Court of Appeal File No. CA41813

COURT OF APPEAL

ON APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE COHEN OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED APRIL 16, 2014

BETWEEN:

B.C. FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

APPELLANT
(PLAINTIFF)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(DEFENDANT)

APPELLANT'S FACTUM

Appellant:

B.C. Freedom of Information
and Privacy Association

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

January 28, 2013	Notice of Civil Claim filed
February 18, 2013	Response to Civil Claim filed
March 12, 2013	Summary Trial Application filed
October 15, 2013	Response to Application filed
November 4-5, 2013	Summary Trial in Victoria before Cohen J.
April 16, 2014	Reasons for Judgment issued

OPENING STATEMENT

This is an appeal from Cohen J.'s order of April 16, 2014 dismissing a constitutional challenge to s. 239 of the *Election Act*, R.S.B.C. 1996, c. 108, which requires individuals and organizations in BC to register with the Province before engaging in certain simple acts of highly protected political speech, such as putting a sign in their window or wearing a t-shirt with a message about an issue relevant to a provincial election. If they do not fill out the correct form, have it notarized, filed within government office hours and processed before expressing themselves, the *Election Act* makes them liable to imprisonment for a term not longer than one year, a fine of up to $10,000, or both. The notion that a person would have to register with the Province before expressing themselves about political, social, environmental or financial issues that affect the Province is antithetical to democracy. Free expression is a right, not a privilege and political speech is the most highly protected expressive right of all. Cohen J. properly rejected the argument that any breach of the *Charter* was trivial. Any curtailment of s. 2(b) thus requires a pressing and substantial purpose and compelling justification. Nevertheless, in the absence of any evidence, Cohen J. held that the infringement was justified under s. 1. In doing so, he erred in several important respects.

Cohen J. fundamentally erred by identifying the wrong statutory objective for s. 239. This error tainted his entire s. 1 analysis. Section 239 is part of a statutory regime designed assist in administering the third party advertising provisions which prevent third parties from having undue influence on elections by monitoring and limiting expenditures. Had Cohen J. proceeded to measure s. 239 against the correct statutory objective, he should have found that s. 239 was not rationally connected to this objective. It was also not minimally impairing. Compared to legislation in other provinces and federally, BC's *Election Act* casts a wider net than is necessary and extends to monitoring and limiting free expression made at a scale on which there is no reasonable likelihood that it could unduly influence an election. Free expression is thus limited for no reason. There was also no evidence of any salutary effects that could offset the deleterious effects proven to arise in this case. Cohen J.'s approach to s. 1 failed to hold the AGBC accountable to her burden to "demonstrably justify" infringements of the *Charter* and erroneously effectively reversed the onus.

PART I. STATEMENT OF FACTS

1. The evidence in this case was unchallenged and accordingly most of the facts set out by Cohen J. are not controversial. However, the appellant highlights certain portions of the record in support of its contention that Cohen J. erred in his analysis.

A. The Appellant

2. The appellant is a non-profit society that advocates in a variety of ways for access to government information and for the protection of privacy.[1] It is a highly reputable organization engaged in important work.

3. The appellant is, and has been, directly affected by the third party election advertising registration scheme that it challenges in this proceeding. It engaged in election advertising in a manner which triggered the s. 239 registration requirements in the 2009 and 2013 elections, and as a result its right to free expression has been infringed and will be infringed in the future if s. 239 remains enforceable.[2]

B. The Registration Scheme

4. Section 239(1) of the *Election Act*[3] 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.[4]

5. Election advertising is defined very broadly in s. 228 of the *Election Act*:

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[1] *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2014 BCSC 660 [**TJ Reasons**], ¶2

[2] TJ Reasons, ¶2; Appeal Book, p. 1-3

[3] *Election Act*, R.S.B.C. 1996, c. 108 [*Election Act* or the Act]

[4] TJ Reasons, ¶¶8-9

> **"election advertising"** means the transmission to the public by any means, during the ~~period beginning 60 days before a~~[5] campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include
>
> (a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,
>
> (b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,
>
> (c) the transmission of a document directly by a person or a group to their members, employees or shareholders, or
>
> (d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views;[6]

6. In *Reference re Election Act (BC),* this Court commented as follows on the breadth of this definition:

> Clearly the provision that such advertising includes "an advertising message that takes a position on an issue with which a registered political party or candidate is associated" means it encompasses virtually any issue that may be the subject of political expression because political issues are almost always if not invariably associated with individual politicians and their parties whether they are members of the government or otherwise. It captures a seemingly limitless range of activities in which the government may be engaged, or some may consider it should be engaged. Labour relations, health and education services, consultations with First Nations, and environmental management may be cited as an indication of the scope of the issues that invite political expression in the form of third-party advertising on a continuing basis. It appears that any public communication on

[5] The effect of the decision in *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436, aff'd 2011 BCCA 408.

[6] *Election Act*, s. 228; TJ Reasons, ¶10 (emphasis added)

> government action would be seen as "taking a position" on an issue "associated with" a political party and limited accordingly during the pre-campaign as well as the campaign period. The definition is very broad indeed.[7]

7. Activities that are included in the definition of election advertising are summarized this way in the Elections BC Guide published by the Chief Electoral Officer for British Columbia (the "**CEO**") :

> **Types of activities that can be election advertising**
>
> - television, radio, newspaper or magazine advertisements
> - signs, billboards, posters, mailing inserts, bumper stickers, branded clothing, branded objects, displays, exhibitions and public address announcements
> - telephone calls, text messages and voicemail messages sent by an organization, sent on a commercial basis, or sent using an automated system (e.g. robocalls)
> - newsletters, brochures, emails or other advertising media which are sent to the public
> - Internet websites of organizations, or commercial blogs which are created, used or modified in relation to an election
> - Internet pay-per-click ads, banner ads, display ads, pop-up or pop-under ads, promoted search results, etc.
> - social media posts (e.g. Facebook group pages), Internet videos (e.g. YouTube) and webcasts (e.g. podcasts, Internet radio, video streams) unless they are posted by an individual on a non-commercial basis and are their personal political views[8]

8. Section 240 of the *Election Act* sets out the registration requirements, which include a notarized application being made to the CEO.[9] Registration is not just the act

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[7] *Reference re Election Act (BC),* 2012 BCCA 394, ¶20 (emphasis added)

[8] Appeal Book, p. 133

[9] TJ Reasons, ¶12

of sending in a completed form to apply for registration. Assuming that the correct form has been filled out sufficiently for the CEO's purposes, and solemnly declared before an appropriate person, when it is "practicable"[10] (ie. sometime within government working hours, when the employees have time to process it), the form will be processed and registration will take place, presumably followed by notification of a successful registration.

