36495

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N :

BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

Appellant

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO AND ATTORNEY GENERAL OF QUEBEC

Interveners

- and –

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND CANADIAN CIVIL LIBERTIES ASSOCIATION

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(Pursuant to r. 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. It is difficult, and often impossible, to scientifically test the effects of laws regulating elections. Electoral law objectives such as promoting fairness, meaningful participation, and confidence in the electoral process do not lend themselves to social science proof. In recognition of this difficulty, courts in Canada have applied a contextual approach to the justification analysis under s. 1 in which the nature and sufficiency of evidence required varies depending on the impugned measure. This approach has been applied in the electoral context with deference to legislative choices.

2. The impugned provision in this case, s. 239 of the British Columbia *Election Act* (the "*Act*"), requires sponsors of third-party advertising to register with the Chief Electoral Officer (the "CEO") regardless of the monetary value of the advertisement. On a careful review of the legislative debates, the text of the section and its place in the larger interconnected electoral financing scheme in British Columbia, the trial judge found that it served the objectives of increasing transparency, openness and public accountability in the electoral process, and promoting an informed electorate. In making these findings, the trial judge correctly adopted a contextual and deferential approach in his justification analysis of s. 239.

3. In carrying out his analysis, the trial judge also correctly applied the reasoned apprehension of harm standard, both at the minimal impairment and final balancing stages. Finally, Cohen J. properly rejected the suggestion that the existence of a monetary threshold for registration in other jurisdictions in Canada serves as a constitutional baseline for purposes of demonstrating minimal impairment or determining a remedy. The existence of alternative approaches to third-party registration in Canada merely demonstrates the reasonable range of alternative options open to legislatures to pursue electoral law objectives.

B. STATEMENT OF THE FACTS

4. The Attorney General of Canada ("AGC") accepts the facts as found by the courts below.

PART II – QUESTIONS IN ISSUE

5. By Order dated February 9, 2016, the Chief Justice stated the following constitutional questions:

> 1. Does section 239 of the *Election Act*, R.S.B.C. 1996, c. 106, infringe section 2(b) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms*?

6. The AGC accepts the lower courts' and the parties' positions that the answer to the stated constitutional question 1 is yes, and takes the position that the answer to question 2 is yes. In its intervention it will be addressing the following four issues:

(a) **Nature and sufficiency of the evidence required to justify a limit on a *Charter* right under s. 1 in the electoral law context**: The harms sought to be addressed by electoral laws do not lend themselves to empirical proof and the s. 1 analysis requires a contextual approach that is deferential to a legislature's choices.

(b) **Pressing and substantial objective:** The trial judge correctly assessed the importance of the purpose of s. 239 of the B.C. *Act* by accounting for its role in the larger electoral legislative scheme.

(c) **Minimal impairment and final balancing**: A reasoned apprehension of harm is not limited to cases involving "low value" speech, or to the first stages of the s. 1 analysis. In addition, comparative domestic election laws do not constitute an appropriate constitutional "baseline" against which to measure the impugned provision at the minimal impairment or remedy stages.

(d) **Remedy**: In the event that s. 239 of the B.C. *Act* is found to be unconstitutional, any remedy must be guided by respect for the role of legislatures in crafting electoral law.

PART III – STATEMENT OF ARGUMENT

A. NATURE AND SUFFICIENCY OF THE EVIDENCE REQUIRED UNDER S. 1 IN AN ELECTORAL LAW CONTEXT

(i) The nature and sufficiency of evidence required depends upon the whole context of the claim

7. This Court has rejected the imposition of rigid formulas and categorical rules in the justification analysis under s. 1. Contrary to the assertion of the appellant, the nature and sufficiency of the evidence required has never depended solely upon the type of alleged breach (e.g. "high value" or "low value" speech). Instead, the Court has consistently emphasized that the type of proof required will vary depending on the legislative context in which an impugned provision is found.[1]

8. In *Harper* and *Bryan*, both election law challenges, the majority of the Court outlined four contextual factors to aid in determining the nature and sufficiency of evidence required for the Attorney General to establish that a violation of s. 2(b) is saved by s. 1. These factors are: (i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity.[2]

