S.C.C. FILE NO. _____

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

BETWEEN:

B.C. FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

APPLICANT
(Appellant)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

(B.C. Freedom of Information and Privacy Association, Applicant)

(pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 as amended)

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART I. OVERVIEW AND STATEMENT OF FACTS

Overview

1. This case is about political expression and the government onus of proving that such restrictions are justified. The legislation in question, the *Election Act*, R.S.B.C. 1996, c. 106 (the "BC Act"), imposes an absolute ban on unregistered expression that falls within the very broad definition of election advertising. The applicant takes issue, not with the registration requirement, but with the absence of a minimum threshold for registration – a measure adopted in many comparable legislative instruments across Canada and an important safety valve, designed to limit the impact of the registration requirement on individuals and small spenders.

2. Without a minimum threshold, the prohibition includes even home-made signs in windows and bumper stickers. It 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. Once an election engages an issue, signage in respect of that issue will fall within the ambit of the prohibition unless the advertiser registers, even if the signage pre-existed the election period.[1]

3. Saunders J.A. described the breadth of this provision, dissenting but not on this point:

> [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

[1] *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2015 BCCA 172 [CA Reasons], ¶¶61, 68, Saunders J.A., dissenting but not on this point

> 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.[2]

4. Cohen J. rightly found that the registration requirement has a restrictive effect on spontaneous political expression.[3] That finding was unchallenged and the majority of the Court of Appeal noted as well that the registration requirement inhibits "political expression by persons who do not wish their names and addresses to become public knowledge."[4] Justice Saunders, dissenting but not on this point, agreed that the BC Act was likely to "chill some who otherwise could muster the courage to stick their head over the parapet and publically advocate a view on a public issue" and for those who for reasons of personal security will not register, it is a complete barrier to their participation in public discourse.[5]

5. In light of the "fundamental importance" of political expression, Cohen J. rightly found that this provision infringed of s. 2(b) of the *Charter*[6] and that the infringement occasioned by s. 239 of the BC Act was not "trivial or insubstantial,"[7] indeed the infringement was conceded by the Attorney General of British Columbia ("AGBC") at the BC Court of Appeal[8] and was characterized by the BC Court of Appeal majority as "obvious."[9]

6. Indeed, the central issues in this case are questions of law; the evidence in this case was minimal, unchallenged and the facts are not controversial.

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[2] CA Reasons, ¶68, Saunders J.A., dissenting but not on this point
[3] *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2014 BCSC 660 [TJ Reasons], ¶¶121, 142
[4] CA reasons, ¶56
[5] CA Reasons, ¶69
[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*")
[7] TJ Reasons, ¶¶123-26
[8] CA Reasons, ¶62, Saunders J.A., dissenting but not on this point
[9] CA Reasons, ¶1

7. This case involves a legal controversy surrounding the s. 1 justification analysis by the courts below. The fundamental issue raised by this case is the standard to be applied and the nature and extent of the evidence required to demonstrably justify such an admitted and obvious *Charter* breach of political expression.

8. In this case, the Courts below have inappropriately imported a reasoned apprehension of harm analysis into consideration of whether the law minimally impairs and is proportional. This is a fundamental analytical error that leads to a reduced s. 1 threshold and effectively reduces the onus. An "obvious" infringement with people's free political expression has been found to be justified by the lower courts despite AGBC advancing *no* evidence to support the impugned law. In fact, the evidence below established that the Chief Electoral officer viewed British Columbia's imposition of a blanket registration requirement as unnecessary.

9. It is an issue of distinct public importance that an obvious infringement of free political expression could be justified without evidence and on the mere assertion that the restriction was adopted simply for administrative convenience, particularly in the face of evidence of a simple, alternative measure employed elsewhere to achieve the same objectives. This is a low water mark for justification under s. 1 in the Canadian jurisprudence, and it sets a dangerous precedent.

