

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)

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APPLICANT'S REPLY TO THE RESPONSE OF THE ATTORNEY  
GENERAL OF BRITISH COLUMBIA  
[B.C. Freedom of Information and Privacy Association]  
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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## APPLICANT'S REPLY MEMORANDUM OF ARGUMENT

### A Significant Breach

1. Attorney General of British Columbia's ("AGBC") suggestion that because s. 239 of the *Election Act*, R.S.B.C. 1996, c.106, is "a relatively minor part of a larger scheme" the infringement at issue is somehow inconsequential or unimportant was specifically rejected by Cohen J., who rightly noted that the inquiry at this stage is *not* on the nature of the regulatory requirement, but on the *effect* of the legislation.<sup>1</sup> The Chambers Judge rightly found this *effect* was not trivial or insubstantial; instead it related to political expression which is of "fundamental importance" to democratic society.<sup>2</sup>

2. AGBC takes issue with the Court of Appeal's unanimous concern about the chilling effect of the impugned provision by suggesting, at paragraph 30, that this was merely an "impression left by the dissenting judgment." In fact, the BC Court majority noted the "fact that the information provided to the CEO by a registrant is publicly available reinforces this concern."<sup>3</sup>

3. AGBC's contention, at paragraphs 6 and 17, that the impugned provision has "generated no controversy in its operation" is wrong: the lack of spending threshold was specifically raised by the *amicus curae*, by FIPA and others in the *Reference re Election Act (BC)*, 2012 BCCA 394. The BC Court of Appeal did not address the argument, but also did not reject it noting:

[45] ...The current amendments unjustly interfere with the rights guaranteed by s. 2(b) of the *Charter* to the extent the freedom of political expression is limited in the pre-campaign period.

[46] All of those who intervene make submissions which support this conclusion based on their individual interests and perspectives. Much of the argument advanced enhances the basis for this conclusion. It is, in the circumstances, not necessary to review or address what has been said. [emphasis added]

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<sup>1</sup> *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2014 BCSC 660 [TJ Reasons], para. 125

<sup>2</sup> TJ Reasons, para. 124

<sup>3</sup> *BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2015 BCCA 172 [CA Reasons], para. 54

4. AGBC's contention is also wrong in light of the extensive media coverage that has been generated decrying the lack of a minimum threshold.<sup>4</sup>

5. The contention is also curious because behind it lies the assumption that notwithstanding the unanimous finding of every single justice who has considered the issue that the impugned law infringes on freedom of political expression, the law is valid because breaches of it are not being prosecuted and because it has been "on the books" and not yet subject to a challenge. This suggestion is troubling when coupled with an understanding of who is most impacted by this legislation – small spenders for whom access to justice is difficult.

6. There is no merit to AGBC's suggestion that the law's impact on small spenders is without evidentiary foundation. The majority of FIPA's expenditures in 2009 were about this issue. In 2013, FIPA's spending was under \$500. FIPA's standing is unchallenged. Moreover, it was uncontested that the definition of election advertising includes "even home-made signs in windows and bumper stickers"<sup>5</sup> – the infringement by s. 239 is self-evident. AGBC asserted at the Court of Appeal that the problem, if there was one, was a problem in the definition not in the lack of spending threshold. This submission simply identifies one possible *legislative response* to a finding of constitutional invalidity; it is no answer to the unconstitutional effects of the law.

7. The Election Chill Report was always relied upon as part of the factual matrix and not as expert evidence because it was not needed – again, as the BC Court of Appeal majority found – the infringement by s. 239 was "obvious."<sup>6</sup> It was AGBC's onus to produce evidence to justify the lack of a minimum threshold. If the report had been relied upon as an expert report, it would have been served as such under the rules for expert reports rather than being exhibited, as it was, to the affidavit of FIPA's executive director.

