Court of Appeal File No. CA41813

COURT OF APPEAL

BETWEEN:

B.C. FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

APPELLANT
(Plaintiff)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Defendant)

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

REPLY FACTUM OF THE APPELLANT

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REPLY FACTUM OF THE APPELLANT

A. The Province did not Select a $0 Minimum Expenditure Threshold

1. Running throughout the Province's factum is the proposition that it considered what value should be selected for a minimum expenditure threshold in the context of s. 239 of the *Election Act* and arrived upon $0 as the appropriate threshold. To that policy choice, the Province says this Court should give deference.[1]

2. There was, in fact, no such consideration given to the matter by the Province because prior to the trial decision in this case, the Province did not recognize that the registration requirement breached s. 2(b) of the *Charter*. No document or affidavit evidence has been produced by the Province showing any recognition of the infringement, and at trial the Province argued that if there is any infringement from the registration requirement, it is so trivial and insubstantial, it is not constitutionally protected.

3. So the fact is that no consideration was ever made as to what threshold would serve to advance the objective of the legislation yet minimally impair the rights of free expression for British Columbians. No deference can therefore be given to a purported minimum expenditure threshold of $0 and it is not fairly characterized as cast as such – it is instead an absence of any threshold.

4. The question then, is whether a registration requirement with no minimum expenditure threshold can nevertheless be justified under s. 1. That, of course, is the Province's burden.

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[1] For example, see the Province's Opening Statement, last paragraph, or its Issues on Appeal in paragraph 42(b).

B. The Problem with a Standalone Objective of Transparency

5. The Province argues[2] that s. 239 should be viewed in isolation, independent of the larger statutory scheme, as advancing the discrete objectives of "transparency, openness and public accountability." The appellant makes three points in reply.

6. First, the Province says deference is owing to the Trial Judge for his acceptance of the legislative objective as stated by the Province.[3] In this exercise, the trial judge had some uncontested affidavit evidence about the history of the *Election Act* and the Province included some Hansard extracts from its introduction in the Brief of Authorities, but otherwise it was an exercise in statutory interpretation. There was, for example, no social science evidence or legislative facts at issue. In this context, where there is already a layer of deference being applied by the trial judge to the government asserting the objective, the appropriate standard of review ought to be one of correctness.[4]

7. Second, it should be noted that a legislative objective may be considered independently, but that objective may reveal that the objective is to support or implement a larger statutory scheme. That, for example, was the court's view in *Harper* with respect to the attribution, registration and disclosure provisions in the federal legislation.[5]

8. Third, and more importantly, if as the Province advocates, one views s. 239 as an entirely separate provision, unconnected to the objectives of promoting fair elections by preventing the wealthy from dominating election discourse, we are left with the proposition that during an election campaign the government can require everyone who wishes to communicate in a wide variety of ways about important political issues to register their names with a government office before they do so. If they do not, they can be thrown in jail.

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[2] AGBC Factum, paras. 48-58
[3] AGBC Factum, paras. 63-64
[4] See by contrast, *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 56
[5] *Harper v. Canada (Attorney General),* 2004 SCC 33 [*Harper*], para. 142

9. That is a proposition so patently contrary to the constitutional right of free expression, it is troubling to see it advanced by an Attorney General. People in this country are free to communicate their thoughts and views without being required by the government to register their intention to do so. The terms "transparency, accountability and openness" are concepts associated with principles of good administration in public institutions. But divorced from any larger objective, forcing individuals in the name of "transparency and accountability" to identify and register themselves before they express themselves on issues of public importance, has a very different effect and tramples rights of free expression and privacy. That concept of governmental power is antithetical to Canadian democratic society. If the Province truly wishes to have s. 239 considered in isolation from the larger context of the legislation, a standalone requirement of registration is so repugnant to free expression that there is no s. 1 evidence that could ever save it.

C. Protecting the Listener

10. The Province suggests[6] that a standalone registration requirement is consistent with *Charter* values because free expression "protects the listener as well as the speaker." The Province cites McLachlin C.J.'s comments in dissent in *Harper* for this point (para. 17 of *Harper*), but there the Chief Justice was not speaking of any protection flowing from knowing the identity of the speaker. The Chief Justice's reference was to the right of listeners to hear *the information* conveyed by fellow citizens freely expressing themselves, as her impassioned dissent in paragraphs 16-19 of *Harper* make clear. Viewed as a standalone provision, s. 239 does nothing to enhance free expression – it simply restricts it.

D. Misconstruing the Role for the Comparator Legislation

11. Returning then to the question of whether the absence of any threshold can be justified under s. 1, even if s. 239 is viewed as contributing to the larger scheme of

[6] AGBC Factum, para. 62

preventing the harms of the wealthy dominating election discourse, the s. 1 evidence is nowhere near sufficient to justify the infringement of free expression for small spenders who cannot plausibly threaten to dominate election discourse.[7] The Province's only evidence is from the Deputy Chief Electoral Officer who deposes that sometimes Elections BC and some members of the public have used the information obtained by the registration requirement. The Deputy Chief Electoral Officer also deposes that the Chief Electoral Officer has recommended that a $500 minimum expenditure threshold be legislated. The Province has introduced no evidence that the information obtained by way of the infringement is needed by anyone. The Province cannot meet its burden under s. 1. That should be the end of the matter.

12. The Province has no reasonable argument available to suggest that a registration requirement minimally impairs the rights of free expression. Moreover, the Province is confronted by the fact that the concept of sheltering free expression in election speech through the use of expenditure thresholds is a common and constitutionally valid legislative mechanism for ensuring that rights of free expression are minimally impaired. This is evident in the election legislation of other provinces and in the decision in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569. The point is that legislating for minimal impairment is easily achievable.

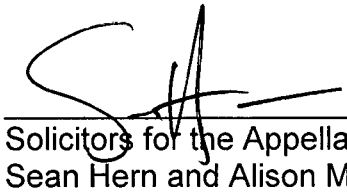
13. As to the appropriate amount for the threshold, one would think that the $500 threshold in the Federal legislation and as recommended by British Columbia's Chief Electoral Officer would be adequate and appropriate. When the Province *actually considers* what threshold would appropriately balance the rights of free expression and

[7] The Province argues that some small spenders for the purposes of the *Election Act* may find avenues to communicate about election issues that do not attract a monetary value and are therefore not restricted. But the ascribing of a monetary value to election advertising as defined by the Province, and limiting it on that basis is the Province's own metric for measuring the harm that can be caused by advertising. The Province should therefore not be attempting to justify its infringement by arguing that its own yardstick for measuring harm is not accurate or effective.

13. As to the appropriate amount for the threshold, one would think that the $500 threshold in the Federal legislation and as recommended by British Columbia's Chief Electoral Officer would be adequate and appropriate. When the Province *actually considers* what threshold would appropriately balance the rights of free expression and the true objectives of the legislation, something it has never done, perhaps a different number could be selected, but in no event will it be $0.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 13, 2015



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LIST OF AUTHORITIES