10. In light of the expanding regulatory sphere in Canadian society, the applicant's position is that even where governments have a reasoned apprehension of harm that is sought to be addressed through regulation, courts must use rigour in scrutinizing administrative incursions into fundamental freedoms, especially at the final two steps of the s. 1 analysis, in order to safeguard Canadians' fundamental rights. These incursions can collectively result in a "regulatory creep" which will have insidious, indeed Orwellian, consequences if allowed to propagate with minimal or no justification as occurred in this case.

Background Facts

11. The applicant is a non-profit society that advocates in a variety of ways for access to government information and for the protection of privacy.[10]

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[10] TJ Reasons, ¶2

12. This application for leave to appeal arises from proceedings that are "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")."[11] In each of the prior three proceedings, provisions of the BC Act were found to be unconstitutional.[12]

13. Part 11 of the BC Act 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, telephone numbers 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.[13] This public record is available "indefinitely to all."[14]

14. AGBC, therefore, had the burden of demonstrable justification under s. 1 of the *Charter*. Yet AGBC led very little, if any, evidence in support of its task of justification. As the BC Court of Appeal majority noted, there were only two affidavits of note in this case, only one of which was led by AGBC. There was no royal commission report or social science evidence before the court in aid of AGBC's burden of justification.[15]

15. The applicant led affidavit evidence appending a report from the CEO. The CEO has been recommending for years that a minimum expenditure threshold be adopted in BC.[16] This is significant because the CEO is charged with, *inter alia*, administering elections, ensuring they are fair and making recommendations to improve the election process in BC.[17] The recommendation shows that while some of the registration information gathered from low spending third parties as a result of the infringement may be used from time to time, it is not needed. The CEO is evidently comfortable with being able to contact small spending third party

[11] CA Reasons, ¶1
[12] CA Reasons, ¶2
[13] CA Reasons, ¶1; ¶60 per Saunders J.A. dissenting but not on this point
[14] CA Reasons, ¶56
[15] CA Reasons, ¶22
[16] TJ Reasons, ¶¶88-89
[17] *Election Act*, s. 12

election advertisers if required by using means other than consulting with their registration forms and there is no evidence that his office has any difficulty doing so.

16. The applicant's affidavit also contained a chart showing election finance provisions in other Canadian provinces. It is noteworthy that in the *Canada Elections Act* ("*Elections Act*"),[18] and in every province that has third party election advertising restrictions, there is a minimum threshold of expenditures before any registration requirement applies. Manitoba, Ontario, New Brunswick, and Nova Scotia all have provisions similar to s. 353 of the *Elections Act* with $500 registration thresholds, and Alberta has a minimum threshold of $1,000.[19] In BC, there is no minimum. The result is that persons who within the campaign period make and wear out of the house a t-shirt that says "Vote for the Environment" or tape a sign on their car window that says "End Poverty," must register as election advertisers or be at jeopardy of a $10,000 fine and a year in jail.

17. Given the many other jurisdictions in Canada that have a minimum threshold of expenditures before any registration requirement applies, one would have expected AGBC to justify its anomalous approach by recourse to *some evidence* that such systems lead to any harms such as third parties having undue influence on elections. While this evidence may not have been scientific or conclusive, it could have included evidence of the ubiquity of low cost election advertising, voter complaints, the CEO's views in those jurisdictions and social science evidence (such as that relied on by the Supreme Court of Canada in *Harper*[20]). There was no such evidence.

