COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General),* 2015 BCCA 172

Date: 20150423
Docket: CA041813

Between:

B.C. Freedom of Information and Privacy Association

Appellant
(Plaintiff)

And

Attorney General of British Columbia

Respondent
(Defendant)

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Lowry

On appeal from: An order of the Supreme Court of British Columbia, dated April 16, 2014 (*BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2014 BCSC 660, Docket No. 13-0335, Victoria Registry).

Counsel for the Appellant:	S. Hern A. Latimer
Counsel for the Respondent:	K. Horsman, Q.C. K. Wolfe
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Place and Date of Hearing:	Vancouver, British Columbia February 13, 2015
Place and Date of Judgment:	Vancouver, British Columbia April 23, 2015

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Lowry

Dissenting Reasons by: (p. 34, para. 59)
The Honourable Madam Justice Saunders

Summary:

Section 239 of the Election Act, R.S.B.C. 1996, c. 106 requires third party "sponsors" of election "advertising" during a campaign period to register with the Chief Electoral Officer. The Appellant brought a Charter challenge to this provision. It submitted the provision should be read down to include an exception for third parties spending less than $500 on election advertising. The parties agreed, and chambers judge found, s. 239 infringed freedom of expression, but found this infringement was justified under s. 1 of the Charter. The judge relied on Harper v. Canada (Attorney General), 2004 SCC 33, where a challenge to the federal Elections Act was dismissed. Appellant argues he erred in his s.1 analysis, especially the minimal impairment and 'balancing of effects' tests.

Held (per Newbury and Lowry, JJ.A.): ***Appeal dismissed****. Chambers judge did not err in defining purpose of s. 239 as increasing transparency, openness and public accountability in the electoral process. This conclusion was consistent with the evidence and the relevant case law. As found by SCC in Harper, these objectives are pressing and substantial and rationally connected to the legislation. On the proportionality analysis, the legislation is justified because of the insubstantial burden placed on third parties and the importance of promoting egalitarianism in political discourse, again as found in Harper.*

Per Saunders J.A. (dissenting): The impugned provision is overbroad because it captures political expression of people with small and independent voices, for whom registration may be a barrier. Without an exception for inexpensive expression the advantage of the public interest in the registration requirement does not overcome the infringement of freedom of expression, such that the legislation cannot be described as demonstrably justified in a free and democratic society.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This case represents at least the third constitutional challenge to aspects of Part 11 of the *Election Act*, R.S.B.C. 1996, c. 106 (the "BC Act"). Part 11 is headed "Election Communications". It imposes restrictions on the amounts political parties, candidates and all other persons (referred to as "third parties") may spend in expressing their views publicly on election issues during provincial election campaigns. (The expression of such views is referred to in the legislation as "election advertising".) It also requires anyone so expressing a view to be identified in the "advertising"; and s. 239 – the provision challenged in this case – requires third parties to register their names and addresses with the Chief Electoral Officer ("CEO") before they may "sponsor" any such "advertising". The information provided to the CEO becomes a matter of public record. Obviously, s. 239 and various other provisions of Part 11 infringe the constitutionally protected right of freedom of expression and must therefore be justified under s. 1 of the *Charter*.

[2] Each of the previous challenges led to amendments to the BC Act. The decision of Brenner J. (as he then was) in *Pacific Press and Nixon v. British Columbia (Attorney General)* 2000 BCSC 248, declaring invalid what were then sections 235 and 236 of the BC Act (as originally enacted by S.B.C. 1995, c. 51), led to the repeal of those sections by S.B.C. 2002, c. 60 and the introduction of new provisions by S.B.C. 2008, c. 41. This court's decision in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* 2011 BCCA 408, affirming Cole J. below (see 2009 BCSC 436), holding that restrictions on third party advertising during the 'pre-campaign' period in ss. 235.1 and 228 were unconstitutional, led to further proposed amendments, introduced by S.B.C. 2012, c. 18. Finally, in *Reference re Election Act (BC)* 2012 BCCA 394, this court found those proposed amendments to be unconstitutional. They have therefore never been brought into force.

The Legislation

[3] I have reproduced at Schedule A to these reasons the provisions of Part 11 that are now in force and that are material to this appeal. In general terms, the election expense restrictions and the attribution, registration and disclosure requirements are now very similar to those found in Part 17 of the *Canada Elections Act*, S.C. 2000, c. 9 (the "Federal Act"). These were the subject of an unsuccessful constitutional challenge that reached the Supreme Court of Canada in *Harper v. Canada (Attorney General)* 2004 SCC 33. This similarity informed the reasons of Mr. Justice Cohen, the trial judge in the case at bar, and must inform our consideration of this appeal from his order affirming the constitutional validity of s. 239.

[4] For our purposes, the relevant provisions of the BC Act are the following:

- Section 228 defines "contribution" to mean "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" is defined to mean:

> … the transmission to the public by any means, during a campaign period[1] 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
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> > 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,

[1] The words "the period beginning 60 days before a campaign period," found to be invalid *in British Columbia Teachers, supra*, have not been repealed but have been declared of no force or effect.

> 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.

- Section 228 defines the "value of election advertising" to mean the price actually paid for preparing and conducting the advertising, or the market value if the price paid is lower than market value or if no price is paid.

- Section 229(1) states that the "sponsor" of election advertising is the individual or organization who "pays for the election advertising to be conducted" or if the services of conducting the advertising are provided without charge, the individual or organization to whom the services are contributed. If the individual or organization is acting on behalf of another, that other person or organization is deemed to be the "sponsor".

- Section 230 – the "attribution" provision – prohibits so-called "indirect sponsorship" of election advertising.

- Section 231 prohibits any individual or organization from sponsoring, publishing, broadcasting or transmitting to the public any election advertising unless the advertising identifies the name of the sponsor, indicates that it was authorized by the identified sponsor, and gives the phone number or mailing address at which the sponsor or its financial agent may be contacted regarding the advertising. The CEO is authorized to remove and destroy, without notice, or to require a person to remove or discontinue, any election advertising that does not comply with s. 231.

- Section 235.1(1) imposes financial limitations on advertising that may be carried out by individuals or organizations <u>other than</u> candidates, registered political parties or registered constituency associations during a campaign. These persons are referred to in the headings in Part 11,

although not in the text of the legislation, as "third parties". Such persons must not:

> … sponsor, directly or indirectly, election advertising during the campaign period[2] and ending at the end of the campaign.
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> a. such that the total value of that election advertising is greater than
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> i $3,000 in relation to a single electoral district
>
> ii $150,000 overall,
>
> 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 $3000 in relation to a single electoral district,
>
> ii $150,000 overall.

- Section 235.2(1) provides for the deregistration of a sponsor who exceeds the limits, and a penalty of up to ten times the amount by which the value of the advertising exceeded the limit.

- Section 239(1) prohibits any person (other than a candidate or party) who is not registered with the CEO, from sponsoring election advertising. Section 239(3) also provides:

  > 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.

- Section 240 provides the detailed requirements for registration. An individual or organization who wishes to register is required to file an application with its full name, address, the names of the principal officers of the organization if the applicant is an organization, a phone number, and other related information. The application must be signed and accompanied by a solemn declaration that the applicant is not prohibited

[2] See footnote 1 above.

from being registered by s. 247 and "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." The CEO must register the applicant as a registered sponsor upon being satisfied the requirements of s. 240 have been met. Registrants must also update information from time to time.

- Where an individual or organization sponsors election advertising that has a total value of $500 or more, that sponsor must under s. 244 file an election advertising disclosure report with the CEO within 90 days after the general voting day for the election to which it relates. The contents of the disclosure report must include the items listed in s. 245(1) - (6).
- Information filed under Part 11 with the CEO must, under s. 250, be available for public inspection at the CEO's office.
- The penalties for contravening ss. 231, 239 or 241, *inter alia*, are set out in s. 264 and include the payment of a fine of not more than $10,000 or imprisonment for a term not longer than one year, or both.

[5] It is the registration requirement in s. 239 that the plaintiff ("FIPA") challenges in this proceeding as an unjustified incursion on its right to free expression under s. 2(b) of the *Charter*. The plaintiff acknowledges that the Supreme Court in *Harper* upheld a similar requirement applicable to third parties, but it emphasizes that the Federal Act contained a "floor" of $500 – i.e., that third parties were required to register only if they had incurred election advertising expenses of $500 or more. (See s. 353(1).) Similar thresholds have been adopted by some, but not all, other Canadian provinces in their election spending legislation. The plaintiff here sought a declaration that, to the extent it applies to third party election advertising expenditures of less than $500, s. 239 unjustifiably infringes s. 2(b) of the *Charter* and is of no force or effect.