9. Following registration, in addition to the obligation to provide the CEO with written notice of any change in the information submitted in the form (per s. 240(6)), the registrant has continuing obligations set out in s. 241(2) of tracking and recording contributions, which are defined in s. 228 as "money provided to a sponsor of election advertising, whether given before or after the individual or organization acts as a sponsor".

10. Section 264(1)(h) of the *Election Act* provides that if an individual or organization contravenes s. 239, they have committed an offence and are liable to a fine of not more than $10,000, or imprisonment for up to a year, or both.

11. In its submissions below, the Province highlighted that s. 239 has been in place since 1995,[11] as if that suggests it is either constitutional or not controversial. That is not an inference that was, can or should be drawn. Constitutional challenges are expensive and time consuming, and because the issues here concern the rights of small spenders, the costs involved render it legislation that is vulnerable to going unchallenged notwithstanding its infringing character. Judicial scrutiny is particularly important in these circumstances to prevent the regulatory "creep" into the rights of free expression, particularly in people's ability to engage in political discourse.

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[10] *Election Act*, s. 240(5)

[11] TJ Reasons, ¶6

C. The BC Legislation Contains No Minimum Expenditure Threshold

12. In the *Canada Elections Act*,[12] and in every province that has third party election advertising restrictions, there is a minimum threshold of expenditures before any registration requirement applies. Manitoba, Ontario, New Brunswick, and Nova Scotia all have provisions similar to s. 353 of the *Canada Elections Act* with $500 registration thresholds, and Alberta has a minimum threshold of $1000.[13]

13. In BC, there is no minimum. The result is that persons who within the campaign period make and wear out of the house a t-shirt that says, “Vote for the Environment” or tape a sign on their car window that says, “End Poverty,” must register as election advertisers or be at jeopardy of a $10,000 fine and a year in jail.

D. The Chief Electoral Officer Recommends a Minimum Expenditure Threshold

14. The CEO has been recommending for years that a minimum expenditure threshold be adopted in BC.[14] This is significant because the CEO is charged with, *inter alia*, administering elections, ensuring they are fair and making recommendations to improve the election process in BC.[15]

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[12] *Canada Elections Act*, SC 2000, c 9, s. 353

[13] *The Election Financing Act,* C.C.S.M., c. E27 (Manitoba), Part 12 "Third Party Spending"; *Election Finances Act,* R.S.O., c. E.7 (Ontario), ss. 37.5-37.13; *Political Process Financing Act*, SNB 1978, c P-9.3 (New Brunswick), s. 84.3(1); *Elections Act,* S.N.S. 2011, c. 5, s. I (Nova Scotia), ss. 275-284; *Elections Finance and Disclosure Act*, RSA 2000, c E-2 (Alberta), s. 9.1(1).

[14] TJ Reasons, ¶¶88-89

[15] *Election Act*, s. 12

15. The April 2010 report from the CEO to the Legislative Assembly states as follows:

> Election advertising rules do not distinguish between those sponsors conducting full media campaigns and individuals who post handwritten signs in their apartment windows. The *Election Act* does not establish a threshold for registration, resulting in all advertising sponsors being required to register and display disclosure information – including individuals with a simple handmade sign in their window. The *Canada Elections Act* only requires registration by those who sponsor election advertising with a value of $500 or more. Having a consistent threshold would prevent the considerable confusion and administrative burden that currently exists.[16]

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

> **Section 239**
>
> Election advertising sponsors other than candidates, registered political parties and registered constituency associations must be registered under the *Election Act*, regardless of the value of election advertising they sponsor. For example, a handwritten sign posted in an apartment window requires registration by the sponsor. This creates considerable confusion as the *Canada Elections Act* only requires registration if the value of sponsored advertising is $500 or more. The B.C. *Election Act* establishes that election advertising sponsors who sponsor advertising with a value of less than $500 are not required to file an election advertising disclosure report. Significant resources are spent during a general election managing this process due to general misunderstanding of the requirements of the Act.
>
> - *Recommendation:*
>
> Registration should only be required if the value of sponsored election advertising is $500 or more. This is consistent with requirements of the *Canada Elections Act*.[17]

17. The inescapable inference to be drawn from this recommendation is that the officer of the Legislature tasked with administering fair elections and making recommendations to the government to improve the electoral process says that registration of those who spend under $500 in election advertising is not needed.

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[16] Appeal Book, p. 24 (emphasis added); see TJ Reasons, ¶88

[17] Appeal Book, p. 39 (emphasis added)

18. Cohen J. committed a palpable and overriding error in refusing to draw such an inference. Cohen J. held that this "is not a comment on the constitutionality of s. 239, or even a recommendation for improvement of the electoral process with a view toward the legislative objectives described above. Even if it were intended as either of the latter, the Court is not bound by this opinion."[18] As discussed below, Cohen J.'s identification of the wrong statutory purpose tainted his analysis of this evidence. Properly focusing on the purpose of s. 239 - to assist in administering the third party advertising provisions which prevent third parties from having undue influence on elections by monitoring and limiting expenditures– reveals that the CEO's comments are clearly related to the improvement of the electoral process with a view toward the relevant legislative objective. Thus the inference should have been drawn that his view was that a $500 threshold would not negatively impact election fairness or give rise to undue influence.

PART II. ERRORS IN JUDGMENT

19. Cohen J. erred in:

a) his analysis under s. 1 of the *Charter* by failing to require AGBC to justify, with substantive evidence, the infringement in relation to individuals and organizations who incur less than $500 in third party election advertising expenses;

b) defining the purpose of s. 239 as "to increase transparency, openness and public accountability in the election process, and to promote an informed electorate" and also in finding that this purpose was pressing and substantial;[19]

c) finding that the infringement was otherwise proportionate under s. 1.

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[18] TJ Reasons, ¶140

[19] TJ Reasons, ¶116

PART III. ARGUMENT

A. Cohen J. Correctly Identified the Breach of s. 2(b) of the *Charter*

20. Cohen J.'s correct conclusion that the s. 2(b) breach in question was not trivial or insubstantial was significant because it required a full s. 1 analysis to be conducted.

