Court of Appeal File No. CA039942
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COURT OF APPEAL

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, RSBC 1996, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 296/12 DATED MAY 16, 2012 CONCERNING THE CONSTITUTIONALITY OF AMENDMENTS TO PROVISIONS IN THE *ELECTION ACT*, RSBC 1996, c. 106 REGARDING ELECTION ADVERTISING BY THIRD PARTIES

FACTUM OF THE INTERVENOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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CHRONOLOGY OF THE BCCLA ii

OPENING iii

PART I: FACTS 1

PART II: ISSUES ON THE REFERENCE 13

PART III: ARGUMENT 14

PART IV: NATURE OF ORDER SOUGHT 29

LIST OF AUTHORITIES 31

CHRONOLOGY OF THE INTERVENOR BCCLA

The BCCLA accepts the Chronology of the AGBC.

OPENING

Should government restrict and regulate political expression by citizens? In a democracy, the answer must be "no". Government derives its legitimacy from the people. In a nation where, even before fundamental freedoms were embedded in a constitutional *Charter of Rights,* courts found an implied bill of rights that proscribed government interference with public debate and dissent, it would be passing strange to find that the very act of embedding rights expressly in the constitution had the effect of detracting from them.

The BC government's Factum refers to "legitimate political speech", as if it can choose to decide that some is illegitimate. Its approach is to use election oriented expression as a toe-hold to broaden both the definition and the duration of regulation of political expression. It uses *Harper v. Canada,* a unique and controversial split decision of the Supreme Court of Canada, allowing some limits on some advertising for a short duration specified for an election campaign. The BC government wrongly seeks to use *Harper* as the thin edge of a wedge to regulate political speech generally.

On this reference, the court is to determine whether certain *2012 Election Act* Amendments (the "2012 Amendments") are "reasonable limits", "prescribed by law" and "demonstrably justified in a free and democratic society" within section 1 of the Charter. The 2012 Amendments create registration, reporting and compliance requirements and restrictions on "third party election advertising" for up to 40 days before the election campaign period for scheduled elections. The BC government asserts that is necessary otherwise "third party" groups will spend heavily on advertising in that period and upset three alleged "objectives" of elections law: promotion of equality in political discourse during election campaigns, protecting the integrity of political party and candidate election financing regimes, and ensuring voters have confidence in the electoral process. Yet the 2012 Amendments do not serve those objectives. By driving up complexity, adding transaction costs and raising the specter of penalties, they have the effect of a poll tax chilling speech and lessening voter participation. In doing this, the 2012 Amendments enhance the position of political elites and tilt politics and elections in BC in favor of incumbents.

The BC government's case falters and fails, however, when *Harper* is distinguished based upon its context, the development of the law since *Harper* is considered, and the distinctions between what BC has done with the 2012 Amendments are measured against what the Charter of Rights requires.

PART I: FACTS

Introduction

1. The British Columbia Civil Liberties Association (the "BCCLA") is a non-profit, non-partisan group incorporated in 1963 under the *B.C. Society Act* and has as its objects the promotion, defence, sustainment and extension of civil liberties and human rights. The BCCLA was an intervenor in the BCTF Trial and BCTF Appeal proceedings.[1] Chief Justice Finch granted the BCCLA leave to intervene here.

Overview

2. The lifeblood of democratic society is political expression. Expression is protected as a fundamental freedom not just so as to serve the rights and interests of the speaker,[2] but also the rights and interests of prospective listeners.[3] Limiting such rights and freedoms in the context of political expression and democratic governance strikes at the heart of democratic society.[4] It smacks of a paternalistic

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[1] *B.C. Teachers Federation et al v. BC (Attorney General)* 2009 BCSC 436 ("BCTF Trial") and *B.C. Teachers Federation et al v. BC (Attorney General)* 2011 BCCA 408 ("BCTF Appeal").

[2] *R. v. Sharpe,* 2001 SCC 2, [2001] 1 S.C.R. 45 per McLachlin, C.J.C., at paras. 21 and 23. *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 47-50 and 52 (the rejection of an "overly solicitous" desire for protecting reputation as a limit on free expression finds a parallel here in the AGBC's "overly solicitous" desire to protect what the public hears during elections. See also *R. v. Zundel* [1992] 2 S.C.R. 731 per McLachlin

[3] *Dixon v. Powell River (City),* 2009 BCSC 406 at paras. 29-30 per Garson, J.; *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 17.

[4] *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573 at paras. 12-15 per McIntyre, J.: "Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection." Cory, J., in *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326, agreed, quoting J. S. Mill: "All silencing of discussion is an assumption of infallibility." See also Iacobucci, J., in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69 at para. 272. The notion that governments in Canada will not target individuals and groups they regard as political adversaries is hardly far-fetched. See *B.C. (A.G.) v. Georgetti et al* 1987 CanLII 2656 (B.C.S.C.) at paras. 12-13 and *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27 at paras. 44-63.

view incompatible with a society that respects and recognizes the mature judgment of its citizens.

3. While government is not entitled to regulate the content of speech, it has in certain contexts been entitled (e.g., where it has created a particular forum), to determine what speakers are invited to participate. Per Deschamps, J. in *Translink*: the Charter "generally does not go so far as to place the government under an obligation to facilitate expression by providing individuals with a particular *means* of expression."[5]

4. Given the Supreme Court's observations in *Translink,* the AGBC's position that government has the right to regulate speech by limiting the amount and means of communication permissible for certain speakers is suspect. First, the "forum" here – belongs to the people, not to government. Second, even were one aspect of the "forum" under consideration here (elections) regarded as a government creation (and the analogy is inapt as elections are constitutive of government, not the other way round), the notion that only speakers the government chooses to invite may participate runs counter to the constitutional purpose for which elections exist. Third, if government wishes to help some voices get their message out, that may be permissible. But reducing speech and silencing voices is not.

5. Government action limiting political speech rights must be subjected to close scrutiny. Generalizations offered up as support for limitations on such precious rights should be rejected. As McLachlin, C.J.C., said in relation to section 3 rights:

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[5] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 per Deschamps, J., at para. 26: "In the respondents' view, their claim centres on the use of government property for public expression without undue state interference with the content of their expression, and should therefore be resolved using the analysis for public space expression set out by this Court in *City of Montréal.*" See also Fish, J., concurring, at para. 121: Government "cannot, without infringing s. 2(*b*) of the *Charter*, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law." Compare *Haig v. Canada; Haig v. Canada (Chief Electoral Officer),* [1993] 2 S.C.R. 995 per L'Heureux-Dube, J.: "...freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones", approved by Rothstein, J., in *Baier v. Alberta*, 2007 SCC 31 at para. 21.