[6] The trial judge dismissed FIPA's claim, affirming the validity of s. 239 without any monetary threshold. With respect to the "proportionality" test for justification under s.1 of the *Charter*, he concluded that:

> … 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. [At para. 148.]

[7] Before examining his reasons in detail, however, I propose to advert to two decisions of the Supreme Court of Canada, *Libman v. Attorney General of Quebec* [1997] 3 S.C.R. 569 and *Harper*. In both instances, the Court adopted with considerable enthusiasm the "egalitarian model" of electoral reform propounded in Canada by the 1991 *Royal Commission on Electoral Reform and Party Financing*, known as the Lortie Commission.

Libman and Harper

[8] In *Libman*, the Court considered the constitutional validity of various sections of the *Referendum Act*, R.S.Q., c. C-64.1, which applied to referendums in Quebec. I do not intend to review the legislation in detail. For our purposes, it is sufficient to note that the *Referendum Act* provided for the financing of "national" committees and imposed limits on the amounts they could spend during a referendum campaign. Such spending was limited to the official agents of the committees or their deputies; all other persons were generally prohibited from incurring or authorizing regulated expenses. As stated by the Court at 583:

> ….no one may accept or execute an order for regulated expenses not given or authorized by a national committee's official agent, his or her deputy, a local agent or an authorized advertising agency … Nor may anyone claim or receive a different price for goods or services whose cost is wholly or partly a regulated expense; however, a person may provide personal services and the use of his or her vehicle, provided that this is done without monetary

> consideration and freely, and not as part of his or her work in the service of an employer …

and at 593-4:

> Thus, to be able to incur regulated expenses, the Act requires that a person belong either to one of the national committees or to a group affiliated with one of the committees. Since the definition of regulated expenses is very broad, most of the expenses incurred to campaign during a referendum period fall into this category reserved exclusively for the national committees or affiliated groups. Certain categories of persons therefore do not have access to regulated expenses during a referendum campaign, in particular:
>
> > (1) persons who, either individually or as a group, would like to support one of the options submitted to the referendum but who do not *wish to* join or affiliate themselves with the national committee supporting the same option as they do – for a variety of reasons – are limited to the unregulated expenses set out in s. 404 Special Version;
> >
> > (2) individuals who, while supporting one of the options submitted to the referendum, cannot join the national committee campaigning for that option directly – because they do not wish to identify their political ideas with those promoted by that committee or because they disagree with that committee's referendum strategy, for example – *cannot* even affiliate themselves because the possibility of affiliation provided for in s. 24 of the *Referendum Act* is restricted to "groups". They are thus limited to the unregulated expenses provided for in s. 404 Special Version;
> >
> > (3) persons who, either individually or as a group, wish to participate in the referendum campaign without supporting either of the options – if they advocate abstention or are against the referendum question as worded, for example – *cannot* directly join or affiliate themselves with one of the national committees. They are thus limited to the forms of communication set out in s. 404 Special Version, that is, to unregulated expenses. [At para. 34; emphasis by underlining added.]

[9] In the course of its reasons, the Court accepted that the objective of the legislation was to "guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting." (At 596.) The Court continued:

> Thus, the objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters' point of view, the system is designed to permit an informed choice to be

> made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money. [At 596-7.]

The Court found this to be a "highly laudable" objective of pressing and substantial importance in a democratic society. (At 597.)

[10] Under the rubric of "rational connection" – the first part of the "*Oakes*" proportionality test – the Court described at some length the Lortie Commission's report. The Court summarized the "equality model" of electoral reform advocated by the Commission thus:

> The Lortie Commission pointed out that expenses incurred in an election campaign – advertising, for example – have a considerable impact on the outcome of the vote (Lortie Commission, *supra*, at pp. 324 and 339; testimony of Professor Peter Aucoin, Case on Appeal, at pp. 36-37, 94 and 131). It recognized that spending limits are essential to ensure the primacy of the principle of fairness in democratic elections. The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate (Lortie Commission, *supra*, at p. 324). To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard. Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties. Thus, the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy (Lortie Commission, *supra*, at p. 323). Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources (Lortie Commission, *supra*, at p. 324). It should also be noted that 93 percent of the respondents to a national survey conducted by the Lortie Commission supported limits on spending by political parties (Lortie Commission, *supra*, at p. 334). This high percentage shows that the majority of Canadians agree with limiting election spending in order to promote fairness as a fundamental value of democracy.

> For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups. According to the Lortie Commission, the definition of election expenses must be sufficiently broad to include the cost of any goods and services used during an election campaign to promote or oppose, directly or indirectly, a candidate or political party (Lortie Commission, *supra*, at pp. 339-41). Thus, such expenses should include not only those incurred by political parties and candidates, but also those incurred by independent individuals and groups unrelated to the parties and candidates (Lortie Commission, *supra*, at p. 339).
>
> The actions of independent individuals and groups can directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. …
>
> Independent spending could very well have the effect of directly or indirectly promoting one candidate or political party to the detriment of the others; the purpose of limits on spending by independent individuals and groups is to prevent their advertising or other expenditures from having a disproportionate influence on the vote (Lortie Commission, *supra*, at pp. 339 40 and 354). [At 598-601; emphasis added.]

[11] Ultimately, however, the Court in *Libman* found that the spending prohibitions imposed on unaffiliated persons by the Quebec legislation did not meet the minimal impairment test "in the case of individuals and groups who can neither join the national committees nor participate in the affiliation system." It noted that there were "better alternative solutions" to the problem, including the Lortie Commission's recommendations on limiting third party expenses. (At 618.) The Court explained:

> To guarantee the operation of the system of election spending limits, the Lortie Commission recommended, *inter alia*, that groups and individuals not connected with a political party or candidate (independents) be prohibited from incurring election expenses exceeding $1000 and from pooling these amounts (Lortie Commission, *supra*, at pp. 350-56). This recommendation made it possible for all practical purposes to ensure that the balance in the financial resources of the parties and candidates was respected without radically restricting the freedom of expression of independents. By allowing a certain amount without limits on how it was to be used, the Commission ensured that independents would be able to assert their points of view and that they would have some leeway in choosing forms of expression. Furthermore, by allowing a relatively low amount and prohibiting pooling, the Commission removed the temptation for parties or organizations of candidates to split into small groups in order to multiply and thus increase the limits imposed on their campaigns by the *Canada Elections Act*. [At 618; emphasis added.]

[12] This approach had, the Court noted, been adopted by Parliament in enacting the *Canada Elections Act* in force at the time, s. 259.1 of which prohibited the incurring of advertising expenses in excess of $1,000 during a campaign. The Court continued:

> By virtue of this exception, individuals and groups who can neither join nor affiliate themselves with the national committees would be entitled to a minimum amount that they would be able to spend as they saw fit in order to communicate their positions. In our view, this alternative would result in a more acceptable balance between absolute individual freedom of expression and equality of expression between proponents of the various options. It is not up to this Court to decide what amount should be allowed. Should the legislature adopt this alternative, it will have to set the amount. Nevertheless, it might be thought that the amount of $1000 proposed by the Lortie Commission in the Canadian election context is not necessarily appropriate in the context of a Quebec referendum. The appropriate amount will have to be fair while being small enough to be consistent with the objective of the Act. [At para. 620; emphasis added.]

[13] By the time *Harper* reached the Supreme Court of Canada, the Federal Act prohibited third parties from incurring election advertising expenses of more than $150,000 during an election period, of which not more than $3,000 could be incurred to promote the election of a candidate in a given electoral district (s. 350). Section 351 prohibited third parties from circumventing, or attempting to circumvent, the foregoing limits in any manner. Section 352 required that third parties identify themselves in any election advertising and indicate their authorization thereof; and s. 353(1) required that third parties register immediately after incurring election advertising expenses of $500 or more, and prohibited them from registering before the issuance of the writ. The registration requirements were similar to those of the BC Act, including a provision requiring any third party incurring expenses of $5,000 or more to appoint an auditor. (Section 355(1)).