21. AGBC vigorously argued there was no infringement of s. 2(b) because the requirement that people register with the Province before expressing themselves in certain ways about political issues was a "trivial and insubstantial burden" not protected by s. 2(b) of the *Charter*.[20] Cohen J. disagreed, rightly recognizing the significance of the expression at stake:

> [124] Given the fundamental importance of all forms of political expression (as long as such expression is not violent: *Irwin Toy*, at para. 42) to democratic society, the fact that spontaneous or unplanned forms of election advertising may be most affected by the requirement to register is not a trivial or insubstantial effect.[21]

22. Cohen J. noted that the inquiry at this stage was "not limited to the nature of the regulatory requirement but asks whether the *effect* of the legislation is trivial or insubstantial".[22] Cohen J. found the effect was not trivial or insubstantial.[23] That effect was the restriction of "spontaneous or unplanned election advertising, which, like other forms of political expression, enriches political discourse."[24] Cohen J. rightly found that in limiting participation in this way, s. 239 has the effect of undermining the values

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[20] TJ Reasons, ¶¶4, 95, 102, 111

[21] TJ Reasons, ¶124

[22] TJ Reasons, ¶125

[23] TJ Reasons, ¶126

[24] TJ Reasons, ¶121

underlying s. 2(b) of the *Charter*.[25] Section 239 also has the effect of restricting planned election advertising.

23. This finding was significant because it required a full s. 1 analysis to be conducted.

B. Cohen J.'s Section 1 Analysis was Flawed

24. Section 1 of the *Charter* provides:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

25. *Oakes*[26] is the seminal case defining the correct approach to s. 1. In *Hutterian Brethren*, the Supreme Court of Canada further clarified this test which was articulated in *Oakes* and can be summarized as follows:

1. Is the limit prescribed by law?
2. Is the purpose for which the limit is imposed pressing and substantial?
3. Is the limit rationally connected to the purpose?
4. Does the limit minimally impair the right?
5. Is the law proportionate in its effect?[27]

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[25] TJ Reasons, ¶121

[26] *R. v. Oakes*, [1986] 1 S.C.R. 103 [***Oakes***]

[27] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, [***Hutterian***], ¶¶35-78

(i) The AGBC Bore a Heavy Burden of Proof

26. Cohen J. erred by effectively reversing the onus of proof under s. 1 and upholding the law in the absence of any evidence from AGBC to justify it.

27. In *RJR-MacDonald*, the Supreme Court of Canada explained that it is the state who bears the evidentiary onus under s. 1 of the *Charter* and that it is a heavy burden. The Court clarified the extent of this burden as follows:

> **128** … to meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.[28]

28. The standard of proof under s. 1 has been variously described as "rigorous"[29] or "onerous"[30] by the Court. For example, in *Oakes* the Court held:

> **63** It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms - rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."

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[28] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [***RJR-MacDonald***], ¶128 (emphasis in original)

[29] *Oakes*, ¶67; *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, para. 37 [***Andrews***], p. 201

[30] *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769 [***Lavoie***], ¶6

> **64** A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> **65** The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society. [31]

29. In *Libman*, the Court emphasized that where political expression is curtailed, a high test should be imposed for justification under s. 1:

> The degree of constitutional protection may also vary depending on the nature of the expression at issue (*Edmonton Journal, supra*, at pp. 1355-56; *Rocket v. Royal College of Dental Surgeons of Ontario,* [1990] 2 S.C.R. 232, at pp. 246-47; *Keegstra, supra*, at p. 760; *RJR-MacDonald, supra*, at pp. 279-81 and 330). Since political expression is at the very heart of freedom of expression, it should normally benefit from a high degree of constitutional protection, that is, the courts should generally apply a high standard of justification to legislation that infringes the freedom of political expression.[32]

[32] *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, (emphasis added)

[32] *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, (emphasis added)

30. This was a case, "as is generally the case",[33] where "cogent and persuasive"[34] evidence was required to "demonstrably" justify the infringement under s. 1. Yet AGBC introduced no evidence relevant to the s. 1 analysis. What was provided was an affidavit from Nola Western, the Deputy CEO, Fundraising and Disclosure, of Elections BC. Ms. Western's evidence, however, amounted to what is effectively an admission that the infringement is unnecessary and the legislation is therefore not minimally impairing of the right of free expression.

31. Ms. Western deposed that the registration information (for all registrants whether they have spent more or less than $500) is sometimes used as contact information "to advise them of, and ensure they understand, the rules, including any changes and what they must file, and to provide new guidelines or information to assist sponsors in complying with the rules".[35] In addition, Ms. Western deposed that the registration information allows members of the public to know who is registered and perhaps to contact or complain about them.[36]

32. But Ms. Western's affidavit also explains that these uses of the information are not necessary for the administration of fair elections such that the CEO has recommended that registration not be required unless the value of election advertising undertaken is $500 or greater.[37]

33. This evidence was far from cogent or persuasive. Leaving aside how weak this evidence would be if advanced in support of a s. 1 argument, in its written argument to Cohen J. the AGBC explained that it was not being relied on for the purpose of s. 1. The AGBC wrote this, at paragraph 19 of its written argument below:

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[33] *Oakes*, ¶68

[34] *Oakes*, ¶68

[35] TJ Reasons, ¶21; Western Affidavit, ¶27; Appeal Book, p. 121

[36] Western Affidavit, ¶28; Appeal Book, p. 121

[37] Western Affidavit, ¶¶20-21; Appeal Book, p. 120

> …In its written submissions (para 34), the plaintiff asserts the province relies on Ms. Western's affidavit for its "purported justification of the infringement of free expression". This is inaccurate. The province relies on Ms. Western's affidavit to provide assistance to the Court in understanding the mechanics of the registration requirement, and the role of Elections BC more generally in administering the election financing rules in the *Election Act*.

34. In the absence of Ms. Western's affidavit being relied on under s. 1, AGBC had no evidence at all to demonstrate why the registration requirement was justified for those who spent less than $500 on election advertising.

35. Despite this complete lack of evidence, Cohen J. upheld s. 239 under s. 1 of the *Charter* erroneously applying the *Oakes* test as if *the appellant* bore the onus of establishing that s. 239 could not be justified.

36. In considering whether the objectives were pressing and substantial, he held:

> [129] …In my view, the case at bar is one where a reasoned apprehension that the absence of a registration requirement would be contrary to these objectives is sufficient for this stage of the test: *Pacific Press*, at para. 78; *Harper*, at paras. 77, 88; *Bryan*, at para. 28.[38]

37. The reasoned apprehension of harm[39] standard of proof originated as a means of enabling the government to discharge its burden to demonstrate that the objective of the law was pressing and compelling and, more commonly, to demonstrate a rational connection between a law's effect and the law's objective. It has most commonly arisen in freedom of expression cases where the harm claimed to be caused by the expression in question was *not amenable to proof* by means of scientific or other conventional

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[38] TJ Reasons, ¶116

[39] *R. v. Butler*, [1992] 1 S.C.R. 452 [***Butler***], at 504

evidence. In that context, it was considered sufficient if Parliament demonstrated it had a reasonable apprehension that the expression was harmful.[40]

38. The case law makes clear that the "apprehension" standard for proof of harm applies only with respect to the existence of harm and the causal relationship between a harm and an impugned law. It may *only* be resorted to where the nature of the harm is such that traditional forms of evidence are not available to establish the harm.[41] Even when properly invoked, it should be supported by "some social science evidence" such as occurred in *Harper*.[42] There was none in this case.