18. The applicant's materials also included a report published by the Canadian Centre for Policy Alternatives, the British Columbia Civil Liberties Association, and the applicant entitled *Election Chill Effect: The Impact of BC's New Third Party Advertising Rules on Social Movement Groups*.[21] The report is in the record to show the government had notice of the concerns with s. 239 of the BC Act. As the onus was on the government in s. 1, the report was not relied on by

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[18] *Canada Elections Act*, S.C. 2000, c. 9, s. 353
[19] *The Election Financing Act*, C.C.S.M., c. E27 (Manitoba), Part 12 "Third Party Spending"; *Election Finances Act*, R.S.O., c. E.7 (Ontario), ss. 37.5-37.13; *Political Process Financing Act*, S.N.B. 1978, c. P-9.3 (New Brunswick), s. 84.3(1); *Elections Act*, S.N.S. 2011, c. 5 (Nova Scotia), Part I, ss. 275-84; *Elections Finances and Contributions Disclosure Act*, R.S.A. 2000, c. E-2 (Alberta), s. 9.1(1).
[20] *Harper v. Canada*, 2004 SCC 33 [*Harper*]
[21] Affidavit of Vincent Gogolek sworn March 12, 2013, Exhibit B

the applicant for the truth of its contents. The government produced no expert report, social science or survey evidence in support of their case under s. 1.

19. AGBC merely led an affidavit from Nola Western, the Deputy CEO, which simply described the role of Elections BC, the workings of ss. 239 and 240 of the BC Act, and how the information required in an application for registration is used.[22] Ms. Western also acknowledged the recommendations of the CEO that the legislation should include a minimum expenditure threshold. In the summary trial, the AGBC had argued to the trial judge that Ms. Western's affidavit was not being relied upon as s. 1 evidence. This meant that the AGBC led no s. 1 evidence at all.

20. The evidence established that s. 239 imposes an "'administrative burden' that facilitates contacting third parties."[23] The information is used "only for administrative convenience."[24]

21. While there was disagreement between the BC Court of Appeal majority and Saunders J.A., dissenting, as to whether this administrative burden was onerous, both the majority and dissenting judgments rightly recognized that in addition to interfering with spontaneous political expression by prohibiting it until the various protocols of registration within government office hours are satisfied, the act of registration may inhibit political expression by persons who do not wish their names and addresses to become public knowledge.[25] Saunders J.A., dissenting, described the issue as follows:

> [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

[22] CA Reasons, ¶24
[23] CA Reasons, ¶49
[24] CA Reasons, ¶56
[25] CA Reasons, ¶¶53-56

> 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.[26]

22. The "significant" penalties for contravening s. 239 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.[27]

23. On these facts, leave to appeal is sought from an order of the British Columbia Court of Appeal which dismissed an appeal from an order upholding the constitutional validity of s. 239 with little or no evidence in support of the section 1 analysis.

PART II. STATEMENT OF QUESTION IN ISSUE

24. The issue of public and national importance raised by this application is whether, in light of the expanding regulatory sphere, a registration requirement covering all political advertising – without a minimum threshold – which results in an admitted and obvious breach of *Charter* rights may ever be justified without evidence and on the mere assertion that the restriction was adopted simply for administrative convenience, particularly in the face of evidence of a simple, alternative measure employed elsewhere to achieve the same objectives.

25. If the BC Court of Appeal majority judgment is allowed to stand, government will be permitted to brazenly breach fundamental freedoms with minimal, if any, justification. The circumstances and manner in which such infringements could be carried out in the expanding regulatory sphere are too numerous to count. The consequences could be devastating to our collective commitment to civil liberties.

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[26] CA Reasons, ¶69, Saunders J.A., dissenting; see also majority judgment at CA Reasons, ¶¶53-56
[27] CA Reasons, ¶70, Saunders J.A., dissenting but not on this point

PART III. STATEMENT OF ARGUMENT

A. Public Importance of Addressing Regulatory Incursions on Civil Liberties

26. Given the vastness of the regulatory sphere and the state's ubiquitous use of regulatory offences to accomplish government objectives, it is entirely predictable that, from time to time, regulatory offences will give rise to substantial legal questions of patent public and constitutional importance. This is what has occurred in the present case. Indeed, in this case, it is the very regulatory context which adds to the matter's significance.