[14] While the dissenting judges in *Harper* (Chief Justice McLachlan, Major and Binnie JJ.) were of the view that the legislation was an “overreaction to a non-existent problem” (para. 34), the majority again strongly endorsed the egalitarian model of electoral reform. The majority of the Court, *per* Bastarache J., observed:

> … The regime is clearly structured on the egalitarian model of elections. The overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*. [At para. 63.]

[15] The majority found that the objectives of the Federal Act were pressing and substantial even though both the harm sought to be remedied and the legislative solution were difficult to measure scientifically. The Lortie Commission had reported that unlimited third party advertising could undermine election fairness in several ways, including by eroding the confidence of the Canadian electorate "who perceive the electoral process as being dominated by the wealthy." The majority of the Court in *Harper* agreed:

> This harm is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process. In light of these difficulties, logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy. [At para. 79.]

[16] The Court also acknowledged there was no evidence that third party advertisers in Canada were seeking to be manipulative, to smear political candidates or to engage in other non-political discourse. Nevertheless, the majority said, the danger of such possibilities warranted "some deference to the means chosen by Parliament." (Para. 85.) Bastarache J. continued:

> Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process. For candidates, political parties and third parties, meaningful participation means the ability to inform voters of their position. For voters, meaningful participation means the ability to hear and weigh many points of view. The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the court must approach the justification

> analysis with deference. The lower courts erred in failing to do so…. In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.
>
> On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient. [At paras. 87-8.]

[17] After finding a rational connection between the infringement and the benefits sought to be advanced by the Federal Act (see paras. 104-109), Bastarache J. turned to the question of minimal impairment at para. 110. He emphasized that because the definition of "election advertising" in s. 319 applied only to advertising associated with a candidate or party, s. 350 permitted third parties to "partake in an unlimited advertising campaign" where the advertising was not so associated. (Para. 114.). In his analysis, the $3,000 and $150,000 limits on election advertising were "high enough to allow third parties to engage in a significant amount of low cost forms of advertising such as computer generated posters or leaflets or the creation of a 1-800 number …". As well, the definition of "election advertising" in s. 319 did not apply to many other forms of communication such as debates, speeches, columns, letters and commentary, the news and the Internet. (Similar exceptions are made in the BC Act: see s. 228 and B.C. Reg. 329/2008.)

[18] Ultimately, although one could conceive of less impairing limits – the $3,000 and $150,000 limits stated in s. 350 could be increased, for example – the provision was found to satisfy the minimal impairment test. The majority emphasized the objectives of the provision:

> … The limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties. The limits preclude the voices of the wealthy from dominating the political discourse, thereby allowing more voices to be heard. The limits allow for meaningful participation in the electoral process and encourage informed voting. The limits promote a free and democratic society. [At para. 118.]

The deleterious effects of s. 350 were also found to be outweighed by its salutary effects: see paras. 119-121. In so holding, the majority cited the Court's suggestion at para. 84 of *Libman* that protecting the fairness of referendum campaigns will necessarily involve "certain restrictions" on freedom of expression.

[19] At para. 136, the majority in *Harper* turned to consider the attribution, registration and disclosure requirements applicable to third parties, namely ss. 352–7, 359, 360 and 362. (Again, these are similar to ss. 228 – 250 of the BC Act.) Since these were interdependent, the majority said, their constitutionality fell to be determined together. (Para. 137.) Bastarache J. characterized the objectives of this set of provisions thus:

> 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. [At para. 142; emphasis added.]

[20] The majority found that the requirements were rationally connected to the enforcement of the election advertising regime and added transparency to the electoral process (paras. 143-4) and that they were minimally impairing in that they varied depending on the amount spent on election advertising; the personal information required of contributors was "minimal"; and even the appointment of a financial agent or auditor was not "overly onerous". In summary, the majority concluded:

> The salutary effects of the impugned measures outweigh the deleterious effects. The attribution, registration and disclosure requirements facilitate the implementation and enforcement of the third party election advertising scheme. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal. The burden is certainly not as onerous as the respondent alleges. There is no evidence that a contributor has been discouraged from contributing to a third party or that a third party has been

> discouraged from engaging in electoral advertising because of the reporting requirements. [At para. 146; emphasis added.]

[21] The dissenting justices in *Harper* also found that the registration requirements were justified under s. 1. In their words:

> These requirements, variously found in ss. 352 to 357, 359, 360 and 362 of the *Canada Elections Act*, are not keyed to the citizen election spending limits in s. 350. Requiring citizens to register with the Chief Electoral Officer, self-identify on advertisements, and disclose their adherents and the nature of their expenditures serves the interests of transparency and an informed vote in the political process. We agree with Bastarache J. that the infringement that these provisions work on the freedom of expression is saved by s. 1. [At para. 48.]

The Case at Bar

Evidence Before the Trial Judge

[22] There was no royal commission report or social science evidence before the trial judge in this case. There were two affidavits of note, one of Mr. Gogolek, the executive director of FIPA; and one of Ms. Western, the Deputy Chief Electoral Officer. Mr. Gogolek appended to his affidavit a copy of the report of the Chief Electoral Officer of British Columbia, Mr. Neufeld, to the Legislature, issued in April 2010. At p. 16, the CEO had stated:

> 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 registration threshold would prevent the considerable confusion and administrative burden that currently exists. [Emphasis added.]

[23] Also attached to Mr. Gogolek's affidavit was a chart showing current election finance provisions in other Canadian jurisdictions, and a copy of a report entitled *Election Chill Effect: The Impact of BC's New Third Party Advertising Rules on Social Movement Groups*, by S. Daub and H. Whiteside, published by the Canadian Centre for Policy Alternatives, the BC Civil Liberties Association (an intervenor in this

court) and FIPA. One of its themes was that the very groups that could have benefited from caps on election advertising, i.e., "small spenders", were overregulated by the BC Act, especially given the inclusion of volunteer labour in the definition of "advertising expenses". Various groups working primarily on behalf of vulnerable populations such as children, low-income families, the homeless, marginalized women and others were said to be "deeply uncomfortable with legislation that transformed their work into the crass purchase of influence" – a statement I find puzzling. Similar discomfort had been expressed, the report stated, by participants from environmental sustainability and conservation groups.

[24] Ms. Western's affidavit described the role of Elections BC as a non-partisan, independent office of the Legislature, responsible for administering the electoral process for provincial general elections and by-elections. She described the workings of ss. 239 and 240 of the BC Act and how the information required in an application for registration is used:

> The registration provisions were enacted as part of a complete repeal and replacement of the *Election Act* in 1995. The general election in 1996 was the first election administered under the new legislative regime and the public was not provided with a lot of information about the changes, including the newly enacted requirement to register before sponsoring election advertising. As a result, there were a lot of individuals and organizations who engaged in election advertising without having registered first, which created some public anger. Elections BC dealt with those issues on an administrative level by contacting the individuals and organizations in order to explain the new rules, including the requirement to register and include an authorization statement on most advertising. For the most part, the individuals and organizations complied.
>
> Since that time, Elections BC has followed the same basic process for dealing with complaints about apparently unregistered, unauthorized or improper advertising. Upon receipt of a complaint, Elections BC asks the complainant to check the advertising again and to provide Elections BC with a copy of the advertising (or its location, if sending a copy is not practical). Once Elections BC has reviewed the advertising, and determined whether the sponsor is unregistered, or perhaps has registered but simply omitted the required authorization statement, Elections BC will attempt to contact the individual or organization to explain the rules and ask the sponsor to register, to add the authorization statement to the advertising, or to address any other concern (such as placement of the advertising).
>
> <u>If the sponsor is registered, and the advertising indicates who is sponsoring it, Elections BC will have access to their contact information and can contact</u>

> them in order to explain the rules and seek compliance. If the sponsor is not registered, or the advertising does not indicate who is behind it, Elections BC uses other methods to attempt to determine who to contact, including going through the media source, such as the newspaper or radio, running the advertising.
>
> Since the provision was enacted in 1995, no individual or organization has been fined for not having registered before sponsoring election advertising.
>
> Elections BC uses the registration information primarily as contact information, to enable Elections BC to communicate with sponsors 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. By way of example, Elections BC used the registration information to advise election advertising sponsors of the information sessions arranged by Elections BC during the 2013 election. Elections BC also uses the registration information to assist in responding to complaints and questions.
>
> Elections BC posts the list of registered sponsors on its website, so that the public is aware of who is registered to sponsor election advertising. The public has also used the list of registered sponsors in making complaints to Elections BC, by identifying advertising from unregistered sponsors, or advertising from a registered sponsor that does not comply with certain election advertising rules. If media are asked to conduct election advertising by an unregistered sponsor, they can contact Elections BC and ask for assistance to explain the requirement to register to the sponsor. [At paras. 23-8; emphasis added.]

