File No. **CA41813**

COURT OF APPEAL

BETWEEN:

B.C. FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

APPELLANT
(PLAINTIFF)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(DEFENDANT)

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENER

FACTUM OF THE INTERVENER
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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OPENING STATEMENT

This case is about whether the state can require universal registration by individuals or organizations who "sponsor" "election advertising". The intervener, British Columbia Civil Liberties Association, respectfully submits that registration in this context constitutes a serious intrusion upon both freedom of expression and privacy interests. The infringement is all the more worrisome when enacted under an umbrella of electoral regulation that has as its only justifications the preservation of confidence in the electoral system, and preventing the voices of the wealthy from drowning out all others.

The appeal brings into focus the importance of a full appreciation of the nature and severity of the infringing state conduct to the assessment of whether a law that restricts a freedom guaranteed by the *Charter* is demonstrably justified in a free and democratic society. Specifically, this appeal provides the Court with an opportunity to consider the role that *Charter* values play in the fourth and final stage of the justification analysis, which involves measuring the proportionality of the law's effects.

From the perspective of the intervener, this case is not only about spontaneous or unplanned election advertising. It is also about the importance of privacy and anonymity in permitting an effective voice for unpopular or under-represented views during an election campaign.

While recognizing that s. 239 of the *Election Act* constitutes a breach of section 2(b) of the *Charter*, the learned trial judge failed to appreciate the full extent of the *Charter* infringement and the *Charter* values implicated.

A proper appreciation of the nature and significance of the breach in this case, when compared with the limited nature of the benefits from the impugned law, show that the deleterious effects, as measured by *Charter* values, outweigh the benefits of section 239. Accordingly, the *Charter* infringement cannot be justified under section 1.

PART 1 STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association ("BCCLA") is a non-profit, non-partisan, unaffiliated advocacy group whose objects include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

2. The BCCLA intervenes in this appeal with leave granted by Mr. Justice Willcock on December 9, 2014.

3. The BCCLA adopts the statement of facts set out in the appellant's factum.

PART 2 ISSUES ON APPEAL

4. The BCCLA intervenes on two issues:

   a. the nature and significance of the infringement of s. 2(b) of the *Charter of Rights* and Freedoms by s. 239 of the *Election Act*, RSBC 1996, c 106 ("*Election Act*"); and

   b. whether the deleterious effects of s. 239 are disproportionate to the benefits, at the proportionality of effects stage of the analysis under s. 1 of the *Charter*.

PART 3 ARGUMENT

A. Introduction

5. One cannot determine whether an infringement of a right or freedom is justified under s. 1 of the *Charter* without examining the seriousness and severity of the violation. The s. 1 analysis is contextual. The factors to be considered include the nature and importance of the infringed activity.

Harper v. Canada (A.G.), [2004] 1 SCR 827 (Joint Brief of Authorities, Tab 10), at para. 10, per McLachlin C.J.C., dissenting on other grounds;

Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 SCR 391 (Joint Brief of Authorities, Tab 10), at para 139.

6. Although relevant throughout the section 1 analysis, the nature and seriousness of an infringement is of particular importance to the fourth and final step of the justification analysis, in determining the proportionality of the law's effects. While the first three stages of *Oakes* are anchored in an assessment of the law's purpose, the fourth branch allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the infringement, or "whether the 'deleterious effects of a measure on individuals or groups' rights outweigh the public benefit."

Alberta v. Hutterian Bretheren of Wilson County, [2009] 2 SCR 567 (Joint Brief of Authorities, Tab 10), at paras. 72-78 ("*Hutterian Brethren*").

7. Sometimes overlooked in the broader s.1 analysis, the fourth stage performs a fundamentally distinct role. 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 effects, as measured by underlying *Charter* values.

Thompson Newspapers Co. v. Canada (A.G.), [1998] 1 SCR 877, at para. 125, as cited in *Hutterian Bretheren, supra*, at para. 77.

8. In the present case, the trial judge found that the requirement to register under s. 239 of the *Election Act* had "the effect of restricting spontaneous or unplanned election advertising," and therefore infringed s. 2(b) in a way that was more than "trivial or insubstantial."

Reasons for Judgment (Appeal Record, pp. 35), at paras. 121-126.

9. At the fourth stage of the *Oakes* test, on the other hand, the trial judge found that the process of registering requires "*minimal* personal information and undergoing a *minimal* administrative inconvenience."

Reasons for Judgment (Appeal Record, pp. 41), at para. 148 (emphasis added).