27. Canadians live in a legal environment thick with regulations. As Archibald, Jull and Roach observe, "Regulations cover every aspect of modern society from health and safety to equality and social policy."[28] In the 1980s, the Law Reform Commission of Canada estimated that any individual was subject to over 40,000 provincial regulatory offences[29] and the Department of Justice counted over 97,000 federal regulatory offences.[30] Despite changing trends over time, complex and pervasive regulation remains a fact of the everyday lives of ordinary Canadians.[31] In *R. v. Wholesale Travel Group Inc.*, Justice Cory summarized the centrality and prevalence of regulation as a method of governance:

> It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted....[32]

28. Beneficial though government regulation may often be, the regulatory or quasi-criminal sphere poses particular stresses and challenges for the administration of justice in Canada; as R.C.B. Risk observed, regulation presents "distinctive problems, especially with the individual and the state."[33] The threat to civil liberties that regulatory prohibitions give rise to may be less

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[28] T.L. Archibald, Kenneth E. Jull, and Kent W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, looseleaf (Aurora, Ont.: Canada Law Book, 2010) ("*Regulatory and Corporate Liability*") at 1-3

[29] Law Reform Commission of Canada, *Studies in Strict Liability* (Ottawa: Law Reform Commission of Canada, 1974), pp. 2, 10

[30] Law Reform Commission of Canada, *Policy Implementation, Compliance and Administrative Law* - Working Paper 51 - (Ottawa: Law Reform Commission of Canada, 1986), p. 38

[31] *Regulatory and Corporate Liability*, note 6

[32] *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, p. 221

[33] R.C.B. Risk, "Lawyers, Courts, and the Rise of the Regulatory State" (1984) 9 Dalhousie L.J. 31 at 54

stark than those arising from, for example, criminal prohibitions; however, the very proliferation of regulatory burdens and the lack of pecuniary incentive or assistance for challenging them are just some of the reasons to look closely at the justification for those challenges that do arise especially where the *Charter* breaches are "obvious."[34]

29. Constitutions and constitutional rights serve to constrain and discipline the exercise of state power. As this Court has stated, it is a fundamental postulate that "in a constitutional democracy, all government power must be exercised in accordance with the Constitution."[35]

30. Given that regulatory offences are now one of the chief means of exercising state power, when a proceeding is brought forward to test an admitted and "obvious" regulatory breach of *Charter* rights, government action must be fully and assiduously tested and governments must be disciplined in discharging a rigorous standard and process of demonstration in order to justify incursions on fundamental freedoms. This process should include evidence not merely apprehensions and this evidence should cover not only the state objective but how the regulatory tool is used in practice, what other tools exist to substantially meet the state objective and what actual effects these uses have.

31. No obvious *Charter* breach that is neither trivial nor insubstantial can be justified by a measure used for mere "administrative convenience"[36] as occurred in this case. Allowing such justification to stand ensures that the state's robust regulatory power is effectively immunized from constitutional scrutiny. While this concern is pressing in the elections context, it is not limited to this sphere. Absent the discipline of justification, such creeping regulatory incursion on civil liberties could occur in any and all of the vast web of regulations shaping our lives from cradle to grave.

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[34] CA Reasons, ¶1
[35] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, ¶37
[36] CA Reasons, ¶56

B. Public and National Importance of Protecting Free Political Speech in Particular

32. Political expression is the lifeblood of a democracy. There are few, if any, rights of such fundamental importance.[37] Such a wide-reaching infringement as that shown in this case - touching as it does upon the rights of all British Columbians to express themselves on political matters during elections and to receive the benefit of such expression – is of a special and extraordinary quality. Cases like this that wrongly uphold unjustified infringements of political expression are of national and public importance because while this case arises under the BC Act, the precedent could give rise to similar restrictions in the regulation of elections in every jurisdiction in Canada and, indeed, in other contexts outside of the regulation of elections.

