400-406

30. Union membership in British Columbia is not always voluntary. For Ms. Laurence, her union membership and the consequential mandatory deduction of union dues from her paycheques is compelled, as terms and conditions for her employment pursuant to collective agreement.

31. As such, it is inevitable that there will be a significant number of union members who do not support the use of their compulsory dues for political purposes without their consent. Indeed, as already noted, Canadian courts have recognized that a necessary consequence of compelled union membership will be that the union membership will include individuals who do not support the union, or who would not have otherwise chosen to join the union, or both. The Supreme Court of Canada has further recognized that the use of compulsory union dues and union membership to enhance a union's ability to participate in political activity impairs the constitutional expressive and associational interests of dissenting union members.

Lavigne;
Advance Cutting.

32. However, there is no mechanism by which union members can decline to have their dues used for election advertising that endorses political views or candidates that they do not support. Courts in other jurisdictions, including the US Supreme Court and the European Court of Human Rights have restricted the ability of unions to use dues for political purposes, including election advertising based on the need to protect the expressive interests of dissenting employees.

Trial Reasons at para. 144;
Mortimer Affidavit #1, Exhibit "A"
Oil, Chemical and Atomic Workers International Unions v. Imperial Oil, [1963] S.C.R. 584
Abood v. Detroit Board of Education (1977), 431 U.S. 209
Sorensen & Rasmussen v. Denmark [GC], nos. 52562/99 (January 11, 2006)

33. As noted, the reason for granting unions the authority to deduct union dues from all employees within the bargaining unit, be they union members or not, is not to allow them to use those funds for political activity. Nevertheless, unions in British Columbia have engaged in significant activity and expenditures to promote particular political parties and positions, and have used compulsory union dues for that very purpose.

MacKenzie Affidavit #1, at para. 11
Stewart Affidavit #1, at para. 6
Laurence Affidavit #1
Weis Affidavit #1

34. In point of fact, unions are amongst the most significant third party election advertisers in British Columbia. In the 2005 provincial election, unions not only constituted the biggest third party spenders in the campaign, in terms of dollar amount, but also made up the greatest proportion of registered election advertising sponsors: 66.5% of the total third party spending in the 2005 provincial election came from unions (emphasis added):

> [138] Both the number of third party advertising sponsors and the amounts spent on third party advertising increased dramatically in the 2005 election. The Elections BC, *Report of the Chief Electoral Officer: 38th Provincial General Election, 2005 Referendum on Electoral Reform, May 17th,* 2005 (Victoria: 2005) (the "2005 Report") discloses that the following amounts were spent:
>
> | | |
> |---|---|
> | Unions (94) | $3,228,953 |
> | Business Associations (10) | $1,143,280 |
> | Advocacy Groups (12) | $ 400,781 |
> | Corporations (5) | $ 58,323 |
> | Individuals (6) | $ 13,373 |
> | **TOTAL:** | **$ 4,844,710** |
>
> [139] The total number of registered election advertising sponsors was 129. Ninety-four of the 129 sponsors were labour organizations. Seven of the 129 sponsors spent more than $150,000:
>
> a. British Columbia Teachers' Federation - $874,964;

b. Independent Contractors and Business Association of British Columbia - $612,100;
c. British Columbia Government and Service Employees' Union - $431,251;
d. British Columbia Nurses' Union - $257,282;
e. Hospital Employees' Union - $257,282;
f. Federation of Post-Secondary Educators of British Columbia - $209,602;
g. CUPE BC - $198,000;
i. [sic] Mining Association of British Columbia - $160,000.

Trial Reasons, paras. 57, 138-139.

35. Though election spending limits generally aim to target both corporations and unions as institutional third party election advertisers, the situation of dissenting union members is somewhat different from that of corporations and its minority shareholders. A person has the choice whether to invest in a company and become a shareholder. Corporations are required to provide information as to their activities, through the circulation of prospectuses, for example, including how they spend their money. Potential shareholders are able to make informed decisions about whether to invest based on this information.

36. By contrast, in the case of Ms. Laurence, her membership in her union is not voluntary, and her union is not a voluntary organization. Rather, in order to be employed in her chosen profession, Ms. Laurence is compelled to join her union, and to pay union dues. Her voice has little or no impact on how those dues are spent. Nor can she leave her respective union or seek to withhold her dues because she disagrees with the political causes or issues to which those dues are being put.