> This Court has repeatedly held that the "general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament....Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations....The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. [6]

Unfair Discrimination Among Speakers

6. The Supreme Court has held that regulating speech content and discriminating among speakers in a forum open to all (e.g., advertising on transit in *Translink;* advertising in relation to political matters and elections here) is impermissible. Yet that is exactly what the B.C. government has done with the *Elections Act.*

7. Some speakers (third party advertisers) are severely restricted. Some speakers (political parties and candidates) have limits, but they are so high that no party has yet hit the maximum and for candidates, the restrictions reflect roughly what was were spent without limits.[7] Some speakers (e.g., newspapers, periodicals, radio, television and other media) are not subject to any restrictions.

8. The Kent Commission, the Lortie Commission and the *Charter* itself recognize that what the media do with reporting and editorializing is political speech. Obviously what they write and say concerns issues associated with candidates and parties. The value of the pages or broadcast time that their political speech would command if it were offered to the marketplace would be immense and vastly outstrip any and all of the limits put in place. Yet the media are wholly exempt. The Lortie Commission noted concerns that politicians had that too much of their message was

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[6] *Sauvé v. Canada (Chief Electoral Officer),* 2002 SCC 68 at paras. 12-13.

[7] The AGBC refers in his factum at paras. 4-6 to the advertising expenditures of parties in the 2001 and 2005 elections, none of which come remotely close to the overall campaign expenditure limits. While obviously parties may choose to spend on things other than advertising, the *Elections Act* does not dictate how they do so. It is conceivable that a party could choose to spend up to its limit on advertising – which, assuming a party with a full slate of candidates, would allow for close to $17 million (being the $1.1 million and $4.4 million a party is allowed, plus 82 candidates x ($70,000 + $70,000)).

conveyed to the public mediated through journalists, rather than directly.[8] No doubt this applies to everyone wanting to get a message across to the public.

9. In making this point, the BCCLA should not be taken to be encouraging regulation of political speech by the media. Far from it. But it is odd that an ad in a newspaper is subjected to limits under this law, yet reporting on campaigns and editorializing about who to support appearing on the same paper is not. The same goes for the broadcast media. The fact that one person rents space or time, while the other owns the medium, is apparently controlling for the B.C. government. Justifying that distinction is not possible.

"Earned Media", Web 2.0, and "Going Viral"

10. Cole, J., in the *BCTF Trial* recognized the importance of "earned media".[9] That involves getting the media to give attention to a particular candidate or issue. The more constrained one's budget is, or the more constrained legal limits on expenses may be, the greater the need to try to gain "earned media" or to engage in other means of avoiding the restrictions the law imposes (e.g., Web 2.0 technology – which Cole, J., recognized had wrought a significant change since *Harper* was decided).

11. But "earned media" is publicity passed through the filter of reporters in the media. There is nothing wrong with the media (or anyone else) reporting or providing an opinion on what someone else has to say about a political matter. But permitting communication through that filter while proscribing it directly is odd.

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[8] Joint Reference Book, v. 2, pp. 761 ("Forms of campaign communication" chart, and comment: "it is also essential to distinguish between those forms of campaign communication that allow the parties relatively direct access to voters and those that are filtered through journalists and commentators. There is considerable demand from both parties and voters for more unmediated communication."), 764-6 (Tables 6.16, 6.18, 6.19 and text discussion), 785 ("clear need for direct communication"), 789 (the "need expressed by voters and the parties for more unmediated communication..."), Aff. #1 of Sally Yee, Ex. B, Lortie Report.

[9] Reasons for Judgment, paras. 214-5, 220, 230-1.

12. The Kent Commission on "Newspaper Ownership in Canada" begins its report in 1981 at page 1 with the words: "Freedom of the press is not a property right of owners. It is a right of the people. It is part of their right to free expression, inseparable from their right to inform themselves."[10] But the Kent Commission report and the one by Senator Keith Davey both expressed serious concern about concentrations of ownership and power in the print media.[11] Similar concerns, of course, exist in relation to other media. And it is common knowledge that the ownership concentration that existed at the time of those reports has continued to this day.

13. Media and politicians are constantly talking about political issues. Third party advertisers are not - speaking out for them is typically transient. Yet third party advertisers are subjected to the severest constraints under the 2012 Amendments. That is true during an election campaign and, if the 2012 Amendments are upheld, would extend the constraints for a substantial period prior to the election. It is notable that those periods are at a time when the public and such advertisers are increasingly engaged about political matters.

14. During the BCTF Trial, the AGBC argued that the rise of the internet had raised a new, "more democratic" forum for political debate. The use of Facebook, Youtube, Twitter and other social media, whereby users would either send out a message or link that would be passed along, with or without further comment, by recipients to others was a way of political messages to "go viral" and obtain a wide audience rapidly.

15. Since non-commercial efforts to communicate in this fashion were argued to be exempt from the 2009 amendments, this additional forum for communication was proffered as a means for political discussion that undercut the need for any third party to use traditional media. Cole, J., acknowledged the rise of such new media, but decided that the traditional media were still the mainstay for effective political

[10] Kent Commission Report, p. 1.
[11] Kent Commission Report, pp. 9-14, 221.

advertising.[12] What went unappreciated or at least underappreciated, however, is that most of these internet based communication tools are, as the AGBC noted, filtered in the sense that they do not get transmitted unless the recipient chooses to send them along.

What is "caught" by the Election Advertising Definition?

16. The definition of "election advertising" in the 2012 Amendments is exceedingly broad. At the trial before Cole, J., and in this court, both the AGBC and plaintiffs' counsel agreed that the definition was so broad that there was really no room for any political advertising at all in whatever the period of restriction was. Cole, J. and this court appear to have accepted that and so found.[13]

17. That is a significant difference distinguishing this case from *Harper*. In *Harper* at para. 112, Bastarache, J., relies upon the notion that third parties can still advertise on political matters during election campaign periods and assumes to support his conclusion that there is something not caught by the federal *Canada Elections Act* definition.

18. Given the findings in the BCTF Trial and BCTF Appeal that there is no room for advertising about political matters beyond the definition, then that premise in *Harper* does not to exist, at least in the BC context.

Transaction Costs of Registering, Reporting and Compliance – the new "Poll Tax"

19. The discriminatory effects of the 2012 Amendments are underscored when one reflects on compliance issues. The burden of those falls most heavily on those least able to bear them.

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[12] See BCTF Trial Reasons, paras. 213-232.

[13] BCTF Trial Reasons, para. 246, holding that Bastarache, J.'s comment, "does not accord with the reality of election advertising in this province. Practically speaking it is not readily apparent when an issue is *not* associated with a candidate or political party." See BCTF Appeal Reasons, paras. 65-66 (definition of election advertising overly broad when applied to the pre-campaign period). From the Joint Reference Book on this appeal, see Aff. #2 of Moira Mackenzie, v. 5, pp. 1611-1953 setting out party platforms of BC Liberals and BC NDP and various issue advocacy and other groups advertising.