9. The adoption of a contextual approach to assessing the nature and sufficiency of evidence in the s. 1 analysis is not simply a question of deference. As noted by Bastarache J. in *Bryan*, traditional forms of evidence may simply be unavailable or inappropriate:[3]

> *…The contextual factors are essentially directed at determining to what extent the case before the court is a case where the evidence will rightly consist of "approximations and extrapolations" as opposed to more traditional forms of social science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case.*

10. The four contextual factors set out by Bastarache J. in *Bryan* do not constitute a rigid or closed test. In *Bryan* itself, Bastarache J. made it clear that context could "*be best established by*

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[1] *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 [*Thomson Newspapers*] at para 88, **Book of Authorities of the Intervener, Attorney General of Canada (AGC Auth), Tab 15**; *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 [*Bryan*] at para 10, **Book of Authorities of the Respondent (Resp Auth), Vol I, Tab 8**; *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827 [*Harper*] at para 76, **Resp Auth, Vol I, Tab 3**.
[2] *Harper*, *ibid* at paras 76 - 88; *Bryan*, *ibid* at para 10.
[3] *Bryan*, *ibid* at paras 28-29.

reference to the four factors" – not that it could only be established by reference to them.[4] Lower courts have also not interpreted the four contextual factors to be a closed list.[5]

(ii) Objectives pursued by electoral laws do not lend themselves to empirical evidence

11. A contextual approach to determining the kind of evidence required under s. 1 is particularly critical in the electoral law context: The polycentric policy considerations required to regulate the fairness of democratic elections do not lend themselves to justification by empirical evidence. They are, however, the vital girders of Canadian democracy. Academic commentators, including those critical of a deferential approach to s. 1 analysis in an electoral context, have noted the difficulty, and often impossibility, of marshalling empirical evidence in support of election law objectives:[6]

> *Democratic systems are immensely complex with a wide array of institutions and actors. It is very difficult, if not impossible, to scientifically test the effects of many of the laws that regulate the political system. For example, it would be hard to conduct a randomized controlled trial to measure the effects of certain kinds of laws. The regulation of the democratic process is a quintessentially polycentric inquiry that involves policy determinations which will likely be made in the absence of the kind of social science data required to satisfy the* Oakes *test.*

12. The crafting of an electoral law requires the kind of "polycentric" decision-making that traditionally attracts judicial deference to legislative choices in Canada.[7] In keeping with this approach, this Court has asserted the need to adopt a "natural attitude of deference" toward legislatures which respects their right "to choose Canada's electoral model and the nuances inherent in implementing this model".[8] That approach can be contrasted with that adopted in the

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[4] *Ibid* at para 10. [Emphasis added.].
[5] See: *Canadian Doctors for Refugee Care v Canada (Attorney General*), 2014 FC 651 at para 885, **AGC Auth, Tab 4**; *Henry v Canada (Attorney General)*, 2010 BCSC 610 at para 230, **AGC Auth, Tab 5**; *British Columbia Teachers' Federation v British Columbia (Attorney General)*, 2009 BCSC 436 at para 160, aff'd 2011 BCCA 408, **AGC Auth, Tab 2**.
[6] Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32 NJCL 173 at 179, **Resp Auth, Vol I, Tab 21**.
[7] *Harper*, *supra* at paras 85-88, **Resp Auth, Vol I, Tab 3**; *Bryan*, *supra* at para 9, **Resp Auth, Vol I, Tab 8**; *Libman v Québec (Attorney General*), [1997] 3 SCR 569 [*Libman*] at paras 61-62, **Book of Authorities of the Appellant (App Auth), Tab 14**.
[8] *Bryan*, *supra* at para 9, **Resp Auth, Vol I, Tab 8**; *Harper*, *supra* at para 87, **Resp Auth, Vol I, Tab 3**.