33. Cohen J. rightly recognizing the significance of the expression at stake:

> [124] Given the fundamental importance of all forms of political expression (as long as such expression is not violent: *Irwin Toy*, at para. 42) to democratic society, the fact that spontaneous or unplanned forms of election advertising may be most affected by the requirement to register is not a trivial or insubstantial effect.[38]

34. Cohen J. noted that the inquiry at this stage was "not limited to the nature of the regulatory requirement but asks whether the *effect* of the legislation is trivial or insubstantial."[39] Cohen J. found the effect was not trivial or insubstantial.[40] That effect was the restriction of "spontaneous or unplanned election advertising, which, like other forms of political expression, enriches political discourse."[41] The BC Court of Appeal rightly apprehended that the effect was not limited to spontaneous expression but included a chilling effect in particular on persons who would choose to remain anonymous, vulnerable persons, or those wishing to express unconventional or underrepresented views.[42] Cohen J. rightly found that in limiting participation in this way, s. 239 has the effect of undermining the values underlying s. 2(b) of the *Charter*.[43]

35. As Saunders J.A. observed, dissenting, but not on this point:

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[37] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, p. 1327 per Dickson, C.J. and Lamer and Cory J.J.
[38] TJ Reasons, ¶124
[39] TJ Reasons, ¶125
[40] TJ Reasons, ¶126
[41] TJ Reasons, ¶121
[42] CA Reasons, ¶56
[43] TJ Reasons, ¶121

> [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.[44]

36. AGBC failed to provide any such compelling justification in this case as is explained below and the impact this failure has on elections in British Columbia as well as the precedent set for unjustified infringements of *Charter* rights including political expression nationwide, are of compelling public and national importance.

C. Public and National Importance of Protecting A Robust Process of Demonstration Under Section 1

37. This case presents this Court with a needed opportunity to clarify that even where harms cannot be proven to a scientific certainty such that a reasoned apprehension of harm is resorted to at the first stages of the s. 1 analysis, s. 1 requires a process of demonstration if *Charter* breaches are to be justified. That process must include at least some evidence about the efficacy of available legislative alternatives and the law's actual effects. There was none in this case.

38. In *RJR-MacDonald*, this Court explained that it is the state who bears the evidentiary onus under s. 1 of the *Charter* and that it is a heavy burden. The Court clarified the extent of this burden as follows:

> 128 ... to meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.[45]

39. The standard of proof under s. 1 has been variously described as rigorous[46] or "onerous"[47] by this Court.[48] Since political expression is at the very heart of freedom of expression, it should normally benefit from a high degree of constitutional protection, that is, the

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[44] CA Reasons, ¶67, Saunders J.A., dissenting but not on this point
[45] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, ¶128 (emphasis in original)
[46] *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], p. 137; *Andrews v. Law Society British Columbia*, [1989] 1 S.C.R. 143, p. 201
[47] *Lavoie v. Canada*, 2002 SCC 23, ¶6
[48] *Oakes*, pp. 135-36

courts should generally apply a high standard of justification to legislation that infringes the freedom of political expression.[49]

40. This was a case, as is generally the case,[50] where "cogent and persuasive"[51] evidence was required to "demonstrably" justify the infringement under s. 1. Yet AGBC introduced no evidence relevant to the s. 1 analysis and Cohen J. and the BC Court of Appeal majority effectively reversed the onus of proof under s. 1 upholding the law in the absence of any evidence from AGBC to justify it.

41. What was provided by AGBC was an affidavit from the Deputy CEO which admitted that the information collected was not necessary for the administration of fair elections such that the CEO has recommended that registration not be required unless the value of election advertising undertaken is $500 or greater. This evidence was far from cogent or persuasive and AGBC explained in its written argument at trial that it was <u>not</u> being relied on for the purpose of s. 1.

42. In the absence of Ms. Western's affidavit being relied on under s. 1, AGBC had <u>no evidence at all</u> to demonstrate why the registration requirement was justified for those who spent less than $500 on election advertising.