20. First, there is a transaction cost to compliance with the *Election Act* registration, accounting and audit and reporting functions. That exists not just in terms of out-of-pocket expense if paid workers are used to perform the required tasks or if professional advice and service is sought on legal, accounting and other matters related to registration and filing requirements. It is true as well if the job is done by the "third party election advertiser" herself (if an individual) or by volunteers (for groups, clubs, societies, unions or corporations). That cost, obviously, like all transaction costs, will deter some from entering this "marketplace of ideas" at all. Also, it will take away from resources that could be applied to other, preferred activities for "third parties" that nonetheless register and advertise.[14]

21. Second, there is a burden on everyone, lay persons particularly, to understanding what is "caught" and what is not, by the 2012 Amendments. Where the consequences of non-compliance are penal, uncertainty begets silence.

22. Third, enforcement by the Chief Electoral Officer will never be complete. Some whose conduct is caught by the broad language of the *Elections Act* will never face prosecution. Yet the prospect of enforcement proceedings will chill some persons from participating in politics.[15] It is more likely that activist issue-advocacy and charitable organizations would be attacked by enforcement than ad hoc individual advertisers.

23. Fourth, the array of requirements and limitations on third party advertisers will serve as an incentive to those with substantial means to engage in avoidance measures

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[14] See M. Vonn Affidavit and S. Daub Affidavit, particularly paras. 12 and 19 (found at Joint Reference Book, v. 1, pp. 223-336. Note that Exhibit A to the Daub Affidavit (at Joint Reference Book, pp. 237-285, was prepared for the BCCLA, as well as the CCPA and FIPA. The BCCLA will not repeat herein the submissions made in the Amicus Factum and the FIPA Factum, which will set out in detail the evidence and findings of Daub and the "Election Chill " paper. See also F. Palda, "Election Finance Regulation in Emerging Democracies: Lessons from Canada and the U.S." (May 2000) at p. 35.

[15] See Couture Gagnon and Palda, "The price of transparency: do campaign finance disclosure laws discourage political participation by citizens' groups?" Public Choice (2011) 146: 353-374 at 353-5, 357-8, 364-8 (tangible costs), 368-9 (intangible costs) and 372-3.

that aim at achieving influence without publicity.[16] That is likely to result in channeling financial and other support and influence to candidates and parties, even where the "third party" would otherwise not have been inclined to do so.[17]

Advertising Requires Repetition and Persistence to be Effective

24. Political advertising is but a small part of advertising overall[18]. Billions of dollars are spent by business, government, charities and other groups. They do so to achieve market awareness and, for businesses, higher levels of sales and market share. It is common knowledge to ensure brand awareness, product quality and features and recognition of one's message advertising has to be repetitive and persistent in order to be effective.

25. Repetition and persistence are required not just to establish such awareness among consumers, but to keep it. Decay is rapid without repetition and persistence.[19]

26. While political ads occupy a small part of all advertising, questions about who should govern and what public policy should be are far more important than what detergent or car to buy, what fast food restaurant to eat at or soda to drink. To restrict political discourse denigrates the position it properly should hold and inhibits the attention that the public otherwise may devote to their role as democratic citizens.

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[16] The so-called "hydraulic effect" has been noted by many commentators, including Prof. C. Feasby, whose earlier work was referred to by Bastarache, J., in *Harper*. See, e.g., C. Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 45 Osgoode Hall L. J. 513 at 533.

[17] In this sense, the 2012 Amendments run counter to what the Supreme Court of Canada decided in *Libman v. Quebec (Attorney General),* [1997] 3 SCR 569.

[18] This point underscores the elasticity of supply of advertising. Political speech could be increased with relative ease if demand were not constrained by legal limits.

[19] The evidence accepted by Cole, J., in the BCTF Trial concerning the reasons that political consultants recommend repetition, persistence and close proximity in time to election day for "effective" election advertising campaigns is useful to note here. But see also Gerber, Bimpel, Green and Shaw, "How Large and Long-lasting Are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment", Am. Poli. Sci. Rev. 105:1 (2011), referring to political advertising as having a "priming effect" including at p. 135 ("the effects of the advertisements dissipate rapidly"), p. 137 (rapid decay effects of political advertising similar to that of product advertising), and p. 137 (decay takes place in a matter of 2-3 days up to a week).

27. Political debate is not structured like a judicial hearing, a public inquiry, or even a parliamentary session. Democratic societies rightly have chosen not to attempt to structure public political debate like formal institutions.

28. Finally, is important to note, as Cole, J., did, the opportunity of political parties and candidates to "answer and re-answer" whatever may have been said in advertisements by third parties in the pre-campaign period. Unless one argues that the objective of the 2012 Amendments is to control public debate itself so that some ideas are not presented and have no effect at all on the public, then the rationale for the 2012 Amendments dissipates.

Government Financing and Subsidies

29. The extent to which government may subsidize or otherwise enhance the ability of some groups to speak is not directly in issue in this case. The Supreme Court has considered that to some extent government may do so.[20] That fact is a significant consideration for "minimal impairment."

30. The B.C. government has, like most other governments in Canada, subsidized donors to political parties and candidates with, for example, political contribution tax credits for donations to donors to parties and candidates. Additionally, research, staff and office premises budgets given official parties in the legislature and MLAs enhance the ability to get their messages out.[21] Using the "government frank" for the mail system for mail to constituents does so as well. Broadcasting debates in the legislature and some committee sessions does so as well. In a mediated fashion, so does the existence of the legislature's "press gallery," plus all other access to the media that government, the opposition and MLAs enjoy.

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[20] *Baier v. Alberta*, 2007 SCC 31. See as well, *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 per Cory, J., where Manitoba subsidies to political candidates who achieved a certain vote threshold were upheld (albeit primarily because the court thought it unwise to make a ruling as to a Charter violation absent evidence).

[21] See section 20, *Income Tax Act*, [RSBC 1996] CHAPTER 215.

The Advantage for Incumbents

31. The privileged position of incumbents in the "marketplace" of political expression occurs on a more or less continuous basis between elections. "Come election time the incumbent may have exhausted the potential of money to enlighten voters on his or her performance and policy views." For office-holders, all of the means at their disposal for communicating and gaining attention amount to the equivalent of "a continuous election campaign."[22]

> "Between elections the incumbent is busy making a name. By the time of the campaign, money buys the incumbent little recognition. The challenger starts the race unknown and needs every dollar to win support. In technical terms, the incumbent's marginal product of campaign spending is lower than the challenger's marginal product. This means that a campaign spending limit will hurt the challenger and help the incumbent."[23]

32. The same harm applies to those who wish to engage in issue advocacy and not become candidates. Whether the issue is one that favors an incumbent or a challenger (or neither), limits on what such people or groups may say limits, or may even eliminate, issues from political debate.