United States where courts have been reluctant to permit restrictions on speech, even when those restrictions advance other democratic objectives:[9]

> *[Canada's] approach can be directly contrasted to the analysis that has been taking place in American jurisprudence, namely in* Buckley *and* Citizens United, *where the court has greatly limited the legislator's arsenal of "justifications" in support of the government objectives supporting expenditure limits. The USSC adopted the higher level of strict scrutiny when analyzing government regulation of expenditures because of its "direct assault to the first amendment", following* Buckley*… As a result the legislator essentially cannot legislate to regulate campaign finance, unless its objective fits within the narrow mold provided by the court.*

13. The lower courts correctly rejected a more libertarian approach as inconsistent with Canada's deferential approach which accepts the legitimacy of justifiable limits on political expression in order to promote other democratic objectives.

14. Deference does not constitute "blind reverence,"[10] nor does it diminish the burden of justification. Section 1 analysis still requires a determination of whether the impugned measure serves a pressing and substantial objective, is rationally connected to that objective, is minimally impairing, and has salutary effects that outweigh any deleterious effects – with all stages being assessed on a reasonable apprehension of harm standard. Legislatures are, however, accorded a considerable degree of deference to make choices best suited to achieving their objectives within a range of reasonable alternatives.[11]

B. PRESSING AND SUBSTANTIAL OBJECTIVE: AN IMPUGNED PROVISION MUST BE ASSESSED WITHIN THE CONTEXT OF ITS LARGER LEGISLATIVE SCHEME

15. The trial judge found that B.C.'s objective in introducing s. 239 was to increase "transparency, openness, and public accountability in the electoral process, and to promote an informed electorate".[12] This finding was based on the trial judge's careful review of the

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[9]Rachel Atkinson, "Too Much or Too Little? A Comparison of the Canadian and American Supreme Courts' Approaches to Third Party Expenditures in Election Campaigns" (2014) 8 Journal of Parliamentary and Political Law 687 at 709-710, **AGC Auth, Tab 17**; *Citizens United v Federal Election Commission*, 558 US 310 (2010), **Resp Auth, Vol I, Tab 2**; *Buckley v Valeo*, 424 US 1 (1976), **AGC Auth, Tab 16**.

[10] FIPA Factum, at paras 79, 81, 94.

[11]*Libman, supra* at para 62, **App Auth, Vol 14**. See also: *Canada (Attorney General) v JTI-MacDonald Corp.* 2007 SCC 30, [2007] 2 SCR 610 [*JTI-MacDonald Corp*] at paras 39 – 47, **App Auth, Tab 4**.

[12]*BC Freedom of Information and Privacy Association v British Columbia (Attorney General)*, 2014 BCSC 660 [BCSC Decision] at paras 116-17, 129-30, 138, 144, **Appellant's Record (App Rec), Vol I, pp 35-6, 38, 40, 41**.

legislative debates surrounding the introduction of the *Act*, the text of s. 239 and its surrounding provisions, and the evidence of the Deputy CEO.[13] It was also based on an assessment of the purpose of the impugned provision within its full electoral context.

16. While a limiting provision has to be justified on its own terms and defined as precisely as possible for its importance to be evaluated,[14] this Court has recently stated that the limiting provision must be assessed in "its full context… In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms."[15] Thus, the analysis of a provision's objectives must be assessed within the full context of its legislative scheme.[16]

17. The assessment of a legislative objective within the larger legislative context is particularly vital in challenges to electoral laws, which operate as inter-connected schemes. The Attorney General of British Columbia ("AGBC") rightly observes that s. 239 has stand-alone purposes, including providing leverage for compliance and enforcement measures in relation to self-identification on election advertising, allowing members of the public to verify the self-identifying information, and providing assurance that sponsors are truly independent of candidates and parties. While in respect of its application to small-spending sponsors, s. 239 serves no direct role in enforcing third-party advertising spending limits, it serves a vital indirect educative function that assists in ensuring compliance with detailed reporting obligations once small spenders exceed a certain spending threshold.[17] This nuanced understanding of legislative purpose, which informed the trial judge's approach, demonstrates how isolating impugned provisions from their context risks minimizing their importance and distorting the s. 1 analysis.

