IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia Teachers' Federation v. British Columbia (Attorney General),*** 2009 BCSC 436

Date: 20090330
Docket: S085226
Registry: Vancouver

Between:

British Columbia Teachers' Federation,
Federation of Post-Secondary Educators of British Columbia,
British Columbia Division of the Canadian Union of Public Employees,
British Columbia Nurses' Union
and Marcia Toms

Plaintiffs

And

Attorney General of British Columbia,
Gloria Laurence and Wendy Weis

Defendants

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

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Date and Place of Trial/Hearing:	December 8-12, 15-17, 19, 2008 Vancouver, B.C.

I. NATURE OF THE ACTION

[1] The plaintiffs are four public sector unions and one individual member of a plaintiff union. They challenge the constitutionality of third party election advertising restrictions in the British Columbia ***Election Act***, R.S.B.C. 1996, c. 106 [***BC Act***] on the grounds that they unjustifiably infringe their rights and freedoms under ss. 2(b), 2(d) and 3 of the ***Canadian Charter of Rights and Freedoms*** [***Charter***]. The plaintiffs seek a declaration that ss. 235.1 and 228 of the ***BC Act*** (together the "impugned provisions") are of no force and effect.

[2] The Attorney General of British Columbia (the "Attorney General") concedes that the impugned provisions restrict expression under s. 2(b) of the ***Charter*** but denies that they are inconsistent with ss. 2(d) or 3. The Attorney General further submits that the impugned provisions are reasonable limits that are demonstrably justified in a free and democratic society and therefore saved by s. 1. The individual defendants share the position taken by the Attorney General.

II. FACTUAL BACKGROUND

[3] What follows is a brief overview of some of the factual background. Reference to other facts will be made as they become relevant to the analysis.

A. The Parties

[4] The British Columbia Teachers' Federation (the "BCTF") is a certified trade union representing over 40,000 teachers in British Columbia. Its official goals as set out in its constitution include the promotion of the cause of education in the province, the promotion of teachers' welfare and the development of social justice programs. The BCTF advocates for public education both generally and within the context of election campaigns. In each of its last two fiscal years, it has spent approximately $200,000 in this regard. In the 28 days leading up to the last provincial general election in 2005, the BCTF spent approximately $875,000 on advertising.

[5] Marcia Toms is a member of the BCTF and is the individual plaintiff in this action.

[6] The Federation of Post-Secondary Educators of British Columbia (the "FPSE") is a federation of certified trade unions. Together, its member unions represent over 10,000 faculty and staff in colleges, university colleges, research institutes and private institutes in British Columbia. The FPSE's purposes, as set out in its constitution, include fostering and promoting the objectives of post-secondary education and improving the economic welfare of post-secondary educators. In the 88 days preceding the 2005 provincial election, FPSE spent approximately $500,000 on advertising. Much of this advertising focused on the educational voting record of MLAs in ridings containing or near post-secondary institutions.

[7] The Canadian Union of Public Employees is a national trade union organization ("CUPE National"). The plaintiff CUPE BC is a provincial division of CUPE National. CUPE BC represents approximately 200 local unions chartered by CUPE National representing approximately 75,000 employees in healthcare, education, municipalities, libraries, universities, social services, public utilities, transportation, emergency services, airlines and non-profit societies in British Columbia.

[8] The CUPE BC and CUPE National constitutions set out the objectives of CUPE BC, which include advancement of the social and economic welfare of public employees, and the defence and extension of the civil rights and liberties of public employees. The constitutions state that CUPE is to achieve these goals by, among other things, educating the general public and promoting desirable legislation. To this end, CUPE engages in public information campaigns critical of certain

government policies, and advocates for government program, spending and legislative changes. In the 88 days preceding the 2005 provincial election, CUPE BC spent approximately $198,000 on advertising.

[9] The British Columbia Nurses' Union (the "BCNU") is a certified trade union representing approximately 26,000 registered nurses and allied healthcare workers in the province. BCNU's goals include the promotion of member welfare and high standards of healthcare. In the 28 days leading up to the 2005 provincial election, the BCNU spent $250,000 on advertising.

[10] In addition to the Attorney General, two individuals are defending this action: Gloria Laurence and Wendy Weis. Ms. Laurence is a special education assistant employed by the Surrey School District, and is a member of CUPE BC, Local 728. Ms. Weis is an integrated support teacher employed by the Surrey School District, and is a member of the BCTF. The Surrey School District is bound by collective agreements with CUPE 728 and the BCTF, both of which require, as a condition of employment, all employees in the bargaining unit to be members of the union. Both collective agreements also require the Surrey School District to deduct union dues from the paycheques of Ms. Laurence and Ms. Weis, and to forward those dues to their unions.

[11] Ms. Laurence and Ms. Weis both oppose their unions using their mandatory dues to advance political agendas with which they do not agree.

B. The Electoral Regime in British Columbia

[12] The electoral process is heavily regulated in all jurisdictions in Canada. Elections in this province are governed by the ***BC Act***.

[13] An election is called by the Lieutenant Governor who dissolves the legislature and issues an Order in Council directing the Chief Electoral Officer (the "CEO") to issue the writs of election. Pursuant to s. 27 of the ***BC Act***, voting day is the 28th day after the date on which the election is called. The ***BC Act*** defines this 28-day period between the calling of the election and the close of general voting as the "campaign period".

[14] In 2001, British Columbia became the first jurisdiction in Canada to adopt fixed election dates. As a result of amendments to the ***Constitution Act***, R.S.B.C. 1996, c. 66, elections are now held every four years on the second Tuesday in May, barring earlier dissolution by the Lieutenant Governor. The first fixed date election was held on May 17, 2005.

[15] On April 30, 2008, the Attorney General of British Columbia introduced ***Bill 42***, ***Election Amendment Act, 2008***, 4th sess., 38th Parl., 2008 [***Bill 42***] which amended the ***BC Act***. The sections of ***Bill 42*** that are material to these proceedings received Royal Assent and came into force on May 29, 2008. Those sections, *inter alia*, amended the definition of election advertising; modified the election spending limits imposed on political parties and candidates; introduced limits on third party

election advertising; and extended the third party election advertising limits beyond the campaign period.

[16] For the purposes of these proceedings, the general parameters of the current election advertising regime are set out following. The two provisions that the plaintiffs challenge as unconstitutional are ss. 228 and 235.1.

[17] Section 228 of the ***BC Act*** defines election advertising as:

> …the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of 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;

[18] Pursuant to s. 239, only candidates, political parties, constituency organizations and registered advertising sponsors may engage in election advertising:

> 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.

[19] Registered election advertising sponsors are commonly referred to as third parties, and I will refer to them as such in these Reasons.

[20] Section 235.1 of the ***BC Act*** limits the amount of election advertising that third parties can sponsor. The global ceiling is $150,000, of which no more than $3,000 can be spent in relation to a specific electoral district. In the case of fixed date elections, these limits apply during the period commencing 60 days before the campaign period, as well as during the 28-day campaign period. Section 235.1 reads, in part:

> (1) In respect of a general election conducted in accordance with section 23(2) of the *Constitution Act*, an individual or organization other than a candidate, registered political party or registered constituency association must not sponsor, directly or indirectly, election advertising during the period beginning 60 days before the campaign period and ending at the end of the campaign period
>
> (a) such that the total value of that election advertising is greater than

(i) $3 000 in relation to a single electoral district, and

(ii) $150 000 overall, or

(b) in combination with one or more individuals or organizations, or both, such that the total value of the election advertising sponsored by those individuals and organizations is greater than

(i) $3 000 in relation to a single electoral district, and

(ii) $150 000 overall.

(2) In respect of a general election conducted other than in accordance with section 23(2) of the *Constitution Act*, the limits under subsection (1) do not apply to the period beginning 60 days before campaign period, but do apply to the campaign period.

[21] Throughout these Reasons, I will refer to the 60-day period before the campaign period as the "pre-campaign period".

[22] Section 235.2 imposes substantial penalties for violations of s. 235.1. A sponsor who exceeds an election advertising limit is deregistered as a sponsor and must pay a penalty 10 times the amount by which the limit was exceeded.

[23] Spending limits exist as well for political parties and candidates. Pursuant to s. 198 of the ***BC Act***, the election expense limits for a political party are $1.1 million during the pre-campaign period and $4.4 million during the campaign period. Section 199 sets out the corresponding limits for candidates, which are $70,000 during the pre-campaign period and $70,000 during the campaign period.

[24] Sections 217 and 218 impose penalties on candidates and political parties that exceed their election expense limits. An elected candidate ceases to hold

office, while the registration of a political party is suspended for a period six months. In both cases, violators are liable to pay a penalty of double the amount by which the election expenses exceeded the limit.

III. OVERVIEW OF THE POSITIONS OF THE PARTIES

[25] The 88 days during which the third party election advertising restrictions apply encompass the period when the provincial government begins its final legislative session with a Throne Speech, Budget and a host of new legislation, all of which, say the plaintiffs, have the purpose, at least in part, of ensuring its re-election in the forthcoming election. By limiting the ability of third parties to present their views in the public square, particularly during the pre-campaign period when the legislature is in session, the impugned provisions are profoundly undemocratic. Political expression lies at the very heart of the freedom of expression, and the plaintiffs say that spending restrictions clearly infringe s. 2(b).

[26] The plaintiffs submit that the s. 3 right to vote as interpreted by the courts goes beyond the mere right to cast a ballot, and includes the right to effective representation, the right to play a meaningful role in the political and electoral process, and the right of the voter to be reasonably informed of all possible choices. The impugned provisions infringe these aspects of the right to vote.

[27] The plaintiffs say that the guarantee of freedom of association in s. 2(d) protects the right of union members to engage in the collective activity of election advertising through their unions, which activity is of an associational nature in the

pursuit of common goals. The impugned provisions impair their ability to do so, and further impair their associational rights by prohibiting third parties from combining to advertise if the combined expenses exceed the prescribed limits.

[28] The plaintiffs argue that the Attorney General is unable to discharge the heavy onus of justifying the impugned provisions under s. 1. They submit that the definition of election advertising is impermissibly vague such that it is not a limit prescribed by law for the purposes of the justification analysis. Further, the plaintiffs say that the true objective of ***Bill 42*** is not electoral fairness, as asserted by the Attorney General, but rather, tilting the electoral playing field in favour of the governing Liberal Party. This is not a pressing and substantial objective. The plaintiffs submit that even if the Court concludes that ***Bill 42*** has a legitimate objective, it nevertheless fails under the proportionality analysis called for by s. 1. The means chosen are not rationally connected to the objectives of the legislation, nor are they a minimal impairment of the rights and freedoms of the plaintiffs. Most importantly, the deleterious effects of ***Bill 42*** grossly exceed any salutary effects of the legislation.

[29] The Attorney General relies heavily on the Supreme Court's decision in ***Harper v. Canada (Attorney General)***, 2004 SCC 33, [2004] 1 S.C.R. 827 in defending this action. He concedes that the impugned provisions restrict expression under s. 2(b) of the ***Charter***, but denies that they are inconsistent with ss. 2(d) and 3.

[30] With respect to the plaintiffs' claims based on s. 2(d), the Attorney General responds that to the extent that the ***BC Act*** may impact union members in particular, the legislation furthers democracy by protecting the expression of individual political thought (whether expressed individually or through voluntary organizations) over the group expression of corporate entities — which present advertising that is, at best, only roughly approximate of the views of members. The prohibition on third parties combining to spend in excess of the prescribed limits constitutes a valid anti-circumvention measure similar to that upheld in ***Harper***.

[31] With respect to the alleged breach of s. 3 of the ***Charter***, the Attorney General counters that the spending restrictions do not interfere with the ability of citizens to meaningfully participate in the political process and to be effectively represented. To the contrary, the restrictions on the use of traditional mass media by the economically powerful actually serve to enhance citizen participation.

[32] The Attorney General submits that to the extent the impugned provisions are found to infringe the plaintiffs' rights under the ***Charter***, they are reasonable limits demonstrably justified in a free and democratic society and are thus saved by s. 1. The provisions are a measured attempt to reduce the disproportionate influence of the wealthiest and most power citizens and bodies so that those with fewer resources can more effectively participate in political debate in the period leading up to a provincial election. In practical terms, the limits imposed by the ***BC Act*** are less restrictive than those upheld in ***Harper***. Moreover, says the Attorney General, the justification for the limits is established even more firmly in the present case since

there is evidence before the Court that was not available in ***Harper***, and new and inexpensive communication tools and technologies not contemplated by the Supreme Court have also since emerged.

[33] The two individual defendants do not challenge the constitutional validity of compelled union membership or the payment of dues in these proceedings. Nevertheless, they say that when unions use the vehicle of compelled membership and payment of dues for purely political purposes, such as for election advertising, three consequences follow:

(1) unions enjoy no greater protection from legislated election spending limits than any other organization;

(2) the negative impacts of election advertising on dissenting union members must be taken into account in assessing the plaintiffs' ***Charter*** claims; and

(3) the salutary effects of spending limits that arise from the fact of compelled membership must be weighed in the s. 1 analysis.

With respect to this last point, the individual defendants say that in limiting the ability of union members to use their union as a political vehicle, the restrictions protect the ***Charter*** rights of union members who do not agree with the political stance of their unions.

[34] The individual defendants stress that the crucial factor in understanding the rights of union members in the electoral process is that unions are not voluntary organizations. They say that the plaintiffs' submissions regarding the effects of the ***BC Act***'s advertising restrictions on union members are premised on an incorrect

assumption that union members unanimously support the political parties and issues championed by their unions.

[35] The British Columbia Civil Liberties Association (the "BCCLA") was an intervenor in these proceedings. It is not necessary that I refer to their submissions other than to indicate that they joined issue with the plaintiffs and that they challenged the impugned provisions on the further ground that they are *ultra vires* the legislative authority of the province.

[36] The Attorney General raised three objections to the BCCLA's submissions in the oral hearing:

> (1) they were in the nature of partisan advocacy and simply repeated the plaintiffs' submissions rather than offer a unique perspective;
>
> (2) by raising a division of powers argument, the BCCLA broadened the scope of the litigation beyond that defined by the parties; and
>
> (3) the BCCLA failed to give adequate notice of its constitutional challenge as required by the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68.

[37] The BCCLA was joined in these proceedings with the consent of both the plaintiffs and the Attorney General. Based on their submissions, however, it is my view that they should not have been. I agree with the Attorney General's objections to the plaintiffs' submissions.

[38] Intervenors in these circumstances should only be added to litigation proceedings when they satisfy the court that they either have a direct interest in the

litigation (which is not the case here) or they "can make a valuable contribution or bring a different perspective to the consideration of the issues that differs from those of the parties": ***EGALE Canada Inc. v. Canada (Attorney General)***, 2002 BCCA 396, 170 B.C.A.C. 204 (in Chambers) at para. 7, qtd. in ***Faculty Association of the University of British Columbia v. University of British Columbia***, 2008 BCCA 376 at para. 4. The BCCLA's submissions did not satisfy this second criterion, as they were mostly a repetition or a modest expansion of the submissions made by the plaintiffs. This is contrary to the principles sets forth in ***Vancouver Rape Relief Society v. Nixon***, 2004 BCCA 516, 204 B.C.A.C. 315 at para. 14, where the Court held:

> The respondent should not have to face repetitive arguments from the appellant and intervenors. Moreover, as Newbury J.A. pointed out in *Oak Bay Marina Ltd. v. Human Rights Commission (B.C.)*, [2001] B.C.J. No. 1136; 162 B.C.A.C. 4; 264 W.A.C. 4; 2001 BCCA 389, at para. 8, the Supreme Court of Canada has dealt extensively with the law affecting human rights generally and appeals from human rights tribunals in particular, and it is now for the courts to interpret and apply that law to particular cases. Further, as she observed, "there is a danger that appeals in this area will be seen as unfair if other parties ... are permitted to 'weigh in' on one side or the other - usually that of the complainant - without being directly interested and without having particular contributions to make on particular issues".

[39] Accordingly, I decline to entertain the BCCLA's submissions regarding the ***Charter*** issues.