33. This has been the effect at the federal level. Third party advertising during federal elections in 2004, 2006, 2008 and 2011 has been minimal compared to 1988. In 1988 it was estimated to total $4.7 million. In the last four federal elections it has ranged between $700,000 and $1,260,000.[24] In contrast, in the 2011 election, federal parties spent about $66,000,000 and were reimbursed for half of that.[25] The (unfounded) fears of limitless third party advertising have led to laws squelching third parties and concentrating political discourse in what incumbent politicians choose.

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[22] F. Palda, Campaign Finances: An Introductory Essay, March 2002.
[23] F. Palda, The Economics of Election Campaign Spending Limits, February 1996.
[24] Elections Canada website, http://www.elections.ca/content.aspx?section=fin&document=index&dir=thi/advert/tp41&lang=e
[25] Elections Canada website, http://www.elections.ca/content.aspx?section=fin&dir=pol/remb&document=table1_11&lang=e

34. If the effect of third party speech is not to elect a candidate, but rather raise awareness of an issue so that the media and public confront candidates (either incumbents or challengers) for their position on the issue, surely democratic discourse is enhanced. To argue otherwise is to contend for an approach that gives control of the public agenda to politicians, not the public.

35. Professor Marie Rekkas concluded her study of the 1997 Canadian federal election thus:[26]

> "The empirical results demonstrate the importance of a candidate's spending during the campaign period and the heterogeneity of voter preferences with respect to these expenditures. Candidates that held incumbency status were found to benefit substantially compared to their challengers.

36. She observed at page 20 that increased campaign spending "induces nonvoters to vote and thus enlarges the vote set." The result is that "If the incumbent is negatively affected by higher levels of voter participation, then the results would seem to suggest that it would desire lower expenditure limits than the challenging parties." The same principle would hold true for limiting the expenditures of individuals and groups.

37. The BC government's political tax credit program and related subsidies for some political parties and candidates amplifies those voices in the political process. While there are limits to how much tax credit each taxpayer may claim, there are no limits in BC to the amount of donations that may be made. On the other hand, BC has no parallel tax credit or subsidy program for individuals or third party groups who wish to engage in political speech.[27]

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[26] M. Rekkas, "The Impact of Campaign Spending on Votes in Multiparty Elections," (1997), p. 21.

[27] Businesses may achieve a similar "subsidization" effect by writing off political advertising and contribution expenses even beyond the political tax credit limits.

BC and Canada's Election Laws Compared

38. BC's laws differ from federal Canadian laws in significant respects. The federal laws provide for the following, which are not present in BC law: (a) a cap of $1,150 per annum for donations to a registered party;[28] (b) a cap of $1,150 per annum for donations to a riding association or candidate;[29] (c) contributions to parties and candidates are banned from unions and corporations and may only be made by individual citizens and permanent residents of Canada;[30] (d) free-time broadcasts on the CBC for political parties during election campaign periods are made available;[31] (e) annual subsidies are paid by the government to political parties based upon the number of votes received;[32] (f) reimbursement of 50% of election expenses is paid registered parties who achieve certain vote levels;[33] and (g) reimbursement of 60% of election expenses is paid candidates who achieve 10% of the vote in their riding.[34]

39. "Without a full examination of the entirety of the electoral schemes of the countries under consideration, one cannot be confident that it is sensible to isolate third-party spending limits as a discrete area of examination to justify the specific provision in [BC's] legislation."[35]

40. Canadian federal law has been described as adopting the "egalitarian model." BC's approach cannot be so described. Doing so is would be like saying that a single strand of spider's silk amounts to a web. By its choices, the BC government has simply not brought itself within an "egalitarian model."

41. BC's system permits unlimited donations by any person, including the wealthy, unions and corporations, to political parties and candidates, and does not conform to

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[28] Election Act, S.C. 2000, c.9, s. 405 and 405.1.
[29] Election Act, S.C. 2000, c.9, s. 405 and 405.1.
[30] Election Act, S.C. 2000, c.9, s. 404(1).
[31] Election Act, S.C. 2000, c.9, Part 16.
[32] This feature is being phased out over the next several years by the federal government. See Election Act, S.C. 2000, c.9, s. 435.01.
[33] Election Act, S.C. 2000, c.9, s. 435, party must obtain 2% of the vote overall or 5% of the vote in the ridings where it ran candidates.
[34] Election Act, S.C. 2000, c.9, s. 464-465.
[35] BCTF Appeal, per Ryan, J.A. at para. 60.

the "egalitarian model."[36] Its lack of candidate and party financing and subsidy regime does not do so either.

42. Having ruled out the egalitarian, libertarian and liberal models, what is left with as the model of BC election laws is one that distorts political debate such that political parties dominate and incumbents hold the advantage.

PART II: ISSUES ON THE REFERENCE

43. The question on this reference is set out in the instrument signed for the Lieutenant Governor in Council, being whether "sections 80 to 86 of the *Miscellaneous Statutes Amendment Act* (No. 2), 2012, ...which amend sections 1, 183, 198, 204, 228, 235.1 and 244 of the *Election Act*, R.S.B.C. 1996, c. 106, unjustifiably infringe section 2(b) of the Canadian Charter of Rights and Freedoms? If yes, in what particular or particulars and to what extent?"

44. The BCCLA offers these points for the consideration of this Honourable Court concerning the Reference question:

a) Courts are to protect fundamental freedoms, not mandate limits on them;

b) Stare Decisis, Issue Estoppel and Abuse of Process arising from the BCTF Trial and BCTF Appeal apply against the BC government;

c) A comparative legal analysis with U.S. law is instructive;

d) The 2012 Amendments fail the minimum impairment requirement; and

e) The 2012 Amendments fail the proportionality test.

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[36] C. Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 45 Osgoode Hall L.J. 513 at 533, 543 and 562-3.

PART III: ARGUMENT

Courts are to protect fundamental freedoms, not mandate limits on them

45. There is no constitutional requirement for restrictions on free speech. Certain parts of the AGBC's Factum appear to suggest that there is and that the "egalitarian model" is a constitutional requirement. Bastarache, J., in *Harper* recited what he took the perceived purpose of the federal Parliament to be. He did not purport to doff his judicial robes and take on those of a legislator. Were the "egalitarian model" a constitutional imperative, the Supreme Court would not have held that section 2(b) was infringed.[37] Neither would the AGBC have conceded in her pleadings that it was infringed. There would be no need to turn to section 1. When a court finds that section 1 is engaged and provides a basis for justification of an infringement of a Charter right, the law that is preserved does not gain constitutional status. It remains a legislative choice that, on the peculiar facts and circumstances of the case, is held to constitute a reasonable limit, prescribed by law, that is demonstrably justified in a free and democratic society.[38]

46. In *Harper*, Bastarache, J., introduces the concept of the "egalitarian model" at para. 62 by noting that it represents an academic's gloss on what laws that seek to amplify the voices of the supposedly weak and poor and limit the voices of the rich and powerful. He does not pretend that Parliament expressly adopted the thesis of Professor Feasby or Professor Fiss.[39] Historically, the array of provincial

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[37] *Dixon v. AGBC* (1986) 7 B.C.L.R. (2d) 174 (S.C.) per McEachern, C.J.S.C., at paras. 35, 52-53; *Dixon v. AGBC* (1989) 35 B.C.L.R. (2d) 273 per McLachlin, C.J.S.C., Part I; *Reference re Prov. Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158 per McLachlin, J., Part II – Application of the Charter.