18. The approach of the trial judge is consistent with this Court's approach in *Harper*. In that case, this Court analyzed the objectives of the registration, attribution and disclosure provisions of the *Canada Elections Act*, and found that the provisions supported pressing and substantial

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[13] BCSC Decision at paras 7, 9-16, 19-22, 116-17, 120, 132-33, 138, **App Rec, Vol I, pp 3, 4-8, 35-36, 38-9, 40**.
[14] *Thomson Newspapers*, *supra* at para 98, **AGC Auth, Tab 15**.
[15] *R v Moriarity*, 2015 SCC 55, [2015] 3 SCR 485 [*Moriarity*] at paras 26, 48, **AGC Auth, Tab 11**.
[16] *R v Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 SCR 209 [*Advance Cutting & Coring*] at para 255 (LeBel J. dissenting, but not on this point, see para 290), **AGC Auth, Tab 9**; *Moriarity*, *ibid* at para 26, **AGC Auth, Tab 11**.
[17] AGBC Factum at paras 85-87.

objectives that included "the proper implementation and enforcement of the third party election advertising limits".[18] As the Court noted, "[t]o adopt election advertising limits and not provide for a mechanism of implementation and enforcement would be nonsensical".[19] The Court also found the registration, attribution and disclosure provisions enhanced informed voting, which the Court recognized as a *Charter* value.[20] These objectives were unanimously upheld as being pressing and substantial – and saved by s. 1 – including by the Chief Justice and Major J. in dissent in *Harper*.[21]

19. The appellant correctly points out that *Harper* does not constitute direct support for interpretation of the B.C. *Act* that was not before the Court. The significance of *Harper* (and *Bryan*), however, lies in the fact that this Court accepted as pressing and substantial such objectives as "information equality among voters", "transparency [of] the electoral process", providing "voters with relevant election information" and maintaining and enhancing the "integrity of the electoral process".[22] These objectives are certainly as general or "symbolic" as those accepted by the trial judge in the present case.

20. The fact that the Court did not, in *Harper*, consider the impact of the limitation upon "small spenders" in upholding these objectives as pressing and substantial does not diminish its precedential significance in this case. The impact upon particular claimants is not the focus of the first stage of the s. 1 analysis. It is the focus of the remaining stages.

21. As this Court stated in *Bryan*, "the first stage of the s. 1 analysis is not an evidentiary contest".[23] Instead, "some objectives, once asserted, can simply be accepted by the Court as always pressing and substantial in any society that purports to operate in accordance with the tenets of a free and democratic society".[24] Therefore, objectives such as transparency, openness, and public accountability in the electoral process, as well as the promotion of an informed electorate are always pressing and substantial within the meaning of s. 1.

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[18] *Harper*, *supra* at para 142, **Resp Auth, Vol I, Tab 3**.
[19] *Ibid.*
[20] *Ibid*.
[21] *Ibid* at para 48.
[22] See: *Ibid* at paras 103, 142, 145; *Bryan*, *supra* at para 37, **Resp Auth, Vol I, Tab 8**.
[23] *Bryan*, *ibid* at para 32.
[24] *Ibid* at para 34.

C. MINIMAL IMPAIRMENT AND FINAL BALANCING

(i) Reasoned apprehension of harm is not restricted to cases of "low value" speech and can be applied in the minimal impairment and final balancing stages of the s. 1 analysis

22. This Court has found that a reasoned apprehension of harm may ground a justification at all stages of the s. 1 test, including in the electoral law context, and not only in cases involving "low value" speech.

23. *Harper* and *Bryan*, both of which involve political expression in an electoral context, affirmed the proper use of a reasoned apprehension of harm standard. This standard applies where it is difficult or impossible to measure the impact of a harm, and where logic and reason (assisted by some social science evidence where available) can sufficiently demonstrate the harm sought to be remedied.[25] This standard was not applied in *Thomson Newspapers* because logic rebutted any reasoned apprehension of harm. There was no suggestion, however, that a reasoned apprehension of harm should be restricted to cases of "low value" speech.[26]

24. Significantly, while the majority in *Sauvé* did not uphold the impugned limitation on s. 3 voting rights, it did not insist on empirical evidence to establish a justification. The majority agreed that it would suffice for the justification to be "supported by logic and common sense", which the majority found lacking in that case.[27]