[25] Ms. Western also referred to the CEO's report to the Legislature dated April 2010 which, as we have seen, recommended that third party registration not be required unless the value of election advertising undertaken was $500 or more. This recommendation was repeated in a report of Elections BC in 2011.

The Trial Judge's Analysis

[26] Mr. Justice Cohen carried out a detailed and thoughtful description of the legislative history of s. 239, the financing and advertising restrictions in the BC Act, the registration process, the law with respect to freedom of expression under 2(*b*) of the *Charter* and the well-known *Oakes* tests for justification under s. 1. He also reviewed the previous constitutional challenges to registration requirements in *Libman*, *Harper* and *United Steelworkers of America, Local 7649 v. Quebec (Chief Electoral Officer)* 2011 QCCA 1043. In the latter case, the Court of Appeal upheld provisions of the *Quebec Election Act* which "essentially prohibit[ed] third parties

from incurring any 'election expenses' during an election campaign." (Para. 63.) With respect to minimal impairment, Cohen J. cited passages in which the Court of Appeal had rejected the proposition that as soon as there exists a "solution elsewhere that is less restrictive than that existing under the Quebec legislation, [the] legislation becomes by that fact, too restrictive". The Court in *United Steelworkers* continued:

> … This type of reasoning by degrees risks depriving legislators of legitimacy in the choices they make, choices that the appellants considered unreasonable, while the questions raised concern choices that are purely political. In other words, for a measure to be minimally intrusive, no law enacted in another jurisdiction may constitute a relaxation in relation to *Quebec's Election Act*. [At para. 45; quoted at para. 65 of the trial judge's reasons in this case.]

The Court concluded that the impairment of s. 2(b) rights constituted by the impugned provisions was minimal "because it is reasonable from the standpoint of the objective sought, because everyone is treated in the same way, without regard for financial means or ideals, with voters remaining essential to the electoral process and any member of the FTQ retaining the right to contribute in his or her own name to elections funds and to the electoral discourse." (At para. 49.)

[27] After noting some of the American jurisprudence at paras. 70–79, Cohen J. in case at bar then described FIPA's argument, which he summarized as follows:

> In summary, the plaintiff states that, in light of (a) the lack of s. 1 evidence presented by the Attorney General, (b) the recommendation of the CEO and the affidavit of Ms. Western, (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 *Act* is not saved under s. 1 of the *Charter.*
>
> Finally, the plaintiff makes submissions on what it views as the appropriate remedy. Drawing from *Libman*, and, in particular, the recommendations of the Lortie Commission discussed at paras. 77-81 therein, the plaintiff submits that a minimum expenditure threshold would strike an appropriate balance between absolute individual freedom of expression and equality of expression between the proponents of the various choices in an election. Specifically, the plaintiff proposes a declaration to the effect that registration not be required below a $500 minimum threshold, which it says is the standard threshold in

> most Canadian jurisdictions and is consistent with the recommendation of the CEO.
>
> In the alternative, if the Court declines to specify the minimum expenditure threshold, the plaintiff submits that the appropriate remedy is to declare s. 239 invalid and allow the provincial Legislature to enact an appropriate threshold. [At paras. 91-3; emphasis added.]

[28] The Attorney General's argument was described beginning at para. 94 in connection with each of the four *Oakes* criteria. In the Attorney's submission, the registration requirement in s. 239 had the objective of promoting transparency and public accountability in the electoral process and thus encouraging an informed electorate. (Para. 106.) These goals, it was said, were "objectives to be simply accepted by the court".

[29] The Attorney argued that in some respects, the BC Act was less onerous with respect to third party advertisers than the Federal Act, where although there is a minimum spending threshold of $500, third party advertisers must comply with more onerous requirements once that threshold is met. In any event, the Attorney contended, legislative choices made in other jurisdictions "can neither dictate nor constitutionally invalidate the choices made by the legislature in British Columbia." (Para. 110.) With respect to the balancing of beneficial and deleterious effects, it was said that the burden of registration was "trivial and insubstantial" and that the goals of the provision easily outweighed any costs.

[30] Finally, counsel submitted that the registration and disclosure provisions were qualitatively different and that the former do not limit speech, but serve "democratic objectives in promoting both transparency in the electoral process and an informed electorate." (Para. 112.)

The Trial Judge's Legal Analysis

[31] Cohen J. noted at the outset that the Attorney General had conceded, correctly, that the "activity" at issue (i.e., requiring third party advertisers to register with the CEO) fell within s. 2(*b*) of the *Charter*. As he noted:

> The protection of political expression lies at the heart of the guarantee of freedom of expression, and third party advertising is clearly a form of political expression that enriches and broadens political discourse in a democratic society. In its regulation of third party advertising, the *Act* clearly falls within the sphere of conduct protected under s. 2(b). [At para. 114.]

[32] The trial judge accepted the Attorney's assertion that the purpose of s. 239 was not to restrict speech, but to "increase transparency, openness, and public accountability in the electoral process, and thus to promote an informed electorate." (Para. 116.) Its effect, however, was to infringe freedom of expression and in particular, to restrict spontaneous or unplanned advertising, thus infringing the value underpinning s. 2(b) of the *Charter*. He found that the registration requirement was not so trivial or insubstantial that it was unnecessary to proceed to s. 1 for justification. (Para. 124.)

[33] Turning to the s. 1 analysis, the trial judge also found that the objectives of s. 239 were "crucial to a free and democratic society, and thus sufficiently pressing and substantial to justify limiting a *Charter* right." (Citing *Pacific Press* at para. 78 and *Harper* at paras. 77 and 88.)

[34] With respect to the *Oakes* proportionality test, the judge found that the registration requirement for all third party election advertisers was rationally connected to the objectives of s. 239. In his words:

> … The registration requirement under s. 239 increases transparency by allowing the CEO to receive notice and confirmation of which third parties are engaging in election advertising. In turn, third party sponsors can be identified and made known to the public, and contacted by Elections BC in case of a problem in compliance with the other advertising regulations. In this way, s. 239 facilitates openness and public accountability in the electoral process. Finally, by making verified information available to the public, s. 239 promotes an informed electorate, as those receiving the election advertising are able not only to hear the message it promotes, but to identify its source and make informed decisions as to the weight they will give it.
>
> Section 239 operates in concert with s. 231 of the Act, which requires that the identity of a sponsor be disclosed on election advertising (a provision not challenged by the plaintiff). The added benefit of the requirement under s. 239 is obvious; that is, the registration process requires that the application include a name, contact information, signature, and solemn declaration on behalf of the registrant: s. 240. In this way, the identity of the registered

> advertiser is confirmed and verified and public accountability is better fostered. [At paras. 132-3; emphasis added.]

I did not understand FIPA to take issue with this proposition on appeal.

[35] On the topic of minimal impairment, FIPA had made two arguments – first that since other Canadian jurisdictions had enacted a minimum threshold for third party registration, the minimal impairment test could not be met; and second, an argument, based on Ms. Western's affidavit, that the registration information gathered under s. 239 is used only occasionally by Elections BC and thus could not justify the infringement of rights under s. 2(*b*). The first of these arguments was rejected, perhaps not surprisingly given the previous judicial authorities rejecting it: see *BCTF, supra, per* Ryan J.A. at para. 60; *United Steelworkers* at para. 45. The trial judge also rejected the second argument, reasoning that:

> … The purpose of s. 239, as discussed above, includes transparency and accountability. That third parties are required to provide contact information in order to participate in election advertising promotes both these goals, even if most registrants are never contacted. [At para. 138.]

[36] Also under this rubric, the trial judge observed that the minimal impairment test is intended to assess whether the legislation in question falls along a “range” of reasonable alternatives given the legislative objectives, not to find the measure that impairs the least. As stated by McLachlin J. (as she then was) in *RJR–MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: … On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [At 342-3; emphasis added.]

Cohen J. found that s. 239 represented a “reasonable approach, within the spectrum of possible measures" in light of the stated legislative objectives. (Para.144).

