

VANCOUVER  
AUG 29 2012  
COURT OF APPEAL  
REGISTRY

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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REPLY FACTUM OF THE RESPONDENT GLORIA LAURENCE

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**A. The actual salutary effects of the Amendments**

1. *Amicus Curiae* argues that the s. 1 *Oakes* analysis cannot include salutary effects “which are wholly unconnected to the government’s objectives in enacting the measures at issue”.<sup>1</sup> Ms. Laurence submits that it is firmly established that, at the third stage of the *Oakes* analysis, both the *actual* deleterious and salutary effects of the legislation must be considered:<sup>2</sup>

“...the third step of the second branch of the *Oakes* test requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental freedoms” [emphasis added]

2. Taken to its logical conclusion, the position of *Amicus Curiae* would also mean that the deleterious effects of legislation could be ignored in considering its constitutionality, if the unintended effects had not been in the contemplation of the government. However the Supreme Court of Canada has held that the unintended effects of legislation can render legislation unconstitutional.
3. Nor can it be said that the salutary effects that Ms. Laurence seeks to emphasize are “wholly unconnected” to the government’s objectives in enacting advertising restrictions during a pre-campaign period. In *Harper v. Canada*, the Supreme Court of Canada held that promoting equality in political discourse and ensuring that the wealthy are not able to dominate the electoral process as the rationales for restriction election advertising.<sup>3</sup> Ms. Laurence wishes to draw this Court’s attention to how one particular subset of the vulnerable Canadian electorate is additionally affected by the specific activities of a particular type of wealthy third party election spender: unions.
4. Contrary to the submission of the *Amicus Curiae*, this Court’s consideration of the salutary effects of the Amendments presented by Ms. Laurence will not lead

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<sup>1</sup> Factum of *Amicus Curiae*, at para. 101.

<sup>2</sup> *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at 887-88.

<sup>3</sup> *Harper v. Canada*, 2004 SCC 33, [2004] 1 SCR 827 at paras. 62, 92.

to unbounded debate over the wisdom of these Amendments. Consideration of these issues fall squarely within the accepted parameters of the s. 1 *Oakes* test.

**B. The rationales for restrictions on third party political advertising**

5. *Amicus Curiae* argues that the objectives of third party advertising limits identified by Ms. Laurence in the opening statement to her factum are not those endorsed by the Supreme Court of Canada in *Harper v. Canada* or by the courts in the *BCTF* proceedings, and therefore should not be endorsed by this Court.<sup>4</sup>
6. Those three rationales – to prevent corporations and unions who spend large amounts of money from exerting undue influence on officeholders, to 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 to provide protection to union members and shareholders from financially supporting and being identified with political views which they do not support – are offered from the perspective of the average citizen, who restrictions on third party election advertising are intended to protect. Furthermore, they have been endorsed in American jurisprudence.<sup>5</sup> Nor are these purposes out of step with the rationales identified in *Harper v. Canada*.<sup>6</sup>
7. The three purposes of limiting third party election spending identified in Ms. Laurence's opening statement, from the perspective of an average citizen, are important contextual factors that should be taken into account in determining the constitutionality of the Amendments.

**C. BC labour legislation does not restrict how union dues are spent**

8. An additional important reason for considering the protection of dissenting union members as a salutary effect of the Amendments is the fact that labour legislation in British Columbia places no restrictions on how unions can use dues

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<sup>4</sup> Factum of *Amicus Curiae*, at para. 99.

<sup>5</sup> *Citizens United v. Federal Election Commission*, 558 US 50, 130 S. Ct. 876 (2010).

<sup>6</sup> *Harper v. Canada*, 2004 SCC 33, [2004] 1 SCR 827 at paras. 62, 92.



for purposes unrelated to collective bargaining. Nor does it provide union members with any mechanism for meaningfully participating in the decisions as to how their dues will be spent on those non-collective bargaining activities. This lack of legislated restrictions on how unions dues may be spent on matters unrelated to collective bargaining makes it all the more important that this Court consider the situation of individuals like Ms. Laurence in its analysis of the constitutionality of these Amendments.