25. This Court has consistently examined apprehensions of harm at both the minimal impairment[28] and final balancing stages[29] of the s. 1 test. Whether a law is minimally impairing and its salutary and deleterious effects proportionate simply cannot be determined in isolation from the law's objectives. If a reasoned apprehension of harm can properly be relied upon to

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[25] *Ibid* at para 19; *Harper supra* at para 79, **Resp Auth, Vol I, Tab 3**.
[26] *Thomson Newspapers*, *supra* at paras 115-117, **AGC Auth, Tab 15**.
[27] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 at para 9, **App Auth, Tab 26**.
[28] See: *R v Butler*, [1992] 1 SCR 452 at 505, **AGC Auth, Tab 10**; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian*] at paras 54, 76, **AGC Auth, Tab 1**; *Irwin Toy Ltd. v Quebec (Attorney General.)*, [1989] 1 SCR 927 at 993, **AGC Auth, Tab 6**; *Thomson Newspapers*, *supra* at paras 115 - 117, **AGC Auth, Tab 15**; *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 at para 100, **AGC Auth, Tab 12**; *Saskatchewan Human Rights Tribunal v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*] at para 135, **AGC Auth, Tab 14**.
[29] See: *Hutterian, ibid* at paras 78, 85, **AGC Auth, Tab 1**; *Thomson Newspapers, ibid* at para 125, **AGC Auth, Tab 15**; *Sharpe*, *ibid* at para 103, **AGC Auth, Tab 12**; *Harper*, *supra* at paras 88, 120, **Resp Auth, Vol I, Tab 3**; *Whatcott, ibid* at para 148, **AGC Auth, Tab 14**; *Little Sisters Book & Art Emporium v Canada (Minister of Justice),* 2000 SCC 69, [2000] 2 SCR 1120 at paras 147, 153, **AGC Auth, Tab 7**.

establish a legislative objective, it follows that the same apprehended harm may be relied upon in conducting the minimal impairment and final balancing analyses.

26. Cohen J. correctly referenced the reasoned apprehension of harms he had identified within his proportionality analysis. Specifically, he found:

> (a) At the rational connection stage, that the means by which s. 239 allowed the CEO to receive notice and confirm which third parties were engaging in sponsored election advertising was rationally connected to the objectives of openness, transparency and public accountability in the electoral process – and the goal of an informed electorate. [30]
>
> (b) At the minimal impairment stage, that the provisions were a reasonable approach, within the spectrum of possible measures, in light of these same objectives.[31]
>
> (c) Finally, at the final balancing stage, that the salutary effects of these same objectives outweighed the restrictive effect on spontaneous political expression which he noted required only the providing of minimal personal information and undergoing a minimal administrative inconvenience.[32]

Cohen J.'s analysis could not have been carried out without referencing the objectives he found to be pressing and substantial in the application of a reasoned apprehension of harm standard. In adopting this approach, he did not err.

(ii) Comparative domestic law is not a constitutional "baseline" for the purposes of the minimal impairment analysis

27. Monetary thresholds for registration in electoral legislation in other Canadian jurisdictions do not establish a constitutional "baseline" against which s. 239 of the *Act* should be measured.

28. Legislators do not have to duplicate the legislative choices of other jurisdictions on the same subject-matter in order to satisfy the minimal impairment test. In *Advance Cutting & Coring*, LeBel J. described differing provincial responses to similar problems as "part of the very fabric of the Canadian constitutional experience," and observed that the "principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity".[33] More recently, in *Quebec v A*, McLachlin C.J. similarly described minimal impairment as being informed by the federal values of distinctiveness,

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[30] BCSC Decision at paras 132-133, **App Rec, Vol I, pp 38-9**.
[31] BCSC Decision at para 144, **App Rec, Vol I, p 41**.
[32] BCSC Decision at para 148, **App Rec, Vol I, p 42**.
[33] *Advance Cutting & Coring*, *supra* at para 275, **AGC Auth, Tab 9**.

diversity and experimentation, and cautioned against applying minimal impairment "in a manner that amounts to identifying the Canadian province that has adopted the 'preferable' approach to a social issue and requiring that all other provinces follow suit".[34]