[40] The BCCLA also challenged the ***BC Act*** on a division of powers basis. Its submissions in that regard were inappropriate, as the constitutionality of the legislation on non-***Charter*** grounds was not raised by the parties. It is not

permissible for an intervenor to broaden litigation by raising new issues, as stated in ***Faculty Association*** at para. 15

> It is clear that intervenors are not permitted to raise new issues but are limited to making submissions on the issues as defined by the parties ...

[41] Moreover, the BCCLA failed to provide notice as is required in a constitutional challenge by s. 8 of the ***Constitutional Question Act***. Such notice is mandatory and when not given, the court lacks jurisdiction to rule on the constitutional question: ***Donas v. British Columbia Securities Commission*** (1997), 147 D.L.R. (4th) 668, 90 B.C.A.C. 252 at paras. 12-15 (C.A.).

[42] For these reasons, I also decline to consider the BCCLA's arguments based on the constitutional division of powers.

IV. ANALYSIS

A. The Egalitarian Model of Elections

[43] The Supreme Court of Canada has endorsed an egalitarian approach to elections in this country. Such an approach endeavours to create a level playing field for those who wish to engage in the electoral discourse with measures that promote the equality of the various participants in the electoral process. In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.

[44] The central precepts that underlie the egalitarian model were developed By The Royal Commission on Electoral Reform and Party Financing (the "Lortie Commission") in *Reforming Electoral Democracy* (Ottawa: Communication Group, 1991) (the "Lortie Report"). Established following the 1988 federal election during which public concerns had been raised regarding the significant levels of third party spending by opponents and, overwhelmingly, proponents of the Free Trade Agreement, the Commission's mandate was to inquire into the Canadian electoral system and to present recommendations aimed at improving and preserving the democratic character of federal elections in Canada. Among the issues that the Commission considered was third party advertising.

[45] The Commission accepted as a basic proposition that the inequality of resources inherent in the economic marketplace should not extend into the electoral domain where equality must be the pre-eminent value. That equality manifests by regulating election spending to ensure that "some are not able to dominate election discourse because of their financial resources". The Commission was strongly of the view that limits on third party election advertising were important for the integrity and fairness of the electoral process, and it made recommendations as to appropriate limits on such election advertising. The Lortie Report was filed as an exhibit in the present trial.

[46] The egalitarian approach endorsed in the Lortie Report has been repeatedly affirmed by the Supreme Court of Canada. One of the earliest occasions on which it did so was in ***Libman v. Quebec (Attorney General)***, [1997] 3 S.C.R. 569, 151

D.L.R. (4th) 385, which the Court summarized at paras. 60-61 of its later decision in ***Harper***:

> [60] In *Libman*, the Court was asked to determine the constitutionality of the independent spending limits set out in Quebec's referenda legislation, the *Referendum Act*, R.S.Q., c. C-64.1. The impugned provisions of the *Referendum Act* circumscribed groups' or individuals' participation in a referendum campaign by requiring that they join the national committee supporting their position or by affiliating themselves with it. Only the national committees and the affiliated groups were permitted to incur "regulated expenses", which were effectively advertising expenses. Mr. Libman did not wish to endorse either position advocated by the national committee. Rather than supporting the "yes" or "no" position, Mr. Libman advocated in favour of abstaining from the vote. Mr. Libman argued that the impugned provisions infringed his rights to freedom of political expression and freedom of association because they restricted campaign expenditures conducted independently of the national committees.
>
> [61] The Court agreed that the limits on independent spending set out in the *Referendum Act* were not justified. The Court did, however, endorse spending limits as an essential means of promoting fairness and referenda and elections which the Court held were parallel processes: *Libman* at para. 46. The Court, relying on the Lortie Report, endorsed several principles applicable to the regulation of election spending generally and of in dependent or third party spending specifically. They include (at paras. 47-50):
>
> > [1] If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. . . . To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard [equal dissemination of points of view].

> [2] Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties [free and informed vote]. . . .
>
> [3] For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups [application to all-effectiveness of spending limits generally]. . . .
>
> [4] The actions of independent individuals and groups can [either] directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. . . . "At elections, the advocacy of issue positions inevitably has consequences for election discourse and thus has partisan implications, either direct or indirect: voters cast their ballots for candidates and not for issues" [issue advocacy vs partisan advocacy]. . . .
>
> [5] It is also important to limit independent spending more strictly than spending by candidates or political parties. . . . [O]wing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate [application to all-effectiveness of spending limits generally].
>
> [Emphasis added by Bastarache J.]

[47] Under challenge in ***Harper*** were provisions in the ***Canada Elections Act***, S.C. 2000, c. 9 [***Federal Act***]that regulate election advertising by third parties in much the same manner as those in the ***BC Act*** at issue in these proceedings. Section 350 of the ***Federal Act*** prohibits third parties from incurring election advertising expenses of more than $150,000 nationally during an election period (defined as "the period beginning with the issue of the writ and ending on polling day") and of more than $3,000 in a given electoral district. Related provisions were directed at preventing circumvention of these limits.

[48] Stephen Harper, then leader of the National Citizens' Coalition, sought a declaration that these restrictions on third party election advertising unjustifiably infringed ss. 2(b), 2(d) and 3 of the ***Charter***. It was conceded that the spending restrictions infringed s. 2(b), and while the Court was unanimous in finding that electoral fairness was a legitimate governmental objective, it split 6–3 on the question of whether the restrictions were justified under s. 1, specifically on the question of minimal impairment. The majority approached Parliament's legislative choice with deference and upheld the restrictions as a reasonable limit under s. 1.

[49] I will refer to various parts of the ***Harper*** decision in detail throughout these Reasons. For now, I simply wish to review the Court's comments regarding the egalitarian conception of electoral fairness.

[50] Bastarache J., on behalf of the majority of six judges, commenced his analysis by endorsing the egalitarian approach taken in ***Libman***. Following upon his distillation of that decision referred to earlier, he wrote at paras. 62-63:

> [62] The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation … Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. …
>
> [63] The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. The regime is clearly structured on the egalitarian model of elections. The overarching objective of the regime is to promote electoral fairness by

> creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*.
>
> [Citations omitted]

[51] The principal import of the egalitarian model of elections for present purposes are its implications for the justification analysis under s. 1 of the ***Charter***, as Bastarache J. explained at para. 87:

> [87] Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process. For candidates, political parties and third parties, meaningful participation means the ability to inform voters of their position. For voters, meaningful participation means the ability to hear and weigh many points of view. The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference. The lower courts erred in failing to do so (Paperny J.A., at para. 135). <u>In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.</u>
>
> [Emphasis added]

B. Alleged Charter Infringements

1. Section 2(b)

[52] The Attorney General and the individual defendants concede that the impugned provisions restrict freedom of expression under s. 2(b) of the ***Charter***.

2. Section 2(d)

[53] Section 2(d) of the ***Charter*** guarantees freedom of association.

[54] The plaintiffs plead three bases upon which the impugned provisions of the ***BC Act*** infringe their freedom of association:

a. s. 235.1 prevents or impedes the individual plaintiff and other members of the plaintiff organizations from associating to collectively exercise their constitutional right to freedom of expression in the pursuit of common goals;

b. s. 235.1 restricts the ability of union members to collectively express themselves on matters that pertain to collective bargaining; and

c. s. 235.1(b) prevents union members, or the unions together, from associating to collectively exercise their lawful right to spend up to $150,000 each on election advertising overall or up to $3000 in any one electoral district.

[55] Underlying these arguments is the plaintiffs' contention that the spending restrictions are anti-egalitarian when applied to third parties such as unions. The egalitarian model espoused in the Lortie Report, ***Libman*** and ***Harper*** was based on concerns about the affluent having a disproportionate effect on electoral discourse through their access to greater resources. However, say the plaintiffs, unions act as

conduits for the expression of the non-affluent, and by limiting their ability to advance the causes of the non-affluent, the third party advertising restrictions have a substantive effect that is distinctly anti-egalitarian.

[56] I will briefly address this issue before going on to consider the plaintiffs' s. 2(d) challenge.

[57] I do not accept the premise that the plaintiff unions ought to be considered among the non-affluent, as it would seem on any reasonable definition of "affluent" that they are. One of the precepts of the egalitarian approach is that the affluent ought to not, by reason of their wealth, be able to dominate election discourse and thereby deprive opponents of a reasonable opportunity to speak and be heard: ***Harper*** at para. 61. As I discuss later, of total third party spending during the 2005 provincial election, unions spent $3,228,953, representing 66.5% of the total. I therefore reject the plaintiffs' submission that the substantive effect of the restrictions on third party election advertising is anti-egalitarian.

(a) Associational Activity

[58] In ***Dunmore v. Ontario (Attorney General***), 2001 SCC 94, [2001] 3 S.C.R. 1016 at para. 14, Bastarache J. confirmed the four-part formulation of the scope of s. 2(d) articulated in earlier decisions:

> … These three elements of freedom of association are summarized, along with a crucial fourth principle, in the oft-quoted words of Sopinka J. in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"), at pp. 401-2:

> Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2*(d)* guarantee of freedom of association emerge from the case: first, that s. 2*(d)* protects the freedom to establish, belong to and maintain an association; second, that s. 2*(d)* does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2*(d)* protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2*(d)* protects the exercise in association of the lawful rights of individuals.
>
> [Emphasis added by Bastarache J.]

[59] The plaintiffs in the present case submit that the impugned provisions are contrary to the third and fourth propositions in that they restrict the ability of union members to do in association that which they are free to do individually, namely, exercise their constitutional freedom of expression. The provisions prohibit each member of a union from spending through the union any more than a nominal amount for the purpose of election advertising (depending, of course, on its size), and thus, their argument goes, the provisions bar the collective exercise of spending that would be within the limit for an individual.

[60] This was not an argument raised in ***Harper***, where the Court's s. 2(d) analysis was limited to the anti-collusion provision. A similar argument, however, was advanced in ***Somerville v. Canada (Attorney General)*** (1996), 184 A.R. 241, 136 D.L.R. (4th) 205 (C.A.).

[61] Sections 259.1(1) and 259.2(2) of the federal elections legislation in effect at the time of ***Somerville*** prohibited third parties from spending more than $1,000 to

promote or oppose a political party or candidate (though there was no restriction on issue advertising):

> 259.1(1) Every person who incurs advertising expenses in excess of one thousand dollars between the date of the issue of the write and the day immediately following polling day is guilty of an offence.
>
> …
>
> 259.2(2) For the purposes of section 259.1, no person shall incur an advertising expense in combination with one or more other persons if the aggregate amount of the advertising expenses incurred exceeds one thousand dollars.

[62] In upholding the trial judge's conclusion that s. 259.2(2) was contrary to s. 2(d) of the ***Charter*****,** Conrad J.A. wrote as follows at paras. 26-27:

> [26] An important aspect of association is the ability to combine resources to pursue common goals, influence others, exchange ideas and effect change. If the right of a group to speak is limited, then the good that comes from that association is thwarted. Association for the purpose of participation and communication during an election must surely stand as a primary reason for constitutionally entrenching the right to associate.
>
> [27] Here there is an intimate link between the restriction on individuals advertising in s. 259.1(1), and the restriction on combining with others to advertise contained in s. 259.2(2). The effect of the latter is to make the overall restriction on individual advertising much more severe, thereby significantly impacting directly on the right of free expression. The restriction on speech impacts directly and significantly on the right to associate. If third parties wish to associate to pool resources for the purpose of advertising in favour of, or in opposition to, a particular candidate or party, they are jointly limited to an expenditure of $1,000. If they wish to spend more, their only option is to do so by contributing to an existing party. In effect, the spending restrictions in both s. 259.1(1) and s. 259.2(2) force those who wish to participate by advertising in any meaningful way to do so through association with the political parties and candidates. As such, the sections interfere with an individual's freedom of association to

> accomplish not only very legitimate, but essential, objectives in a democratic country. It is true that this legislation does not restrict indirect advertising, and thus third parties are allowed to advertise regarding issues, as opposed to advertising for or against a party or candidate. However, the inability of associations and individuals to identify their own goodwill with a candidate or party muzzles during an election campaign what might otherwise be a strong, independent voice of people with shared goals. By interfering with this ability of individuals, through association of their choice, to independently lend strength to a candidate or party, this legislation is a limitation of legitimate activities of association, and by extension one's right to associate. This prohibition is an interference with an integral function of association -- namely that of sharing resources, knowledge and skills with a view to achieving common goals.

[63] Although the Supreme Court in ***Libman*** and ***Harper*** subsequently rejected Conrad J.A.'s s. 1 justification analysis, it did not comment on his conclusion regarding the *prima facie* violation of s. 2(d).

[64] In my view, the substantial monetary difference between the spending limits in ***Somerville*** and those at bar reduces the applicability of Conrad J.A.'s reasoning to the present context. Given his conclusion that the effect of the low $1,000 ceiling was to force those who wished to engage in meaningful advertising to associate with political parties and candidates, his analysis was as much concerned with the freedom to disassociate as it was with associational freedom. That concern is simply not in play here given the much higher spending limit.

[65] The $150,000 global spending limit in the ***BC Act*** applies to both individuals and organizations. While it is certainly conceivable that an individual could spend that amount on election advertising, the limit is, in practical terms, one that essentially only affects organizations. Accordingly, I consider that the provisions in

the ***BC Act*** can be most logically read as providing individuals with equivalent rights as the organizations to which the legislation would appear to be principally directed. Indeed, the Attorney General admits that the spending limits are essentially set with reference to group, not individual, spending.

[66] Members of a union, or any other organization for that matter, are able to engage in election advertising up to the prescribed limits on their own or in combination with others should they choose. If they elect to join together through their union, the union faces the same spending restrictions as its individual members. The impugned provisions do not restrict members from doing together what they are able to do individually; rather, they restrict the amount that can be spent to the same level regardless of whether the election advertising is conducted individually or collectively. Individuals and organizations are treated equally, and that is sufficient to satisfy the third and fourth prongs of the s. 2(d) test quoted from ***Dunmore*** above.

[67] I understand the plaintiffs to ground this aspect of their challenge primarily on the more expansive scope of the s. 2(d) protection that emerged from ***Dunmore***. At paras. 16-18, Bastarache J. wrote:

> [16] As these dicta illustrate, the purpose of s. 2(*d*) commands a single inquiry: has the state precluded activity <u>because</u> of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(*d*). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has

nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra*, such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(*d*) (at p. 367):

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. . . . The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

This passage, which was not explicitly rejected by the majority in the *Alberta Reference* or in *PIPSC*, recognizes that the collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distill their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union. To limit s. 2(*d*) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives. …

[17] As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak (see *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law

> protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities — making collective representations to an employer, adopting a majority political platform, federating with other unions — may be central to freedom of association even though they are inconceivable on the individual level.
> …
>
> [18] In sum, a purposive approach to s. 2(*d*) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* (see *Egg Marketing*, *supra*, *per* Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference*, *supra*, *per* Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.
>
> [Emphasis added by Bastarache J.]

[68] The plaintiffs submit that the impugned provisions bar activity that is collective in nature because of its concerted or associational nature. Expression when engaged in by a collective is qualitatively different than when engaged in by an individual, as it has more force, reach and impact. In the case of unions with large memberships, the restrictions have a particularly onerous and disproportionate effect. Further, the plaintiffs argue that the jurisprudence recognizes the important function that unions serve for their members, and that, as a consequence, s. 2(d) protects the right of union members to have their unions engage in election advertising in the same way as it has been held to protect their right to have their unions engage in collective bargaining.

[69] To repeat what is quoted above from ***Dunmore***, at para. 16, "the purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?" In my view, it has not. The impugned provisions do not prevent individuals from joining in associations to collectively pursue common goals, such as political speech. What they do is simply prevent those associations from spending in excess of the prescribed limits.

[70] This being the case, are members of unions, by virtue of the important functions that unions serve, accorded greater rights of collective expression than those of other organizations?