[38] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* 2000 SCC 69, [2000] 2 S.C.R. 1120 per Iacobucci, J., at para. 271: "Sometimes "constitutionality" means only that an unimpressive, minimal threshold has been met."

[39] C. Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999), 44 *McGill L.J.* 5. Note Feasby's observation at para. 3 that Bastarache, J., in *Thomson Newspapers v. Canada (A.G.),* [1998] 1 S.C.R. 877, 159 D.L.R. (4th) 385 neither accepts nor rejects any particular political theory underlying legislation limiting freedom of expression in the political campaign context.

governments[40] in power at the time of the 1982 patriation of the constitution would never have agreed to such a thing.

47. A century ago, Holmes, J., in the U.S. Supreme Court commented thus:

> But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.* [p76] It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[41]

48. The framers of the Canadian constitution, whether in 1867 or 1982, simply did not intend that the "egalitarian model" predominate. Most would likely not have identified with a pure "libertarian" model either. It is much more likely that they would have eschewed both choices and said that a more moderate, "liberal" democratic model was to be used.[42] The liberal model would be one that stressed the importance of allowing the free marketplace of debate, discussion and ideas to flourish, while ensuring that mechanisms were in place for fair elections to be held so that anyone who wanted to speak out, run for office or vote was afforded that opportunity.

49. The end product of what the framers intended is the language of the *Charter.* The obiter dicta of Bastarache, J., in reciting Professor Feasby's analysis of how Parliament's intent should be identified as between "egalitarian" and "libertarian"

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[40] Premiers W.R. Bennett of British Columbia, P. Lougheed of Alberta, S. Lyon of Manitoba, W. Davis of Ontario, R. Hatfield of New Brunswick, J. Buchanan of Nova Scotia, A. MacLean of P.E.I., and B. Peckford of Newfoundland, as Social Credit or Progressive Conservative leaders, were not proponents of the "egalitarian" model and the convention requiring "substantial agreement" of the provinces for amending the constitution means their government's views must be considered: *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 904-5.

[41] Dissenting in *Lochner v. New York* (1905) 198 U.S. 45 at pp. 75-76.

[42] See Jay Makarenko,*"Fair Opportunity to Participate: The Charter and the Regulation of Electoral Speech,"* (2009) Canadian Political Science Review 3(2) 38 at 48, arguing that the *Harper* majority's concern was "not promoting the egalitarian ideal of equality of political influence", but rather "to ensure that hierarchies of political power are procedurally fair and that all have an equal opportunity to attain positions of political influence."

models was just that – a political characterization not of what the framers of the constitution intended, but rather what the legislation under scrutiny had as its aim. It cannot reasonably be taken to amount to an "endorsation" *by the court* of one political theory over competing ones.

50. With this in mind, the comments of now retired Bastarache, J., in *Harper* are put in appropriate context. They do no more than characterize what Parliament did on the peculiar facts of that case. They do not and could not go further and straitjacket political discourse or legislative jurisdiction by mandating one political point of view - the "egalitarian model" - as the only constitutional one. It is notable that the word "egalitarian" has only appeared in three Supreme Court decisions since *Harper.* None support the notion that "egalitarianism" is the constitution's theory.[43]

51. A finding by a court that a particular legislative enactment meets the requirements of section 1 of the Charter in a particular case says nothing more than that. It is not a "rule" for application in other cases, just as a fact found in one case on evidence presented therein is not a finding that binds a later court which must deal with the evidentiary record that is presented before it.[44]

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[43] In *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, the court rejected the notion that an egalitarian approach to health care delivery (cf. para. 21) was a sufficient reason to infringe individual rights: see para. 100. In *R. v. Kapp*, 2008 SCC 41 (where "egalitarian" is used in paras. 46 and 90), communal fishing rights were held to supersede egalitarian concepts. *Honda Canada Inc. v. Keays*, 2008 SCC 39. (cf. para. 25) uses "egalitarian" in a non-governmental context and is irrelevant here.

[44] *B. (M.) v. British Columbia*, 2001 BCCA 227 at paras. 140-141 per MacEachern, CJBC (dissenting, but on other grounds), quoting from *Quinn v. Leathem*, [1901] A.C. 495 (H.L.) per Halsbury L.C. at 506 and *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*, [1914] A.C. 25 (H.L.) per Viscount Haldane L.C. at 39-40. The Supreme Court of Canada has said that overbroad application of stare decisis inhibits judicial and legal creativity and the development of the common law; *R. v. Henry*, 2005 SCC 76 at paras. 52-56. See also *The Queen v. Snider*, [1954] SCR 479 at 496-7 per Cartwright, J., *Whonnock Industries v. National Bank* (1987) 16 BCLR (2d) 320 (C.A.) at para. 6 per Seaton, J.A and *Canada (Attorney General) v. 311165 B.C. Ltd.*, 2011 BCCA 409 at para. 11 per Frankel, J.A.

Stare Decisis, Issue Estoppel and Abuse of Process

52. The AGBC Factum refers to stare decisis, issue estoppel and abuse of process at paras. 46-59, asserting that "Previous judicial determination of fact and law which are binding and have not been appealed are conclusive." That is not, however, an accurate rendition of what those legal concepts mean and to whom they apply. Stare decisis is a principle that requires courts to follow the legal principles and interpretations of the law laid down by decisions.[45] It does not bind future courts as to findings of fact. To the extent that the facts in later cases are found to be indistinguishable in a material respect, the legal principles and law laid down in the previous case ought to be followed. Exceptions exist where the previous case ignored legal principles, was premised on a misunderstanding, or otherwise would lead to injustice.

53. Issue estoppel applies to findings of fact, mixed fact and law and law made against a party so that it cannot re-litigate those in later proceedings.[46]

54. The plaintiffs in the BCTF Trial are not litigants in this Reference proceeding. The AGBC was a party to the previous proceedings and is bound by all determinations of fact, mixed fact and law and law made against the BC government. The same applies to Ms. Laurence. For what it is worth, the same does not apply to the BCCLA as it was an intervenor, not a party, did not have the right to present evidence, or advance claims and defences and was not a privy of any party. The Amicus Curiae in this court was not a party to the previous proceedings. Neither were any of the other intervenors. Issue estoppel and abuse of process in the sense described by the AGBC do not apply to them.

55. The AGBC seeks to overturn findings of fact by Cole, J. With respect, that is not permissible. Even if it were, the AGBC would have to meet the strict requirements

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[45] *Susan Heyes Inc. v. South Coast B.C. Transportation Society*, 2010 BCCA 113 at paras. 7 and 11.