39. However, in this case there is no need to resort to the reasonable apprehension of harm test because the appellant concedes that *without any regulation* actual harm could arise from failing to regulate third party election spending; that concession, however, does not answer the additional questions of whether the means chosen - which require registration by everyone no matter how little (including nothing) is expended on 'election advertising' - is proportionate. Although Cohen J. did not say so expressly, given there was no evidence upon which to base his analysis, he must have resorted to this same standard of reasonable apprehension when he found that s. 239 was rationally connected to the objectives that he had articulated, was not minimally impairing and even when he considered the proportionality of effects.[43] This was not the correct approach as it effectively reversed the onus of proof.

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[40] CA Reasons, ¶¶130-31; *Butler*, at 504, , see also *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [***Whatcott***], ¶¶128-35, *Bryan*, ¶¶10, 16, 20, 28

[41] The classic cases are the expression cases. Obscenity is said to harm women generally: *Butler*. Child pornography is said to harm children generally: *R. v. Sharpe,* 2001 SCC 2 [***Sharpe***], ¶¶100-01. The harms of expression which are considered in these cases are attitudinal harms. See e.g. *Whatcott*, ¶132.

[42] *Harper*, ¶79

[43] TJ Reasons, ¶132-148

40. Instead, at these later stages of analysis Cohen J. ought to have required AGBC to adduce *some evidence*.

41. Given the many other jurisdictions in Canada that have a minimum threshold of expenditures before any registration requirement applies, one would have expected AGBC to justify its anomalous approach by recourse to *some evidence* that such systems lead to any harms such as third parties having undue influence on elections. While this evidence may not have been scientific or conclusive it could have included evidence of the ubiquity of low cost election advertising, voter complaints, the CEO's views in those jurisdictions and social science evidence (such as that relied on by the Supreme Court of Canada in *Harper*). Cohen J. dismissed the significance of these other statutory regimes on the basis that this type of reasoning risks depriving legislators of legitimacy in the choices they make. However, the significance of the existence of these other statutory regimes is, in part, that the total absence of evidence that these regimes result in any of the harms alleged by AGBC means the apprehension of such harms is far less "reasonable".

42. The Supreme Court of Canada has required evidence at the later stages of the s. 1 analysis even when it begins with a reasonable apprehension of harm in other cases. So for example, in *Sharpe*, the Court noted that the harms of pornography do not lend themselves to scientific proof and so a reasoned apprehension standard is used. The Court concluded that the social science evidence "buttressed by experience and common sense" demonstrated a rational connection between the purpose of the law – protecting children from harm – and the means adopted.[44]

43. But when it came to minimal impairment the Court came to a different conclusion. It held that if the law is drafted in a way that "unnecessarily catches material that has little or nothing to do with the prevention of harm to children then the justification for overriding freedom of expression is absent".[45] The Court found that aspects of the law

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[44] *Sharpe*, ¶94

[45] *Sharpe*, ¶95

that raised little or no risk of harm to children were not minimally impairing even though the Court recognized that "it may be difficult to draft a law capable of catching the bulk of pornographic material that puts children at risk without also catching some types of material that are unrelated to harm to children".[46]

44. It also said it was grossly disproportionate. It is important to note that the court accepted that possession of pornography that was created and held by the accused alone and visual recordings created by or depicting the accused and are held by the accused exclusively for private use could be harmful for the various reasons the court set out. The Court noted "that they pose some risk" but the Court held the "risk is small, incidental and more tenuous than that associated with the vast majority of the material targeted by" the law.[47]

45. Cohen J., in contrast, started with a reasoned apprehension of harm and then erroneously imposed a burden *on the appellant* to "satisfy"[48] or "persuade"[49] him that the apprehended harms would be ameliorated by creating a minimum threshold of expenditure.

46. These apprehended harms had no basis in the evidence and could not even be supported by reason or common sense at the expenditure amounts in question. Cohen J.'s analysis was fundamentally flawed and essentially gives AGBC a free pass on *Charter* breaches, absent a positive case from the claimant under s. 1, where the harms in question are not amenable to scientific proof. That is not the law.

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[46] *Sharpe*, ¶95

[47] *Sharpe*, ¶100

[48] TJ Reasons, ¶141

[49] TJ Reasons, ¶142

(ii) Prescribed by Law

47. In this case it was uncontested that the limitation was prescribed by law.[50]

(iii) Cohen J. Identified the Wrong Objective of s. 239

48. Cohen J. held:

> [129] ...As stated above, the purpose of s. 239 is to increase transparency, openness, and public accountability in the electoral process, and to promote an informed electorate. These objectives are crucial to a free and democratic society, and thus sufficiently pressing and substantial to justify limiting a *Charter* right. ….[51]

49. In so holding, Cohen J. erred in finding that the purpose of s. 239 was as asserted by AGBC. The true objective of s. 239 is to assist in administering the third party advertising provisions which prevent third parties from having undue influence on elections by monitoring and limiting expenditures. If, *arguendo,* the objective of s. 239 is as asserted by AGBC, then Cohen J. erred in finding that it is pressing and substantial.

