



February 2, 2017

Keith Archer
Chief Electoral Officer
Elections BC, Victoria BC
By E mail

Re: Elections BC February bulletin on third party advertising

Dear Chief Electoral Officer,

We are writing to you regarding the Bulletin which went up on the Elections BC website on February 1. This is apparently your organization's response to the decision of the Supreme Court of Canada (the "SCC Judgment") last Thursday which clarified your previous erroneous interpretation of the meaning of the BC *Election Act's* third party spending provisions.

<http://www.elections.bc.ca/docs/homemade-election-advertising-bulletin-February-1-2017.pdf>

The Bulletin is plainly and obviously inconsistent with the SCC Judgment in many respects. The Court set out clearly that the sections in question apply to "paid advertising", not to individual or group expression that does not take the form of advertising as commonly understood.¹ This is an interpretation that narrows the scope of the *Election Act* to prevent its interference with the constitutional right of free expression, and must be read in that light.

Your Bulletin says that it is an offence for someone to

"... make and personally hand-out more than 25 copies of homemade signs or pamphlets during the campaign period."

In the SCC Judgment there is no support whatever for such a proposition. Free expression does not transform into paid advertising when a person crosses an arbitrary threshold of 25

¹ "In this case, each of these considerations indicates that s. 239 is directed only at those who undertake organized advertising campaigns — that is, "sponsors" who either pay for advertising services or who receive those services without charge as a contribution. In no case does the registration requirement apply to those engaged in individual self-expression." Para 21

instances of free expression. From where do you draw the authority for this draconian restriction, and how do you plan on enforcing it?

The Bulletin says further:

"There must be no question of who is responsible for the advertising. This means that the advertising must be hand-delivered directly to another person, not dropped in a mailbox or otherwise distributed anonymously".

Again, there is absolutely no support in the SCC Judgment for such a pronouncement. If a person is freely expressing themselves in a way that is not "sponsorship", the attribution rules do not apply to them. They can choose to be anonymous or identified, and that choice is a fundamental part of their free expression.

The Bulletin goes on:

"Groups of individuals or organizations that conduct any sort of election advertising are advertising sponsors and must register with Elections BC before sponsoring the advertising."

The SCC Judgment makes clear that free expression by groups and organizations is equally constitutionally protected expression and is to be treated in the same way as expression by individuals. The factual basis of the SCC Judgment was free expression made in the campaign period by FIPA, an organization, and the SCC Judgment referenced organizations as well as individuals as being able to express themselves without being considered "sponsors" so long as they were not engaging in paid advertising.²

We are extremely concerned that the Bulletin reflects an attempt by your office to return the province to a similar state of confusion and self-censorship that prevailed before the Supreme Court of Canada clearly stated that the law does not cover expression that is not advertising. If that is not your intention, please review the SCC Judgment (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16348/index.do>) and revise your Bulletin so that it is consistent with the reasons of the Court such that the conduct of Elections BC does not interfere with free expression of individuals and organizations who are not sponsors as the Court has defined them.

² " However, s. 239 of the Act limits the registration requirement by requiring registration only by individuals or organizations who "sponsor election advertising". The ordinary meaning of "sponsor" does not suggest a person engaged in individual self-expression, but rather a person or group that is undertaking or "sponsoring" an organized campaign. A "sponsor" is "a person or group that promotes another person or group in an activity or the activity itself, either for profit or for charity"" para 24

If you choose to respond to this letter, we would appreciate hearing whether you have discussed this with the Attorney General and whether she agrees with your interpretation of the SCC Judgment.

Sincerely,



Vincent Gogolek
Executive Director
FIPA



Micheal Vonn
Policy Director
BC Civil Liberties Association

Cc: Suzanne Anton, Attorney General of BC