[46] *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at paras. 18, 42, 53, 58, 63, 69-71, citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25 and *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 at para. 23.

that courts have repeatedly stressed with regard to the deference that findings of fact by trial court judgments are to enjoy.

56. Para. 61 of the AGBC Factum erroneously argues that Cole, J., erred in finding that there was not "sufficient proof of third party election advertising spending in the pre-campaign period." Cole, J., was aware that there was pre-campaign third party advertising. At BCTF Trial Reasons, para. 210, he notes the BCTF spent money on newspaper ads in November 2007, more than a year before the 2009 election and gives other examples of advertising outside the 2005 and 2009 election campaign periods.

57. Thus, Cole, J., does not say there was no such advertising. He held that that AGBC had failed to show the harm of advertising in the pre-campaign period.[47] On each point in the BCTF Appeal, the AGBC conceded that Cole, J., had *some* evidence on which he could rely to come to the facts he found.

58. This court did not find palpable error on the part of Cole, J., in the BCTF Appeal, and again, the AGBC does not appear to allege palpable error. What the AGBC sought, and appears to seek again, is a rehearing and new fact determinations by this court. That went beyond this court's appellate jurisdiction in the BCTF Appeal. And it is, with respect, not open to the AGBC to contend otherwise now.[48]

59. That is particularly so given that the AGBC chose not to present evidence to support the putative policy choice made by the legislature. "It cannot be said that the government lacks the necessary resources to show that its legislative action is motivated by a reasonable objective connected with the problem it has undertaken to remedy. The courts are an appropriate forum for a serious and complete debate."[49]

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[47] Compare Cole, J., BCTF Trial Reasons, para. 268.
[48] *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 per Fish, J., at paras. 9, 15, 52-55, 59, 64-65, 72, and 76, explaining *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.
[49] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 87 per Deschamps, J.

60. At paras. 31, 53 and 61 of the AGBC's Factum, the comment by Ryan, J.A., (likely made with para. 210 of the Reasons of Cole, J., in mind) that there was "plenty of evidence" that third parties engaged in political advertising before the campaign period is noted. The AGBC appears to try to turn evidence of political advertising in the pre-campaign period into evidence of "harm" to the electoral process. Cole, J., rejected that. And Ryan, J.A., must be taken to have rejected it as well. In para. 59 of her reasons in the BCTF Appeal, she says,

> "Even accepting that third parties would in fact engage in election advertising in the pre-campaign period, the trial judge was concerned that the broad definition of "election advertising" would limit the ability of third parties to speak out in advertisements about such things as ongoing labour negotiations or the content of proposed legislation currently before the Legislature."

61. She does not make a finding that Cole, J., had "erred in finding that it had not been proven" that there was "third party election advertising in the pre-campaign period" as the AGBC asserts. She simply finds that, in her view at least, even if there was it wouldn't matter to the outcome given the overbreadth of the legislation.

62. The AGBC tries to turn that into a reversal of findings by Cole, J. But it does not establish such a thing. That is as true for the question of whether there was indeed pre-campaign political advertising as it is of the acceptance by Cole, J., of the evidence of Mr. Zubyk that political parties sought to concentrate their election advertising spending close to election day so as to be "effective." Obviously, the "harms" alleged by the AGBC in relation to the 2009 amendments or the 2012 Amendments lose any sense of reality if "election advertising" in the pre-campaign period is not effective by election day and if the parties and candidates have, as Cole, J., noted, time to answer and re-answer whatever issues were raised.

63. A further point bears mentioning. If the AGBC is correct that any political advertising that falls within the definition of "election advertising" may be limited or proscribed in the pre-campaign period, then what is to hold it back from being extended all the way to the day after the previous election? We are left with the specter of permanent restrictions and regulations on political speech.

64. For present purposes, however, the issue whether the AGBC can seek to get out from under the clear findings of Cole, J., which were not held to be palpably wrong and were not overturned by this court, must be answered against the AGBC. Generally speaking, the standard rules for appellate review are just as applicable in a constitutional case as they are in a civil or criminal case. That applies not just to primary facts, but to factual inferences drawn from the evidence and to a trial judge's conclusion as to the weighing of mixed fact and legal issues, for example balancing factors under section 24 of the Charter.[50]

65. An exception may exist where the finding of the trial judge involves "legislative facts." The latter do not involve weighing evidence and reaching a factual finding based upon assessments of credibility and probability. Instead such facts are usually drawn from social science data and appellate courts may be in as good a position as the trial judge to make them. But one must not take this too far. While proportionality under section 1 may involve "legislative facts" and trial court findings on those entitled to "minimal deference," the trial judge's conclusions on minimal impairment are entitled to greater deference, particularly where the government has adduced no evidence and the trial judge has evidence on which to rely.[51]

66. The 2012 Amendments admittedly violate section 2(b) of the Charter and have not been shown to be demonstrably justified by the AGBC so as meet the requirements of section 1 of the Charter. Cole, J., found that the infringement of rights during the pre-campaign period was such that it failed the "minimum impairment" test. The AGBC asserts that is an error, but has presented no evidence to support its position. That may well reflect the haste and lack of study given the legislation before it was passed in 2009 and the lack of an ability to find anything supportive in the time since. No social science studies, no commissions of inquiry and no legislative

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[50] *R. v. Beaulieu*, 2010 SCC 7 per Charron, J., at paras. 4-5.

[51] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 by McLachlin, J., at paras. 139-141, 151-152, "Under the minimal impairment analysis, Chabot J. did not rely on problematic social science data, but on the fact that the government had adduced no evidence to show that less intrusive regulation would not achieve its goals..." See also LaForest, J., (dissenting) at para. 81, with whom Iacobucci, J., at para. 181 agreed.

committee hearings were undertaken to flesh out what the "legislative facts" were and what the purposes and effects of various possible laws might be.

67. This underscores the concern that McLachlin, CJC, referred to in *Harper* about the unsatisfactory nature of the government's effort to justify the statute. McLachlin, CJC, noted that "constraining powerful interest groups actually ends up reducing the political efficacy of all groups in society - including the small, weaker ones - because it strengthens the relative power of the government vis-à-vis all political groups."[52] Strengthening the power of incumbents and government is hardly something that fits within either the egalitarian or the libertarian models. And it surely fails the liberal model that is more clearly the appropriate test for section 1 limits. Yet with that effect as a clear consequence of putting in place restraints on the power of groups to organize and get their message before the public, the AGBC attempt to justify the 2012 Amendments rings hollow.