37. Moreover, while minority shareholders have at their disposal many statutory and common law protections from abuse by the majority, dissenting union members have comparatively little protection. The duty of fair representation does not extend to non-collective bargaining related activities. And in the *BCTF* Proceedings, the unions candidly admitted that there is little opportunity for an individual union member to

influence how dues are spent on political activities, and that their positions on political issues are essentially determined through majority rule. For example:

a) There is no mechanism available for individual members of the FPSE and BCGEU unions to prevent their dues from being spent on political advertising (Athaide Affidavit, at pp. 28-29; Rowles Affidavit, at pp. 41-42; Dumler Affidavit, at p. 86);
b) The only way for dissenting members to influence their union's political positions is if they are able to persuade a majority of their Local to agree to put a resolution before the convention, or to make a personal complaint, in which case a determination will be made as to whether there is sufficient support for the resolution (O'Neill Affidavit, at pp. 34-37);
c) The FPSE purports to speak on behalf of its 10,000 individual members, despite the fact that only 19 association members have the right to vote in FPSE internal affairs (Cross-Examination of Dileep Athaide, November 16, 2008, p. 47, II. 26-36; p. 47 II. 41-47; p. 48, II. 1-16).

38. It is also worth noting that the internal polling of CUPE and the BCGEU shows that there are many union members who do not support the political stances of their unions. Further, polling generally of union members and the public at large shows that there is overwhelming opposition to unions using dues monies for political purposes without the consent of union members.

Exhibit "A" to Mortimer Affidavit, supra

39. Compulsory union membership and the mandatory payment of dues has a significant, adverse impact on the expressive and associational rights of minorities, and it does so in several ways.

40. Firstly, forced association is a wrong in and of itself, and has a negative impact on the right of those members who are compelled to join the union to be free from ideological coercion.

41. Second, it permits the money paid by union members as dues to be spent on a purpose to which they do not all agree, without any democratic safeguards. These union members, who would not have otherwise chosen to become union members, are publically identified with and pay monies to fund political expression with which they disagree. Moreover, because of the costs associated with electoral advertising, these dissenting union members are likely unable to successfully communicate their dissent. Thus, a union's political agenda will also affect the freedom of expression rights of dissenting union members.

42. Third, forced association in this context has the incidental effect of misrepresenting the views of some members of the union. The Canadian electorate may thus be left with the impression of unanimity of position between the union and its rank and file membership, which has a distorting effect on the issues.

43. Ms. Laurence is a member of a union who is active in political campaigns and hence has a heightened interest and concern about the expenditure of her union dues during election campaigns. However, the same concerns, although to a somewhat lesser extent because of the lesser degree of compulsion, is experienced by average citizens who invest in public companies for financial, not political reasons. They too have little if any control over the expenditure of their monies on political campaigns.

44. Indeed, in his dissenting opinion in *Citizens United*, Justice Stewart questioned the majority's reliance on the protections offered by the so-called corporate democracy, and questioned their confidence in the effectiveness of those mechanisms (emphasis added):

> <u>The concern to protect dissenting shareholders and union members has a long history in campaign finance reforms</u> … Indeed, we have unanimously recognized

> the governmental interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC.
>
> The Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," and it seems, through Internet-based disclosures … I fail to understand how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule… Modern technology may help make it easier to track corporate activity, including electoral advocacy, but it is utopian to believe that it solves the problem. Most American households that own stock do so through intermediaries such as mutual funds and pension plans, see Evans, A Requiem for the Retail Investor? 95 Va. L.Rev. 1105 (2009), which makes it more difficult both to monitor and to alter particular holdings. Studies show that a majority of individual investors make no trades at all during a given year. *Id*., at 1117. Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which "the interests of unwilling … corporate shareholders [in not being] forced to subsidize that speech" "are at their zenith." Austin, 494 U.S., at 677 (Brennan, J., concurring). And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications might similarly be conditioned on voluntariness.

45. Justice Stewart also noted that individual interests in expending money towards political advertising merit more protection than corporate interests (emphasis added):

> …[T]he problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others. See, *e.g.*, *id*., at 663 (discussing risk that corporation's "members may be … reluctant to withdraw as members even if they disagree with [its] political expression"). Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these "expenditures reflect actual public support for the political ideas espoused," id., at 660. The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

46. The third party spending limits apply equally to "individuals" and "organizations", other than candidates. However, as the Supreme Court of Canada has acknowledged, as a practical matter, individual citizens cannot afford to mount the kinds of advertising campaigns targeted by the third party limits (emphasis added)

> Further, the reality in Canada is that regardless of the spending limits in the Act, the vast majority of Canadian citizens simply cannot spend $150,000 nationally or $3,000 in a given electoral district. What prevents most citizens from effectively exercising their right of political free speech as defined by the Chief Justice and Major J. is a lack of means, not legislative restrictions. Contrary to what the Chief Justice and Major J. say at para. 44, I do not suggest that since the breach of s. 2(b) only affects a few people, it is therefore justifiable. As discussed, the objective is to ensure the political discourse is not dominated by those who have greater resources. The proper focus is on protecting the right to meaningful participation of the entire electorate.
>
> *Harper v. Canada (Attorney General),* para. 113.