[71] In ***Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia***, 2007 SCC 27, [2007] 2 S.C.R. 391, the Supreme Court for the first time extended s. 2(d) protection to collective bargaining. In setting out the scope of this newly recognized constitutional right, McLachlin C.J. wrote as follows at paras. 89-92:

> [89] The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(*d*) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together

to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

[90] Section 2(*d*) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association" (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

[91] The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. … Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

> [92] To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

[72] Although a watershed decision for bringing collective bargaining within the ambit of s. 2(d) for the first time, ***Health Services*** goes no further than to include the process of collective bargaining as within the associative acts protected. The plaintiffs endeavour to bridge the gap between what was articulated in ***Health Services*** and the right of union members to have their unions engage in election advertising, by submitting that the Supreme Court has rejected a bright line distinction between what unions do when they engage in collective bargaining and in political activity such as election advertising. They cite, for instance, ***Lavigne v Ontario Public Service Employees Union***, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545. The plaintiff in that case sought a declaration that his obligation to pay dues to a teachers' union, of which he was not a member, infringed his right to freedom of association to the extent that the union used those compelled dues to fund political parties or causes unrelated to the representation of employees. Both Wilson J. and La Forest J., in separate reasons, acknowledged the difficulty in determining

whether a particular cause was related to the collective bargaining process, and spoke of the connection between union involvement in politics and collective bargaining. Wilson J., for instance, wrote at p. 290 that:

> … Unions' decision to involve themselves in politics by supporting particular causes, candidates or parties, stem from a recognition of the expansive character of the interests of labour and a perception of collective bargaining as a process which is meant to foster more than mere economic gain for workers. From involvement in union locals through to participation in the larger activities of the union movement the current collective bargaining regime enhances not only the economic interests of labour but also the interest of working people in preserving some dignity in their working lives.

[73] At p. 291, she stated:

> … Whether collective bargaining is understood as primarily an economic endeavour or as some more expansive enterprise, it is my opinion that union participation in activities and causes beyond the particular workplace does foster collective bargaining. Through such participation unions are able to demonstrate to their constituencies that their mandate is to earnestly and sincerely advance the interests of working people, to thereby gain worker support, and to thus enable themselves to bargain on a more equal footing with employers.

[74] La Forest J. commented to similar effect at p. 337 when discussing whether permitting members to opt out of paying dues was less impairing of ***Charter*** rights:

> To return to the effect an opting-out alternative would have on the finances of unionism, as Lavigne's claim makes clear, those compelled to pay dues will not only object to the spending of union money on things that are "clearly" not relevant to collective bargaining. For example, he objects to the Union's support for the NDP. It was submitted, however, and there is evidence to support the view that the cause of unionism and of working people generally has been advanced by the NDP. The respondents referred to the role that party played in the establishment of medicare, pensions, and unemployment insurance, and of what unions would have had to give up in the way of

> demands in other areas in order to get medical coverage from employers, private unemployment insurance coverage, and so on. In the light of the foregoing, it is inconceivable that support of the NDP could be considered irrelevant to the union's obligation to represent those who pay dues to it. But the important point is that if individuals can "opt out" of supporting the NDP, the unions will simply have much fewer dollars to support it.

[75] I have no difficulty accepting that union involvement in political causes has very real impacts on collective bargaining. Nevertheless, advertising during an election campaign, whether in support of a particular party or regarding an issue with respect to which a political party is associated, is not part of the collective bargaining process that is protected by s. 2(d) of the ***Charter*** as set out in ***Health Services***. I am not prepared to make the significant leap that would be required to accede to the plaintiffs' submission that s. 2(d) protects the right of union members to have their unions engage in election advertising. Ultimately, the communication of political messages, regardless of their perceived importance to the successful achievement of a union's goals and objectives, comes within the ambit of s. 2(b) of the ***Charter***, not s. 2(d).

[76] I dismiss the plaintiffs' challenge to the impugned provisions on this ground.

(b) Expression re: Collective Bargaining

[77] The plaintiffs' second challenge grounded in s. 2(d) is the manner in which the impugned provisions of the ***BC Act*** restrict unions' freedom of expression and the ability of union members to collectively express themselves on matters that pertain to collective bargaining. They cite paras. 89–90 of ***Health Services*** quoted

at para. 71 above, and frame the question to be addressed as whether restrictions on the ability of public sector unions to appeal to the public during their negotiations constitute a substantial interference with the collective bargaining process.

[78] Given that the government is the employer when it comes to public sector unions, the plaintiffs say that it is virtually impossible to separate issues relating to collective bargaining from those relating to an election. They submit that public pronouncements during labour negotiations and strikes are important, and they point to the BCNU as an example.

[79] Much of the BCNU's advertising is at least partially related to bargaining and in the past has occurred during the campaign and pre-campaign periods leading up to provincial elections. In 2001, which was both an election year and a bargaining year for nurses, the BCNU spent $600,000 on an advertising campaign that called upon government and health employers to "Pay them what they're worth". The plaintiffs say that a similar occurrence is anticipated for the 2009 provincial election. The advertisements will likely focus on public health care issues and the working conditions of nurses, and will be critical of government policy. Thus, the plaintiffs submit that the impugned provisions severely circumscribe the BCNU's ability to advertise on significant collective bargaining-related issues.

[80] Another example that the plaintiffs point to is ***Bill 29***, *Health and Services Delivery Improvement Act*, 2nd sess., 37th Parl., 2002, the law that was the subject of the ***Health Services*** case. If legislation of that nature was to be introduced during

the next legislative session, advertising on the subject would be in relation to both collective bargaining and the provincial election. As such, the plaintiffs say, it would certainly be caught by the third party spending restrictions, contrary to both freedom of expression and association.

[81] The defendants say that this is not the case, and that so long as the unions restrict themselves to advertising in relation to their specific collective bargaining issues with their employer without directly or indirectly supporting or opposing a particular party or its election platform, such advertising will not fall under any reasonable definition of election advertising. Further, and in any event, they say, the ability to seek public support for a union's position in collective bargaining is not a component of the associational rights protected by the ***Charter***.

[82] The ***BC Act*** as it stood in 2001 did not restrict third party election advertising. Nevertheless, it did require sponsors of election advertising to register and report any spending over $500. (s. 244). The definition of "election advertising" then in effect was "advertising used during a campaign period to promote or oppose, directly or indirectly, the election of a candidate … or a registered political party". While not identical to that currently in force, it is similar in its principal respects. The Elections BC, *Report of the Chief Electoral Officer on the 37th Provincial General Election* (Victoria: 2001) (the "2001 Report") regarding the 2001 provincial election discloses that the BCNU did not report any election advertising during the campaign period. The strong inference is that the BCNU did not consider its advertising campaign to be election advertising, which undercuts to some extent the plaintiffs' position that

the impugned provisions severely circumscribe the BCNU's ability to advertise on significant collective bargaining-related issues.

[83] More important, however, is the fact that union members do not have a constitutionally protected right to advertise regarding bargaining issues. As set out in ***Health Services***, the constitutional right to engage in collective bargaining includes the right of employees "to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals" (para. 89). It also imposes corresponding duties on government employers to agree to meet and discuss with the employees in good faith. It does not, in my view, include the right to advertise to engender support for a particular bargaining position.

[84] Accordingly, I do not accede to the plaintiffs' submissions on this issue.

(c) The Anti-Pooling Provisions

[85] Section 235.1(1)(b) of the ***BC Act*** prohibits sponsors of election advertising from combining their resources such that they exceed the prescribed limits:

> 235.1(1) In respect of a general election conducted in accordance with section 23(2) of the *Constitution Act*, an individual or organization … must not … sponsor, directly or indirectly, election advertising …
>
> ...
>
> (b) in combination with one or more individuals or organizations, or both, such that the total value of the election advertising sponsored by those individuals and organizations is greater than

> (i) $3,000 in relation to a single electoral district, and
>
> (ii) $150,000 overall.

[86] Section 235.1(1) contains both anti-splitting and anti-combination provisions. Splitting is addressed by the inclusion of “directly or indirectly” in the main body of subsection (1); combination is dealt with in paragraph (1)(b).

[87] The basis of the plaintiffs’ s. 2(d) challenge to s. 235.1(1) is that it prohibits groups or individuals from each spending less than the designated amounts if the combined total is greater than that amount. In this way, they say, third parties are prohibited from doing in association what they may lawfully do as individuals. A union, for instance, faces a single limit which is reached when it spends that amount on its own or jointly with others.

[88] The equivalent provision in the federal legislation is s. 351, which provides:

> A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

[89] The majority in ***Harper*** held that the primary purpose of s. 351 was to preserve the integrity of the advertising expense limits established under s. 350, and that it did not infringe s. 2(d) of the ***Charter***. Bastarache J. reasoned as follows at paras. 125-127:

> The splitting and collusion provision does not violate s. 2*(d)* of the *Charter*. Section 2*(d)* will be infringed where the State precludes activity because of its associational nature, thereby discouraging the collective pursuit of common goals; see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 16. It is only the associational aspect of the activity, not the activity itself, which is protected; see *Canadian Egg Marketing Agency v. Richardson*, [1988] 3 S.C.R. 157, at para. 104.
>
> Section 351 does not prevent individuals from joining to form an association in the pursuit of a collective goal. Rather, s. 351 precludes an individual or a group from undertaking an activity, namely circumventing the third party election advertising limits set out in s. 350.
>
> The trial judge relied on the Court's finding that s. 2*(d)* was infringed in *Libman* to conclude that s. 351 also infringed s. 2*(d)*. This is an inappropriate comparison. The referenda legislation in *Libman* effectively forced individuals to associate with an affiliated or national committee to incur regulated expenses. As discussed, this is not the case here. Section 351 exists only as mechanism to enforce s. 350.
>
> [Emphasis in original]

[90] Thus, it was clearly the "wrong" that was held to be the target of the anti-combination provision, not the associational nature of the activity.

[91] The plaintiffs submit that the use of the word "collusion" in s. 351 recognizes a clear anti-avoidance objective, in contradistinction to s. 235.1(1)(b) of the **BC *Act***, which catches the mere act of combining without any requirement for an anti-avoidance intent. Individuals or organizations may combine for legitimate reasons unrelated to circumventing spending limits; for example, they may share a common position on an issue but maintain separate identities and funding. Nevertheless, they are subject to a single limit, regardless of the purpose of their combination. The

plaintiffs submit, therefore, that it is the associational aspect of the activity that is prohibited by s. 235.1(1)(b), rather than the act of collusion.

[92] I do not ascribe much significance to the use of “collusion” in the federal provision and “combination” in the ***BC Act***. It is ultimately immaterial whether individuals and/or groups join together for the purpose of circumventing the spending restrictions, or simply because they share a common position on an issue — the purpose of the provisions is to prevent the election discourse from being dominated by a small number of voices. As I indicated earlier, the impugned provisions do not restrict individuals or individual groups from doing collectively what they are able to do individually; they only restrict them from spending in excess of the prescribed limits whether they engage in election advertising individually or collectively. As Bastarache J. observed at para. 72 of ***Harper***, “[i]n the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse.” Measures of this nature are a necessary corollary to spending limits on third parties.

[93] I would add that as I interpret s. 235.1(1)(b), there is nothing to prevent individuals or groups from *coordinating* their campaigns to maximize their resources. Thus, for example, each of the 200 local unions that make up CUPE BC is able to run an individual campaign and coordinate its efforts with its fellow local unions with respect to the timing or themes of their campaigns. So long as it does not use another local union’s resources, each local is able to spend the maximum under s. 235.1(1).

[94] In light of the foregoing, I conclude that the impugned provisions do not infringe s. 2(d) of the ***Charter***.

3. Section 3

[95] Section 3 of the ***Charter*** confers on every citizen the right to vote:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[96] The right to vote as protected by the ***Charter*** is not limited to "the bare right to place a ballot in a box": ***Dixon v. British Columbia (Attorney General)***, [1989] 4 W.W.R. 393 at 403, 35 B.C.L.R. (2d) 273 (S.C.). Its purpose "includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also the right of each citizen to play a meaningful role in the electoral process": ***Figueroa v. Canada (Attorney General)***, 2003 SCC 37, [2003] 1 S.C.R. 912 at para. 25. Iacobucci J. explained this concept of meaningful participation further at para. 29 of that decision:

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion

> about the formation of public policy and the functioning of public institutions through participation in the electoral process.

[97] As Bastarache J. explained in ***Harper*** at para. 70, after citing the above passage: "[g]reater participation in the political discourse leads to a wider expression of beliefs and opinions, and results in an enriched political debate, thus enhancing the quality of Canada's democracy."

[98] The right to meaningful participation in the electoral process includes an informational component. As the majority described at para. 71 of ***Harper***:

> The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has the right to be "reasonably informed of all the possible choices": *Libman*, at para. 47.

[99] Section 3 does not, however, guarantee a right to unimpeded and unlimited electoral debate or expression. "Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voters' ability to be adequately informed of all views": ***Harper*** at para. 72.

[100] Bastarache J. cautioned against overly restrictive spending limits that might undermine the informational component of the right to vote, and set out the test for a breach of s. 3 at para. 73:

> Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the information component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.

[101] In concluding that the challenged spending restrictions did not infringe s. 3, Bastarache J. wrote as follows at para. 74:

> The question, then, is whether the spending limits set out in s. 350 interfere with the right of each citizen to play a meaningful role in the electoral process. In my view, they do not. The trial judge found that the advertising expense limits allow third parties to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns" but would prevent third parties from engaging in an "effective persuasive campaign" (para. 78). He did not give sufficient attention to the potential number of third parties or their ability to act in concert. Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression.

[102] The Supreme Court was in fact unanimous that the provisions in question did not infringe s. 3.

[103] The plaintiffs in the present case advance three bases upon which they assert that the impugned provisions infringe their rights under s. 3:

a. any restrictions on third party election advertising outside the campaign period violate s. 3;

b. the restrictions on third party election advertising imposed by the ***BC Act*** do not allow for effective, persuasive advertising or informational campaigns; and

c. the impugned provisions have, as their purpose or effect, to give the governing party an advantage or the opposition party a disadvantage.

[104] The Attorney General contends that despite the third party advertising restrictions, citizens of British Columbia can meaningfully participate in the political process and be effectively represented. Embracing the logic of ***Harper***, he says that citizen participation is in fact enhanced by the limits on the use of traditional mass media by the economically powerful during the restricted period. Thus, says the Attorney General, the restrictions are supportive of the democratic interests that animate the s. 3 right to vote.

[105] Although the Supreme Court did not have to address the effect of third party election advertising restrictions during the pre-campaign period, I am nevertheless of the view that Bastarache J.'s reasoning regarding s. 3 applies equally to the case at bar. Contrary to the submissions of the plaintiffs and as I discuss elsewhere in these Reasons, I find that a modest informational campaign is the standard for a constitutionally acceptable advertising campaign, and that the impugned restrictions allow for such campaigns. Further, I also find that the purpose of the impugned provisions is electoral fairness. In the result, I conclude that the impugned provisions do not infringe s. 3 of the ***Charter***.

C. Is the Infringement of s. 2(b) Justified Under s. 1 of the *Charter*?

[106] As the defendants concede a violation of s. 2(b), it is necessary that I consider whether impugned provisions can be upheld under s. 1 as a reasonable limit demonstrably justified in a free and democratic society.

[107] Section 1 of the ***Charter*** provides:

> The *Canadian Charter of Rights and Freedoms* 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.

[108] The burden rests upon the Attorney General to establish that the impugned provisions constitute a reasonable limit that can be demonstrably justified in a free and democratic society. The relevant analytical framework was set out in ***R. v. Oakes***, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, with certain refinements regarding the third step of the proportionality test in ***Dagenais v. Canadian Broadcasting Corp.***, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, as follows:

> a. the law must be directed towards an objective that is sufficiently pressing and substantial to justify limiting a *Charter* right; and
>
> b. the law must be proportionate, in the sense that
>
> i. the measures chosen are rationally connected to the objective;
>
> ii. those measures impair as little as possible the *Charter* right in question; and
>
> iii. there is proportionality both between the objective and the deleterious effects of the statutory restrictions, and

> between the deleterious and salutary effects of those restrictions.

[109] The standard of proof is on a balance of probabilities. I will deal with each element of the test individually.

1. The Objective

[110] In ***R. v. Advance Cutting & Coring Ltd.***, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 255, the Court further clarified the first part of the analysis:

> In any s. 1 analysis, courts must identify the objectives of the impugned law with care. (See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.) The purposes of the legislation at the time of its enactment must be fully identified to make sure that they remain consonant with *Charter* values (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331). Furthermore, the state must justify the specific infringing measure, not simply the law as a whole. (See *RJR-MacDonald*, per McLachlin J., at paras. 143-44.) At the same time, however, the analysis should not be carried out in a vacuum. The place and function of the challenged provisions in the legislative scheme must be carefully identified. The nature of the system and its broader objectives have to be kept in mind. The analysis should not consider the infringing provision apart from its legislative context. (See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 101-3.)