> Some observers celebrate such campaign-spending legislation because it seems to give aid to less wealthy or powerful political actors. In fact, it levels political power across civil society - to the benefit of entrenched, incumbent political actors. This was not lost on Chief Justice McLachlin.[53]

68. The 2012 Amendments' effect for politicians is to "render them less accountable even though they might seem to be promoting more robust political competition."[54]

Comparative Law – the U.S. Experience

69. The 1st Amendment to the US Constitution prohibits laws that infringe on free speech and the free press. The 14th Amendment extends that limit to the states.[55] The US Constitution lacks an express equivalent to the Canadian Charter of Rights section 1. But limits on free speech rights have been allowed so as to uphold laws against sedition, incitement to violence, "fighting words", and the like. Laws that

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[52] C. Manfredi and M. Rush, *Electoral Jurisprudence in the Canadian and U.S. Supreme Courts: Evolution and Convergence* (2007) 52 McGill L.J. 457 at para. 69.
[53] Ibid., at para. 71.
[54] Ibid., para. 96.
[55] See *Harper et al v. Virginia Board of Elections* 383 U.S. 663 (1966) per Douglas, J., at 665-6 (holding poll taxes and other burdens on the right to vote were unconstitutional, including at the state level).

regulate or prohibit union or corporate donations to political candidates and political advertising have caused more controversy.

70. In the early 1970's, Congress passed laws that provided both public financing of presidential campaigns where candidates opted into that and for limits on certain kinds of political contributions. *Buckley v. Valeo* upheld some provisions (contribution limits to candidates), but struck down others (ceilings on overall candidate campaign expenditures, limits on donations to political associations that did not expressly call for the election or defeat of a candidate, limits on what candidates could spend from their own personal resources).[56] *Buckley* did not expressly deal with whether corporations could be limited in their political expenditures. *First National Bank v. Belotti*[57] held that such limits would be unconstitutional in relation to corporate advertising concerning referenda affecting their business.

71. In 1990, the U.S. Supreme Court revisited the issues in relation to a Michigan law that restricted corporation political advertising, but not that of unions or media corporations' political expression. In *Austin v. Michigan Chamber of Commerce*,[58] the court narrowly ruled that such regulation was acceptable, premised upon anti-corruption concerns. Congress used that to pass the McCain-Feingold campaign finance regulation laws. Those eventually came before the courts for review.

72. *McConnell v. FEC*[59] narrowly upheld McCain-Feingold's restriction on broadcast advertising that mentioned or listed a federal election candidate within 60 days of the election. That represented the high-water mark for restricting political speech.

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[56] *Buckley v. Valeo* 424 U.S. 1; 96 S. Ct. 612 (1976)
[57] 435 U.S. 765 (1978)
[58] 494 U.S. 652 (1990)
[59] 540 U.S. 93 (2003). See discussion at Gora, An Intersection of Laws: *Citizens United v FEC*: The First Amendment, (2011) 27 Ga. St. U.L. Rev. 935 at pp. 945-6, noting that those opposing the laws were "an alphabet soup list of across-the-spectrum strange political bedfellows including the AFL-CIO, the Chamber of Commerce, the National Rifle Association, and the ACLU."

73. In 2006, however, the court overturned a Vermont campaign finance law that was viewed as having unduly low caps on contributions and expenditures.[60] In 2007, the court's protection of free speech accelerated with *FEC v. Wisconsin Right to Life*.[61] There, the court read down McCain-Feingold (holding that only those ads that were the "functional equivalent" of express advocacy of the election or defeat of a candidate were prohibited) so as to allow a pro-life group to run ads calling on citizens to ask Wisconsin's senators to support certain legislation. The ad was issue-oriented, did not expressly call for voters to support or defeat anyone, but because one of the senators was up for re-election the year the ad was run, it was arguably caught by the legislation absent reading-down.

74. Roberts, CJ, wrote of the confusion endemic to over-analysis of whether ads were express advocacy ads or not:

> [*471] The FEC and intervenors try to turn this difference to their advantage, citing McConnell's statements "that the most effective campaign ads, like the most effective commercials for products . . ., avoid the [Buckley] magic words [expressly advocating the election or defeat of a candidate]," ... and that advertisers "would seldom choose to use such words even if permitted," .... An expert for the FEC in these cases relied on those observations to argue that WRTL's ads are especially effective electioneering ads because they are "subtl[e]," focusing on issues rather than simply exhorting the electorate to vote against Senator Feingold... Rephrased a bit, the argument perversely maintains that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy. This "heads I win, tails you lose" approach cannot be correct.[62]

75. Scalia, J., concurred, criticizing at p. 495 the morass into which defining issue advocacy and election advertising by "magic words" had descended.

76. The stage was set for the more comprehensive review of the campaign finance laws that occurred in 2010 in *Citizens United v. FEC*. The case revolved around whether a movie criticizing then Senator Hillary Clinton could be played during periods close to election dates. The face of the law prohibited it. The Citizens United group

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[60] *Randall v. Sorrell*, 548 U.S. 230 (2006)
[61] 551 U.S. 449 (2007)
[62] 551 U.S. 449 (2007) at 471.

challenged that and was supported by amici curiae that included the AFL-CIO and the Chamber of Commerce. The United States Supreme Court ruled that limits on third party expenditures, including by associations, unions and incorporated bodies, were unconstitutional.[63] Kennedy, J., explained the flawed logic of trying to limit some political speech and ending up unfairly distorting the political process.[64]

77. The court majority in *Citizens United* reviewed a lengthy history of legislative efforts to suppress union speech and the courts' response to those. They noted as well the efforts to limit corporate speech. They noted that many groups and associations formed corporations to organize under and were caught by such laws.

78. Previous decisions that differentiated pure issue advocacy and election advocacy were criticized. Allowing strong views to be expressed on an issue that the public readily could identify candidates were for or against meant that such ads were effectively election advocacy ads. That did not justify banning such advertising. It instead called into question laws that sought to limit or restrict. The answer was in more speech, not less. Roberts, C.J., concurred, noting that freedom of expression "protects more than just the individual on a soapbox and the lonely pamphleteer."

79. Kennedy, J., carried the point further by noting the incongruity of banning corporate ads but allowing the media to carry on exempt from such laws:

> ... *Austin*'s antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. See *McConnell*, 540 U. S., at 283 (opinion of THOMAS, J.) ("The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press")....
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> The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale...The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the

[63] *Citizens United*, supra.
[64] *Citizens United, supra,* at p. 26.

> media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment. [65]

80. Kennedy, J., also noted that "Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers....Today, 30-second television ads may be the most effective way to convey a political message....Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues."[66] That shifting focus of what part of the media is most effective does not justify discriminatory regulation of part thereof.

81. Kennedy, J., cautioned against permitting any branch of government to draw such lines:

> Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.[67]

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[65] Kennedy, J., in *Citizens United, supra*, p. 18. The "antidistortion rationale" is a rough equivalent to the "egalitarian model."

[66] Lamer, C.J.C., was to like effect in relation to whether publication bans made sense where communications technology made them unenforceable: see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 886.

[67] At page 9.