47. Institutions made up of individual members, be they unions or corporations, are able to use the funds made available to them, whether compelled or voluntary, from that membership. Not only are they free to use those funds for purposes over which the individual members have little to no control. But they are also free to use those funds to send out a political message that *appears* to have the weight of the collective

membership behind it. In this sense, political advertising by a union or a corporation carries a greater weight than an individual campaign ever could, and therefore warrants the increased concern over third party advertising than over individual advertising.

B. Contextual Considerations in the Minimum Impairment Analysis

48. Spending limits on third parties for their political advertising during election campaigns have been upheld in Canada as a justifiable limit on s. 2(b) of the *Charter*. The question in this Reference is whether it is justifiable to extend these third party spending limits to a defined, narrow, pre-campaign period, in light of British Columbia's move to a regime of fixed election dates.

Harper v. Canada (Attorney General);

Lavigne.

49. The *BCFT* proceedings held that the previous provisions dealing with limits on third party election spending during a 60 day pre-campaign period were unconstitutional and could not be justified by s. 1 of the *Charter*. The courts in the *BCFT* proceedings were concerned that the combined effect of spending limits during the pre-campaign period, and a definition of "election advertising" that included issue advocacy, would prevent political speech and commentary on significant aspects of the legislative agenda. Because of the timing of the fixed election dates, the pre-campaign period was bound to include both the Throne Speech and the Budget, and other significant items on the government's legislative agenda. Spending limits on political advertising during this pre-campaign period would therefore limit expression unrelated to the election campaign, and therefore bore no relation to the legislative goal of ensuring election fairness.

Trial Reasons, at para. 281;

Court of Appeal Reasons, at paras. 67-70.

50. Subsequent to the *BCTF* proceedings, the British Columbia Legislature amended the *Election Act* as it relates to third party spending during the pre-campaign period. These amendments address the concerns of both courts in the *BCTF* proceedings as they related to interference with legitimate political speech. First, the pre-campaign period during which the restrictions on third party advertising apply was shortened from 60 days to 40. But, additionally, a buffer zone was created to ensure that the restrictions on third party advertising do not apply at any time that the Legislative Assembly is sitting, or for 21 days after the conclusion of the sitting. Thus, the pre-campaign period is now effectively defined as the shorter of either the 40 day period prior to the campaign period, or the period beginning 21 days following any sitting of the Legislative Assembly.

51. Prior to discussing more fully why the British Columbia Legislature's response to this Court's decision in the *BCTF* proceedings satisfies the minimal impairment requirement of s. 1, it is important to remember the importance of showing proper deference to the decisions of Parliament or a provincial legislature when dealing with complex social issues, and when dealing with competing constitutional rights; in this case, sections 2(b) and 3 of the *Charter*. While the "mere fact that the legislation represents [the legislature's] response to a decision of this Court does not militate for or against deference", when dealing with complex social issues and problems, courts should not require perfection:

> 43. Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if

> Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713; *Irwin Toy*.
>
> *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at paras. 11, 43.

52. It should therefore be noted that these amendments do not, as such, create a new restriction on freedom of expression. Rather, they represent a rearrangement by the British Columbia Legislature, with this Court's guidance from the *BCTF* proceedings, of the rules and regulations governing third party political spending, in order to meet the challenges posed by fixed election dates. Put another way, the amendments to the *Election Act* simply represent a re-modeled version of the restrictions on third party political advertising approved of by the Supreme Court of Canada in *Harper*.

53. As noted, the courts in the *BCTF* proceedings were concerned about the extension of the campaign spending limits into the pre-campaign period. Moreover, the courts seemed to accept that it was possible to distinguish between true "issues" advertising – targeted at a Budget Bill or the Throne Speech, for example – and the election campaign advertising that was to follow shortly thereafter. However, it is unclear to what extent this distinction can actually be drawn in practice.

54. Underlying the government's decision to extend the third party spending limits to a pre-campaign period was the move to fixed election dates**.** The British Columbia Government's decision to extend the third party spending limits in light of fixed election dates was based on recommendations from the Chief Executive Officer of BC Elections:

> Since the establishment of fixed dates for general elections, concerns have been expressed that the effectiveness of election expenses limits and rules regarding the identification of election advertising sponsors may be compromised. Amendment of the definition of campaign period for fixed date events could address these concerns.
>
> BC Elections, *2006 Recommendations,* "Impact of Fixed Election Dates on Election Advertising and Expenses Limits", 2006.