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<sup>4</sup> See by way of non-exhaustive, e.g. MacLeod, Andrew: "Election Law 'Chilling' Groups Wanting to Share Info." *The Tyee.ca* 22 Apr. 2013, available at <http://thetyee.ca/News/2013/04/22/Election-Law-Chill/>; Editorial – Langley Times, "Editorial – Province and political parties want control of elections." *The Langley Times* 30 Apr. 2015, available at <http://www.langleytimes.com/opinion/301742351.html>; The Canadian Press. "Mandatory registration for political ads a reasonable limit on free speech: B.C. judge." *The Globe and Mail*, 21 Apr. 2014, available at <http://www.theglobeandmail.com/news/british-columbia/registering-for-political-ads-a-reasonable-limit-on-free-speech-ruling-says/article18080515/>; The Canadian Press. "B.C. privacy watchdog challenges election advertising law." *CBCNews* - *British Columbia* 30 Jan. 2013, available at <http://www.cbc.ca/news/canada/british-columbia/b-c-privacy-watchdog-challenges-election-advertising-law-1.1370465>

<sup>5</sup> CA Reasons, para. 61, Saunders JA dissenting but not on this point.

<sup>6</sup> CA Reasons, para. 1

8. It is also incorrect to suggest that the courts must wait to be faced by the hypothetical single handmade sign maker in order to consider the law's impact on that individual. This Court's jurisprudence is clear that "[a] claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties" or, as here, both.<sup>7</sup> This issue was recently re-examined and upheld by a majority of this Court in *R. v. Nur*. This case provides a stark illustration of why this principle is so important in constitutional litigation – without the ability to consider on the law's impact on third parties, constitutional justice may be out of reach for the lone and small voices.

9. AGBC's further submission, at paragraphs 11-12, that because s. 231 would continue to preclude anonymous or unattributed sponsorship of "election advertising," the challenge to s. 239 is somehow trivial is also meritless. As the BC Court of Appeal majority noted, these provisions have different effects and the effects of s. 239 are worse:

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

### **No Justification**

10. AGBC's impassioned plea to be left alone to set a threshold within a "zone of discretion" wrongly suggests that in this case this discretion was exercised thoughtfully in light of all the relevant considerations including, importantly, the breach of *Charter* rights that would follow such a threshold.

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<sup>7</sup> See e.g. *R. v. Ferguson*, 2008 SCC 6, para. 59; *R. v. Nur*, 2015 SCC 15, paras. 51-65

11. There is simply no evidence at all about any such consideration being made within government or in the legislature. There is no provision in the legislation indicating there will be a minimum threshold of \$0; rather, there is simply no provision at all.

12. AGBC also never recognized that s. 239 constituted a breach of s. 2(b) and that is why AGBC argued before the Chambers Judge that there was no such breach.

13. As a result, the suggestion here that the legislature considered the matter and “established a spending threshold” of \$0 or decided to “draw the line” at \$0 is disingenuous.<sup>8</sup> This is important, because it is to this fictional consideration of the appropriate spending threshold which AGBC says the court should defer in its minimal impairment analysis, rather than require any evidentiary justification for the infringement. In this case, there is no legislative consideration of a minimum threshold to defer to. Evidence, not deference, is required.

14. At paragraph 22, AGBC contests that the CEO views the registration information as unnecessary. As the Trial Judge found:

[88] ... the CEO has recommended that registration not be required unless the value of election advertising undertaken is \$500 or greater. As stated at p. 16 of that report:

[The *Act*] does not establish a threshold for registration, resulting in all advertising sponsors being required to register and display disclosure information - including individuals with a simple handmade sign in their window. The *Canada Elections Act* only requires registration by those who sponsor election advertising with a value of \$500 or more. Having a consistent threshold would prevent the considerable confusion and administrative burden that currently exists.

15. If the CEO held the view that registration of small spenders was “necessary” he would not be recommending the abolition of the requirement for election advertising undertaken for less than \$500.

16. The AGBC never addresses in its response the simple fact that it has advanced no s. 1 evidence in support of its violation of s. 2(b). It is this lack of any evidentiary justification that fuels the precedential concerns of FIPA. A judicial decision permitting government to infringe political expression without any evidentiary justification signals a significant departure from the

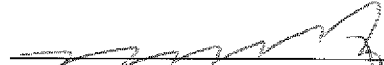
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<sup>8</sup> AGBC Response to the Application for Leave to Appeal, paras. 36(a)- (b)

plain language of s. 1 and the jurisprudence of this Court on the subject dating back to the *Charter's* inception.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, the 31st day of August, 2015.