**D. Election spending in other Canadian provinces**

9. Much has been said of the fact that, of those jurisdictions in Canada who have adopted fixed election dates, only British Columbia has seen a need to legislate restrictions on third party advertising during a designated pre-campaign period. British Columbia has had fixed elections since 2005, while many of these jurisdictions have only recently had their first fixed election. Therefore, the data as to increases in pre-campaign spending may yet to have fully materialized.
10. Nevertheless, the experience during the recent Ontario election indicates that third party advertisers, and organized labour in particular, are able to wield tremendous influence during elections. In the 2011 Ontario election, three unions – Working Families Coalition, the Elementary Teachers’ Federation of Ontario, and the Ontario English Catholic Teachers Association – together spent more on advertising during the election period than either of the two main parties. The Elementary Teachers’ Federation of Ontario alone spent \$ 2.6 million on ads, which is 300 times as much they would have been permitted to donate to a party. Importantly, these numbers underestimate what these unions actually spent, as reporting in Ontario is required only during the writ and a short period before and after. The unions “also spent heavily on advertising before the

election was called, but since they didn't have to report such expenditures to Elections Ontario, we will never know the true extent of their involvement."<sup>7</sup>

#### E. Election spending in the United States

11. Neither the *Amicus Curiae* nor any of the interveners supporting its position accept that there is any harm caused by the move to fixed election dates, and the notion that the beginning of the campaign will be known well in advance. So long as there are restrictions during the campaign period, they say, there is no risk that a flood of pre-campaign advertising will dominate the electoral debate. This position assumes that it is possible to conclusively determine that an election campaign has officially begun.
12. This position is not borne out by the experience in the United States, where fixed elections have been in place for over 150 years and election advertising by third parties is completely unrestricted. To date, over \$512 million has been spent in the US Presidential election campaign, which is the same amount spent on the entire 2008 general election. Over half that amount is spent by third parties. \$ 343 million has been spent on ads since April, despite the fact that neither party has officially nominated its presidential candidate. Though the US Presidential election campaign formally begins with the nomination of the parties' candidates, election-related advertising clearly takes place well before that time.<sup>8</sup>

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<sup>7</sup> Tom Flanagan, "Organized labour is now a super PAC", *The Globe and Mail* (July 16, 2012) online, emphasis added; Bruce Cheadle, "Third-party ads blitz provincial campaigns, where strict federal rules absent", *The Canadian Press* (Sunday, October 02, 2011) online; See also 2011 Third Party Reports", (as at August 13, 2012), online: Elections Ontario; Elementary Teachers' Federation of Ontario, "2011 Third Party Election Advertising Report tpar-1", online: Elections Ontario; The Ontario English Catholic Teachers' Association, "2011 Third Party Election Advertising Report tpar-1", online: Elections Ontario; Working Families, "2011 Third Party Election Advertising Report tpar-1", online: Elections Ontario (**Supplemental Reference Book**).

<sup>8</sup> Domenico Montanaro "Political campaign ad spending tops \$500 million" *NBC News* (August 28, 2012) online; Sam Youngman, "Little respect for conventions in never-ending U.S. campaign", *The Chicago Tribune* (August 25, 2012) online; Benjamin Reeves, "Political Ad Spending For US Presidential Election To Reach \$2.9B",

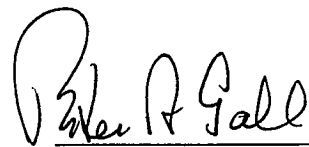
13. Canada is moving in a similar direction. In March 2012, more than 3 years before the next fixed election date and a mere 9 months after the last election, the Conservative Party began running an "election-style attack ad" directed at Liberal Leader Bob Rae. For Bon Hepburn of the Toronto Star, the fact that the Conservatives launched a re-election campaign so far in advance of the actual election meant that already there were questions as to how the 2015 federal election campaign will be conducted.<sup>9</sup> In light of fixed elections, it is not possible to draw a bright line between the election period and the period leading up to it.

**F. Public sector collective bargaining in British Columbia**

14. *Amicus Curiae* has argued that, though the Amendments provide that there will be no third party advertising restrictions while the Legislature is sitting, restrictions during the pre-campaign period will prevent advertising on other aspects of government action, including collective bargaining.
15. Ms. Laurence submits that any third party advertising dealing with the process of collective bargaining itself would not fall within the definition of "election advertising". Advertising that does address the substantive issues being bargained over is properly restricted as being election advertising, as unions would be seeking to elect a government more sympathetic to their cause, just as other stakeholders would hope is the effect of their third party advertising.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED August 29, 2012

 / "Lauren Wihak"  
Lawyers for Gloria Laurence

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*International Business Times* (August 15, 2012) online (**Supplemental Reference Book**).

<sup>9</sup> Bob Hepburn, "Stephen Harper: Can we stop the dirty attack ads?" *The Toronto Star* (March 21, 2012) online (**Supplemental Reference Book**).