55. The Attorney General, when introducing the initial third party spending amendments that were at issue in the *BCTF* proceedings, confirmed that the extension of the limits were a direct response to the effects of fixed election dates:

> These changes to spending limits – in particular the creation of the 120-day pre-campaign period – are a response to the effects of the set-date elections. For those elections, everyone knows when the campaign will begin, and it is important to ensure that the pre-campaign period does not become a spending spree, a free-for-all, to the detriment of parties and candidates that lack significant financial resources.
>
> BC, Legislative Assembly, Hansard, Vol. 32, No. 4 (5 May 2008) at 11957.

56. When the date of an election is known well in advance, third parties seeking to influence the campaign through political advertising can get a head start. Put another way, the election campaign will commence earlier, in substance if not in form. The pre-campaign period simply imposes a quiet time between the ordinary business of the British Columbia Legislative Assembly and the campaign, which because of the fixed election date is known well in advance. Common sense, based on experience, supports the government's rationale.

57. While fixed election dates in Canada are in their relative infancy, one need only look to the example of the United States, where election dates have always been fixed, to see that it has become nearly impossible to determine when an electoral campaign actually starts and when it concludes. Most elected officials at the federal level in the United States, who now need a campaign war-chest containing upwards of $ 1.3 Million USD to simply get re-elected, would likely feel that their re-election campaign begins the day after they are sworn into office. Moreover, in the United States, where corporate and union political contributions are virtually unlimited, well-funded special interests have come to dominate the public policy-making process.

> Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – And a Plan to Stop It* (Twelve Hachette Book Group, New York: 2011);
> *Citizens United v. Federal Election Commission,* per Stewart J.

58. Even the Supreme Court of Canada, back in the *Libman* case, recognized that it is not always possible to draw a bright line between pure issue advocacy and election campaign advocacy, at the time of an election campaign:

> [49] The actions of independent individuals and groups can directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. Such individuals or groups might either conduct a campaign parallel to that of one of the candidates or of a party and in so doing have a direct influence on the campaign of that candidate or party, or take a stand on a given issue and in so doing directly or indirectly promote a candidate or party identified with that issue. As the Lortie Commission pointed out in this regard, it is difficult to distinguish between partisan advocacy and advocacy by third parties in terms of influence on the vote; the objective of an election campaign is to influence the outcome of the vote, that is, the election of a candidate or of a political party. People do not vote for issues; nevertheless, the purpose or effect of the debate on the issues will be to influence the final vote. The Commission stated the following on this subject, at p. 340:
>
> > Canadian and comparative experience also demonstrate that any attempt to distinguish between partisan advocacy and issue advocacy – to prohibit spending on the former and to allow unregulated spending on the latter – cannot be sustained. At elections, the advocacy of issue positions inevitably has consequences for election discourse and thus has partisan implications, either direct or indirect: voters cast their ballots for candidates and not for issues.
>
> Independent spending could very well have the effect of directly or indirectly promoting one candidate or political party to the detriment of the others; the purpose of limits on spending by independent individuals and groups is to prevent their advertising or other expenditures from having a disproportionate influence on the vote (Lortie Commission, supra, at pp. 339-40 and 354).
>
> *Libman*, at para. 49.

59. In light of the move to fixed elections, it is no longer clear what the period "at elections" can reasonably refer to. The courts who considered the *BCTF* case appeared to view this phrase literally, with the period commencing at the start of the 28 day campaign period. However Ms. Laurence submits that it is impossible to draw a bright line between the day before, and the day after the commencement of the 28 day campaign period, in light of fixed election dates. What the 21 day buffer zone does,

importantly, is to impose a quiet time – a bright line indicating the start of the electoral campaign – when, because of the fixed election date, the true start of the campaign might not otherwise materialize.

60. Ms. Laurence respectfully submits that the provisions dealing with limits on third party advertising during the pre-campaign period minimally impair the s. 2(b) right. It is unclear to what extent a bright line can be drawn between pure issues advocacy and an election campaign, during the short time leading up to a fixed election date. There is no "on-off" switch. Faced with the potential for continuous election campaigns, the Government has not sought to impose third party spending limits on a continual, year-round basis, or to cover the entire year leading up to a fixed election date. Rather, the pre-campaign period has been limited to the period right before the campaign period is set to begin, and it will not apply during any sittings of the Legislative Assembly. In light of the deference on this issue to which the British Columbia Legislature is entitled, Ms. Laurence respectfully submits that these amendments to the *Election Act* impair the s. 2(b) right as little as possible, while still accomplishing the goal of preserving election fairness and the protection of citizens' s. 3 *Charter* rights.