(a) Reasonable Limit Prescribed By Law

[111] Before embarking upon the proportionality analysis, I will first address the preliminary issue of whether the definition of “election advertising” in s. 228 of the ***BC Act*** is too vague to constitute a limit prescribed by law for the purposes of s. 1.

[112] In order for a restriction to be prescribed by law within the meaning of s. 1, the law must articulate an intelligible standard for the application of the restriction: ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577. As P. Hogg explains in his text, *Constitutional Law of Canada: Student Edition 2006,* 4th ed. (Scarborough: Thomson Carswell, 2006) at 836-41, this requirement of an intelligible standard is intended to capture the two values protected by the phrase "prescribed by law": fair notice to citizens of what is prohibited and checks on enforcement discretion.

[113] ***Irwin Toy*** concerned a challenge to legislation prohibiting commercial advertising directed to persons under thirteen years of age. It was alleged that the generality of the statute made it impossible to know whether a particular advertisement would contravene the prohibition. In dismissing the submission that the legislation was too vague to constitute a reasonable limit prescribed by law, a majority of the Supreme Court held at 983:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

[114] The threshold for finding a law to be impermissibly vague is high. The court need only determine whether the legislation in question provides a sufficient basis

for legal debate and judicial interpretation. In ***Ontario v. Canadian Pacific Ltd.***, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385, the majority wrote at para. 79:

> Where a court is faced with a vagueness challenge under s. 7, the focus of the analysis is on the terms of the impugned law. The court must determine whether the law provides the basis for legal debate and coherent judicial interpretation. As I stated above, the first task of the court is to develop the full interpretive context surrounding the law, since vagueness should only be assessed after the court has exhausted its interpretive function. If judicial interpretation is possible, then an impugned law is not vague. A law should only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible. In a situation, such as the instant case, where a court has interpreted a legislative provision, and then has determined that the challenging party's own fact situation falls squarely within the scope of the provision, then that provision is obviously not vague. There is no need to consider hypothetical fact situations, since it is clear that the law provides the basis for legal debate and thereby satisfies the requirements of s. 7 of the *Charter*.

[115] Although these comments were made in the context of a vagueness challenge under s. 7 of the ***Charter***, they apply equally to s. 1.

[116] A useful starting point in considering the alleged vagueness of the definition of election advertising in the ***BC Act*** is to look at the definition that was upheld in ***Harper***:

> "election advertising" means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include
>
> (a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;

> (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, as the case may be; or
>
> (d) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.

[117] In dismissing the argument that this definition was unconstitutionally vague, Bastarache J. wrote as follows at paras. 89-90:

> 89. The respondent argues that the entire third party advertising expense regime is too vague to constitute a limit prescribed by law on the basis that the legislation provides insufficient guidance as to when an issue is "associated" with a candidate or party. Thus, it is unclear when advertising constitutes election advertising and is subject to the regime's provisions. This argument is unfounded. The definition of election advertising in s. 319, although broad in scope, is not unconstitutionally vague.
>
> 90. A provision will be considered impermissibly vague where there is no adequate basis for legal debate or where it is impossible to delineate an area of risk; see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40. The interpretation of the terms at issue here must be contextual. It is clear that a regulatory regime cannot by necessity provide for a detailed description of all eventualities and must give rise to some discretionary powers — a margin of appreciation. What is essential is that the guiding principles be sufficiently clear to avoid arbitrariness. While no specific criteria exist, it is possible to determine whether an issue is associated with a candidate or political party and, therefore, to delineate an area of risk. For example, it is possible to discern whether an issue is associated with a candidate or political party from their platform. Where an issue arises in the course of the electoral campaign, the response taken by the candidate or political party may be found in media releases (Lortie Report, *supra*, at p. 341). Whether the definition is impermissibly broad is a matter for legal debate and is more properly considered at the minimal impairment stage of the justification analysis.

[118] In March 2006, Elections BC released the *Report of the Chief Electoral Officer: Recommendations for Legislative Change* (Victoria 2006) (the "2006 Recommendations"). The report contained 60 recommendations for amendments to the ***BC Act*** to address issues of fairness, efficiency and effectiveness of electoral administration and participation in electoral democracy. One of the recommendations was for a clearer definition of election advertising, with the suggestion that it could be similar to the federal definition.

[119] The definition of election advertising in s. 228 the ***BC Act*** ultimately came to mirror the federal definition to a large extent, though it is not precisely the same.

[120] The plaintiffs argue that this definition is both vague and overbroad, though their submissions are directed primarily to the question of overbreadth. Although courts often consider these distinct concepts together, I prefer to deal with overbreadth later in my discussion of minimal impairment.

[121] The plaintiffs' concerns regarding the vagueness of this definition lie not with the initial broad proscription but, rather, with the four exemptions in paragraphs (a) to (d). They say, for instance, that the meaning of "the publication without charge of news …" in paragraph (a) is unclear. In contrast, the federal definition simply exempts "news". Does paragraph (a) capture news carried in newspapers or on cable channels for which consumers must pay? Paragraph (a), they say, also exempts "a radio or television program" without limiting it to the news on such a program and without the requirement that it be without charge. What is the effect of

this distinction? Does this exemption permit the type of half-hour television program that Barack Obama broadcast on numerous major networks in the days just prior to the recent American presidential election? What is "a speech or commentary in a bona fide periodical publication"?

[122] The plaintiffs also raise a number of queries with respect to paragraph (d). By necessary implication it does not exempt the transmission by a group of individuals or an organization of its collective views, and it is thus clear that the plaintiff unions' websites are not exempt. However, does this definition apply where a Facebook member transmits a message to others within the site on behalf of a group? Does it apply to the websites of media organizations? Does it apply to organizations that use their websites to convey information about issues that are associated with a political party, such as the Suzuki Foundation posting materials regarding the environment on its website or the Fraser Institute doing the same with publications about the government's economic plan?

[123] The plaintiffs say that given that the value of advertising is to be calculated at the time of transmission, websites that have been in operation for years would easily run over the $150,000 limit if the costs of creating and maintaining the website, as well as their content, are included. For instance, the BCTF website contains an archive of advertisements, publications and other materials on educational and other issues produced over the past seven years, many of which challenge the provincial government on policy choices and deal with issues that can be associated with government actions. There is affidavit evidence that the value of the materials

available through the website is well in excess of $150,000. Interestingly, however, I note that the BCTF reported 2005 election expenses of only $799.41 in relation to its website.

[124] The Attorney General responds that there are no consequential differences between the definitions of election advertising in the provincial and federal legislation that affect the vagueness of the former. With respect to paragraph (a), he says that the language in the ***BC Act*** was designed to address a loophole in the federal definition whereby it could be argued that a paid advertisement that consisted of an "open letter" or "election news", for instance, was not election advertising. Similarly, a third party could create an infomercial-style "election news" or "commentary" program and not be captured by the federal definition. The Attorney General explains that "bona fide periodical publication" simply ensures that election advertising that is produced in a one-off newspaper or magazine that has no purpose other than to act as a vehicle for the election message is captured by the definition.

[125] Comparing the federal definition with that in s. 228 of the ***BC Act***, I accept the explanations offered by the Attorney General. Further, and in any event, I do not consider the provincial definition to be vague as alleged by the plaintiffs. Paragraph (a) exempts from the ambit of election advertising the publication, at no cost, of any of the enumerated communications in a *bona fide* periodical publication (meaning a publication that is not a one-off publication), a radio program or a television program.

Understood in this way, the responses to the queries posed by the plaintiffs are clear.

[126] I similarly do not find paragraph (d) to be vague. It is clear that this paragraph deals with exempting only individuals. The groups and organizations referred to by the plaintiffs are clearly not exempt and would be included in definition election advertising.

[127] Accordingly, while s. 228 defines election advertising very broadly, I do not find it to be too vague to constitute a limit prescribed by law for the purposes of s. 1 of the ***Charter***. It provides an intelligible standard and sufficient guidance to those who are subject to it to ascertain its application. Indeed, the plaintiffs acknowledge that the definition would capture all, or virtually all, of the advertising in which they have engaged in the past and in which they may wish to engage in the future, including all reasonable hypothetical advertising. That being the case, it cannot be said to be too vague to constitute a limit prescribed by law.

[128] I acknowledge the plaintiffs' submission that courts should be particularly loathe to uphold a vague law in the context of expression because of the chilling effect it can have if people decline to engage in lawful expression for fear of crossing a vague or indiscernible line. However, as I have found that the definition of election advertising is not vague, I do not consider that problem to arise here.

(b) Objective of the Impugned Provisions

[129] The Attorney General, at paragraph 26 of its amended statement of defence, asserts that the objectives of the impugned provisions are to promote equality in the political discourse; to protect the integrity of the financial regime applicable to candidates and parties; and to ensure that voters have confidence in the electoral process. These are the same objectives that the Supreme Court identified with respect to the federal third party advertising restrictions in ***Harper***.

[130] The plaintiffs do not accept that electoral fairness is the objective of the impugned provisions, and instead submit that the evidence reveals a number of other more likely objectives:

a. allowing the government to control its public message as it prepares for the upcoming election and not to be taken off that message by third parties;

b. targeting unions that the government considers too "friendly" to the NDP and thereby enhancing the government's chances of re-election; and

c. provoking a confrontation with the unions.

[131] An assertion by the Attorney General of a pressing and substantial objective is sufficient for the purposes of a s. 1 analysis: ***Bryan***, 2007 SCC 12, [2007] 1 S.C.R. 527 at para. 32; ***Harper*** at para. 25. However, the plaintiffs say that it is not for the Attorney General to simply assert the objective of the legislation; rather, it is for the Court to determine what that objective is. They rely on the Supreme Court's decision in ***Health Services***, a decision released a few months after ***Bryan***, for the

proposition that the court is not bound to accept the objective of legislation as asserted by the Attorney General. At paras. 143-147 of ***Health Services***, McLachlin C.J. and LeBel J., on behalf of the majority, wrote as follows:

> 143 The government set out its objectives for enacting the Act as follows:
>
> > The objective of the *Act* is to improve the delivery of health care services by enabling health authorities to focus resources on the delivery of clinical services, by enhancing the ability of health employers and authorities to respond quickly and effectively to changing circumstances, and by enhancing the accountability of decision-makers in public health care.
> >
> > (Respondent's Factum, at para. 144)
>
> 144 These are pressing and substantial objectives. We agree with the respondent that the health care crisis in British Columbia is an important contextual factor in support of the conclusion that these objectives are pressing and substantial.... We also agree with the respondent that this Court's recent ruling in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, that governments are constitutionally obliged to provide public health care of a reasonable standard within a reasonable time, at least in some circumstances, reinforces the importance of the objectives, particularly of the main objective of delivering improved health care services....
>
> 145 The appellants argue that the objectives behind the legislation are not pressing and substantial on two bases. First, they contend that the objective is framed too broadly and is not linked to the specific harm that the legislation is aimed at addressing. Second, they argue that the evidence suggests that the true objective behind the Act is to increase the rights of management, and to save costs, which constitute a suspect basis for finding a pressing and substantial objective. (See *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66, at para. 72, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 109).
>
> 146 We reject the argument that the government's objective is stated too broadly. The government states its objective in terms of one main objective (improving health care delivery), pursued by way of several sub-objectives (enabling health authorities to focus resources on clinical services, enhancing the ability of health employers and

> authorities to respond quickly to changing circumstances, and enhancing the accountability of decision-makers in public health care). Even if it is accepted that the main objective is somewhat broad, the more precise aims of the government are made clear in the sub-objectives. Therefore, the objective is not stated too broadly.
>
> 147 The appellants' contention that cutting costs and increasing the power of management are also objectives of the legislation has merit. The record indicates that at least part of the government's intention in enacting the Act was to cut costs and increase the rights of management.... To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin*, indicating that "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints" (*N.A.P.E.*, at para. 72, see also *Martin*). Nor, on the facts of this case, is it clear that increasing management power is an objective that is "pressing and substantial in a free and democratic society". However, this does not detract from the fact that the government has established other pressing and substantial objectives.
>
> [Emphasis added]

[132] It is evident, say the plaintiffs, that the Supreme Court determined the objective of the legislation in question on the basis of the evidence, not simply the Attorney General's assertion. That evidence had been obtained by the plaintiffs in that action through its discovery of the government through documents and examinations.

[133] The plaintiffs in the present case sought extensive discovery that was resisted by the Attorney General. On an application by the Attorney General, Rice J. set aside the plaintiffs' notice to examine the Premier's Chief of Staff, as well as their interrogatories and notice for demand for documents, largely on the basis that the information being requested was irrelevant: ***British Columbia Teachers' Federation v. Attorney General of British Columbia***, 2008 BCSC 1699.

Notwithstanding this outcome, the plaintiffs submit that there remains sufficient evidence on the record to cast doubt upon the Attorney General's assertion as to the true objective of ***Bill 42***.

[134] Although I am of the view that the assertion by the Attorney General of the objectives of the impugned provisions is sufficient for the purposes of the s. 1 analysis, the evidence on the record also satisfies me that the objectives are as he asserts.

[135] The parties filed reports from the CEO regarding the 2001 and 2005 provincial general elections. As earlier noted, the 2005 election was the first fixed date election in British Columbia. At the time of elections, the ***BC Act*** did not restrict third party election advertising, though it required sponsors of election advertising to register and report any spending over $500. The definition of "election advertising" then in effect was "advertising used during a campaign period to promote or oppose, directly or indirectly, the election of a candidate … or a registered political party".

[136] According to the 2001 Report, there were 14 registered third party advertising sponsors with the following breakdown in spending:

Unions (1)	$ 11,589
Business Associations (3)	$ 163,880
Advocacy Groups (3)	$ 30,103
Corporations (2)	$ 6,957
Individuals (4)	$ 25,943

Langara Students Union Assoc.	$ 76,463
TOTAL:	**$ 314,935**

[137] I should note that because I do not know the nature of Langara Students Union Association as an organization, I did not include it in any of the categories.

[138] Both the number of third party advertising sponsors and the amounts spent on third party advertising increased dramatically in the 2005 election. The Elections BC, *Report of the Chief Electoral Officer: 38th Provincial General Election, 2005 Referendum on Electoral Reform, May 17th,* 2005 (Victoria: 2005) (the "2005 Report") discloses that the following amounts were spent:

Unions (94)	$ 3,228,953
Business Associations (10)	$ 1,143,280
Advocacy Groups (12)	$ 400,781
Corporations (5)	$ 58,323
Individuals (6)	$ 13,373
TOTAL:	**$ 4,844,710**

[139] The total number of registered election advertising sponsors was 129. Ninety-four of the 129 sponsors were labour organizations. Seven of the 129 sponsors spent more than $150,000:

a. British Columbia Teachers' Federation – $874,964;

b. Independent Contractors and Businesses Association of British Columbia – $612,100;

c. British Columbia Government and Service Employees' Union – $431,251;

d. British Columbia Nurses' Union – $257,282;

e. Hospital Employees' Union – $257,282;

f. Federation of Post-Secondary Educators of British Columbia – $209,602;

g. CUPE BC - $198,000;

i. Mining Association of British Columbia – $160,000.

[140] Both the 2001 Report and the 2005 Report indicate that the political parties reported spending the following amounts on election advertising in the 28 days preceding the 2001 and 2005 elections respectively:

2001	
NDP	$ 1,336,880
Liberal Party	$ 1,188,643
Green Party	$ 22,654
TOTAL:	**$ 2,548,177**
2005	
NDP	$ 2,015,443
Liberal Party	$ 1,972,907
Green Party	$ 12,133
TOTAL:	**$ 4,000,483**

[141] I acknowledge that these figures regarding the amounts political parties spent on election advertising should be looked upon with some caution. They represent what was spent by the provincial campaign, and do not reflect what was spent by the individual ridings. Nevertheless, they are still useful to show percentage increases. What is striking is the dramatic extent to which third party advertising expenditures increased between the two elections, going from approximately 12% of what parties spent in 2001 to over 120% in 2005.