50. At this stage of the analysis, it is for AGBC to assert the legislative objective. This Court will then determine whether the asserted objective is pressing and compelling.[52] There is thus a distinction as to whether, on the one hand, the Court will consider whether an objective, as asserted by the AGBC, is pressing and substantial and whether, on the other hand it is the "true objective" of the legislation. It is clear that neither AGBC nor its counsel (nor, for that matter, the Plaintiffs) can, by simply asserting the objective of a limitation, conclusively prove it. It is nonetheless AGBC's onus to prove what the objective is.[53]

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[50] *Hutterian Brethren*, ¶39

[51] TJ Reasons, ¶116

[52] *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 [***Bryan***], ¶32

[53] See *Bryan*, ¶14; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [***Health Services***], ¶¶143-47

51. Once the Court has determined the true objective of the impugned law, it determines whether this objective is pressing and substantial.[54]

52. The true objective of s. 239 is to assist in administering the third party advertising provisions which prevent third parties from having undue influence on elections by monitoring and limiting expenditures. Section 239 is part of the overall scheme of third party election advertising limits. As this Court summarized in *Reference re Election Act (BC)*:

> …some measure of restriction is recognized as essential where it is necessary to preserve the fairness of the election process. Unlimited third-party election advertising can undermine the fairness of an election where it permits those with the resources to monopolize the election discourse.[55]

53. Registration of third party election advertisers is an administrative component of the legislative scheme to protect the fairness of elections. This objective is consistent with the objective identified in *Harper* which involved a challenge to a similar third party registration scheme in the *Canada Elections Act*, but included a $500 minimum threshold. In *Harper* the Supreme Court of Canada explained:

> The attribution, registration and disclosure provisions advance two objectives: first, the proper implementation and enforcement of the third party election advertising limits; second, to provide voters with relevant election information. As discussed, the former is a pressing and substantial objective. To adopt election advertising limits and not provide for a mechanism of implementation and enforcement would be nonsensical. Failure to do so would jeopardize public confidence in the electoral system. The latter objective enhances a Charter value, informed voting, and is also a pressing and substantial objective.
>
> The registration and disclosure requirements are rationally connected to the enforcement of the election advertising regime. The registration requirement notifies the Chief Electoral Officer of which individuals and

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[54] See e.g. *Bryan,* ¶¶33-34

[55] *Reference re Election Act (BC),* para. 25

> groups qualify as third parties subject to the advertising expense limits...[56]

54. From these passages, it may be seen that the registration component was to implement and enforce the third party election advertising limitations which were aimed at protecting the fairness and integrity of elections by giving effect to the provisions imposing third party advertising limits (which in the Federal legislation did not apply to expenditures under $500). The purpose of informing the electorate (to the extent registration would do that) is not "openness" for its own sake, but to provide the electorate with "relevant election information", which does not include information about the smallest voices spending little or nothing. Communications beneath the expenditure threshold are not relevant because they pose no risk of dominating election discourse.

55. Uncoupling concepts of transparency, openness and public accountability in the electoral process from the harms that the third party election advertising schemes are intended to address, risks compromising the entire s. 1 analysis. The Supreme Court of Canada has in past cases admonished governments to characterize the objective of the "infringing measure" and not to state the objective "too broadly that its importance is exaggerated and the analysis compromised."[57]

56. This exaggeration was commented upon in *Sauvé v. Canada*[58] which was a challenge to legislation that prohibited prisoners from voting. The objectives asserted by the government were "promoting civic responsibility and respect for the law and imposing appropriate punishment". McLachlin J. stated:

> This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation. Vague and symbolic objectives such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? Who

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[56] *Harper v. Canada (Attorney General),* [2004] 1 S.C.R. 827, ¶¶142-143

[57] *RJR-MacDonald*, ¶144

[58] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519

> can argue that proper sentences are not important? Who can argue that either of these goals, taken at face value, contradicts democratic principles? However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation. One articulation of the objective might inflate the importance of the objective; another might make the legislative measure appear more narrowly tailored. The Court is left to sort the matter out.[59]

57. Likewise, in this case, the vague and symbolic objectives of "transparency, accountability and an informed electorate" carry many meanings yet reveal little about why the limitation on freedom of expression is necessary and what the infringing measure is expected to achieve in concrete terms. Why does a person need to be registered with the government before putting a sign in their window that would have little or no chance of having a disproportionate influence, let alone dominating election discourse and compromising the fairness of a provincial election? The objectives of "transparency, accountability and an informed electorate", cannot inform the analysis. Detached from the statutory scheme, the statutory objects asserted here are impossibly vague and devoid of meaning.

58. For these reasons, AGBC's asserted purpose, accepted by Cohen J., is vague and inaccurate. The true objective of s. 239 is to assist in administering the third party advertising provisions which prevent third parties from having undue influence on elections by monitoring and limiting expenditures. Identification of the wrong objective tainted Cohen J.'s entire s. 1 analysis because when the proportionality of the law is considered under the rational connection and minimal impairment stages of analysis, it is measured against the objective.

59. However if, *arguendo*, AGBC's asserted objective is accepted, then it is not pressing and substantial. Arguments of a similar character were recently addressed by

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[59] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, ¶22

Penny J. in *Frank v. Canada*[60] in which a challenge was brought to changes that had been made to the rules for non-resident citizens of Canada voting in federal elections. In support of legislation prohibiting voting by citizens who had been non-resident for five years or more, Canada asserted that the objects of the legislation were to prevent unfairness for Canada's resident voters and to "maintain the proper functioning and integrity of Canada's electoral system and system of parliamentary representation". In considering whether these objectives were pressing and substantial, Penny J. expressed a number of concerns:

> The majority's concerns in Sauvé #2 can be transcribed almost directly to the circumstances of this case. The rhetorical nature of the government objectives advanced here renders them suspect. The first objective, fairness to resident voters, could be asserted in support of not only a complete prohibition against all non-resident voting (including, by the way, the non-resident voting of prisoners incarcerated in other locations in Canada), but also in support of a "means" test which would require proof of a sufficient "affinity" to Canada, and an understanding of not only national but local issues and sufficient legal "capacity" to vote meaningfully. In the complete absence of any concrete evidence of a problem with non-resident voting somehow thwarting the will of the resident majority, it is difficult, if not impossible, to weigh whether the infringement of the right is justified or proportionate.
>
> I am equally troubled by the notion of what is or is not "fair" to the resident majority of voters. Substantive "fairness" is almost always in the eye of the beholder....
>
> The second objective, concerns over electoral fraud, while less vague than the first, is subject to the same frailties. In this case, the government has failed to identify any particular problem with non-resident voter fraud or of non-resident voting causing an undue drain on Parliamentary resources. Indeed, the only evidence of these concerns at all comes from the speculation of a political science professor teaching at the University of Buffalo — State University of New York, who opines that an increase in non-resident voting "could," "may" or "might" give rise to concerns in the future. The available evidence from Elections Canada is that there are no documented problems associated with non-resident voting.

[60] *Frank v. Canada (Attorney General)*, 2014 ONSC 907

> For these reasons, I would have been inclined to the view that the objectives cited by the Respondent do not qualify as pressing and substantial within the meaning of the *Oakes* test.... [61]

60. Thus, if Cohen J. was correct in identifying the objective, he ought to have held, as Penny J. did, that the objective was not pressing and substantial.