10. It was on the basis of perceiving the infringement to be something more than trivial, but yet minimal in nature, that the trial judge engaged in the proportionality analysis, and found that the benefits of the law were not outweighed by its deleterious effects.

11. For the reasons which follow, the BCCLA submits that the learned trial judge failed to appreciate the full nature and seriousness of the infringement caused by s. 239. This in turn led him to overlook the full scope of *Charter* values implicated by the law, and thereby err in the final stage of the proportionality analysis.

12. On a proper analysis, the deleterious effects of s. 239 exceed the restriction on spontaneous election advertising described by the trial judge. In light of the fact that the salutary effects identified by the trial judge are minor and largely theoretical, they cannot justify the encroachment upon fundamental *Charter* rights and values effected by s. 239.

B. The Nature and Significance of the Infringement

13. Section 239 of the *Election Act* requires every individual or organization who sponsors election advertising to be registered. As the appellant notes, the statutory definitions of "sponsor" and "election advertising" are expansive, and arguably include all forms of meaningful political speech. Section 239 therefore effectively requires every law-abiding person who intends to participate in the political discourse during an election campaign to provide his or her name and contact information to the chief electoral officer, who must, in turn, make that information publically available.

Election Act, (Joint Brief of Authorities, Tab 34), ss. 228, 229, 239, 240 and 250.

14. Section 239 is part of a broader regime of reporting, disclosure and attribution requirements in Part 11 of the *Election Act,* which, taken together, amount to a ban on anonymous political speech during an election campaign.

Election Act, ss. 231 and 244-245.

15. Section 239 also operates as a separate, enforceable, disclosure obligation. For example, persons who sponsor advertising which is excluded by regulation from the attribution requirement in s. 231 must still register in accordance with s. 239. Indeed, the Attorney General submits that one of the objectives of s. 239 is for the

electorate to know, "not only who is responsible for which advertisements, but who is participating generally."

Election Act, ss. 231(2) and 238;
Election Advertising Regulation, B.C. Reg. 329/2008;
Respondent's Factum, para. 72.

16. As the Supreme Court of Canada has held, there is "no denying that freedom of expression necessarily entails the right to say nothing." This protection extends to factual statements, which would include a person's name, home address and contact information. Section 239 requires public disclosure of a person's identify under conditions in which some people would choose to remain anonymous. In this way, s. 239 constitutes a form of compelled speech, which has the effect of impinging upon a person's informational privacy.

Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038 at 1080.

17. The importance of privacy in a free and democratic society cannot be understated. Informational privacy protects the right of the individual to determine when, how, and to what extent he or she will release personal information. As the Supreme Court has recognized, the protection of informational privacy is derived "from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit".

Dagg v. Canada (Minister of Finance), [1997] 2 SCR 403, at paras. 65-67.

18. Allowing persons to choose if, when, and under what circumstances, to disclose information about themselves is central to human dignity and autonomy. In the context of the *Charter*, the option to preserve one's anonymity is a necessary aspect of informational privacy, and "essential to the individual's personal growth and the flourishing of an open and democratic society." This *Charter* value is all the more critical in the information age, where personal information, once disclosed, cannot easily be recaptured.

R. v. Spencer, 2014 SCC 43, at paras. 41-48.

19. In assessing the nature and seriousness of the breach in this case, it should be

> noted that anonymity in the political context may be particularly important for vulnerable speakers or those expressing unconventional or underrepresented views. 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.
>
> *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825, at para. 60.

20. 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.

See e.g. *R. v. Zundel*, [1992] 2 SCR 731 at 766, 773, 777.

21. 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.

22. As a result, s. 239 makes the exercise of the fundamental *Charter* right to engage in political expression – which lies at the very core of the 2(b) guarantee – contingent on the partial abandonment of an equally fundamental *Charter* interest, to an individual's privacy. It requires individuals and organizations to abandon their anonymity as the purchase price to exercise free expression, at any level, during an election campaign.

23. Viewed from the perspective of those who are most in need of robust protection for freedom of expression, the *Charter* infringement occasioned by the registration requirement in s. 239 cannot be described as minimal, nor is it limited to

administrative inconvenience and delay. For those animated by a strong aversion to disclosure of their identity and personal information, either publicly or to the state, it may effectively constitute an indirect prohibition on public political expression during the election period. Like the widow's mite, such restrictions on expression, although perhaps "minimal" from the vantage point of government, are not "minimal" from the perspective of individuals and small groups, who may be unreasonably driven from the electoral process as a result of the registration requirement.

24. For these reasons, the BCCLA submits that the infringement in this case is more serious than the trial judge acknowledged, and requires a more compelling justification under a contextual section 1 analysis.