[142] There is no evidence before me that the exponential increase in third party spending was attributable to the first fixed date election in 2005. The plaintiffs point to other factors which they say more likely account for the increased spending, in particular, the different political situation facing the electorate and the relative usefulness of election advertising. The Liberal Party was widely expected to win the 2001 election, which the plaintiffs say would have rendered third party advertising of only marginal, if any, utility. The Liberal Party ultimately won 77 seats and the NDP, two. In contrast, the 2005 election was much more competitive, and saw the Liberal Party win 46 seats to the NDP's 33.

[143] In my view, the substantial increase in third party election advertising from 2001 to 2005 is likely explained to a great extent by the different political climate that existed at the times of these two elections, though I make no specific finding in this regard as no evidence on this point was led. However, I am also satisfied that fixed date elections were at least one of the causes of that increase because their fixed

nature permitted third parties to plan their advertising campaign in a more orderly fashion.

[144] Another interesting set of statistics reflect the amount the two main political parties received in political contributions. According to the Liberal Party's *2005 General Election Financing Report*, the Liberal Party received $11,396,025 in political contributions, the vast majority of which came from corporate interests and, to a lesser extent, individuals. Political contributions to the NDP totalled $5,969,467. Of this total, $1.8 million came from unions and $3.8 million came from individual contributions.

[145] The plaintiffs say that this evidence strongly suggests that the impugned provisions were designed, at least in part, to tilt the electoral playing field in favour of the Liberal Party. Without limits on third party advertising, there was roughly an even playing field insofar as the Liberal Party benefited from corporate donations whereas the NDP may have benefited from election advertising by unions. The third party restrictions, together with the absence of limits on what corporations and others can contribute to a political party, tilt the electoral playing field in favour of the Liberal Party.

[146] However, it is what political parties spend that has the potential to affect the election discourse, not what they receive in contributions. The legislation that came into effect in 2005 limited election spending by a formula that permitted approximately $4 million in expenses, including advertising expenses. As noted

earlier, both parties reported roughly the same amount on election advertising in 2005. Thus, as the Attorney General points out, third party advertising by organizations allied with the NDP was hardly necessary to offset advertising conducted by the Liberal Party from their larger war chest. What is significant, however, is the sheer volume of third party advertising reflected in the 2005 statistics and its percentage in relation to spending by political parties.

[147] As mentioned above, in March of 2006, BC Elections released the 2006 Recommendations. Under the heading, "Impact of Fixed Election Date on Election Advertising and Expenses Limits", the CEO wrote:

> Since the establishment of fixed dates for general elections, concerns have been expressed that the effectiveness of election expenses limits and rules regarding the identification of election advertising sponsors may be compromised. Amendment of the definition of campaign period for fixed date events could address these concerns. This issue was acknowledged in relation to the 2005 Referendum on Electoral Reform. The Regulation relevant to that event established the campaign period as the period starting on March 1, 2005 and ending at the close of voting on General Voting Day.

[148] The Attorney General introduced ***Bill 42*** on April 30, 2008. When the Bill was moved for second reading on May 5, 2008, the Attorney General explained that it significantly updated the ***BC Act*** by implementing recommendations made by the CEO and instituting timely and necessary changes in a number of areas. He went on to state, in part, the following (BC, Legislative Assembly, Hansard, Vol. 32, No. 4 (5 May 2008) (the "May 5 Hansard") at 11956-11957:

> The bill also enacts a number of other changes for regularly scheduled elections. Political parties and candidates would now be required to

observe election expense limits during a 120-day pre-campaign period as well as the 28 days of the campaign period itself. Currently, there are no limits on spending before the campaign period.

Under this bill, political parties would have a maximum of $4.4 million to spend during a campaign and half that amount, $2.2 million, during the pre-campaign period. Candidates would have the maximum of $70,000 for the pre-campaign period and $70,000 for the campaign period. These amounts would be adjusted over time by the CEO according to the changes in the consumer price index.

…

These changes to spending limits – in particular the creation of the 120-day pre-campaign period – are a response to the effects of the set-date elections. For those elections, everyone knows when the campaign will begin, and it is important to ensure that the pre-campaign period does not become a spending spree, a free-for-all, to the detriment of parties and candidates that lack significant financial resources.

For by-elections and general elections that occur because of a non-confidence matter in the House, of course, it is not possible to create a pre-campaign period, because the election is not planned.

We are also applying the same principle of spending limits to third parties who wish to advertise during elections. The bill would make them subject to spending limits during the 120-day pre-campaign period and the campaign period itself. These limits are patterned on those put in place by the previous government. However, the limits under the bill are higher — $150,000 overall and $3,000 in any single electoral district.

These limits mirror those contained in the Canada Elections Act. We believe these limits are fair and reasonable and will allow third parties to participate in the electoral process without having a disproportionate influence over election outcomes. Again, an important reason for reintroducing spending limits is the effect that the set election dates have on the nature of political campaigns in British Columbia.

As well, in the Supreme Court of Canada, the Hon. Mr. Justice Michel Bastarache, in upholding third-party campaign spending wrote: "Without the limits, a few wealthy groups could drown out others in debates on important political issues." We agree with that, and that is why we are setting reasonable limits on what third parties can spend.

[149] Following the Attorney General's remarks, various members of the NDP opposition, including the NDP Justice Critic, spoke opposing the Bill. Their comments occupied the next 43 pages of the May 5 Hansard, a point I mention only because of the plaintiffs' assertion that there was inadequate debate about the bill in the legislature. In general terms, the opposition members did not question that the objective of the spending restrictions was to address consequences arising from fixed date elections. They were critical, however, of the means chosen and of the extent to which ***Bill 42*** exceeded the parameters sanctioned in ***Harper***. Among the specific targets of their criticism were the "sweeping" definition of election advertising and the extension of the spending limits to the 120-day period preceding the election, a period during which the Budget and Throne Speech would be in political play. Questions were also raised as to why the government had not chosen to ban corporate and union donations to political parties in lieu of advertising restrictions as a means of controlling the influence of money in elections.

[150] Given the plaintiffs' assertions as to the objective of ***Bill 42*** being to target the influence of unions, it is interesting to note the NDP opposition members did not indicate any concerns in this regard. For instance, Leonard Krog, the NDP's Justice Critic, gave a number of examples of the potential negative impact of the 120-day restrictions on the ability of different groups to speak out about matters of concern to them (at 11960-11963). Those impacts included the limitations on an organization representing child development centres from raising a campaign against cuts in the Budget to child development spending; limiting public sector unions from engaging in

a public campaign to oppose an announcement in the Throne Speech of the government's intent to deny workers the right to organize; and limits on the mining industry from raising a response to a government decision to raise royalties by 50%.

[151] While the statements of opposition members have little bearing on the question of legislative intent, if the government's objective had been to target the unions, it appears to have been a point lost on the NDP opposition at the May 5 parliamentary debate.

[152] Second reading on ***Bill 42*** resumed on May 27, 2008. In the intervening weeks, a great deal of public opposition was directed at the third party spending restrictions. Articles and editorials critical of what was described as a "gag law" were published in newspapers. A coalition of public sector unions, including the plaintiffs CUPE BC, BCTF and FPSE, launched the "Just Shut Up" campaign which included full page newspaper advertisements objecting to the proposed legislation, calling it "unconstitutional, undemocratic and unprecedented in Canada". The government also received many e-mails from members of the public condemning ***Bill 42***.

[153] In the result, the government amended the Bill by reducing the pre-campaign period to the present 60 days. The Minister of Aboriginal Relations and Reconciliation and Government House Leader, Michael de Jong, made the following remarks in discussing the amendment BC, Legislative Assembly, Hansard, Vol. 35, No. 1 (27 May 2008) (the "May 27 Hansard") at 12939:

The concerns that have been articulated by some members in this House and by others outside of this House have focused in on that particular issue – the restrictions that this bill would impose on advertising and spending in the lead-up to a general election. But I think that insofar as I and the government welcome that debate and applaud those who are vigilant about drawing attention to the exercise of those rights, the debate needs to be placed within the proper context.

The Supreme Court of Canada has dealt with the issue of third-party spending limits, and it has endorsed the principle of having such limits. In fact, my recollection of the decision is that the Supreme Court of Canada went even further and suggested that the absence of some measure of regulation might, in and of itself, lead to inequalities or lead to a situation in which improper or unfair influences were being brought to bear on political debate and on the outcome of elections.

Similarly, the notion that limits would be placed on candidates and political parties in the spending they are permitted to do in support of their efforts to achieve political office is also something that has been endorsed. I think it's broadly accepted by society now that there would be limitations in place. They are defined both federally and provincially, and we're at a stage now where I don't think people question the wisdom of bringing a measure of equity to the playing field upon which political contests are waged.

If that is so … I would submit and suggest to members that it is – that spending limits for both political parties and candidates are deeply rooted and entrenched legislatively but also, in terms of society, more broadly. The Supreme Court of Canada has pronounced its views with respect to third-party participation and the applicability of some limitation around that. It seems to me that there is one additional factor, one additional variable, that is relevant to this discussion and that is the introduction, as we have in this province, of a fixed election date. This bill recognizes that fixed election date.

I should say that the Chief Electoral Officer himself, in his 2006 report from which the vast majority of proposed amendments in this bill are taken, addressed the question of a fixed election date on page 29 under the heading "Impact of fixed election date on election advertising and expense limits". The Chief Electoral Officer made the observation that the establishment of fixed dates for general elections has raised the issue about whether or not there would be wisdom in moving back from that election date.

> In effect, could the purpose behind spending limits that exist during the writ period be frustrated if there were no regulation at all in the period immediately preceding the campaign? Within his report he makes the observation that there is some validity to that concern that has been expressed since the introduction of a fixed election date…
>
> I think elections shouldn't be about trickery. The practice of manipulating when elections are going to be held and creating ideal circumstances in the way that governments historically have – and continue, I suppose, to do – in this country is unfortunate, I think. Happily, in British Columbia, that is no longer the case, and we have the fixed election date. But as the Chief Electoral Officer has said, that raises questions about whether or not the regulations that apply to spending need to be reconsidered in light of that change.
>
> The challenge, then, is to find balance if we are going to take that step, to ascertain how to balance those various issues. I think it's fair to say that a number of people – I think a goodly number of people – are concerned that the bill in its form before the House now … They are concerned that the government hasn't found that balance, that the 120 days – during which there isn't a ban but there are limitations placed on the ability people have, third parties have, to participate in the electoral process, to discuss issues, to highlight issues and to highlight their preferences – is perhaps too long.
>
> To put it bluntly, upon reflection, the government agrees. The government thinks that 120 days is too long, and that's why the Attorney General has tabled amendments. I thought, actually, that the member who spoke previously would take advantage of the opportunity to comment on those amendments and give us an indication of how he, at least, felt about them. They are standing in the name of the Attorney General on the order paper. They would reduce that period from 120 days to 60 days, Madam Speaker.
>
> I think that does strike a balance. …

[154] Minister de Jong went on to explain that while the length of the pre-campaign period had been reduced, the monetary limits for candidates and third parties remained unchanged. That was not the case for political parties. Having reduced the pre-campaign period to 60 days, the amendment proposed a proportionate

reduction in the spending limits for political parties during that period from $2.2 million to $1.1 million.

[155] Following Minister de Jong's remarks, approximately 23 pages of the May 27 Hansard are taken up with opposition members speaking against ***Bill 42***. The committee stage proceeded perfunctorily a few days later on May 29, at which time a large number of bills were passed. Final reading of ***Bill 42*** also occurred on that same date.

[156] Among the points the plaintiffs raise in arguing that the true objective of ***Bill 42*** was, in essence, to tilt the playing field in favour of the governing party by targeting unions, are: that the government invoked closure to prevent any debate on the Bill; that the individual defendants' expert, political communications specialist Brad Zubyk, speculated that the purpose of ***Bill 42*** might have been to "pick a fight with the unions" and to "provoke the unions"; and that the general focus of the Attorney General's questioning of their witnesses was with respect to unions being generally partisan and pro-NDP.

[157] I do not find any of these points to be compelling. The May 27 Hansard indicates that there was a motion for closure, and that there was a time restriction placed on all the legislation passed in that session of the legislature. However, it was up to the opposition party to allocate its time any way it wished in respect to the particular pieces of legislation it felt had priority. With respect to the evidence of Mr. Zubyk, he is, in my view, in no better position to speculate as to the purpose

behind ***Bill 42*** than anyone else with some political experience. Finally, I would note that questions asked of witnesses are not evidence; only the answers are. The position taken by the plaintiffs throughout these proceedings has been that the purpose of ***Bill 42*** was to limit the voice of unions because they generally support the NDP. The Attorney General, in my view, was only attempting to ascertain the basis upon which the plaintiffs were arguing that the legislation was aimed primarily at them.

[158] I therefore accept that the objectives of the impugned provisions are those asserted by the Attorney General: promoting equality in the political discourse; protecting the integrity of the financial regime applicable to candidates and parties; and ensuring that voters have confidence in the electoral process.

(c) Contextual Factors

[159] The Supreme Court has repeatedly affirmed the importance of context to the justification analysis under s. 1 of the ***Charter***. As the majority in ***Thomson Newspapers Co. v. Canada (Attorney General)***, [1998] 1 S.C.R. 877, 159 D.L.R. (4th) 385, explained at para. 87:

> [87] The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that

> objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

[160] Characterizing the context of the challenged legislation is also critical to determining the nature and sufficiency of the evidence required of the Attorney General to justify the restrictions under s. 1: ***Thomson Newspapers*** at para. 88; ***Harper*** at paras. 75-76; ***R v. Bryan***, at para. 10. This context can be established by reference to the four factors discussed in those cases:

a. the nature of the harm and the inability to measure it;

b. the vulnerability of the group protected;

c. subjective fears and apprehension of harm; and

d. the nature of the infringed activity.

[161] Bastarache J. stressed in ***Bryan*** that these contextual factors must be understood as being about the provision at issue. Thus, he stated, “only once the objectives of the impugned provision are stated ‘should the court’ turn to an examination of the context of those objectives to determine the nature and sufficiency of the evidence required under s. 1” (para. 11).

[162] I will address each of these factors.

i. The Nature of the Harm and the Inability to Measure It

[163] Bastarache J. noted in ***Harper*** that “the Legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address.

Where the court is faced with inconclusive or competing social science evidence relating the harm to the Legislature's measures, it may rely on a reasoned apprehension of that harm" (para. 77). He referred to a number of cases where the Court had, in the absence of determinative scientific evidence, relied on logic, reason and some social science evidence in the course of the justification analysis; see ***R. v. Butler***, [1992] 1 S.C.R. 452 at 503, 89 D.L.R. (4th) 449; ***R. v. Keegstra***, [1990] 3 S.C.R. 697 at 768 and 776, [1991] 2 W.W.R. 1; ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 at para. 137, 127 D.L.R. (4th) 1; ***Thomson Newspapers***, at paras. 104-7; and ***R. v. Sharpe***, 2001 SCC 2 [2001] 1 S.C.R. 45.

[164] With respect to the federal spending restrictions in question, Bastarache J. wrote as follows at para. 79:

> 79 Similarly, the nature of the harm and the efficaciousness of Parliament's remedy in this case is difficult, if not impossible, to measure scientifically. The harm which Parliament seeks to address can be broadly articulated as electoral unfairness. Several experts, as well as the Lortie Commission, concluded that unlimited third party advertising can undermine election fairness in several ways. First, it can lead to the dominance of the political discourse by the wealthy (Lortie Report, *supra*, at p. 326; Professor Peter Aucoin's evidence, at Cairns J.'s paras. 60-61). Second, it may allow candidates and political parties to circumvent their own spending limits through the creation of third parties (Lortie Report, at p. 15; Professor Frederick James Fletcher and Chief Electoral Officer, at Cairns J.'s para. 62). Third, unlimited third party spending can have an unfair effect on the outcome of an election (Lortie Report, at pp. 15-16). Fourth, the absence of limits on third party advertising expenses can erode the confidence of the Canadian electorate who perceive the electoral process as being dominated by the wealthy. This harm is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and

> polls; and the multitude of issues, candidates and independent parties involved in the electoral process. In light of these difficulties, logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy.