43. Despite this complete lack of evidence, Cohen J. upheld s. 239 under s. 1 of the *Charter*, erroneously applying the *Oakes* test as if *the applicant* bore the onus of establishing that s. 239 could not be justified. In considering whether the objectives were pressing and substantial, he held:

> [129] ...In my view, the case at bar is one where a reasoned apprehension that the absence of a registration requirement would be contrary to these objectives is sufficient for this stage of the test: *Pacific Press*, at para. 78; *Harper*, at paras. 77, 88; *Bryan*, at para. 28.[52]

44. The "reasoned apprehension of harm"[53] standard of proof originated as a means of enabling the government to discharge its burden to demonstrate that the objective of the law was pressing and compelling and, more commonly, to demonstrate a rational connection between a

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[49] *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 [*Libman*]
[50] *Oakes*, ¶68
[51] *Oakes*, ¶68
[52] TJ Reasons, ¶116
[53] *R. v. Butler*, [1992] 1 S.C.R. 452 [*Butler*], at p. 504

law's effect and the law's objective. It has most commonly arisen in freedom of expression cases where the harm claimed to be caused by the expression in question was *not amenable to proof* by means of scientific or other conventional evidence. In that context, it was considered sufficient if Parliament demonstrated it had a reasonable apprehension that the expression was harmful.[54]

45. This case presents this Court with the opportunity to make clear that the "apprehension" standard for proof of harm applies only with respect to the existence of harm and the causal relationship between a harm and an impugned law. It may *only* be resorted to where the nature of the harm is such that traditional forms of evidence are not available to establish the harm.[55] Even when properly invoked, it should be supported by "some social science evidence" such as occurred in *Harper*.[56] There was none in this case.

46. However, in this case there is no need to resort to the reasonable apprehension of harm test because the applicant acknowledged that *without any regulation* actual harm could arise from failing to regulate third party election spending at all, i.e. unlimited spending without regulation; that concession, however, does not answer the additional and essential question here of whether the means chosen - which require registration by everyone no matter how little (including nothing) is expended on "election advertising" - is proportionate.

47. Although Cohen J. did not say so expressly, given there was no evidence upon which to base his analysis, he must have resorted to this same standard of reasonable apprehension when he found that s. 239 was rationally connected to the objectives that he had articulated, was not minimally impairing, and even when he considered the proportionality of effects.[57] This was not the correct approach as it effectively reversed the onus of proof. Reasonably apprehending a harm resulting from no regulation cannot be conflated into the analysis of unconstitutional infringements caused by overly broad and disproportionate regulation. *Harper* does not allow

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[54] *Butler*, at p. 504, , see also *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [*Whatcott*], ¶¶128-35, *R. v. Bryan*, 2007 SCC 12 , ¶¶10, 16, 20, 28

[55] The classic cases are the expression cases. Obscenity is said to harm women generally: *Butler*. Child pornography is said to harm children generally: *R. v. Sharpe*, 2001 SCC 2 [*Sharpe*], ¶¶100-01. The harms of expression which are considered in these cases are attitudinal harms. See e.g. *Whatcott*, ¶132.

[56] *Harper*, ¶79

[57] TJ Reasons, ¶132-48

government to draw the reasoned apprehension of harm through each stage of the s. 1 analysis. In the alternative, to the extent that it does, it is time for this Court to revisit that decision.

48. With respect to minimal impairment, given the many other jurisdictions in Canada that have a minimum threshold of expenditures before any registration requirement applies, one would have expected AGBC to justify its anomalous approach by recourse to *some evidence* that such systems lead to any harms such as third parties having undue influence on elections. While this evidence may not have been scientific or conclusive it could have included evidence of the ubiquity of low cost election advertising, voter complaints, the CEO's views in those jurisdictions, and social science evidence (such as that relied on by this Court in *Harper*).