61. However, even if he did not choose to go that far, there is an internal balancing that may occur within the s. 1 analysis, which is that when the objective is stated in a broad and vague fashion, the demands of the proportionality requirement should serve as a correction. This was the conclusion of both the court in *Sauvé v. Canada* and *Frank v. Canada*. As Penny J. stated in the balance of the quoted passage above:

> Nevertheless, despite the abstract nature of the government's objectives and the rather thin basis upon which they rest, as suggested in Sauvé #2, prudence requires that I proceed to the proportionality analysis rather than dismissing the government's objectives outright. The proportionality inquiry will determine whether the government's asserted objectives are in fact capable of justifying its denial of the right to vote to Canadian citizens who are non-resident for five years or more. [62]

62. We turn now to the proportionality analysis. However, given that Cohen J. proceeded with this proportionality analysis in the absence of any evidence, there was no basis for conducting such an internal balancing. This is yet another reason why the analysis was so fatally flawed.

(iv) Section 239, Applied to Small Spenders, is Not Rationally Connected to Its True Objective

63. Had he identified the correct objective, Cohen J. would not have found the law to be rationally connected to this objective

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[61] *Frank v. Canada*, *supra*, ¶¶110-115, (Emphasis added)

[62] *Frank v. Canada, supra*, ¶113, (Emphasis added)

64. Although the rational connection stage of the test has been described as "not particularly onerous," the Court must consider whether "the measures adopted [are] carefully designed to achieve the objective in question." In other words, "they must not be arbitrary, unfair or based on irrational considerations." Rather, "they must be rationally connected to the objective."[63]

65. *Oakes* involved the validity of the *Narcotic Control Act* provisions that created a presumption, on proof of possession, that possession was for purposes of trafficking. The law was not saved by s. 1. There was no rational connection between the basic fact (possession) and the presumed fact (possession for the purpose of trafficking).[64]

66. Section 239 is likewise not rationally connected to its true purpose. There is no rational connection between the basic fact (*de minimis* expression such as a t-shirt) and the presumed fact (undue influence on elections). In order to be rationally connected, the prohibition must only capture conduct "that is likely to cause" unfairness and compromise integrity in elections.[65] It is irrational to infer that *de minimis* expression will cause such outcomes.

(v) Section 239 is Not Minimally Impairing of s. 2(b) of the Charter

67. Minimal impairment asks whether Parliament gave sufficient weight to the values underlying the right in question and whether the prohibition is sufficiently tailored or whether it risks capturing conduct that – while perhaps not valued by all and perhaps even disavowed by many – is not conduct giving rise to the harm protected against.[66]

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[63] *Oakes*, p. 139; *see also Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989, ¶124, per Cory J. (dissenting)

[64] *Oakes*, at 141-42. *Oakes* is one of the few cases determined at this stage. See also *Whatcott*.

[65] *Whatcott*, ¶92

[66] *Whatcott*, ¶¶107-09

68. Section 239 does not give sufficient weight to the core values underlying the *Charter* including democracy, truth seeking, and personal fulfillment.[67] Requiring everyone in every circumstance to register before engaging in "election advertising" captures a great deal of expression which falls short of engaging the harms at which s. 239 is aimed.

69. Cohen J. was tasked with determining whether AGBC had led evidence to demonstrate that there were no alternative, less drastic means of achieving its objective in a real and substantial manner. As above, Cohen J.'s analysis was fatally tainted by being measured against the wrong objective, against apprehended harms not supported by evidence and by imposing the onus on the appellant.

70. Even if it was open to him to rely on Ms. Western's affidavit in this manner, it may be seen that Ms. Western's evidence falls far short of justifying the infringement of free expression.

71. Ms. Western's evidence amounts to what is effectively an admission that regulation for those who spend under $500 is unnecessary. Ms. Western says that the registration information (for all registrants whether they have spent more or less than $500) is used as contact information "to advise them of, and ensure they understand, the rules, including any changes and what they must file, and to provide new guidelines or information to assist sponsors in complying with the rules".[68] In addition, Ms. Western says that the registration information allows members of the public to know who is registered and perhaps to contact or complain about them.[69] Throughout she speaks of use or possible use, not need.

72. Ms. Western's affidavit goes on to demonstrate that the use of the information as she describes is not necessary for the administration of fair elections such that the CEO

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[67] *Montreal v. 2952-1366 Quebec,* [2005] 3 S.C.R. 141, ¶74

[68] Western Affidavit, ¶27, Appeal Book, p. 121

[69] Western Affidavit, ¶28 Appeal Book, p. 121

has recommended that registration not be required unless the value of election advertising undertaken is $500 or greater.[70]

73. The recommendation shows that while some of the registration information gathered from low spending third parties as a result of the infringement may be used from time to time, it is not needed. The CEO is evidently comfortable with being able to contact small spending third party election advertisers if required by using means other than consulting with their registration forms and there is no evidence that his office has any difficulty doing so.

74. Ms. Western's affidavit leads the appellant to ask how can infringement of a fundamental right be upheld when the evidence before the Court is that the infringement produces some information that may be used from time to time by some people but is not necessary to anyone? Cohen J. seems to have applied a test under s. 1 that if the infringing provision is of any use at all to the government, it must be upheld. That is incorrect.

75. Cohen J. has either reversed the onus or given virtually no weight at all to the right of free expression, which is so fundamentally important in our society. The curtailing of a person's desire to express themselves about a political issue may be hugely significant in a person's life. They are instances of civic engagement in democracy that are to be fostered and celebrated, not suppressed, impeded, postponed and perhaps ultimately quashed by government registration requirements backed by punitive sanctions and justified on the basis that someone might consult the person's registration form at some point in the future for contact purposes.

76. AGBC's evidence, if there is any, falls absurdly far short of the mark for justifying infringement on the exercise of s. 2(b) rights, especially when the means by which to cure the over-reaching effect of the legislation is simple, effective, recommended, and employed in legislation across the country. The existence of these other legal regimes,

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[70] Western Affidavit, ¶¶20-21 Appeal Book, p. 120

and the lack of evidence of harm in these jurisdictions, may not "necessarily" mean s. 239 was not minimally impairing; however these regimes were certainly "relevant" to Cohen J.'s analysis and he erred in disregarding them.[71]

77. Nevertheless, Cohen J. held that "the Legislature has already enacted the threshold it sees as appropriate, in that any advertising, which constitutes 'election advertising', will trigger the requirement to register".[72]

78. This is an extraordinary and erroneous finding in the face of (a) AGBC having argued that there is no infringement because the registration requirement is so minimal, and (b) AGBC having led no evidence the government ever acknowledged, studied or considered the infringement and what an appropriate minimum threshold would be.