[165] This reasoning applies with equal force to the present case insofar as we are dealing with the campaign period. Further, the statistics regarding relative third party and political party spending in the 2005 provincial election discussed earlier graphically demonstrate the level of spending by third parties relative to political parties in the context of a fixed date election. The consequences of the increased spending in 2005 have, at a minimum, the potential to lead to the dominance of the political discourse by third parties. This, in my view, is evidence of the harm that the legislature seeks to address in ensuring electoral fairness.

[166] While I have concerns regarding the nature of the harm as it relates to the pre-campaign period, I prefer to deal with this issue when I discuss minimal impairment.

ii. Vulnerability of the Group

[167] The majority in ***Harper*** identified the Canadian electorate as a group whose relative vulnerability warranted protection. Bastarache J. acknowledged that third party spending limits sought to protect the electorate by ensuring that it was possible to hear from all groups and, thus promote a more informed vote. Although recognizing at para. 80 that the "Canadian electorate 'must be presumed to have a certain degree of maturity and intelligence" ' (qtd. in ***Thomson Newspapers*** at

para. 101), he also noted that "where third party advertising sought to systematically manipulate the voter, the Canadian electorate might be seen as more vulnerable."

[168] Bastarache J. identified candidates and political parties as a second group protected by the spending restrictions, but did not consider them to be vulnerable.

[169] It was suggested in the present case that another vulnerable group protected by the impugned provisions is comprised of dissenting members of unions who are of the view that their unions spend their mandatory dues promoting positions and parties with which they disagree or do not wish to have promoted in their name. I do not agree. It seems to me that vulnerable groups should be identified by reference to the objectives of the legislation. As enhancing the ***Charter*** interests of dissenting union members has never been identified as an objective of the impugned provisions, it is my view that it would not be appropriate to consider them a vulnerable group for the purposes of the present analysis.

iii. Subjective Fears and Apprehension of Harm

[170] The notion that unrestrained third party spending is dangerous to democracy is reflected in the Lortie Report and in the Supreme Court's egalitarian model decisions in ***Libman*** and ***Harper***. On this point, the majority in ***Harper*** wrote (at paras. 82-83):

> 82 Perception is of utmost importance in preserving and promoting the electoral regime in Canada. Professor Aucoin emphasized that "[p]ublic *perceptions* are critical precisely because the legitimacy of the election regime depends upon how citizens assess the extent to which the regime advances the values of their electoral democracy"

> (emphasis in original). Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter.
>
> 83 Several surveys indicate that Canadians view third party spending limits as an effective means of advancing electoral fairness. Indeed, in *Libman*, *supra*, at para. 52, the Court relied on the survey conducted by the Lortie Commission illustrating that 75 percent of Canadians supported limits on spending by interest groups to conclude that spending limits are important to maintain public confidence in the electoral system.

[171] There is no evidence in the present case that the public in British Columbia is any less concerned in a general way about the danger of unrestrained third party spending than was reflected in the surveys referred to in the passage from ***Harper***. As mentioned above, there is, however, some evidence of strong public disapproval of ***Bill 42***. The government received almost 2,000 emails between May and September 2008 condemning ***Bill 42***. Newspaper editorials, the BCCLA and the Trial Lawyers Association of British Columbia were also harsh in their criticism of the legislation. While some of the criticisms were against restrictions on third party advertising in general, the duration of the restrictions in ***Bill 42*** – whether 120 days or 60 days – and their applicability during the period when the legislature was in session appear to have been the target of particular attack. While this evidence admittedly does not offer the same insight into public attitudes and perceptions as a broadly-based survey, it is fair to say that there is a perception, in some quarters at least, that ***Bill 42*** is unfair. As Bastarache J. observed, “Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter”.

iv. Nature of the Infringed Activity

[172] Third party election advertising constitutes political expression. Political expression is at the very heart of freedom of expression and benefits from a high degree of constitutional protection. Bastarache J. acknowledged in ***Harper*** that whether partisan or issue-based, third party election advertising enriches political discourse.

[173] Notwithstanding the absence of evidence before the Court that third party advertising sought to be manipulative, Bastarache J. held that the danger that such advertising could manipulate or oppress the voter entitled the means chosen by Parliament, to some deference. He endorsed the proposition espoused in ***Libman***, that spending restrictions that limited the political expression of some could enhance the political expression of others. Further, Bastarache J. wrote that by limiting political expression, the spending restrictions brought greater balance to the political discourse and allowed for more meaningful participation in the electoral process, thus enhancing another ***Charter*** right, the right to vote.

[174] Bastarache J. continued at para. 87:

> Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties, and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process. For candidates, political parties and third parties, meaningful participation means the ability to inform voters of their position. For voters, meaningful participation means the ability to hear and weigh many points of view. The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and

> the nuances inherent in implementing this model, the Court must approach the justification analysis with deference. The lower courts erred in failing to do so (Paperny J.A., at para. 135). In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.

[175] The plaintiffs submit that the extension of the spending restrictions to the pre-campaign period substantially skews the balance sought to be achieved by the legislation upheld in ***Harper*****.** The impugned provisions restrict public discussion of the government while it is in session, which they describe as anathema to the principles of democracy and an assault on democratic traditions.

[176] Again, while I have concerns in this regard, I will address those at the minimal impairment stage. For present purposes, it is sufficient to recognize the importance of the expressive freedom that is being infringed and acknowledge Bastarache J.'s reasoning above.

v. Summary re: Contextual Factors

[177] The majority in ***Harper*** concluded that these four contextual factors favoured a deferential approach to Parliament in determining whether the challenged restrictions were demonstrably justified in a free and democratic society. In ***Bryan*** at para. 28, Bastarache J. elaborated further about what this meant:

> In *Harper*, I referred to the contextual factors as favouring a "deferential approach to Parliament": see para. 88. However, in my view the concept of deference is in this context best understood as being about "*the nature and sufficiency of the evidence required* for the Attorney General to demonstrate that the limits imposed on freedom of

> expression are reasonable and justifiable in a free and democratic society": *Harper*, at para. 75 (emphasis added). What is referred to in *Harper* and *Thomson Newspapers* as a "deferential approach" is best seen as an approach which accepts that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate.
>
> [Italic emphasis in original; underline emphasis added]

[178] Thus, he continued, the contextual factors are essentially directed at determining to what extent the case before the court is a case in which 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 analysis.

[179] In my view, the contextual factors in the present case similarly favour a deferential approach to the Attorney General in determining whether the impugned provisions are demonstrably justified in a free and democratic society.

(d) Pressing and Substantial Objective

[180] In ***Harper***, Bastarache J. noted the desirability of articulating the purpose of limiting provisions with as much precision as possible when engaging in the s. 1 analysis. He more narrowly characterized the overarching objective of electoral fairness as being threefold: to promote equality in the political discourse; to protect the integrity of the financing regime applicable to candidates and parties; and, to ensure that voters have confidence in the electoral process. The Attorney General

in the present case asserts those very same objectives in relation to the impugned provisions.

[181] Relying principally on the Lortie Report, Bastarache J. found each of those objectives to be pressing and substantial (paras. 101-103):

> (i) To Promote Equality in the Political Discourse
>
> As discussed, the central component of the egalitarian model is equality in the political discourse; see *Libman*, at para. 61. Equality in the political discourse promotes full political debate and is important in maintaining both the integrity of the electoral process and the fairness of election outcomes: see *Libman*, at para. 47. Such concerns are always pressing and substantial "in any society that purports to operate in accordance with the tenets of a free and democratic society"; see *Harvey*, at para. 38.
>
> (ii) To Protect the Integrity of the Financing Regime Applicable to Candidates and Parties
>
> The primary mechanism by which the state promotes equality in the political discourse is through the electoral financing regime. The Court emphasized the importance of this regime in *Figueroa*, at para. 72:
>
> > The systems and regulations that govern the process by which governments are formed should not be easily compromised. Electoral financing is an integral component of that process, and thus it is of great importance that the integrity of the electoral financing regime should be preserved.
>
> Accordingly, protecting the integrity of spending limits applicable to candidates and parties is a pressing and substantial objective.
>
> (iii) To Maintain Confidence in the Electoral Process
>
> Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from

> participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective.

[182] I see no reason to depart from these findings, and I conclude that the objectives of the impugned provisions are pressing and substantial.

2. Proportionality

(a) Rational Connection

[183] The rational connection stage of the analysis requires the Attorney General to "show a causal connection between the infringement and the benefit sought on the basis of reason or logic:" ***RJR-MacDonald*** at para. 153. See also ***Harper*** at para. 104.

[184] In ***Harper***, the majority held that there was sufficient evidence establishing a rational connection between restrictions on third party election advertising on the one hand, and promoting equality in the political discourse, protecting the integrity of the financing regime applicable to candidates and parties, and maintaining confidence in the electoral process on the other.

[185] With respect to promoting equality in the political discourse, Bastarache J. wrote at paras. 105-107:

> 105 To establish that third party advertising expense limits promote equality in the political discourse, the Attorney General must establish, first, that political advertising influences voters, and second, that in the

> absence of regulation some voices could dominate and, in effect, drown others out.
>
> 106 The majority of the Court of Appeal concluded, at para. 114, that the social science evidence of the impact of political advertising on voters was inconclusive. Professor Aucoin (in evidence) elucidated why there was a paucity of conclusive social science evidence:
>
> > [T]here is no prima facie reason, or evidence, for the claim that the advertising of third parties can never have its desired effect. It is advertising like all other advertising: sometimes it works, in the sense that it has its intended effects; sometimes it does not (as in having no effect, or having a negative or perverse effect). As with candidate and political party spending on advertising, there are other factors at work and certain conditions must exist for advertising to have its intended effect. Third parties cannot simply spend on advertising and always expect to have influence, anymore than candidates or parties can expect to "buy" elections.
>
> That political advertising influences voters accords with logic and reason. Surely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective. Indeed, advertising is the primary expenditure of candidates and political parties.
>
> 107 Where advertising influences the electorate, and those who have access to significant financial resources are able to purchase an unlimited amount of advertising, it follows that they will be able to dominate the electoral discourse to the detriment of others, both speakers and listeners. An upper limit on the amount that third parties can dedicate to political advertising curtails their ability to dominate the electoral debate. Thus, third party advertising expense limits are rationally connected to promoting equality in the political discourse.

[186] With respect to protecting the integrity of the financing regime that applies to candidates and parties Bastarache J. wrote at para. 108:

> 108 Third party advertising can directly support a particular candidate or political party. Third party advertising can also indirectly support a candidate or political party by taking a position on an issue associated with that candidate or political party. In effect, third party advertising can create an imbalance between the financial resources of

each candidate or political party; see *Libman*, *supra*, at para. 44. For candidate and political party spending limits to be truly effective, the advertising expenses of third parties must also be limited. Indeed, the Lortie Commission concluded that the electoral financing regime would be destroyed if third party advertising was not limited concomitantly with candidate and political party spending (Berger J.A., dissenting, at para. 261). The Commission explained, at p. 327 of the Lortie Report:

> If individuals or groups were permitted to run parallel campaigns augmenting the spending of certain candidates or parties, those candidates or parties would have an unfair advantage over others not similarly supported. At the same time, candidates or parties who were the target of spending by individuals or groups opposed to their election would be put at a disadvantage compared with those who were not targeted. Should such activity become widespread, the purpose of the legislation would be destroyed, the reasonably equal opportunity the legislation seeks to establish would vanish, and the overall goal of restricting the role of money in unfairly influencing election outcomes would be defeated.

Thus, limiting third party advertising expenses is rationally connected with preserving the integrity of the financing regime set for candidates and parties.

[187] Finally, regarding the objective of maintaining confidence in the electoral process, Bastarache J. wrote at para. 109 :

> 109 Limits on third party advertising expenses foster confidence in the electoral process in three ways. The limits address the perception that candidates and political parties can circumvent their spending limits through the creation of special interest groups. The limits also prevent the possibility that the wealthy can dominate the electoral discourse and dictate the outcome of elections. Finally, the limits assist in preventing overall advertising expenses from escalating. Thus, third party advertising expense limits advance the perception that access to the electoral discourse does not require wealth to be competitive with other electoral participants. Canadians, in turn, perceive the electoral process as substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process.
>
> [Emphasis in original]

[188] I have no hesitation in concluding that the impugned provisions are similarly rationally connected to the objectives of promoting equality in the political discourse, protecting the integrity of the financing regime applicable to candidates and parties, and maintaining confidence in the electoral process. The fact that the impugned provisions impose spending restrictions for a longer, and qualitatively different, period of time than the federal legislation, is a matter to be considered under minimal impairment.

(b) Minimal Impairment

[189] In order to be reasonably justified, the impugned legislation must impair the infringed freedom to the minimal extent possible, as explained in the frequently quoted passage from ***RJR-MacDonald*** at para. 160:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

[190] The impugned measures need not be the least impairing option.

[191] The contextual factors discussed earlier speak to the degree of deference to be accorded to the particular means chosen by the government to implement a legislative purpose. In ***Harper***, Bastarache J. held that the contextual factors warranted a deferential approach to the balance Parliament had struck between political expression and meaningful participation in the electoral process (at

para. 111). In the subsequent decision of ***Bryan***, he elaborated that deference in this context did not mean that legislative decisions would be approved by the Court without scrutiny; rather, the contextual approach to s. 1 suggested that in some cases, logic and reason would constitute appropriate supplements to what evidence did exist.

[192] In concluding in ***Harper*** that the federal election legislation minimally impaired freedom of expression, Bastarache J.'s reasoning was as follows. Firstly, the definition of election advertising did not apply to advertising that was not associated with a political party or candidate, thus permitting third parties to undertake unlimited advertising campaigns regarding issues that were not associated with either. Secondly, the $3,000 electoral district limit and the $150,000 national limit allowed for meaningful participation in the electoral process while respecting the right to free expression (para. 115):

> [115] … Why? First, because the limits established in s. 350 allow third parties to advertise in a limited way in some expensive forms of media such as television, newspaper and radio. But, more importantly, the limits are high enough to allow third parties to engage in a significant amount of low cost forms of advertising such as computer generated posters or leaflets or the creation of a 1-800 number. In addition, the definition of "election advertising" in s. 319 does not apply to many forms of communication such as editorials, debates, speeches, interviews, columns, letters, commentary, the news and the Internet which constitute highly effective means of conveying information. Thus, as the trial judge concluded, at para. 78, the limits allow for "modest, national, informational campaigns and reasonable electoral district informational campaigns".

[193] As well, Bastarache J. continued, the limits were justifiably lower than the candidate and political party advertising limits, which was necessary to ensure that a particular candidate who was targeted by a third party had sufficient resources to respond.

[194] Bastarache J. also addressed the opposing view of the minority that the spending limits prevented effective communication, at para. 12:

> [112] The Chief Justice and Major J. assert that short of spending well over $150,000 nationally and $3,000 in a given electoral district, citizens cannot effectively communicate their views on election issues to their fellow citizens (para. 9). Respectfully, this ignores the fact that third party advertising is not restricted prior to the commencement of the election period. Outside this time, the limits on third party intervention in political life do not exist. Any group or individual may freely spend money or advertise to make its views known or to persuade others. In fact, many of these groups are not formed for the purpose of an election but are already organized and have a continued presence, mandate and political view which they promote. Many groups and individuals will reinforce their message during an electoral campaign.

[195] He concluded that the challenged provisions satisfied this stage of the s. 1 analysis, at para. 118:

> [118] Certainly, one can conceive of less impairing limits. Indeed, any limit greater than $150,000 would be less impairing. Nevertheless, s. 350 satisfies this stage of the *Oakes* analysis. The limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties. The limits preclude the voices of the wealthy from dominating the political discourse, thereby allowing more voices to be heard. The limits allow for meaningful participation in the electoral process and encourage informed voting. The limits promote a free and democratic society.

[196] In the present case, the extension of the impugned spending restrictions to the pre-campaign period, together with the alleged overbreadth of the definition of election advertising and inadequacy of the spending limits, ground the plaintiffs' position that the impugned provisions are not minimally impairing.