C. The Proportionality of the Law's Effects

25. The BCCLA respectfully submits that a full appreciation of the nature and seriousness of the *Charter* breach in this case, when weighed against the negligible benefits of the registration requirement, demonstrate that the invasion of *Charter* interests occasioned by s. 239 outweigh its salutary effects. As such, the section 1 justification must fail, if not before, at the final stage of the *Oakes* analysis.

26. The first part of the proportionality of effects stage of the *Oakes* test requires an identification of the benefits or "salutary effects" associated with the legislative goals of the provision.

Hutterian Bretheren, *supra* (Joint Brief of Authorities, Tab 1), para. 79.

27. Three salutary effects of s. 239 were identified by the trial judge: (1) it provides the chief electoral officer and the public with notice and confirmation of which third parties are engaging in election advertising; (2) it provides contact information in case of a problem with compliance with other advertising regulations; (3) it provides information with which to confirm the identity of sponsors identified in election advertising.

Reasons for Judgment (Appeal Record, pp. 37-38), at para. 132-134.

28. Despite these benefits, s. 239 does not contribute directly to the asserted goals of transparency, openness, public accountability, or an informed electorate, which are the objectives found by the court below to be 'pressing and substantial'. To the extent these objectives are advanced, it is by the attribution requirement under s. 231, and other provisions of the *Election Act*. Section 239 performs the more limited role of creating what amounts to a centralized list of authorized speakers for verification purposes.

29. In theory, universal registration, verified by a solemn declaration, serves the alleged "salutary effects" the government has identified. In reality, however, Elections BC uses the registration information to communicate with sponsors about election advertising rules.

30. There is no evidence that the chief electoral officer, or the public, benefits from knowing the identity and contact information of every person who sponsors or participates in an organization that sponsors election advertising. There is equally no evidence that partisans in British Columbia hide behind misleading attributions in the election advertising they sponsor, such that their "true" identity is needed to assess the objectivity of the message.

31. In short, the asserted salutary effects of universal registration are largely theoretical and speculative. On the evidence, the only benefit of s. 239 is the resulting administrative convenience enjoyed by Elections BC, permitting it to more readily send out reminders that individuals may be at risk of being penalized for participating in election-related discourse.

32. The second stage of the proportionality analysis involves a consideration of the deleterious effects of the provision. This stage of the analysis requires the court to consider the impact in terms of *Charter* values.

Hutterian Bretheren, supra. (Joint Brief of Authorities, Tab 1), para. 88.

33. As argued above, s. 239 has the effect of denying freedom of expression to individuals and organizations who choose to remain anonymous, and of chilling

the expression of those who are concerned their full, intended speech may constitute "election advertising" and thus trigger the requirement to be registered.

34. The deleterious effects of s. 239 therefore include the loss of privacy and anonymity, and the associated deterrent to full participation in the electoral process. Coupled with the harms identified by the appellants and the trial judge, this constitutes a serious intrusion upon *Charter* values.

35. As described above, the universal registration requirement also adversely affects small voices disproportionately. Private individuals and small organizations are the most vulnerable to the loss of anonymity required by s. 239, as a prerequisite to engaging in political discourse during an election period. In this way, universal registration works against the overall objectives of the election advertising provisions, because it tends to deter the smaller voices which are meant to be given a more level playing field. This will serve to intensify the advantage enjoyed by larger voices, like unions and corporations, who are less likely to be deterred by the registration requirements and the loss of anonymity.

36. In adopting the Attorney General's minimization of s. 239 (who describes it as a requirement to merely "complete and file a one page form"), the trial judge failed to measure its effects by the values underlying the *Charter*.

37. Measured by the values of privacy and encouraging participation in the electoral debate, particularly for unpopular or marginalized voices, it is not the length of the form that matters, but rather what it demands. A person's name and contact information, when disclosed publicly, is not insignificant personal information, but rather information that strikes at the core of the general right of all citizens to be left alone. The intrusion upon a person's right to decide what to disclose about themselves publicly is particularly harmful where the exercise of a fundamental freedom is made contingent on accepting that intrusion.

38. For these reasons, it is submitted that the salutary effects of s. 239 are not sufficient to justify the deleterious effects of the law.

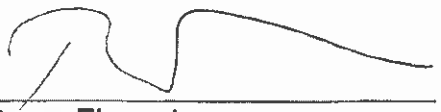
PART 4 NATURE OF ORDER SOUGHT

39. The BCCLA seeks leave to make oral submissions at the hearing of the appeal.

40. The BCCLA does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED January 23, 2015



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