29. In past election law cases, Canadian courts have specifically rejected comparative electoral regimes as appropriate constitutional baselines to measure minimal impairment. In *Thomson Newspapers*, a majority of this Court held that it was not sufficient at the minimal impairment stage for government to point to similar restrictions on the publication of election surveys in other countries, since "[n]ot only may the social context be quite different from that in Canada, but also the legal context within which measures restricting the freedom of expression are evaluated may be dissimilar".[35]

30. A cross-jurisdictional comparison of monetary thresholds in isolation from their legislative context would not account for such diverse factors as the administrative processes governing compliance and enforcement, the consequences for violating the registration requirements, and resources available for education and enforcement.[36] Such a comparative approach in isolation risks comparing apples to oranges.

31. Instead of constituting "baselines", against which legislation must be measured, the existence of a range of different approaches to regulating sponsors of third-party advertising demonstrates the many reasonable alternatives open to legislatures to pursue their electoral policy objectives. Legislatures are owed deference in choosing where to strike the balance within this reasonable range when crafting electoral legislation.[37]

D. REMEDIAL CHOICES IN THE ELECTION LAW CONTEXT SHOULD BE GUIDED BY RESPECT FOR LEGISLATURES

32. Should it become necessary for this Court to consider an appropriate remedy in this case, it should be guided by respect for the role of legislatures.[38] Reading in is only appropriate where

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[34] *Québec v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 440, **AGC Auth, Tab 8**.
[35] *Thomson Newspapers*, *supra* at para 121, **AGC Auth, Tab 15**. See also *British Columbia Teachers' Federation v British Columbia (Attorney General)*, 2011 BCCA 408 at para 60, aff'g 2009 BCSC 439, **AGC Auth, Tab 3**.
[36] AGBC Factum at paras 104-07.
[37] *JTI-MacDonald Corp.*, *supra* at para 43, **App Auth, Tab 4**.
[38] *Schachter v Canada*, [1992] 2 SCR 679 [*Schachter*] at 707, 718, **AGC Auth, Tab 13**; *Sharpe*, *supra*, at para 121, **AGC Auth, Tab 12**.

it can be determined that a legislature with knowledge of the constitutional defect would have enacted the same scheme.[39]

33. Should this Court find s. 239 unconstitutional, there are several legislative options open to B.C. These include enacting a monetary threshold of the type proposed by the appellant, preserving the existing nil threshold but amending the definitions of "election advertising" to explicitly exempt handmade signs, t-shirts, and other forms of individual expression, and amending the registration process to address privacy concerns relating to public access to registrant information. As between these legislative options, there is no evidence that B.C. would select a monetary threshold, let alone that it would set this threshold at $500 as opposed to some other amount. Reading in is inappropriate in these circumstances.

34. The appellant suggests that in *Carter*, this Court abandoned its traditional reluctance to read terms into legislation. This assumes that the remedy in *Carter* was an instance of reading in as opposed to a straight-forward striking down. It is not at all clear, however, that this is the case. Reading in, in the circumstances of *Carter*, would have involved a departure from the settled principles on the appropriate use of this remedy, with no mention of those principles or the governing jurisprudence.[40] Moreover, the Court in *Carter* suspended its declaration for 12 months and re-iterated its long held view that "[c]omplex regulatory regimes are better created by Parliament than by the courts".[41]

35. The appellant also suggests that reading in is appropriate because the Legislature may be unable to address any constitutional defects identified by this Court before the May 2017 provincial election. By this logic, the traditional judicial posture of respect to the remedial choices of legislatures would be set aside in the electoral context whenever there is an election approaching. This logic finds no support in the jurisprudence and indeed would be directly at odds with what this Court has described as a "natural attitude of deference" toward legislatures in electoral matters.[42]

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[39] *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at para 51, **App Auth, Tab 18**.
[40] *Schachter*, *supra* at 707, 718, **AGC Auth, Tab 13**; *Sharpe*, *supra* at para 121, **AGC Auth, Tab 12**.
[41] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at paras 125, 126, **App Auth, Tab 6**.
[42] *Bryan*, *supra* at para 9, **Resp Auth, Vol I, Tab 8**.