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

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**PART VI. TABLE OF AUTHORITIES**

	<b>Paragraph(s)</b>
<b>AUTHORITY</b>	
<i>BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)</i> , 2014 BCSC 660	1, 14
<i>BC Freedom of Information and Privacy Association v. British Columbia (Attorney General)</i> , 2015 BCCA 172	2, 6, 7, 9
<i>Reference re Election Act (BC)</i> , 2012 BCCA 394	3
<i>R. v. Ferguson</i> , 2008 SCC 6	8
<i>R. v. Nur</i> , 2015 SCC 15	8

**SECONDARY SOURCES**

The Canadian Press. "B.C. privacy watchdog challenges election advertising law." <i>CBCNews - British Columbia</i> 30 Jan. 2013, available at <a href="http://www.cbc.ca/news/canada/british-columbia/b-c-privacy-watchdog-challenges-election-advertising-law-1.1370465">http://www.cbc.ca/news/canada/british-columbia/b-c-privacy-watchdog-challenges-election-advertising-law-1.1370465</a>	4
The Canadian Press. "Mandatory registration for political ads a reasonable limit on free speech: B.C. judge." <i>The Globe and Mail</i> , 21 Apr. 2014, available at <a href="http://www.theglobeandmail.com/news/british-columbia/registering-for-political-ads-a-reasonable-limit-on-free-speech-ruling-says/article18080515/">http://www.theglobeandmail.com/news/british-columbia/registering-for-political-ads-a-reasonable-limit-on-free-speech-ruling-says/article18080515/</a>	4
Editorial – Langley Times, "Editorial – Province and political parties want control of elections." <i>The Langley Times</i> 30 Apr. 2015, available at <a href="http://www.langleytimes.com/opinion/301742351.html">http://www.langleytimes.com/opinion/301742351.html</a>	4
MacLeod, Andrew. "Election Law 'Chilling' Groups Wanting to Share Info." <i>The Tyee.ca</i> 22 Apr. 2013, available at <a href="http://thetyee.ca/News/2013/04/22/Election-Law-Chill/">http://thetyee.ca/News/2013/04/22/Election-Law-Chill/</a>	4

**PART VII. STATUTES RELIED ON**

<i>Canadian Charter of Rights and Freedoms</i> , ss. 1 and 2(b), Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (U.K.)</i> , 1982, c. 11	10, 12, 16
<i>Election Act</i> , R.S.B.C. 1996, c. 106, ss. 231 and 239	1, 6, 7, 9, 12

<p><b>Canadian Charter of Rights and Freedoms, ss. 1 and 2(b), Part I of the <i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982 (U.K.)</i>, 1982, c. 11</b></p> <p><a href="http://www.canlii.org">www.canlii.org</a></p>	<p><b><i>Loi constitutionnelle de 1982 (R-U), constituant l'annexe B de la <i>Loi de 1982 sur le Canada (R-U)</i>, 1982, c 11</i></b></p>
<p>1. The Canadian <i>Charter of Rights and Freedoms</i> guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.</p>	<p>1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.</p>
<p>2. Everyone has the following fundamental freedoms:</p> <p>...</p> <p>(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;</p>	<p>2. Chacun a les libertés fondamentales suivantes :</p> <p>...</p> <p>b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;</p>



**Election Act, R.S.B.C. 1996, c. 106, Part 11 – Election Communications**

[www.canlii.org](http://www.canlii.org)

**Part 11 — Election Communications  
Division 1 — General**

**Election advertising must identify sponsor**

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

- (a) identifies the name of the sponsor or, in the case of a candidate, the name of the candidate's financial agent or the financial agent of the registered political party represented by the candidate,
- (b) if applicable, indicates that the sponsor is a registered sponsor under this Act,
- (c) indicates that it was authorized by the identified sponsor or financial agent, and
- (d) gives a telephone number or mailing address at which the sponsor or financial agent may be contacted regarding the advertising.

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

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

- (a) remove and destroy, without notice to any person, or
- (b) require a person to remove or discontinue, and destroy,

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

**Division 3 — Registration of Sponsors**

**Election advertising sponsors must be registered**

239 (1) Subject to subsection (2), an individual or organization who is not registered under this Division must not sponsor election advertising.

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

(3) An individual or organization who is registered or required to be registered as a sponsor must be independent of registered political parties, registered constituency organizations, candidates, agents of candidates and financial agents, and must not sponsor election advertising on behalf of or together with any of these.