79. The only inference that can be drawn from AGBC's evidence and arguments is that they never thought about whether to implement a minimum threshold because they considered it a trivial concern and never acknowledged that it infringed free expression. It was a palpable and overriding error for Cohen J. to fail to so find.

80. The lack of a minimum expenditure threshold in Quebec's *Referendum Act* was the reason the Supreme Court of Canada found parts of that legislation not to be minimally impairing in *Libman v. Quebec (Attorney General)*. In that case, through a variety of provisions prohibiting and regulating expenses, the legislation had the purpose and effect of funnelling political expression about referendums into the national committees on either side of the referendum question. The Court found the effect of the legislation to "come close to being a total ban" on the freedom of expression for groups and individuals who did not feel that politically they could join or align themselves with either committee. For those people, the Court held that there must be some accommodation in the legislation to allow for their political expression without disturbing

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[71] TJ Reasons, ¶65; *United Steelworkers of America, Local 7649 v. Québec (Chief Electoral Officer)*, 2011 QCCA 1043, ¶45

[72] TJ reasons, ¶147

the overall purpose of the legislation, which was to prevent the referendum debates from being dominated by the most affluent members of society.

81. The legislative solution for the over-reaching effect of the *Referendum Act* was one that had been proposed by the 1992 Lortie Commission Report – a minimum expenditure threshold. In *Libman*, the Court discussed the Lortie Commission recommendation and the corresponding enactment of a minimum expenditure threshold that had been made in the *Canada Election Act*.[73] The Court concluded that a minimum expenditure threshold strikes an appropriate balance "between absolute individual freedom of expression and equality of expression between proponents of the various options [in the referendums]".[74]

82. In light of (a) the paucity of s. 1 evidence presented by AGBC here, (b) the CEO's recommendation for a minimum threshold, (c) the legislation across Canada containing minimum expenditure thresholds for third party election advertising, and (d) the Supreme Court of Canada's endorsement in *Libman* of a minimum threshold as a means to ensure legislation is minimally impairing, the infringement on freedom of expression by s. 239 of the *Election Act* is not minimally impairing under s. 1 of the *Charter*.

(vi) Section 239 is Disproportionate in Its Effects

83. It is this last stage of analysis which provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the preceding stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.[75]

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[73] *Libman*, ¶¶76-81

[74] *Libman*, ¶81

[75] *Hutterian Brethren*, ¶¶74, 76-77; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, ¶¶92, 95

84. Cohen J. held:

> [148] In my view, the salutary effects of the impugned measure outweigh the deleterious effects. The most concerning impact of the registration requirement, in my view, is the restrictive effect on spontaneous political expression. The process of registering under the *Act*, on the other hand, requires providing minimal personal information and undergoing a minimal administrative inconvenience. The salutary effect of s. 239 is that it facilitates the implementation and enforcement of third party election advertising regulations, and, in turn, increases the transparency, openness, and accountability of British Columbia's electoral process, and promotes an informed electorate.[76]

85. As above, there was simply no evidence that s. 239 had any of these salutary effects and Cohen J. had already determined that the deleterious effect of restricting "spontaneous or unplanned election advertising, which, like other forms of political expression, enriches political discourse"[77] was neither trivial nor insubstantial. Indeed, freedom of expression is the lifeblood of democratic society. There are few, if any, rights of such fundamental importance.[78] Such a wide-reaching infringement as that alleged in this case - touching as it does upon the rights of all British Columbians to express themselves on political matters during elections and to receive the benefit of such expression – is of a special and extraordinary quality. In light of his finding about the important interests at stake, Cohen J.'s analysis of the proportionality of effects, completely unmoored as it was from any evidence or even logical inference, was seriously wanting.

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[76] It is interesting to note that in this passage, in order to emphasize a salutary effect, Cohen J. makes the critical link here between registration as an administrative aid to the larger scheme of limiting third party election advertising, a link which he failed to consider in determining whether there was a rational connection between the infringement and the object of the provision, or minimal impairment in the legislative scheme.

[77] TJ Reasons, ¶121

[78] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, ¶3, per Cory J.

PART IV. NATURE OF ORDER SOUGHT

86. The Appellant seeks an order that the appeal is allowed and a declaration of constitutional invalidity.

87. The Court in *Libman* determined that it was not for the Court to decide the amount of the minimum expenditure threshold.[79] The Lortie Commission had recommended $1000, but that was the only advice on the subject that had been advanced at that time. As a result, the Court struck down all of the expense regulation provisions at issue and left it to Parliament to consider.

88. Here, the appellant proposed a declaration that acknowledges that registration is not required below a $500 minimum threshold, which is the standard threshold in legislation across the country (except for Alberta, which is $1000), and is the amount recommended by the CEO. It may be that upon consideration, a higher minimum threshold should be imposed, or one that increases with inflation, or by regulation.

89. If the Court is uncomfortable dictating the amount of the minimum expenditure threshold, then the appellant submits, as it did below, that the appropriate remedy is to simply declare s. 239 of no force and effect under s. 52 of the *Constitution Act 1982* and the Legislature can enact an appropriate minimum threshold having sincerely considered the significance of the infringement.[80]

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

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Counsel for the Appellant,
Sean Hern and Alison M. Latimer

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[79] *Libman*, ¶81

[80] *R. v. Ferguson,* 2008 SCC 6

LIST OF AUTHORITIES

CASE LAW **PAGES**

STATUTES

Appendix A

Extracts from the *Election Act*, RSBC 1996 Chapter 106:

Part 11 — Election Communications

Division 1 — General

Election advertising

228 For the purposes of this Act:

"contribution" means a contribution of money provided to a sponsor of election advertising, whether given before or after the individual or organization acts as a sponsor;

"election advertising" means the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include

(a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,

(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,

(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, or

(d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views;

"value of election advertising" means

(a) the price paid for preparing and conducting the election advertising, or

(b) the market value of preparing and conducting the election advertising, if no price is paid or if the price paid is lower than the market value.

* * *

Third party advertising limits

235.1 (1) In respect of a general election conducted in accordance with section 23 (2) of the *Constitution Act*, an individual or organization other than a candidate, registered political party or registered constituency association must not sponsor, directly or indirectly, election advertising during the period beginning 60 days before the campaign period and ending at the end of the campaign period

(a) such that the total value of that election advertising is greater than

(i) $3 000 in relation to a single electoral district, and

(ii) $150 000 overall, or

(b) in combination with one or more individuals or organizations, or both, such that the total value of the election advertising sponsored by those individuals and organizations is greater than

(i) $3 000 in relation to a single electoral district, and

(ii) $150 000 overall.