61. In this case, the minimal impairment analysis must also take into account the fact that the *Election Act* limits the ability of unions to engage in expression that coerces public identification and financial support from dissenting union members through the mechanism of compulsory membership and payment of dues. This effect of the amendments to the *Election Act* is also minimally impairing. If, for example, the government were to completely prohibit unions from spending compulsory dues on election advertising, that would better protect the dissenting unions members' constitutional interests in political expression and meaningful participation in the election process, but likely would be more infringing of the union's rights to express themselves on political matters. However, because of the mandatory membership and compulsory dues requirements, the *Elections Act* has the effect of limiting the extent to which dissenting union members are forced to be publicly identified with and to financially support political expression with which they disagree.

62. Thus, the amendments to the *Election Act* dealing with election advertising by third parties permits unions and other third party election advertisers to advertise in support of particular parties or causes only to an extent that is consistent with the egalitarian model of election advertising, as endorsed by the Supreme Court of Canada.

63. The amendments to the *Election Act* are consistent with the nature, content, and purpose of the s. 3 *Charter* right, and the preservation of a level playing field. They simply extend the protections of the third party spending limits found to be constitutionally compliant in *Harper* in light of fixed election dates. Though they restrict the political expression of some, they enhance the political expression of others, all in the context of the important balancing between s. 2(b) and s. 3 of the *Charter*.

C. Contextual Considerations in the Proportionality Analysis

64. The law with respect to the proportionality stage of the *Oakes* test was settled by the Supreme Court of Canada in *Dagenais*, when it refined the third element of the *Oakes* proportionality analysis to include an assessment of the deleterious and salutary effects of the legislation under consideration:

> In my view, characterizing the third part of the second branch of the Oakes test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the Oakes test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.
>
> *Dagenais*, at para. 95

65. More recently, in *Health Services*, the Supreme Court reiterated that the third element of the proportionality analysis requires an assessment both of whether there is "proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law."

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391 at para. 138

66. Thus, it is clear that the third element of the proportionality analysis includes consideration of actual salutary effects of the legislative measure, whether or not they were part of the legislative objective. Just as the assessment of the deleterious effects of the law are not limited to those deleterious effects considered by the legislature, both the intended and unintended salutary effects must be considered. The whole purpose of the third element of the proportionality analysis is to assess how the law operates "on the ground", in its practical context, and this is what differentiates it from the rational connection and minimal impairment stages of the justification analysis.

Thomson Newspapers, *supra* at para 125

See also *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras 103-110

67. Ms. Laurence submits that, not only do the impugned provisions have salutary effects with respect to protecting the fairness of the electoral process in general and the interests of the public at large, they have very significant salutary effects in protecting her constitutional interests as a dissenting union member. Specifically, by engaging in election advertising, unions are forcing union members who do not support the political views of their unions to be identified with, and to financially contribute to, the election advertising of the unions. Because unions are not voluntary political organizations and because they use their members' mandatory dues payments for the purposes of election advertising, the election advertising limits in the *Election Act* have the salutary effect of minimizing the adverse impact on the constitutionally guaranteed expressive and associational interests of dissenting union members.

68. Moreover, it is clear that, in British Columbia, unions constitute significant third party political advertisers.

69. In this sense, the extension of third party spending limits from the campaign period to a limited, statutorily defined pre-campaign period and in light of fixed election dates in British Columbia simply extends the salutary effects of limiting the ability of unions to engage in third party political spending to this new situation created by the move to fixed elections.

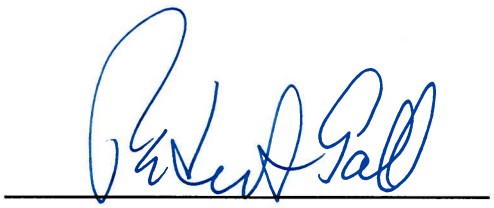
D. Conclusion

70. In conclusion, for the reasons set out above, Ms. Laurence submits that the amendments to the provisions in the *Election Act* dealing with election spending by third parties during the pre-campaign period are justified under s. 1 of the *Charter*.

PART 4—NATURE OF ORDER SOUGHT

71. The Ms. Laurence supports the Order sought by the Attorney General, and seeks her costs in this Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2012.



Peter A. Gall Q.C.

Lauren J. Wihak

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