[37] With respect to balancing the beneficial and deleterious effects of the registration requirement, the trial judge again observed that the main deleterious effect was the inhibition of “spontaneous political expression.” He posited the example of a person who had a “sudden desire” to print and distribute pamphlets on an election issue during the campaign period. He emphasized that the plaintiff was not seeking to have s. 239 struck down in its entirety, but was seeking a declaration that registration need not be required below a $500 floor. Was it better, he asked, that an individual who spends $600 is compelled to register and to wait until registration is completed, while an individual who spends $400 is not? (Para. 142.) In his analysis:

> In my view, the Legislature has already enacted the threshold it sees as appropriate, in that any advertising, which constitutes “election advertising” under the *Act*, will trigger the requirement to register. It is not the role of the Court to substitute its own, or, indeed, the plaintiff’s, view as to what would be an appropriate legislative provision. The role of the Court in this proceeding is to come to a conclusion as to whether s. 239, as written, is constitutionally valid, not to instruct as to whether the plaintiff’s preferred measure would be more or less “proportionate” than the one currently in force.
>
> 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. [At paras.147-8; emphasis added.]

[38] In the result, the Court concluded that although s. 239 infringed the right to free expression under s. 2(*b*) of the *Charter*, it was demonstrably justified under s. 1. The Court dismissed FIPA’s application for a declaration of invalidity.

On Appeal

[39] In this court, the plaintiff asserted in its factum that the trial judge 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;

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

[40] The plaintiff also asserted that the trial judge erred in fact in the inferences he drew from the CEO's observation in his 2010 report that a $500 floor would "prevent the considerable confusion and administrative burden that currently exists." Counsel submits that the Court committed a palpable and overriding error in declining to read the recommendation as meaning that the registration of third parties who spend under $500 is not necessary. Since in FIPA's submission, Cohen J. identified the "wrong statutory purpose" of s. 239 and failed to focus on its true purpose – i.e., "to assist in administering the third party advertising provisions which prevent third parties from having undue influence on elections by monitoring and limiting expenditures" – he failed to appreciate that the CEO's recommendations were "clearly related" to improving the electoral process and thus would further the relevant objective. At the least, says the plaintiff, the trial judge should have inferred that it was the CEO's view a $500 threshold "would not negatively impact election fairness or give rise to undue influence."

Legislative Purpose and the "Pressing and Substantial" Test

[41] The plaintiff's objection to the purposes of s. 239 as found by the trial judge – i.e., to increase transparency, openness, and public accountability in the electoral process and thus to promote an "informed electorate" – may be dealt with fairly briefly. These purposes applied not only to s. 239 *per se* but to all the provisions of Part 11 dealing with third party advertising and election spending generally. They had been enunciated in 1995 by the then Attorney General, Mr. Gabelmann, in introducing the predecessor provisions of what is now Part 11 in the Legislature. The trial judge quoted from Mr. Gabelmann's speech at para. 7:

> … By introducing British Columbia's first election financing rules, this legislation is a milestone in B.C.'s history of electoral reform.
>
> The introduction of these financing rules will bring this province in line with standards set across the country. Voters will now be able to learn who is financing the political process in B.C. Registered political parties, constituency associations, candidates and leadership contestants will be required to disclose contributions and expenses. The openness of the electoral process is also enhanced by new disclosure requirements for election advertising and election opinion surveys. This legislation will increase fairness in the electoral process by introducing spending limits for parties and candidates. To maintain the integrity of these spending limits, and to ensure a level playing field for all participants in the election, third-party advertising will also be restricted. [At para. 7.]

These comments echoed the objectives of the egalitarian model advanced by the Lortie Commission four years earlier.

[42] Obviously, the various provisions of Part 11 serve different functions in fulfilling the intended goals: s. 231 requires election advertising to indicate the identity of the third party sponsor and provide contact information; s. 239 requires third party "sponsors" to register; s. 240 sets out the conditions of registration; and s. 241 details the obligations of a sponsor. While our focus in this appeal must be on the "infringing measure" specifically (see *RJR-MacDonald*, *supra,* at 535-6; *Gosselin v. Quebec (Attorney General)* 2002 SCC 84 at para. 264), we must consider it in the context of the whole legislative scheme – just as in *Harper*, the majority considered that the attribution, registration and disclosure provisions in the Federal Act were interdependent and determined their constitutionality together. (Para. 137.)

[43] It is clear the trial judge reached his conclusion concerning the legislative objectives on a consideration of all the evidence before him. His conclusion is consistent with those found by the court in *BCTF* and by the Supreme Court in *Harper*. At para. 142 of *Harper*, the Court accepted that the group of provisions advanced two objectives – the "proper implementation and enforcement of the third party election advertising limits", and providing voters with relevant election information. In my respectful view, this is another way of stating the goals found by Cohen J.

[44] I see no error in the trial judge's formulation of the purposes of Part 11 as a whole, or s. 239 in particular, and I would not accede to the plaintiff's argument on this point.

[45] Nor am I persuaded that Cohen J. erred in fact in his consideration of the CEO's recommendation of a "consistent registration threshold" in his 2010 report. The trial judge was correct, in my view, in stating that this was not a comment on the constitutionality of s. 239, nor was it a recommendation for improvement "with a view toward the legislative objectives" Cohen J. formulated. As I read the report, it was concerned with the day-to-day administrative burdens imposed by s. 239 and the use made in fact by the CEO of the information collected from registrants. That said, its utility remains relevant to the s. 1 analysis.

"Pressing and Substantial"

[46] I am also unable to agree with FIPA's contention that the trial judge erred in finding the legislative objectives to be pressing and substantial. The objectives asserted by the Attorney were ringingly endorsed by the majority in *Harper* and were accepted by this court in *BCTF* as pressing and substantial. I see no basis on which we could depart from the Supreme Court's endorsement, even if the objectives may be regarded as "vague" or "abstract" by some. Where the government is able to suggest only abstract objectives, courts have on occasion proceeded to the proportionality analysis rather than dismissing the government's objectives outright. (See, e.g., *Sauvé v. Canada (Chief Electoral Officer)* 2002 SCC 68 at para. 26; *Frank v. Canada (Attorney General)* 2014 ONSC 907 at para. 115.) *Harper* also made it clear (at para. 93) that the government need not provide evidence of actual harm or scientific proof in this context, and that where the nature of the harm and the effectiveness of the remedy are difficult to measure scientifically, "logic and reason assisted by some social science evidence is sufficient proof of the harm that [the legislative body] seeks to remedy". (Para. 70.)

Justification

Rational Connection

[47] FIPA acknowledges in its factum that the "rational connection" stage of the *Oakes* proportionality test – which requires that the impugned law not be "arbitrary, unfair or based on irrational considerations" – has been described as "not particularly onerous" (see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 2000 SCC 69 at para. 228) and as having "very little work to do" (see Hogg, *supra,* at §38.10(a).) In *Oakes* itself ([1986] 1 S.C.R. 103) the Chief Justice stated at 141 that at a minimum, the test requires that the legislation be internally rational. I see no basis on which it could be said that s. 239 is arbitrary or irrational in light of the objectives it is meant to achieve.

[48] In *Harpe*r, the majority found that the attribution, registration and disclosure requirements of the Federal Act facilitated the implementation and enforcement of the third party election advertising scheme. (Para. 146.) Bastarache J. noted that registration served the function of notifying the chief electoral officer which individuals and groups qualified as third parties subject to the advertising expense limits. The dissenting justices agreed that the registration requirement was justified without much elaboration. (See para. 21 above.) As we have seen in the case at bar, the CEO in British Columbia uses the registration information primarily as "contact information" so that he may advise sponsors of the rules and any changes thereto from time to time. I agree with Cohen J. that for the purposes of carrying out the proportionality analysis, these circumstances are sufficiently cogent to constitute a rational connection between s. 239 and the enhancement of transparency, openness and public accountability in the electoral process.

Minimal Impairment

[49] It is at the final two stages of the analysis – the "least drastic means" or "minimal impairment" criterion, and the "proportionate effects" criterion – that s. 239 encounters heavier seas. Although it is true that the process of registration itself is not particularly onerous, it does not seem particularly useful when viewed in context.

Third parties are already required by s. 231 to identify themselves and provide a telephone number or mailing address in their 'advertising', and are subject to the spending limits in s. 235.1 on what they may spend. Neither of these provisions is challenged in this proceeding. What, then, does registration under s. 239 accomplish? The CEO, who is well placed to answer this question, describes the registration system as an "administrative burden" that facilitates contacting third parties – a function the plaintiff says could also be achieved by placing notices online or in newspapers. From the point of view of the public, however, I would have thought that the requirement for registrants to provide their names and addresses under oath could help to ensure the veracity of the identification information required in their advertising – and thus, as C.J. McLachlin and Major and Binnie J J. suggested in *Harper*, "serve the interests of transparency".