(2) In respect of a general election conducted other than in accordance with section 23 (2) of the *Constitution Act*, the limits under subsection

(1) do not apply to the period beginning 60 days before campaign period, but do apply to the campaign period.

(3) In respect of a by-election, the limits under subsection (1) do not apply to the period beginning 60 days before campaign period, but the limits under subsection (1) (a) (i) and (b) (i) do apply to the campaign period.

(4) Section 204 applies to adjust the amounts under this section.

* * *

Election advertising sponsors must be registered

239 (1) Subject to subsection (2), an individual or organization who is not registered under this Division must not sponsor election advertising.

(2) A candidate, registered political party or registered constituency association is not required to be registered as a sponsor if the individual or organization is required to file an election financing report by which the election advertising is disclosed as an election expense.

(3) An individual or organization who is registered or required to be registered as a sponsor must be independent of registered political parties, registered constituency organizations, candidates, agents of candidates and financial agents, and must not sponsor election advertising on behalf of or together with any of these.

Registration with chief electoral officer

240 (1) An individual or organization who wishes to become a registered sponsor must file an application in accordance with this section with the chief electoral officer.

(2) An application must include the following:

(a) the full name of the applicant and, in the case of an applicant organization that has a different usual name, this usual name;

(b) the full address of the applicant;

(c) in the case of an applicant organization, the names of the principal officers of the organization or, if there are no principal officers, of the principal members of the organization;

(d) an address at which notices and communications under this Act and other communications will be accepted as served on or otherwise delivered to the individual or organization;

(e) a telephone number at which the applicant can be contacted;

(f) any other information required by regulation to be included.

(3) An application must

(a) be signed, as applicable, by the individual applicant or, in the case of an applicant organization, by 2 principal officers of the organization or, if there are no principal officers, by 2 principal members of the organization, and

(b) be accompanied by a solemn declaration of an individual who signed the application under paragraph (a) that the applicant

(i) is not prohibited from being registered by section 247, and

(ii) does not intend to sponsor election advertising for any purpose related to circumventing the provisions of this Act limiting the value of election expenses that may be incurred by a candidate or registered political party.

(4) The chief electoral officer may require applications to be in a specified form.

(5) As soon as practicable after receiving an application, if satisfied that the requirements of this section are met by an applicant, the chief

electoral officer must register the applicant as a registered sponsor in the register maintained by the chief electoral officer for this purpose.

(6) If there is any change in the information referred to in subsection (2) for a registered sponsor, the sponsor must file with the chief electoral officer written notice of the change within 30 days after it occurs.

(7) A notice or other communication that is required or authorized under this Act to be given to a sponsor is deemed to have been given if it is delivered to the applicable address filed under this section with the chief electoral officer.

Obligations of registered sponsor

241 (1) The identification of a registered sponsor referred to in section 231 must be a name filed by the sponsor under section 240 with the chief electoral officer.

(2) An individual or organization who is registered or required to be registered as a sponsor must maintain records of the following information in respect of contributions received by the sponsor:

(a) in the case of anonymous contributions, the date on which the contributions were received, the total amount received on each date and, if applicable, the event at which they were received;

(b) in other cases, the information referred to in section 190 (1) (a) to (e), with the class of contributor recorded in accordance with section 245 (2).

Voluntary deregistration

242 (1) A registered sponsor may apply to the chief electoral officer for deregistration in accordance with this section.

(2) As an exception, a sponsor may not apply for deregistration under this section if the sponsor is subject to deregistration under this Part or has not yet paid a penalty under this Part.

(3) An application for deregistration must be in writing and must be signed, as applicable,

(a) by the individual applicant, or

(b) in the case of an applicant organization, by 2 principal officers of the organization or, if there are no principal officers, by 2 principal members of the organization.

(4) On being satisfied that an application for deregistration is authorized by the sponsor, the chief electoral officer must deregister the sponsor.

(5) As a limit on subsection (4), if during a campaign period a registered sponsor has sponsored election advertising, the sponsor may not be deregistered until the election advertising disclosure report for the sponsor has been filed.

Reregistration

243 In order to be reregistered, an individual or organization must file any outstanding reports and pay any outstanding penalties under this Part.

* * *

Penalties under this Part are in addition to any others

251 Any penalty under this Part is in addition to and not in place of any other penalty to which an individual or organization may be liable under this Act in respect of the same matter.

Prosecution of offences

252 (1) A prosecution for an offence under this Act may not be commenced without the approval of the chief electoral officer.

(1.1) If the chief electoral officer is satisfied that there are reasonable grounds to believe that an individual or organization has contravened this Act, the chief electoral officer may refer the matter to the Criminal

Justice Branch of the Ministry of Justice for a determination of whether to approve prosecution.

(2) The time limit for laying an information respecting an offence under this Act is one year after the facts on which the information is based first came to the knowledge of the chief electoral officer.

(3) A document purporting to have been issued by the chief electoral officer, certifying the day on which the chief electoral officer became aware of the facts on which an information is based, is admissible without proof of the signature or official character of the individual appearing to have signed the document and, in the absence of evidence to the contrary, is proof of the matter certified.

Prosecution of organizations and their directors and agents

253 (1) An act or thing done or omitted by an officer, director, employee or agent of an organization within the scope of the individual's authority to act on behalf of the organization is deemed to be an act or thing done or omitted by the organization.

(2) If an organization commits an offence under this Act, an officer, director, employee or agent of the organization who authorizes, permits or acquiesces in the offence commits the same offence, whether or not the organization is convicted of the offence.

(3) A prosecution for an offence under this Act may be brought against an unincorporated organization in the name of the organization and, for the purposes of the prosecution, the unincorporated organization is deemed to be a person.

Offences in relation to election advertising and other promotion

264 (1) An individual or organization who does any of the following commits an offence:

(a) contravenes section 230 respecting a restriction on election advertising;

(b) contravenes section 231 respecting identification of the sponsor of election advertising;

(c) contravenes section 232 respecting a rate charged for election advertising;

(d) contravenes section 233 or 233.1 respecting election advertising on general voting day;

(e) contravenes section 234 respecting a restriction on activities near an election office or voting place;

(f) and (g) [Repealed 2002-60-10.]

(h) contravenes section 239 respecting the requirement to be registered as a sponsor;

(i) fails to record information as required by section 241 (2).

(2) An individual or organization who commits an offence under subsection (1) is liable to a fine of not more than $10 000 or imprisonment for a term not longer than one year, or both.