PART IV – NATURE OF ORDER SOUGHT

36. The AGC says that the stated constitutional question 1 should be answered yes and the stated constitutional question 2 should be answered yes.

PART V – COSTS

37. The AGC is not seeking costs and no costs should be ordered against her.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 25th day of July, 2016.

Michael H. Morris
Of Counsel for the Intervener, the Attorney General of Canada

NOTICE TO THE RESPONDENT:

Pursuant to subsection 44(1) of the Rules of the Supreme Court of Canada, this appeal will be inscribed by the Registrar for hearing after the Respondent's Factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

PART VI – TABLE OF AUTHORITIES

Cases	**Cited at paragraph**
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567	25
British Columbia Teachers' Federation v British Columbia (Attorney General), 2009 BCSC 436, aff'd 2011 BCCA 408	10
British Columbia Teachers' Federation v British Columbia (Attorney General), 2011 BCCA 408, aff'g 2009 BCSC 436	29
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Henry v Canada (Attorney General), 2010 BCSC 610	10
Irwin Toy Ltd. v Quebec (Attorney General), [1989] 1 SCR 927	25
Libman v Quebec (Attorney General), [1997] 3 SCR 569	12, 14
Little Sisters Book & Art Emporium v Canada (Minister of Justice), 2000 SCC 69, [2000] 2 SCR 1120	25
Québec v A, 2013 SCC 5, [2013] 1 SCR 61	28
R v Advance Cutting & Coring Ltd., 2001 SCC 70, [2001] 3 SCR 209	16, 28
R v Bryan, 2007 SCC 12, [2007] 1 SCR 527	8-10, 12, 19, 21 23, 35
R v Butler, [1992] 1 SCR 452	25
R v Ferguson, 2008 SCC 6, [2008] 1 SCR 96	32

Cases	**Cited at paragraph**
R v Moriarity, 2015 SCC 55, [2015] 3 SCR 485	16
R v Sharpe, 2001 SCC 2, [2001] 1 SCR 45	25, 32, 34
Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 SCR 519	24
Schachter v Canada, [1992] 2 SCR 679	32, 34
Saskatchewan Human Rights Tribunal v Whatcott, 2013 SCC 11, [2013] 1 SCR 467	25
Thomson Newspapers Co. v Canada (Attorney General), [1998] 1 SCR 877	7, 16, 23, 25, 29
INTERNATIONAL CASELAW	
Buckley v Valeo, 424 US 1 (1976)	12
Citizens United v Federal Election Commission, 558 US 310 (2010)	12
SECONDARY SOURCES	
Rachel Atkinson, "Too Much or Too Little? A Comparison of the Canadian and American Supreme Courts' Approaches to Third Party Expenditures in Election Campaigns" (2014) 8 Journal of Parliamentary and Political Law 687	12
Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32 NJCL 173	11

PART VII – STATUTES RELIED ON

1. *Election Act*, RSBC 1996, c 106, ss 228-29, 239, 252.

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 campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include

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

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

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

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

"value of election advertising" means

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

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

Tenant and strata election advertising

228.1 (1) A landlord or person acting on a landlord's behalf must not prohibit a tenant from displaying election advertising posters on the premises to which the tenant's tenancy agreement relates.

(2) A strata corporation or any agent of a strata corporation must not prohibit the owner or tenant of a strata unit from displaying election advertising posters on the premises of his or her unit.

(3) Despite subsections (1) and (2), a landlord, a person, a strata corporation or an agent referred to in that subsection may

(a) set reasonable conditions relating to the size or type of election advertising posters that may be displayed on the premises, and

(b) prohibit the display of election advertising posters in common areas of the building in which the premises are found.

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.

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.

Prosecution of offences

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

(1.1) If the chief electoral officer is satisfied that there are reasonable grounds to believe that an individual or organization has contravened this Act, the chief electoral officer may refer the matter to the Criminal Justice Branch of the Ministry of Justice for a determination of whether to approve prosecution.

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

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