49. Cohen J. and the Court of Appeal majority dismissed the significance of this evidentiary lacunae on the basis that this type of reasoning risks depriving legislators of legitimacy in the choices they make.[58] However, this Court often has regard to evidence of the experience of *foreign* jurisdictions operating under more minimally impairing regimes.[59] The significance of this evidence is to assist in determining whether the laws in question, often a complete prohibition, are a proportionate response to the problem at issue. In this case, there was no need to look outside of Canada because several other provinces address the same apprehended harms. One would expect that evidence about how these other regimes are operating and what effects their laws have would be significant to the question of the fit or proportionality between British Columbia's laws and the apprehended harm. The total absence of evidence that these more permissive regimes result in any of the harms alleged by AGBC means the apprehension of such harms is far less "reasonable." This Court should clarify that this evidence (or lack of evidence) can be considered in this context. And that there is a significant difference between the legislature making a nuanced choice about spending levels in light of the *Charter* rights engaged and what occurred in this case which was the imposition of an absolute prohibition on unregistered political expression.

50. The apprehension becomes all the less "reasonable" when one considers this Court's decision in *Libman*. The lack of a minimum expenditure threshold in Quebec's *Referendum Act* was the reason this Court found parts of that legislation not to be minimally impairing in *Libman*.

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[58] CA Reasons, ¶¶35-36

[59] See for e.g. *Carter v. Canada*, 2015 SCC 5 [*Carter*], ¶¶8, 22, 25-27, 47, 104-05, 107-13

In that case, through a variety of provisions prohibiting and regulating expenses, the legislation had the purpose and effect of funnelling political expression about referendums into the national committees on either side of the referendum question. The Court found the effect of the legislation to "come close to being a total ban"[60] on the freedom of expression for groups and individuals who did not feel that politically they could join or align themselves with either committee. For those people, this Court held that there must be some accommodation in the legislation to allow for their political expression without disturbing the overall purpose of the legislation, which was to prevent the referendum debates from being dominated by the most affluent members of society. While the Court declined to set the amount, it noted the "appropriate amount will have to be fair while being small enough to be consistent with the objective of the Act"[61] suggesting the amount would be above zero.

51. The legislative solution for the over-reaching effect of the *Referendum Act* was one that had been proposed by the 1992 Lortie Commission Report – a minimum expenditure threshold. In *Libman*, this Court discussed the Lortie Commission recommendation and the corresponding enactment of a minimum expenditure threshold that had been made in the *Elections Act*.[62] This Court concluded that a minimum expenditure threshold strikes an appropriate balance "between absolute individual freedom of expression and equality of expression between proponents of the various options [in the referendums]."[63]

52. This Court should clarify that some evidence is required at the later stages of the s. 1 analysis even when that analysis begins with a reasonable apprehension of harm. This approach is consistent with previous jurisprudence of this Court which was simply not followed by the BC Courts. For example, in *Sharpe*, the Court noted that the harms of pornography do not lend themselves to scientific proof and so a reasoned apprehension standard is used. The Court concluded that the social science evidence "buttressed by experience and common sense" demonstrated a rational connection between the purpose of the law – protecting children from harm – and the means adopted.[64]

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[60] *Libman*, ¶75
[61] *Libman*, ¶81
[62] *Libman*, ¶¶76-81
[63] *Libman*, ¶81
[64] *Sharpe*, ¶94

53. But when it came to minimal impairment this Court came to a different conclusion. It held that if the law is drafted in a way that "unnecessarily catches material that has little or nothing to do with the prevention of harm to children, then the justification for overriding freedom of expression is absent."[65] This Court found that aspects of the law that raised little or no risk of harm to children were not minimally impairing even though the Court recognized that "It may be difficult to draft a law capable of catching the bulk of pornographic material that puts children at risk, without also catching some types of material that are unrelated to harm to children."[66]