[197] The plaintiffs submit that the ***BC Act*** differs fundamentally from the legislation upheld in ***Harper*** because of the extension of the restricted period to the pre-campaign period when the legislature is in session. Relying on para. 112 of ***Harper***, above, they say that Bastarache J.'s conclusion that s. 350 was minimally impairing, rested on the fact that the restrictions were confined to the campaign period. The plaintiffs say that the issuing of the writs of election is the transformative event, and that so long as uninhibited political expression is permitted outside of the campaign period, restrictions during the campaign period can be justified. They add that the longer restricted period in the ***BC Act*** has the effect of rendering the spending limits even more severe, since third parties are, in essence, permitted to spend only $50,000 per month instead of the $150,000 upheld in ***Harper***.

[198] In my view, the plaintiffs read more into para. 112 than it can reasonably bear. Keeping in mind that there were no fixed elections at the federal level at the time ***Harper*** was decided, I interpret Bastarache J. as saying no more than whatever the restricted period, third parties are able to engage in election advertising outside of that period. However, even though the passage does not bear the broad interpretation the plaintiffs give it, the question of whether the impugned restrictions are minimally impairing remains to be considered.

[199] The Attorney General submits that an extension of the restricted period is a necessary anti-circumvention measure in the context of fixed date elections, and that the legislature's choice of a 60-day period constitutes a genuine and reasonable attempt to balance expressive freedom and electoral fairness. Technological developments since ***Harper*** was decided mean that the prescribed spending limits allow for even greater political organization and communication than was previously possible, and strengthen Bastarache J.'s conclusion that a constitutionally-sufficient campaign can be conducted under the prescribed limits. Moreover, says the Attorney General, the fact that the limits in the **BC *Act*** are many times higher than those that apply federally on a per capita basis is firmly dispositive.

[200] I will begin my analysis of minimal impairment by reviewing some of the evidence with respect to the costs of advertising and the emergence of new communication technologies.

i. Advertising Costs and Web 2.0 Technologies

[201] As mentioned above, in ***Harper*** Bastarache J. held at para. 115 that the spending limits permitted third parties to advertise in a limited way in some expensive forms of media such as television, newspapers and radio, and to advertise in a significant way in some low cost forms such as posters, leaflets, or 1-800 numbers. As well, the definition of election advertising in issue did not apply to forms of communication such as editorials, debates, speeches, interviews, and columns. Again, Bastarache J. concluded:

> Thus, as the trial judge concluded, at para. 78, the limits allow for "modest, national, informational campaigns and reasonable electoral district informational campaigns".
>
> [Emphasis added]

[202] The plaintiffs say that although what is referred to in para. 115 may be sufficient to constitute minimal impairment during the campaign period when "space" needs to be afforded the principal players – the political parties and candidates – that cannot be the standard that applies during the pre-campaign period. They cite paras. 35–39 of the minority reasons in ***Harper***, and submit that the appropriate standard during the pre-campaign period is "effective and persuasive communication". At para. 39, McLachlin C.J. and Major J. wrote:

> This is not to suggest that election spending limits are never permissible. On the contrary, this Court in *Libman* has recognized that they are an acceptable, even desirable, tool to ensure fairness and faith in the electoral process. Limits that permit citizens to conduct effective and persuasive communication with their fellow citizens might well meet the minimum impairment test. The problem here is that the draconian nature of the infringement – to effectively deprive all those who do not or cannot speak through political parties of their voice during an election period – overshoots the perceived danger. Even recognizing that "[t]he tailoring process seldom admits of perfection" (*RJR-MacDonald*, *supra*, at para. 160), and according Parliament a healthy measure of deference, we are left with the fact that nothing in the evidence suggests that a virtual ban on citizen communication through effective advertising is required to avoid the hypothetical evils of inequality, a misinformed public and loss of public confidence in the system.
>
> [Emphasis added]

[203] The plaintiffs further submit that even if the standard of a modest informational campaign described by Bastarache J. is applied, the evidence

demonstrates that the prescribed spending limits are not adequate to allow for such a campaign using conventional media.

[204] For instance, it is the evidence of Carrie Ann Barlow, an owner of a business that supplies media planning, buying and consulting services, that the estimated costs for typical province-wide advertising campaigns using various forms of conventional media are as follows:

a. three-week television campaign – $643,000;

b. three-week radio campaign – $273,000;

c. three-week campaign in daily newspapers – $250,000;

d. campaign in community newspapers – $340,000;

e. four-week billboard campaign – $268,000;

f. four-week campaign advertising on outdoor transit shelters – $151,000;

g. four-week campaign advertising on bus exteriors – $130,000.

[205] Stuart Ince, a partner at i2i Advertising and Marketing Ltd., was asked by the plaintiffs to develop a model campaign for a hypothetical non-governmental organization. With respect to the hypothetical, Mr. Ince was asked what kind of advertising campaign would be required to run an effective, persuasive media campaign and at what cost; what kind of campaign would be required to run a province-wide modest informational campaign and at what cost; and what kind of advertising campaign could be purchased for a total budget of $150,000.

[206] Mr. Ince defined an “informational campaign” as one based on the strategy of informing as many persons in the target audience as possible within timing restrictions. He estimated that the cost of a province-wide modest informational campaign that utilized television and newspapers over a three-week period, with an effective reach of 87%, at a frequency of 3-plus times, was at $929,587.

[207] Mr. Ince defined an “effective persuasive campaign” as the more conventional advertising strategy that entails effectively persuading as many people as possible within timing restrictions. For an effective persuasive campaign in the context of the hypothetical, Mr. Ince recommended an eight-week plan that incorporated a combination of television, print, radio and the internet. The campaign would have an effective reach of 93% of adults over the age of 18 years at a frequency of 3-plus times. He estimated cost of such a campaign to be $1,244,122.

[208] With respect to the type of campaign that could be purchased for $150,000, Mr. Ince’s evidence was as follows:

> For a campaign with a budget limited to $150,000, I have supplied a plan with a one week combination of TV and newspaper. Total reach would be 74% of adults 18+ with a frequency of 3. Effective reach would be 30% at a frequency of 3. This plan does not constitute an effective persuasive media campaign or a province-wide modest informational campaign because at 74% total reach and 30% effective reach, it simply fails to effectively reach the target. Over 25% of British Columbians will not be exposed to our message at all.

[209] As has been noted elsewhere in these Reasons, the plaintiff unions have spent considerable amounts in the periods leading up to elections in the past. The BCTF spent over $874,000 in the 28 days leading up to the 2005 election. Of this,

approximately $550,000 was for television advertising. It spent a further $380,000 on television advertising during the pre-campaign period. The BCNU spent over $257,000 on conventional forms of advertising during the same 28-day period, and the FPSE, over $209,000. CUPE BC spent approximately $198,000 on election advertising during the 88-day period preceding the 2005 provincial election.

[210] There is, as well, considerable evidence regarding the costs of specific advertisements and advertising campaigns. To provide just a few examples, in November 2007, the BCTF spend over $178,000 for a newspaper advertisement criticizing the government for spending money on convention centres while "shortchanging" the province's schools. Another example from the BCTF are advertisements it purchased in daily newspapers throughout the province at an approximate cost of $130,000, which lamented the results of government inaction on the school system. CUPE 378 purchased a radio advertisement critical of private power companies at a cost of approximately $50,000. FPSE pent $231,537 during the 2007 fiscal year on a "Better Funding, Better Futures" campaign, and $361,243 on this ongoing campaign during the 2008 fiscal year. CUPE BC distributed 80,000 copies of a "dirty deeds" calendar critical of the government, in 2004, at a cost of almost $74,000.

[211] The government also spends substantial amounts on advertising. A sample of approximate costs for government advertising preceding the May 2005 election include:

a. campaign to inform British Columbians about measures to prevent forest fires – $207,000 for creative and production services, and $1.1 million for advertising purchasing;

b. "The Best Place on Earth" campaign to encourage British Columbians and Canadians to vacation in British Columbia – $939,000 for creative and production services, $3.4 million for advertising purchasing, and $48,000 for photography services for the image bank;

c. campaign to inform British Columbians about investment opportunities in the province – $307,000 for creative and production services, and $2.8 million for advertising purchasing;

d. campaign to inform British Columbians about new parks – $78,000 for creative and production services, and $294,000 for advertising purchasing;

e. campaign to seek input from British Columbians on the priorities for the 2005/2006 budget and fiscal plan – $58,000 for creative services, $30,000 for advertising purchasing, $1,900 for photography services and $343,000 for production and distribution services.

[212] The implications of the $3,000 per riding limit are reflected in the evidence of Eric Swanson of the Dogwood Initiative, a non-profit organization which seeks to increase land under local management and control throughout the province. In February 2008, the organization undertook a public media campaign focussing specifically on the riding of Saanich/Gulf Islands. The campaign, addressing the issue of oil tankers on the British Columbia coast, consisted of lawn signs and cost $4,648 for creative services and production. The evidence is that but for the impugned provisions, the Dogwood Initiative would be undertaking riding specific public media campaigns during the 88 days preceding the May 2009 elections; the spending restrictions, however, effectively preclude the organization from doing so.

[213] The Attorney General was critical of Mr. Ince's evidence because his model was reliant on heavy use of traditional mass media. The Attorney General contends that third parties no longer need to rely on traditional media to effectively inform or persuade the public since new Web 2.0 technologies facilitate constitutionally-sufficient campaigns within the prescribed spending limits.

[214] Various experts provided evidence on Web 2.0 technologies. Neil Monckton, a campaign consultant, and Justin Johnson, an internet and information technology security consultant, jointly authored an opinion regarding Web 2.0 technologies for the plaintiffs. As well, Mr. Zubyk, a political communications specialist, provided evidence in this regard for the independent defendants.

[215] Web 2.0 technologies have emerged to prominence since 2004 when ***Harper*** was decided. Such technologies allow interactive communication via networks, as opposed to passive informational websites. Mr. Johnson and Mr. Monckton explain the differences between traditional media and Web 2.0 technologies in these terms:

> The mass media – television, radio, newspapers, and magazines – are characterized by the fact that they control the channels of communication. Newspaper content is produced by journalists and other writers. Where they allow user input on the "letters to the editor" page, they only publish letters that are topical and that they judge are worth printing.
>
> In the web 2.0 world, the boundaries of the channel are technological rather than editorial. The filters on web 2.0 channels are the tastes of the people in your social network who would forward (or decline to forward) content to you based on their judgment of the value of the content and your likely response. In practice, this means that a high proportion of content that propagates along social networks is likely to

> be well received, since one's direct acquaintances tend to have similar tastes to oneself.

[216] The two salient aspects of Web 2.0 technologies for present purposes are social networking and content-sharing.

[217] Social networking websites, such as Facebook and Myspace, permit users to establish networks of "friends". Messages can be sent to a user's immediate network; those users can then pass the messages along to other users in their own networks, and so forth exponentially. Political candidates increasingly have Facebook pages dedicated to their campaign efforts. In the most recent mayoral election in Vancouver, for example, every candidate had a Facebook page.

[218] Recent opposition to the introduction of new laws in Ontario directed at young drivers offers an example of the ability of Facebook to mobilize users, though it may be fair to say that success at this level is rare. In November 2008, a Mississauga high school student who opposed the initiative organized an opposition group through Facebook that grew from 200 members in the first few hours to over 150,000 at its peak, eventually leading the Premier of the province to withdraw the legislation.

[219] Content sharing sites, such as YouTube, provide opportunities for sharing information, including videos and photographs. The sites are themselves interactive, and links to content can be embedded in social networking sites. A prominent example from the recent American election is will.i.am's Barack Obama video, "Yes We Can". That video has been viewed by over 14 million people on YouTube,

driven by a combination of social network transmission (people forwarding a link to the video to friends and family), earned media (the media reporting on the “viral” transmission of the video) and its social network placement on YouTube. This extensive distribution of the video was achieved at virtually zero cost to will.i.am.

[220] Referring to the evidence of Mr. Zubyk, a search of YouTube for candidates from the Vancouver municipal election reveals dozens of campaign and supporter generated videos for each major candidate.

[221] As Mr. Johnson and Mr. Monckton explain, it is the “people-powered” distribution that political campaigns wish to tap into, and have done so quite effectively in recent elections. They are able to extend their distribution of campaign materials in proportion to the enthusiasm of their supporters at little extra cost.

[222] While not a Web 2.0 technology, email messaging can also be used to reach large numbers of people. Third parties such as unions and businesses often have large databases of email contacts at their disposal, which can be used to deliver partisan political messages, recruit volunteers and encourage members to get out and vote.

[223] Mr. Johnson and Mr. Monckton opine that while free internet-based technologies have expanded the mediasphere in which election campaigns take place, such tools have significant limits on how they may be used by third parties in election campaigns. Among the limitations they identify are the following:

- The transmission of content on social networks is unequal. While some may go “viral” and succeed wildly, most will only see a low level of distribution. The consequence for political campaigns is that use of Web 2.0 technologies does not guarantee extensive distribution of campaign materials.

- Communication through Web 2.0 tools in Canada is limited by overall penetration of Internet access, which is not universal, and further limited to those who actively use such applications.

- By its very nature, Web 2.0 requires active engagement by the user, while traditional media tools, such as television, radio and print media, are based on more intrusive engagements, making them separate and distinct communications strategies.

- The Internet and its related Web 2.0 applications have less impact on older voters, the demographic pool most likely to vote in elections.

- Free Web 2.0 applications have design limitations that make them less efficient and cost-effective for mass election campaign communications. Large-scale campaigns that wish to reach tens of thousands of people must develop expensive, custom-built applications for Internet communications management.

- Web 2.0 social network content distribution is not controllable, making its release to a campaign's target audience less reliable. In contrast, when traditional forms of advertising are purchased, buyers know the level of penetration they can expect to have in their target demographics.

- Content distributed through social networks is not always trusted. Although it may carry an imprimatur of approval insofar as the sender thought it was worth forwarding, this does not translate directly to the credibility of the material.

[224] Mr. Johnson and Mr. Monckton posit that although the Internet is becoming a more relevant player in communications, television remains the dominant source for information. They cite an American study on communication tools in the 2008 American presidential election, according to which 60% of Americans responded that they got most of their presidential election information from television, as opposed to 15% who got most of their news about the election online. Mr. Johnson and Mr. Monckton say that Canadian election campaigns are no different, and that while voters respond to all communications tools that campaigns make use of, traditional media channels remain the most important for those casting ballots. They express their view that Web 2.0 is not a replacement for traditional media in election campaigns but, rather, is another tool in an integrated toolkit that includes traditional media. They also say that:

> For modern-day, large-scale election campaigns, there is no silver bullet when it comes to communicating to voters. Social media cannot

> replace traditional media. If a third-party campaign needs to compete against a mainstream political party or government for the support of the voting public, it will need access to the full array of communication tools including web 2.0, television, radio, newspapers, phone calls, direct mail and other modern campaign tool.

[225] Mr. Johnson and Mr. Monckton agree that Web 2.0 technologies provide those with limited financial resources greater ability to communicate with the public and develop support. Through the effective application of free Web 2.0 technologies, and low-resource campaigns are able to improve their communication effectiveness and to grow and develop their supporter base in ways that were not affordable or even possible before 2004.

[226] Mr. Zubyk's evidence is that as a political communications professional, Web 2.0 technologies have become an indispensible part of his campaign toolkit. Indeed, he says that it would not be possible for him to run an effective political campaign and to organize and inform activists and members of the public around an issue or a political party without extensive use of these tools. Given that these tools are essentially free to users, they represent a highly cost-effective alternative for his clients. Another consequence of their being free is that they are a particularly valuable method of organizing and advertising political campaigns during times when the use of more traditional forms of media are restricted by limits on party or third party election spending.

[227] The Attorney General describes these network communication tools as inherently more democratic than traditional forms of communication because the

extent and success of the dissemination depends to a large degree on how the message is received. A message's reach is largely reliant upon its resonance. A message that is not embraced will not go anywhere; one that is, will spread. This is in contrast to traditional broadcasting, where the dissemination of the message is entirely unrelated to its value as perceived by its recipients. There is, as well, an unpredictability in that messages will not necessarily be propagated without changes or added commentary. This lack of control is a fundamental difference between advertising on paid media and social networks.

[228] The Attorney General submits, in his words:

> Traditional media is a cathedral, where pronouncements are made and reinforced from on high as a means of attempting to ensure their acceptance. The modern internet – Web 2.0 – is a bazaar: chaotic, interactive, organic … and democratic in the sense that only those messages which are engaging are accepted.