[50] The Attorney General contends that that FIPA's complaints about the lack of an evidentiary record justifying the absence of a minimum threshold are misplaced. Ms. Horsman relies on the Court's acknowledgement in *Harp*er that it is difficult to measure scientifically the nature of the harm sought to be addressed by the impugned election laws, and characterizes FIPA's approach to the s. 1 analysis in this case as "rigid" and inconsistent with the judicial deference owed to the Legislature in designing and administering regimes of this kind. On this point, I note that in *Constitutional Law of Canada* (5th ed., supp.), Professor Hogg discusses at § 38.11 the 'softening' of the minimal impairment test to create a "margin of appreciation" or "zone of discretion" accorded legislation given that less intrusive means can almost always be imagined. Counsel also refers to Mr. Gogolek's evidence to the effect that a third party sponsor can engage in a considerable range and quantity of advertising activities before reaching a threshold of $500.

Balancing of Beneficial and Deleterious Effects

[51] Similar arguments are made by the parties respectively in connection with the final *Oakes* test, the balancing of the beneficial and deleterious effects of the impugned legislation. The Attorney submits that the burden imposed by s. 239 on

third parties is a minimal one, far outweighed by the importance of the statutory objectives of the legislation as a whole. There is no evidence that any would-be sponsors have been impaired in their ability to participate as advertising sponsors in the 20 years since s. 239 came into force. The collective goals of increasing transparency, openness and accountability in the electoral system and thereby promoting an informed electorate, are said to outweigh any alleged costs.

[52] The intervenor British Columbia Civil Liberties Association restricted its argument to this final stage of the proportionality question, noting that it "provides an opportunity to assess, in light of practical and contextual details, whether the benefits which accrue from a limitation are proportional to its effect, as measured by underlying *Charter* values." (Citing *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877 at para. 125.) In the Association's submission, the trial judge failed to appreciate the full seriousness of the infringement caused by s. 239 and thus overlooked the full scope of *Charter* values implicated by the law.

[53] It will be recalled that the trial judge acknowledged that the requirement to register under s. 239 "would have the effect of restricting spontaneous or unplanned election advertising, which, like other forms of political expression, enriches political discourse." (Para. 121.) The Association contends that the requirement is also likely to have a chilling effect in particular on persons who would choose to remain anonymous, vulnerable persons or those wishing to express unconventional or underrepresented views. The intervenor states in its factum:

> … While disclosure may impose no barrier on mainstream speakers, such as unions and corporations, 2(b) must equally protect unpopular speech and speakers, particularly those of limited means and political power whose voices may already be marginalized. It is reasonable to expect such individuals and small organizations will be less willing to suffer the loss of anonymity and privacy associated with the disclosure requirements in s. 239.
>
> The Supreme Court has repeatedly inferred that, over and above direct prohibitions on speech, laws may have a 'chilling effect' sufficient to constitute a threat to freedom of expression, and that any chilling effect is likely to be felt most acutely by minority or traditionally disadvantaged groups. The BCCLA submits that s. 239 has just such an impact.

> The effect of s. 239 is, therefore, not only to delay or limit spontaneous political expression, serious as that is. Faced with the option of participating in democratic debate or maintaining their anonymity, a considerable number of people may choose the latter, essentially removing their voices and opinions from the political arena.

[54] Thus s. 239 is said to make political expression dependent on one's abandonment of his or her privacy, which like free speech is a fundamental interest under the *Charter*: see, e.g., *R v. Spencer* 2014 SCC 43 at paras. 39 – 49. The fact that the information provided to the CEO by a registrant is publicly available reinforces this concern. On the other hand, only the name and address of a registrant is required: no enquiry is made as to the content of the political message intended to be expressed.

[55] It is true, of course, that the registration requirement is only one of the series of "attribution, registration and disclosure" provisions and that even if registration were not required, a third party sponsor would still be required by s. 231 to identify himself or herself as the sponsor of any election advertising and give his or her telephone number or mailing address as part of the advertisement. Setting aside for the moment s. 2(b) of the *Charter,* most people might view the registration procedure as a "reasonable" complement to the enforcement of spending restrictions on political advertising. Nevertheless, providing a name and phone number as part of a sign or other message is less onerous than having to register a sworn statement with the CEO, and has less lasting implications in terms of a public record. The third party registrant must also wait until the CEO has confirmed his or her registration – unlike the situation under the Federal Act, s. 353 which requires that registration occur "immediately after" the third party has incurred $500 of election advertising expenses.

[56] At the end of the day we are faced not with a clash of conflicting *Charter* values or even a conflict between important principles *per se*, but a close balancing of some rather subtle circumstances – the fact that the registration requirement is not terribly onerous; the fact that although it could be used to assist the CEO in enforcing the advertising restrictions, it seems at least at present to be used only for

administrative convenience; the fact that third parties are already required, by s. 231, to identify themselves in election advertising; the fact that advertisers might choose to disobey that requirement and might be easier to locate by means of the registration requirement; and the fact that registration may, as the intervenor contends, "delay or limit spontaneous political expression". Closer to principle, there is the fact that registration creates a public record that is available indefinitely to all, arguably inhibiting political expression by persons who do not wish their names and addresses to become public knowledge. Most significantly, there is the fact that political discourse lies at the heart of the value protected by s. 2(b): see the cases cited by the dissenting justices at para. 11 of *Harper*. On the other hand, the goals of egalitarianism in a free and democratic society have been characterized as "laudable" by the Supreme Court, and as important enough to justify incursions on free speech, even in the political realm.

[57] At the end of the day, I am persuaded that s. 239 must be considered in its legislative context just as its federal counterpart was in *Harper*. Given the insubstantial burden it places on third parties during an election period, I conclude that it falls within the "zone of discretion" that should be accorded to the Legislature in promoting equality of participation and influence among the proponents of political views and furthering the other objectives found to be pressing and substantial in *Libman* and *Harper*. One need not look far afield to appreciate that without laws like the BC Act, election politics can become contests of wealth and media access rather than contests of ideas. If we were to accede to FIPA's argument, we would in my view be focussing, incorrectly, on a relatively minor part of a larger scheme that is very similar to one that has already survived *Charter* scrutiny in the Supreme Court of Canada. I cannot say that the differences between s. 239 of the BC Act and s. 353(1) of the Federal Act are such as to make a difference in principle; nor that the trial judge erred in affording some deference to the Legislature in his analysis of the minimal impairment and "proportionate effects" tests as applied to s. 239.

[58] For these reasons, I would dismiss the appeal, with thanks to all counsel, including counsel for the intervenor, for their able submissions.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Lowry"

Dissenting Reasons for Judgment of the Honourable Madam Justice Saunders:

[59] I respectfully have come to a different conclusion than have my colleagues and would allow the appeal. In my view the provision at issue is overbroad and thus does not meet the saving provision of s. 1 of the *Canadian Charter of Rights and Freedoms* for legislation offending the s. 2(b) guarantee of freedom of expression. In particular, the impugned provision unduly muzzles expression of individuals who, without great expenditure of funds, act alone; it smothers the small and independent voices whose participation in public discourse should be encouraged and celebrated, not deterred.

[60] We are concerned in this appeal with a provision found in the *Election Act*, R.S.B.C. 1996, c. 106, forbidding all signage that "takes a position on an issue with which a registered political party or candidate is associated" (see definition of "election advertising" in s. 228), regardless of its cost and scale, absent registration of the individual. Registration requires that a person provide his or her name, address, and telephone number for a public record. We are told the record is broadly available and will endure.

[61] This prohibition includes even home-made signs in windows and bumper stickers. Unlike federal legislation and corresponding legislation in other provinces which exempt election advertising costing less than $500, British Columbia's legislation captures even the smallest expense; the signs of the small voices, lone voices, and independent voices are forbidden during election campaigns unless the person has registered. The test for application of the legislation is whether a candidate or party chooses to associate with the issue addressed by the signage; in other words, once the election engages an issue, signage in respect to that issue will fall within the ambit of the prohibition unless the advertiser registers, even if the signage pre-existed the election period.