54. This Court also said the law was grossly disproportionate. It is important to note that the Court accepted that possession of pornography that was created and held by the accused alone and visual recordings created by or depicting the accused and are held by the accused exclusively for private use could be harmful for the various reasons the court set out. The Court noted that they pose "some risk" but the Court held the "risk is small, incidental and more tenuous than that associated with the vast majority of the material targeted by" the law.[67]

55. Cohen J., in contrast, started with a reasoned apprehension of harm and then erroneously imposed a burden *on the applicant* to "satisfy"[68] or "persuade"[69] him that the apprehended harms would be ameliorated by creating a minimum threshold of expenditure. These apprehended harms had no basis in the evidence and could not even be supported by reason or common sense at the expenditure amounts in question. Cohen J.'s analysis was fundamentally flawed and essentially gives AGBC a free pass on *Charter* breaches, absent a positive case from the claimant under s. 1, where the harms in question are not amenable to scientific proof.

56. Faced with this same absence of evidence, the Court of Appeal majority seemed to uphold the breach on the strength of the legislative objective alone, effectively circumventing the final step of the *Oakes* analysis:

> [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

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[65] *Sharpe*, ¶95
[66] *Sharpe*, ¶95
[67] *Sharpe*, ¶100
[68] TJ Reasons, ¶141
[69] TJ Reasons, ¶142

> 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 focusing, 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.[70]

57. This analysis was in error. The majority's analysis wrongly takes a majoritarian view to *Charter* rights. What is required is an approach that recognizes that everyone's rights are centrally important – that is the purpose of enshrining them in the Constitution. With this recognition comes the requirement that these rights therefore cannot be sacrificed for some idea of the public majoritarian good without consideration of whether there are other, less rights-infringing means to achieve this objective in a real and substantial manner as well as a consideration of whether the law actually achieves those or any salutary benefits. Where, as here, a right is sacrificed for a very minor increase in administrative convenience, the

[70] CA Reasons, ¶¶56-57 (emphasis added)

infringement is not justified. As Deschamps J. observed in *Chaoulli*, and this Court recently affirmed in *Carter*:

> [T]he claimant "d[oes] not have the burden of disproving every fear or every threat", nor can the government meet its burden simply by asserting an adverse impact on the public. Justification under s. 1 is a process of demonstration, not intuition or automatic deference to the government's assertion of risk (*RJR-MacDonald*, at para. 128).[71]

58. Cohen J. ought to have required AGBC to adduce *some evidence* of these matters and the Court of Appeal majority ought to have allowed the appeal on this basis.

59. The Court of Appeal majority seemed to erroneously view the questions posed as foreclosed by *Harper*. *Harper* gave no consideration to whether an absolute ban was constitutionally valid. The Court of Appeal majority simply gave no independent analysis to the final stage of the *Oakes* analysis; preferring to rely on the importance of the legislative objective rather than to grapple with the lack of evidence of any salutary legislative effects.[72] That is not the law.

60. In contrast, Saunders J.A., dissenting, rightly recognized that the importance of the objective lost force in the face of the deleterious effects of the law which were not counterbalanced by any significant salutary effects when she held:

> [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

[71] *Carter*, ¶119, citing *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, ¶68
[72] CA Reasons, ¶56-57

> impairing nor proportionate, and thus is not demonstrably justified in a free and democratic society.[73]

61. A strong statement from this Court is needed to ensure that governments are held to the appropriate standard of justification for serious and obvious *Charter* breaches and that this standard must include evidence and a consideration of each stage of the *Oakes* analysis in light of the evidence.

PARTS IV AND V. COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

62. The applicant seeks an order granting leave to appeal with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, the 22nd day of June, 2015.

FOR Sean Hern and Alison M. Latimer
Counsel for the Applicant

[73] CA Reasons, ¶71, Saunders J.A., dissenting (emphasis added)

PART VI. TABLE OF AUTHORITIES

Paragraph(s)

TEXT

PART VII. STATUTES RELIED ON