

No. 13 0335  
Victoria Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

JAN BETWEEN:

**B.C. FREEDOM OF INFORMATION AND  
PRIVACY ASSOCIATION**

PLAINTIFF

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

DEFENDANT

**NOTICE OF CIVIL CLAIM**

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**TIME FOR RESPONSE TO CIVIL CLAIM**

A response to civil claim must be filed and served on the plaintiff,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or,
- (d) if the time for response to civil claim has been set by order of the court, within that time.

### CLAIM OF THE PLAINTIFF

#### **Part 1: STATEMENT OF FACTS**

##### *The Parties*

1. The B.C. Freedom of Information and Privacy Association (“FIPA”) is a non-profit society organized under British Columbia’s *Society Act*, RSBC 1996, c. 433, with a registered office located at 103-1093 West Broadway Street, Vancouver, British Columbia. FIPA was created in 1991, with the aim of promoting and defending freedom of information and privacy rights.
2. The Attorney General of British Columbia has an address for service at 1001 Douglas Street, Victoria, British Columbia, V8V 1X4.

##### *FIPA’s Election Advertising*

3. From time to time, FIPA engages in public communications on issues which are the subject of political interest and commentary in a manner which, if the communications occur between the period when a provincial election is called and the close of voting, could constitute “election advertising” according to section 228 of the *Election Act*, R.S.B.C. 1996, c. 108 (the “BC *Election Act*”).
4. In the 2009 provincial election, FIPA was required to register under the BC *Election Act* as a third party election advertiser for making communications which included distributing brochures, posting signs and renting venues for events.
5. In the “campaign period” of the upcoming 2013 BC provincial election, FIPA plans to engage in some communications that could be defined as election advertising according to section 228 of the BC *Election Act*, but expects those communications will total less than \$500 as calculated under the legislation and interpreted by the Elections BC publication “Guide to Election Communications for Third Party Advertising Sponsors”. Communications that FIPA intends to make include placing a hand-made sign in its

office window regarding the lack of records being released in response to freedom of information requests.

### *The Registration Scheme*

6. Section 239(1) of the BC *Election Act* requires individuals and organizations to register under Division 3 of the Act in order to be permitted to sponsor election advertising, which includes incurring third party election advertising expenses.
7. Section 240 of the BC *Election Act* sets out the Division 3 registration requirements, which entail an application being made to the province's Chief Electoral Officer.
8. Section 264(1)(h) of the BC *Election Act* provides that if an individual or organization contravenes section 239, they have committed an offence and are liable to a fine of not more than \$10,000, or imprisonment for a term not longer than one year, or both.

### *Unjustifiable Violation of Section 2(b) of the Charter*

9. A legislative regime that forces people to register with a government agency before being able to freely engage in political expression is an interference with the right to free expression guaranteed by section 2(b) of the *Charter*.
10. For reasons discussed further below in Part 3, where an individual's or organization's third party election advertising expenditures are less than \$500, the registration scheme in the BC *Election Act* cannot be demonstrably justified in a free and democratic society such that section 239 is not saved by section 1 of the *Charter*.
11. On January 4, 2013, FIPA's counsel wrote to counsel for the Attorney General and asked what justification the government has for maintaining the registration scheme for third party election advertising expenditures of a value less than \$500.
12. On January 11, 2013, the Attorney General's counsel responded that the government would not tell FIPA the reason that the government sees fit to maintain the registration scheme for third party election advertising expenditures of a value less than \$500, and advised that if FIPA wanted to know the reasons, it would need to bring a *Charter* challenge in the Court to find out.
13. As a result, FIPA brings this action.

### **Part 2: RELIEF SOUGHT**

1. A declaration that, to the extent it applies to third party election advertising expenditures of less than \$500, section 239 of the *Election Act*, R.S.B.C. 1996, c. 108 unjustifiably infringes section 2(b) of the *Charter* and is, to that extent, of no force and effect.

2. Special costs in any event of the cause.

### Part 3: LEGAL BASIS

1. Canadians have a right to free expression under section 2(b) of the *Charter*, and this right lies at the very foundation of Canadian democracy. A law which requires individuals and organizations to register with a government agency before being permitted to freely express themselves is a violation of that right; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, at para 138.
2. The violation of section 2(b) is particularly serious where the registration scheme applies to the expressing of views relating to politics and issues pertinent to an upcoming democratic election. Interfering with the freedom of political expression is justifiable only where there are the clearest and most compelling reasons for doing so; *Reference Re Election Act*, 2012 BCCA 394, at para 25.
3. Section 1 of the *Charter* provides that a violation of the right to free expression can only occur where it is demonstrably justified in a free and democratic society. The government's burden of justification includes, among other things, proving that the legislation is "minimally impairing" of *Charter* rights, which is not the case if there is an alternative, less drastic means of achieving the objective of the legislation in a real and substantial manner; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 55.
4. The government must also prove that both the objective of the law and the salutary effects that actually result from its implementation are proportional to the deleterious effects the measure has on fundamental rights and freedoms; *Reference Re Election Act*, 2012 BCCA 394, at para 26.
5. Here, the objective of the BC *Election Act* provisions relating to third party election advertising expenditures is to ensure there is fairness in elections by preventing third parties with substantial means to dominate or overwhelm the election discourse in the campaign period.
6. The registration of very small spenders is unnecessary to achieve the objects of the third party election advertising provisions in the BC *Election Act*, and is of grossly disproportionate effect. Regardless of how the Chief Electoral Officer chooses to enforce the law, British Columbians should not be liable for up to a year of imprisonment for failing to register before putting a sign in their window or on a shopping cart during the campaign period which contains a comment about an issue with which a political party or a candidate is associated.

7. That the registration scheme is unnecessary for expenditures of less than \$500 is demonstrated by:
- a. the fact that the *Canada Elections Act* exempts from registration third party election advertising expenditures under \$500;
  - b. where comparable legislation exists in other provinces, including Ontario, New Brunswick, and Nova Scotia, they exempt from registration third party election advertising expenditures under \$500 (and Alberta exempts third party advertising expenditures under \$1000);
  - c. the Chief Electoral Officer of British Columbia advised the provincial government in April 2010 that it was unnecessary to require the registration of individuals and organizations who incur third party election advertising expenditures of a value less than \$500, and he recommended that the government amend the BC *Election Act* accordingly.
8. As a result, section 239 cannot be saved by section 1 of the *Charter*.

Plaintiff's address for service:

Farris, Vaughan, Wills & Murphy LLP  
Barristers & Solicitors  
1100-1175 Douglas Street,  
Victoria, British Columbia V8W 2E1

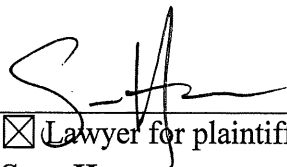
Fax number address for service (if any): 250-405-1982

E-mail address for service (if any): shern@farris.com

Place of trial: Victoria

The address of the registry is: 852 Burdett Street, Second Floor, Victoria, BC

Dated: January 28, 2013

  
 Lawyer for plaintiff  
**Sean Hern**

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

**APPENDIX**

*[The following information is provided for data collection purposes only and is of no legal effect.]*

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

Constitutional challenge to British Columbia's *Election Act*.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- X a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

- a class action
- maritime law
- aboriginal law
- X constitutional law
- conflict of laws
- none of the above
- do not know

**Part 4:**

*Election Act R.S.B.C. 1996, c. 108; Charter of Rights and Freedoms.*