[62] It is conceded that the impugned provision violates s. 2(b) of the *Charter* and is only valid in the event it can be saved under s. 1 of the *Charter* as being

demonstrably justified in a free and democratic society. For this assessment one may turn most easily to the seminal case *R. v. Oakes,* [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, where, at 138-140, Chief Justice Dickson said:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd., supra*, at p. 352 ...
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd., supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd., supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; …. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.
>
> [Emphasis added.]

[63] Generally, modern election advertising schemes in the form of third party spending limits are settled as being constitutional, see for example *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827. *Harper* described the general objective of third party advertising restrictions as electoral fairness, and

found that the objective had great value. Justice Bastarache for the majority expanded upon the objective saying:

> [92] … More narrowly characterized, the objectives of the third party election advertising scheme are threefold: first, to promote equality in the political discourse; second, to protect the integrity of the financing regime applicable to candidates and parties; and third, to ensure that voters have confidence in the electoral process.

[64] In *Harper*, both the majority reasons and those in dissent of Chief Justice McLachlin and Justice Major commented upon the central role political expression plays in a democracy. Justice Bastarache quoted at para. 84 from Chief Justice Dickson in *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 at 763-764:

> … The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. …
>
> [Emphasis added.]

[65] Chief Justice McLachlin and Justice Major said to like effect:

> [1] This Court has repeatedly held that liberal democracy demands the free expression of political opinion, and affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms*' guarantee of free expression. It has held that the freedom of expression includes the right to attempt to persuade through peaceful interchange.] And it has observed that the electoral process is the primary means by which the average citizen participates in the public discourse that shapes our polity. The question now before us is whether these high aspirations are fulfilled by a law that effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign.
>
> [Emphasis added.]

[66] These comments echo the views of judges who struggled with the constitutionality of limitations on freedom of expression before the *Charter.* For example, in *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337, Justice Rand said that parliamentary government demanded "the condition of a virtually unobstructed access to and diffusion of ideas". In the same case Justice Abbott said

"the right of free expression of opinion and of criticism" were "essential to the working of a parliamentary democracy such as ours": see Professor Hogg in *Constitutional Law of Canada*, 5th ed. supplemented (Toronto: Carswell, 2007) at 43-8.

[67] It is often observed that democracy is not tidy. There is considerable rough and tumble inherent in participating in community issues that can be daunting to the individual. Yet, participation at the local grass roots level is to be nurtured and is, perhaps, the surest sign of a vibrant democracy. Discouragement of participation in public discourse itself is to be discouraged and requires a compelling justification. Examples of compelling justification are demonstrated in *Harper,* discussing the advantages of spending limits that significantly level the field of contest, and in *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 discussing the advantages of a restriction on the publication of election results until polls are closed that significantly levels the field of information available to voters.

[68] To assess the issues of minimal impairment and proportionality, one must consider the expression that is affected. Here the provision affects signage already displayed at the beginning of the election period, as well as signage created during the election period. Of particular relevance to this appeal, it applies to signage created at low or no expense. The impugned provision affects, for example, a person protesting outside courthouse doors with a sandwich board covered by banners espousing positions on issues, many of them of a public nature. Those with bumper stickers on vehicles expressing views on environmental or economic matters, those who place signs in home windows or signs on their property expressing support for or disputing a proposal or initiative, and those with pickets signs or other messages advancing a point of view on a public issue, all will be affected in the event the issue leaks into the platforms of a party or candidate during an election. Issues that may be addressed by such signage are beyond counting. Courts of British Columbia are familiar with the strong views of members of the community supporting and opposing proposals for taxation schemes, economic

development, highway construction, pipeline construction, forestry cutting practices, and the use of farmland, to name but a few. Bumper stickers such as "Ban the … ", "No more … ", "I love … ", "Kill … ", "Down with … ", and "I support … ", each referring to a practice or proposal engaging public policy, may be seen on vehicles across the highways of British Columbia, north to south. So too signs relating to First Nations issues raise mainstream political issues. Issues may appear initially to be purely personal or local, yet find their way into an election campaign. It is said that all politics are local. Once the issue has leaked into the election campaign, the impugned provision of the *Election Act* will forbid the sign or bumper sticker unless and until the individual completes his or her registration.

[69] It is contended that the provision is not overly infringing of freedom of expression because a person has only to register to be allowed to express his or her views by means of signage. The judge agreed, saying "the process of registering under the *Act* … requires providing minimal personal information and undergoing a minimal administrative inconvenience". I do not see it that way. What is minimal is situation specific. While it may seem a small thing to those adept at forms and processes to register, not all members of the community can do so easily; I point only to the difficulty many members of the community have with our court forms as an example of the barriers modern administrative organization can present. I have no doubt that the effort required for registration and the nature of the private information required to be disclosed for public record will chill some who otherwise could muster the courage to stick their head over the parapet and publically advocate a view on a public issue. Last, certain members of the community, for reasons of personal security, will not register their addresses in a public record. For people in the circumstances I have described, the mere requirement of registration will be a complete barrier, so that compliance with the legislation will be achieved by diminishing their participation in public discourse during the election period, to the detriment of, in the words of Justice Rand, "access to and diffusion of ideas" for the betterment of the democracy generally.

[70] In reaching this conclusion I recognize that to date the legislation has not been enforced at the level I have described. But it is, in my view, no answer to say a breach of the legislation by the signage I have addressed in these reasons is unlikely to be pursued. We are asked here if the legislation is constitutional. By saying it is we say the legislation is enforceable (and the penalties for non-compliance are significant) against the persons I have described. I suggest exercise of freedom of expression, particularly political expression, is most needy of protection for the small, or lone, or independent voice, sometimes unpopular, and should not depend on forbearance from prosecution.

[71] Against the deleterious effects of the impugned provision must be considered the importance of the provision's objective. The judge described the objective of the legislation as "to increase transparency, openness, and public accountability in the electoral process, and thus to promote an informed electorate". That description of the objective is apt to the registration requirement generally, but has less force at the small end of the spending scale which, in *Harper*, did not factor into the reasoning of the court in upholding the third party advertising scheme. In my respectful view, there is much less to be said on behalf of legislation forbidding expression of ideas through inexpensive means than was said for the legislation at issue in *Harper.* I conclude that the advantage to the public interest inherent in the registration requirement for signage of the nature I have discussed is not so great as to overcome the consequent serious infringement of freedom of expression. The impugned provision, in my view, is a stifling measure affecting only those outside of the mainstream political community, whose participation in public discourse is vital to vibrant democracy. Absent allowance for inexpensive signage the provision is, in my view, neither minimally impairing nor proportionate, and thus is not demonstrably justified in a free and democratic society.

[72] I would allow the appeal. Given these are dissenting reasons, the details of an appropriate remedy need not be explored.

"The Honourable Madam Justice Saunders"

Schedule A

***Election Act*, R.S.B.C. 1996, c. 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*[1] 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,

[1] Pursuant to this court's decision in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* 2011 BCCA 408, the italicized language has been declared to be of no force or effect as it applies to s. 235.1.

(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.

[…]

Sponsorship of election advertising

229 (1) For the purposes of this Part, the sponsor of election advertising is whichever of the following is applicable:

(a) the individual or organization who pays for the election advertising to be conducted;

(b) if the services of conducting the advertising are provided without charge as a contribution, the individual or organization to whom the services are provided as a contribution;

(c) if the individual or organization that is the sponsor within the meaning of paragraph (a) or (b) is acting on behalf of another individual or organization, the other individual or organization.

(2) Where this Part requires the inclusion of a mailing address or telephone number at which a sponsor can be contacted,

(a) any mailing address given must be within British Columbia,

(b) any telephone number given must be that of a place within British Columbia, and

(c) the sponsor must make available an individual to be responsible for answering questions from the public that are directed to the address or telephone number.

(3) Where this Part requires a sponsor to be identified, for a numbered corporation or an unincorporated organization the identification must include both

(a) the name of the organization, and

(b) the name of an individual director or, if there are no individual directors, an individual who is a principal officer or a principal member of the organization.

(4) On request of the chief electoral officer,

(a) an individual identified as a sponsor, or

(b) an individual identified as a director, principal officer or principal member of an organization identified as a sponsor

must file with the chief electoral officer a solemn declaration that the identified sponsor is in fact the sponsor and that the sponsor has not contravened this Part.

No indirect sponsorship of election advertising

230 An individual or organization must not sponsor election advertising with the property of any other individual or organization or indirectly through any other individual or organization.