Minimal Impairment

82. The 2012 Amendments fail the minimal impairment test of section 1 jurisprudence. The objectives the BC government spelled out are all election oriented objectives (promotion of equality in political discourse during election campaigns, protecting the integrity of political party and candidate election financing regimes, and ensuring voters have confidence in the electoral process). They are all drawn (by rote, it seems) from *Harper*'s ruling dealing with the election campaign period. But as has been noted already, the BC context is materially different both overall, and in relation to the pre-campaign period.

83. Requiring registration of everyone who wishes to advertise in whatever period is chosen before the election is not minimally impairing. It unnecessarily burdens smaller voices and undercuts the notion that the 2012 Amendments are "egalitarian." Many would argue that the $500 amount used in the federal Canadian law is too low a threshold, but BC's zero is simply abusive. It is the functional equivalent of a poll tax, albeit for advertising instead of voting.

84. Similarly, minimal impairment cannot be said to have occurred by extending the period of restrictions outside the campaign period. In the BCTF Appeal, Ryan, J.A., suggested that the campaign period could be extended overall. But the BC government chose not to do so. Instead it is simply proffering repetitive arguments from the last proceeding about fixed election dates and unfounded concerns that advertising spending by third parties prior to the election campaign itself will detract from the objectives. It has presented no basis, much less a reasoned, evidence-based one, for such assertions.

85. Consider as well how incumbent politicians would "game the system" if the 2012 Amendments were permitted. By the expedient of not having the Legislature in session during the pre-campaign period, the government could announce by news release a measure affecting substantially the interests of one or another group. If the opposition chooses, for whatever reason, not to oppose it (or at least give it any priority), the public is deprived of debate on it for the pre-campaign period and the

campaign itself. As one deponent said in the BCTF Trial, "Limit on the amounts we could spend in any particular two month period could easily have derailed the campaign by killing its momentum."[68] Similarly, with all its regulation-making powers under existing statutes, the government could engage in all manner of controversial law-changing moves and insulate itself from effective debate at a time when it is most needed.

86. Note as well that in *Harper*, Bastarache, J., at para. 112, upheld the federal limits in place there not just because they were part of an overall matrix of laws regarding campaign finance, political party subsidies and the like, but also because of the limited duration involved. In his view a key reason limits in the campaign itself were justifiable was that up until the campaign everyone, including third party advertisers, could advertise on political and election issues as much as they wanted:

> ... [T]hird party advertising is not restricted prior to the commencement of the election period. Outside this time, the limits on third party intervention in political life do not exist. Any group or individual may freely spend money or advertise to make its views known or to persuade others.

It is untenable for the BC government to contend that a finding at the federal level that allowed the camel's nose into the tent is justification for pushing the whole camel in.

87. If one assumes that the reasoning of Bastarache, J., has application to the BC context, then it does so to underscore that limitations outside the campaign period are not minimally impairing. If one assumes that the reasoning of McLachlin, CJC, applies given the BC context, then other factors, including the amount of the limits and the overbroad definition of election advertising should be considered as evidence of lack of minimal impairment.

88. There are clear alternatives for the BC government to adopt that are non-impairing or far less impairing of the rights involved. It could make available time on the cable TV channel used to broadcast legislative proceedings, which currently sits idle much of the time. It could provide for paid mail-outs at regular intervals, with or without

[68] Joint Reference Book, v. 4, p. 1342, Aff. Of Margaret Birrell, para. 16 (concerning "no fault" fight in 1997).

other government mailings, including when voter registration are distributed. It could buy radio time, newspaper pages or billboard space. It could set up space on the Elections BC or other government operated websites. In each instance it could offer, on a non-discriminatory basis, the advertising space to candidates and parties to state their positions and provide links or contact information. It could provide more opportunities for more speech and more public discussion.[69]

Proportionality and Whether Alleged Salutary Effects outweigh Deleterious Impacts

89. The 2012 Amendments are unfairly discriminatory both as to who may engage in political speech and the means that may be used to engage in political speech. They undermine their own "purpose" and thus fail section 1 on this ground as well. While many aspects of the 2012 Amendments could be referenced on this point, the readiest example is the wholesale exemption of political speech by the media. If the AGBC is correct in applying the "egalitarian model" to non-media persons for "advertising" (i.e., the rental of time or space in a medium of communication belonging to another), then the legislature could just as readily apply the model to the media.

90. *Hutterian Brethren* sets out the proportionate effects test thus at para. 73 thus: "[A]re the overall effects of the law on the claimants disproportionate to the government's objective? When one balances the harm done to the claimants' [rights] against the benefits ..., is the limit on the right proportionate in effect to the public benefit conferred by the limit?[70]

91. The BC government chose to describe the objectives for the 2012 Amendments in general terms. The objectives are not specific objectives targeted at a specific and proven mischief. Where government does this, the evidence it must put forward to justify the measures at the proportionate effects stage of the *Oakes* analysis must be

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[69] See Joint Reference Book, v. 2, p. 762, Aff. #1 of Sally Yee, Ex. B, Lortie Report, Table 6.15 and text discussion.

[70] *Alberta v. Hutterian Brethren*, 2009 SCC 37 per McLachlin C.J.C. (for the majority of the Court) at paras. 72-103.

of a kind and quality that reflects and responds to the particular aspect of the right infringed and the nature of the infringement, in light of that broader, general objective.

92. Governments seeking to justify infringing rights cannot rest on "vague and symbolic objectives", and must instead provide "demonstrable justification" to defend the limitation on rights.[71] In *RJR-McDonald,* McLachlin J. (as she was), stressed that concrete, actual evidence and actual connections must be shown in this part of the section 1 test, underscoring that it is a "fact-specific inquiry."[72]

93. Where an abstract objective presents a challenge for the *Oakes* assessment, then "prudence suggests that [the court] proceed to the proportionality analysis ... [which] allows [the court] to determine whether government's asserted objectives are in fact capable of justifying its denial of the right..."[73]

94. "In the final analysis, even if there were merit in the Court of Appeal's view that the trial judge relied too heavily on the absence of concrete evidence of benefit, it is difficult to avoid the trial judge's conclusion, at p. 916, that 'the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof'."[74]

PART IV: NATURE OF ORDER SOUGHT

95. The BCCLA submits that the 2012 Amendments infringe section 2(b) rights. They do not minimally impair those rights. They are not a proportionate response to any pressing governmental concern. The haphazard and incomplete manner in which the provincial government has approached election legislation distorts political speech and does so in a clearly unconstitutional manner. The 2012 Amendments

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[71] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 per McLachlin C.J.C. (for the majority) at paras. 22-23.
[72] *RJR-McDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (QL) at para. 133. Italics emphasis added.
[73] *Sauvé*, *supra* at para. 26.
[74] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 per McLachlin C.J.C. (for the majority) at para. 61.

should be held not to be a reasonable limit prescribed by law in a free and democratic society. The Reference question should be answered "yes".

96. The BCCLA as an Intervenor herein does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: August 15, 2012

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Counsel for the B.C. Civil Liberties Association

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