Election advertising must identify sponsor

231 (1) Subject to subsection (2), an individual or organization must not sponsor, or publish, broadcast or transmit to the public, any election advertising unless the advertising

(a) identifies the name of the sponsor or, in the case of a candidate, the name of the candidate's financial agent or the financial agent of the registered political party represented by the candidate,

(b) if applicable, indicates that the sponsor is a registered sponsor under this Act,

(c) indicates that it was authorized by the identified sponsor or financial agent, and

(d) gives a telephone number or mailing address at which the sponsor or financial agent may be contacted regarding the advertising.

(2) Subsection (1) does not apply to any class of election advertising exempted under section 283.

(3) The chief electoral officer, or a person acting on the direction of the chief electoral officer, may

(a) remove and destroy, without notice to any person, or

(b) require a person to remove or discontinue, and destroy,

any election advertising that does not meet the requirements of subsection (1) and is not exempted under subsection (2).

[…]

Division 2 — Election Advertising Limits

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*[2] 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.

Penalties for exceeding third party advertising limit

235.2 (1) Unless relief is granted by a court under section 235.3, if a sponsor exceeds an election advertising limit, the sponsor

[2] Pursuant to this court's decision in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* 2011 BCCA 408, the italicized language has been declared to be of no force or effect.

(a) is deregistered as a sponsor under Division 3 of this Part and is not entitled to be reregistered as a sponsor until after the next general election, and

(b) must pay to the chief electoral officer a penalty of 10 times the amount by which the value of the election advertising sponsored by the sponsor exceeds the limit.

(2) In the case of a sponsor that is an unincorporated organization, the members of the organization are jointly and severally liable to pay the penalty under subsection (1) (b).

(3) A penalty referred to in subsection (1) is effective as follows:

(a) if no application under section 235.3 is made in respect of the sponsor, at the end of the period for making such an application;

(b) if, on the final determination of an application under section 235.3, the court refuses to grant relief from the penalty, at the time of that determination.

Court order for relief from advertising limit

235.3 (1) A sponsor may apply to the Supreme Court in accordance with this section for relief from penalties under section 235.2.

(2) An application may be made only within 120 days after general voting day for the election in relation to which the election advertising limit was exceeded.

(3) The petition commencing an application must be served on the chief electoral officer within 7 days after it is filed and the chief electoral officer is a party to the application.

(4) On the hearing of an application, the court may

(a) grant relief from a penalty if the court considers that, in relation to the non-compliance, the sponsor acted in good faith, or

(b) refuse to grant relief.

[…]

Division 3 — Registration of Sponsors

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.

Division 4 — Disclosure of Independent Election Advertising

Independent sponsors must file disclosure reports

244 (1) Subject to subsection (3), if during a campaign period or the period beginning 60 days before the campaign period an individual or organization sponsors election advertising that has a total value of $500 or a higher amount established by regulation, the sponsor must file with the chief electoral officer an election advertising disclosure report in accordance with this section and section 245.

(2) An election advertising disclosure report under subsection (1) must be filed within 90 days after general voting day for the election to which it relates.

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

(4) A sponsor must file a supplementary report with the chief electoral officer if any of the information required to be disclosed in an election advertising disclosure report changes or if the sponsor becomes aware that the report does not accurately and completely disclose that information.

(5) A supplementary report under subsection (4) must be filed within 30 days after the sponsor becomes aware of the circumstances requiring the report to be filed.

Contents of disclosure report

245 (1) An election advertising disclosure report must be in the form prescribed by regulation and must include the following information:

(a) the value of the election advertising sponsored by the sponsor, reported by class as required by regulation;

(b) the amount of the contributions accepted by the sponsor during the period beginning 6 months before the election is called and ending at the end of the campaign period for the election, reported in accordance with subsections (2) to (4);

(c) any amount of the sponsor's assets, other than assets received by way of contribution reported under paragraph (b), that was used to pay for the election advertising sponsored by the sponsor;

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

(2) For the purposes of subsection (1) (b), amounts accepted from contributors must be reported separately for each of the following classes of contributor:

(a) individuals;

(b) corporations;

(c) unincorporated organizations engaged in business or commercial activity;

(d) trade unions;

(e) non-profit organizations;

(f) other identifiable contributors;

(g) anonymous contributors.

(3) If the records of the sponsor indicate that, during the period for which contributions are required to be reported, a contributor made one or more contributions of money that, in total, have a value of more than $250 or a higher amount established by regulation, the report under this section must include the following:

(a) the full name of the individual;

(b) the class of the contributor as referred to in subsection (2);

(c) if the contributor is a numbered corporation or an unincorporated organization, the full names and addresses of at least 2 individuals

(i) who are directors of the organization, or

(ii) if there are no individual directors, who are principal officers or principal members of the organization;

(d) the value of each contribution and the date on which it was made.

(4) For anonymous contributions, the report under this section must include the dates on which the contributions were received, the amounts received on each date and, if applicable, the events at which they were received.

(5) A report under this section must be accompanied by a signed declaration of the individual sponsor or, in the case of an organization, by a principal officer of the organization or, if there are no principal officers, by a principal member of the organization, as to the accuracy of the report.

(6) As a limit on the reporting obligations under this section, the obligations of a sponsor in relation to contributions accepted before the campaign period to which the report relates is that reasonable effort must be made to report the information required under this section.

Late filing of reports

246 If a sponsor fails to file a report under section 244 with the chief electoral officer within the time period established by that section or by a court under section 248, on payment to the chief electoral officer of a late filing fee equivalent to the applicable amount under section 220 (5) (b), the report may be filed within 30 days after the end of the time period under section 244 or before a later date permitted by a court under section 248.

Failure to file reports

247 (1) Unless relief is granted by a court on an application under section 248 commenced before the end of the late filing period under section 246, if an election advertising disclosure report is not filed with the chief electoral officer before the end of that period, the sponsor

(a) is deregistered as a sponsor under Division 3 of this Part and is not entitled to be reregistered as a sponsor until after the next general election, and

(b) must pay to the chief electoral officer a penalty equivalent to the applicable amount under section 220 (5) (b) for each day after the last day on which it may be filed under section 246 up to the date on which it is in fact filed.

(2) In the case of a sponsor that is an unincorporated organization, the members of the organization are jointly and severally liable to pay the penalty under subsection (1) (b).

(3) The penalties referred to in subsection (1) are effective as follows:

(a) if no application under section 248 is made in respect of the sponsor, at the end of the period for making such an application;

(b) if, on the final determination of an application under section 248, the court refuses to grant relief from the penalty, at the time of that determination.

Court order for relief from filing obligations

248 (1) A sponsor subject to section 246 or 247 may apply to the Supreme Court in accordance with this section for relief from an obligation to file an election advertising disclosure report or from a penalty in relation to the filing of such a report.

(2) An application may be made only within 120 days after general voting day for the election in relation to which the report is required or, if the failure is disclosed in a supplementary report under section 244 (4), within 30 days after the supplementary report is filed.

(3) Within 7 days after it is filed, the petition commencing an application must be served on the chief electoral officer.

(4) The applicant and the chief electoral officer are parties to the application.

(5) On the hearing of an application, the court may do the following:

(a) relieve the sponsor from the obligation to file the report, or from specified obligations in relation to the report, if the court considers that, in relation to the non-compliance, the sponsor acted in good faith;

(b) grant an extension of the time for filing the report without payment of a late filing fee under section 246 if

(i) the application is commenced before the end of the time for filing without penalty, and

(ii) the court considers that, in relation to the non-compliance, the sponsor acted in good faith;

(c) grant an extension of the time for filing the report, subject to payment of the late filing fee under section 246, if the court considers that, in relation to the non-compliance, the sponsor acted in good faith;

(d) make any order the court considers appropriate to secure compliance with this Act and the regulations to the extent the court considers reasonable in the circumstances;

(e) refuse to grant an extension or other relief.

Obligation to maintain records

249 An individual or organization who is or has been a sponsor of election advertising must

(a) ensure that the records required for the purposes of this Part are maintained in British Columbia, and

(b) retain these records for at least 5 years, or a longer period specified by the chief electoral officer, from the date of filing of a report required under this Division in relation to those records.

Information to be open to the public

250 The information filed under this Part with the chief electoral officer since the general election before the previous general election must be available for public inspection at the office of the chief electoral officer during its regular office hours.