[229] The Attorney General says that the impugned provisions achieve an egalitarian purpose by restricting all third parties to the same toolkit, and by preventing access to wealth in order to guarantee access to a particular means of communication.

[230] While not a Web 2.0 technology, this is a convenient place to refer to the Attorney General's submission regarding "earned media". Earned media refers to the ability of politicians and activists to publicize their message through conventional media; for instance, a press release or a rally might be covered by the broadcast news, thus generating free advertising for the campaigners. Mr. Zubyk testified that

earned media is the most valuable form of communication available to political campaigns. He also testified, and it accords with common sense, that earned media is more available in the period before an election since that is the period when the attention of newsrooms and the public is most fixed on political matters.

[231] I accept that the increased use of Web 2.0 technologies has and will continue to affect the manner in which both political campaigns and third parties communicate their message to the public. Nevertheless, those technologies are not a replacement for conventional advertising in the mass media, a proposition recognized by all of the parties. As summarized above, Mr. Johnson and Mr. Monckton set out a number of reasons why this is so. The quite obvious fact that political parties and candidates continue to rely heavily on the traditional media to inform and persuade the public further underscores this point.

[232] I am satisfied that the emergence of Web 2.0 technologies has had a modest effect on increasing the level of effective communication possible within the spending limits set out in s. 235.1 of the ***BC Act***. In future, that effect may be greater yet. The evidence is unequivocal that conventional advertising in the mass media is a costly endeavour. Nevertheless, taking into consideration the monetary limits prescribed by s. 235.1 and the fact that they are effectively higher in the context of a provincial, as opposed to federal, campaign; the exemptions from election advertising as set out in s. 228; and the availability of Web 2.0 technologies, I am satisfied that the spending limits allow for a modest provincial informational

campaign and a reasonable electoral district informational campaign, as referred to by Bastarache J. at para. 115 of ***Harper*** in respect to the national sphere.

ii. Approaches in Other Jurisdictions

[233] Fixed date elections exist at the federal level, as well as in a number of other provinces. (Such elections were introduced federally in 2006, subsequent to the decision in ***Harper***.) None of the other Canadian jurisdictions with fixed date elections impose restrictions on third party advertising during the pre-campaign period. This alone, however, is not evidence that it is unreasonable to do so.

[234] In assessing the reasonableness of the restricted period in the ***BC Act***, the Attorney General urges me to consider the approaches taken in other parliamentary democracies that also have fixed date elections. Four commonwealth jurisdictions, apart from British Columbia, have both fixed date elections and limits on third party election advertising: Wales, Northern Ireland, Scotland and New Zealand Each also has a system whereby Parliament is dissolved through the issuance of a writ approximately one month before election day.

[235] The legislation governing third party election spending in Scotland, Northern Ireland and Wales is the ***Political Parties, Elections and Referendum Act 2000*** (U.K.), 2000, c. 41 [***UK Act***]. While couched in different language, the main elements of the ***BC Act*** are present in the ***UK Act***: registration requirements, restrictions on third party election advertising; a broad definition of advertising that includes issues associated with a candidate or party; and an anti-combination

provision. For each of the three jurisdictions, the spending restrictions apply for four months prior to the date of the poll. The spending limit for elections to the Scottish Parliament is £75,800 (approximately C$144,700); £30,000 (C$57,000) for elections to the Welsh Assembly; and £15,300 (C$29,000) for elections to the Northern Ireland Assembly.

[236] The governing legislation in New Zealand is the ***Electoral Finance Act 2007*** (N.Z.), 2007/11 [***New Zealand Act***]. It defines election advertisement in terms similar to the ***BC Act***. The ***New Zealand Act*** imposes a cap of NZ$4,000 (approximately C$2,840) for advertisements that "relate to a candidate in the candidate's capacity as a candidate for an electoral district" and a global limit of NZ$120,000 (C$85,200) (s. 118(1)), during the regulated period. The regulated period varies, and can cover a period between three months and one year. Although New Zealand does not have a statutorily fixed election date, elections are highly predictable because they occur by convention in October or November of every third year.

[237] Again, while the approaches taken in these other jurisdictions are interesting, I consider them neutral in my analysis in the instant case. Simply because other governments have chosen to enact similar legislation is not conclusive as to its necessity. Moreover, as the Supreme Court observed in ***Thomson Newspapers*** at para. 121:

> … In the absence of some consensus in the international context, or of evidence explaining why the provisions adopted in some other free and democratic countries are compelling given the situation in Canada, the experience of some other countries as a justification under s.1 should not be accorded great weight. This is no more than to say that the example of those countries which do not have such provisions is of as much weight in evaluating whether the legislation is justified as those that do.
>
> [Emphasis in original]

iii. Overbreadth

[238] The plaintiffs argue that the definition of "election advertising" in s. 228 of the ***BC Act*** is grossly overbroad. They say that the definition captures what they have done in the past two elections, as well as all reasonable hypothetical advertising they may wish to conduct in the upcoming election. They submit that in the absence of an evidentiary or logical basis upon which to conclude that election advertising during the pre-campaign period will drown out the voices of those who wish to be heard during the campaign period, the definition in s. 228 captures far more expression than is necessary to achieve the legislature's objective of electoral fairness. The 28-day campaign period exists, they say, as a period of calm during which advertising will largely be limited to political parties and candidates.

[239] The plaintiffs also submit that the definition captures within its net advertising that which does not have as its primary purpose the influencing of an election. One example is an advertising campaign seeking to persuade the government not to proceed with a bill or initiative enacted during the preceding 60 days. Another is union advertising on an issue of ongoing interest that is not intended to affect the

election but is transmitted at election time when the public is listening. The plaintiffs say that by capturing expression that has nothing to do with electoral fairness, the impugned provision overshoots its objective.

[240] A law that is overbroad is one in which the means are too sweeping in relation to the objective. As Cory J. explained in ***R. v. Heywood***, [1994] 3 S.C.R. 761 at para. 49, 120 D.L.R. (4th) 348:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[241] As mentioned above, in ***Harper***, Bastarache J. addressed the allegation of vagueness in considering whether the federal legislation constituted a limit prescribed by law. Whether the definition of election advertising was impermissibly broad, he said, was a matter more properly considered at the minimal impairment stage of the justification analysis. Once he reached that stage of the justification analysis, his discussion of minimal impairment focussed on whether the monetary limits were set at appropriate levels, and his discussion of overbreadth was exceedingly brief. At para. 114, Bastarache. J. wrote:

> Section 350 minimally impairs the right to free expression. The definition of “election advertising” in s. 319 only applies to advertising that is associated with a candidate or a party. Where an issue is not

> associated with a candidate or political party, third parties may partake in an unlimited advertising campaign.

[242] That was the extent of his analysis regarding overbreadth.

[243] I will set out the definition of election advertising in s. 228 of the ***BC Act*** again for convenience:

> "election advertising" means the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of 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.
>
> [Emphasis added]

[244] At its core, election advertising is an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate. It includes an advertising message that takes a position on an issue with

which a registered political party or candidate is associated, commonly referred to as issue advertising. Other than the duration of the restricted period, the primary difference between the federal definition upheld in ***Harper*** and s. 228 of the ***BC Act*** is the addition of "directly or indirectly" as underlined above. The federal definition refers only to "an advertising message that promotes or opposes a registered party or the election of a candidate …"

[245] As the Court noted in ***Harper***, third party advertising can directly support a particular candidate or political party; it can also *indirectly* support a candidate or political party by taking a position on an issue associated with that candidate or political party. Thus, the inclusion of "indirectly" in s. 228 simply brings issue advertising within the ambit of the provision. While it is surplusage since issue advertising is also captured by the more explicit proscription on "an advertising message that takes a position on an issue with which a registered political party or candidate is associated", in my view, it does not cause the impugned definition to differ materially from the federal definition in that respect. Any case for overbreadth must therefore rest upon the expanded duration of the restricted period.

[246] I would, nevertheless, observe that Bastarache J.'s comment in ***Harper*** to the effect that third parties may partake in unlimited advertising campaigns regarding issues that are not associated to a political party or candidate does not accord with the reality of election advertising in this province. Practically speaking, it is not readily apparent when an issue is *not* associated with a candidate or political party. The Liberal Party's campaign platform for the 2005 election demonstrates the extent

to which this is the case. Entitled *A Proven Plan for a Golden Decade*, the document (BC Liberal Party: 2005) sets out the party's platform regarding a wide range of topics: education, including life-long learning and advanced education; the arts; cultural diversity; healthier living and physical fitness; health care; seniors; children and families; First Nations; women; public safety; democratic reform; partnerships with local governments; parks; environmental protection; job creation; free enterprise; income taxes; research and technology; forestry industry; sustainable development in the energy and mining industries; the 2010 Olympics; tourism; new "gateways" to the Asia Pacific; transportation; northern development; regional growth; and relations with the federal government and other provinces. Against this platform, it is difficult to conceive of an issue that is not associated with the Liberal Party.

[247] The Attorney General submits that to the extent that the longer restricted period and active legislative session are relevant to the constitutional analysis, they do not affect the validity of the legislation, but rather its interpretation and application. He says that on any reasonable interpretation of the impugned definition, reading it harmoniously with the scheme of the BC Act and its objects, "election advertising" must necessarily exclude advertising that is unrelated to the objective of ensuring a fair election. The Attorney General acknowledges that given the longer restricted period, more scrutiny will be applied to whether an advertisement is related to an election. He asserts that the CEO or the court may find that with respect to the pre-campaign period, election advertising is advertising

on issues that have a sufficient nexus to the election so as to be supported by the rationale of the law. Establishing such a nexus does not require rewriting the law, but rather simply interpreting it consistently with the constitution.

[248] It is settled law that Dreidger's definitive formulation is the preferred approach to statutory interpretation. As Iacobucci J. wrote in ***Rizzo & Rizzo Shoes Ltd., (Re)*** [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193:

> [21] Although much has been written about the interpretation of legislation … Elmer Dreidger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > [citations omitted]

[249] Cory J. stated in ***Heywood*** at para. 31: "If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the act, then that is the interpretation that should govern."

[250] It is also well-settled that ***Charter*** values can play a role in statutory interpretation: ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, [2002] 2 S.C.R. 559. Where there is a genuine ambiguity as to the meaning of a provision, it is appropriate to prefer an interpretation that accords with ***Charter*** principles. This is what the Attorney General seeks to have me do here.

[251] In my view, however, there is no ambiguity in the definition of election advertising. The language of the definition, considered in the context of the scheme and objectives of the ***BC Act*** and the intent of the legislature, as discussed earlier, is clear that it applies to all advertising that promotes or opposes, directly or indirectly, a political party or the election of a candidate. Although ascertaining whether the definition captures a particular issue or advertisement that a third party may wish to run during the pre-campaign period is by no means straightforward, that difficulty arises from the breadth of the prescribed activity, not from any ambiguity in the definition itself.

[252] The Supreme Court's decision in ***Heywood*** is instructive in this regard. The accused was charged with committing vagrancy contrary to s. 179(1)(b) of the ***Criminal Code,*** R.S.C. 1985, c. C-46. That provision made it a crime for anyone who had been committed of specified offences to be found "loitering" near enumerated places. The Crown, hoping to shield the provision from constitutional attack on the basis of overbreadth, had argued that "loiter" within the meaning of s. 179(1)(b) should be interpreted as requiring malevolent intent. The accused submitted that loiter should be given its ordinary meaning. A majority of the Court held that in light of the ordinary meaning of loiter, its meaning as used elsewhere in the ***Criminal Code*** and the purpose of s. 179(1)(b) (which was to protect children from sexual offences), it should be given its ordinary meaning, namely, to stand idly around or hang around. That being the case, the provision was held to be overbroad.

[253] I do not consider that part of the definition of election advertising that refers to an advertising message that directly promotes or opposes a political party or candidate to raise problems. It is the issue of advertising in the context of the expansive pre-campaign period that causes me concern, since it captures advertising that does not have as its primary purpose the influencing of an election. As mentioned above, it would capture, for instance, advertising by a public sector union with respect to collective bargaining underway during the restricted period. It would also capture advertising that endeavoured to persuade the government not to proceed with proposed legislation that may have been enacted during or prior to the pre-campaign period. By way of example, if ***Bill 42*** had been introduced during or just prior to an election pre-campaign period, the "Just Shut Up" advertising campaign opposing that Bill would have been captured as advertising that took a position on an issue with which a party (the governing Liberal Party) was associated. In so doing, it would have captured expression that had nothing to do with electoral fairness.

[254] To interpret s. 228 in such a way as to exclude advertising unrelated to the objective of ensuring a fair election, as urged by the Attorney General, would be unworkable. Its application would then become entirely dependent upon the subjective views of the Chief Electoral Officer, which is clear in the Attorney General's submissions on this point:

> It is possible that the approach in *Harper*, which arguably errs on the side of over-inclusiveness in the 28-day writ period, will be modified given the longer period of restriction, and some connections, some

> nexus, with the election will need to be demonstrated above and beyond mere temporal proximity. Where, for instance, an advertisement does not directly promote or oppose a party or candidate, but takes a position on an issue with which a party or candidate is associated, it can be "indirect" "election advertising" if its content, while promoting a view on an issue, is also tied explicitly or implicitly to the election, such as when its primary purpose is to support or oppose a particular party or candidate.
>
> This might happen, for example, if the issue is explicitly identified with a party and/or candidate (i.e. that "Gordon Campbell's Liberals" have cut school funding), or if the issue is tied to influencing the exercise of a vote (i.e. "think about it: Vote on May 17"). Implicitly, an "issue advertisement" could be "election advertising" if the Chief Electoral Officer determines that, having regard to the content of the advertising, its geographic focus, and the timing of the campaign, it is directed at influencing the outcome of an election.
>
> But these are matters for the Chief Electoral Officer to decide. That Officer, an independent appointee, issues guidelines, including a "Guide to Election Communications" and an "Election Advertising Sponsor Completion Guide". To the extent that any party remains uncertain regarding the application of the BC *Act* to its campaign, it can contact the Chief Electoral Officer directly for his view.

[255] The interpretation advanced by the Attorney General would add little in the way of clarity to the definition, and would in fact, render it vague. Moreover, as discussed earlier, an infringement of a ***Charter*** right must be prescribed by law. Guidelines such as those referenced by the Attorney General are not prescribed by law: see ***Little Sisters Book and Art Emporium v. Canada (Minister of Justice)***, 2000 SCC 69, [2000] 2 S.C.R. 1120, where the Court was unanimous that Parliament is to be judged by its laws, not its guidelines. To essentially require third parties to seek a discretionary opinion from the Chief Electoral Officer as a condition of the exercise of political expression is simply not a suitable response to the overbreadth of the definition.

[256] Although the Supreme Court upheld a definition of election advertising in ***Harper*** that was in all material respects the same as that in question here, it is my view that the extension of the restricted period to the pre-campaign period renders the definition overly broad in the present context. Without temporal proximity to the election to guide the determination of whether an issue is associated to a political party or candidate, and given the significance of the fact that the legislature is in session during the 60-day pre-campaign period, the definition has the effect of capturing more expression than is necessary to achieve the legislature's objective of electoral fairness.

iv. Extension of Restricted Period to the Pre-Campaign Period

[257] I have referred a number of times to my concerns about the restrictions on third party election advertising applying during the pre-campaign period.

[258] The Court in ***Harper*** had the benefit of social science evidence about the harms of unrestricted third party spending during the campaign period. Bastarache J. also relied considerably on the Lortie Report in that regard. While that report is in evidence in these proceedings as well, nothing in it addresses spending restrictions on third parties *outside* of the campaign period.

[259] Some of the relevant evidence in this case was referred to earlier. When introducing ***Bill 42*** in the legislature, the Attorney General explained the creation of the pre-campaign period as a response to the effects of fixed date elections by ensuring that that period did not become "a spending spree, a free-for-all" to the

detriment of political parties and candidates that lack significant resources. The extension of the third party spending restrictions to the pre-campaign period was justified on the same basis; that is, to respond to the effect that fixed date elections have on the nature of political campaigns in the province. The Attorney General also quoted Bastarache J.'s statement in ***Harper*** that "without the limits, a few wealthy groups could drown out others in debates on important political issues", and indicated his agreement with that proposition.

[260] There were spending limits on political parties and candidates in the 2005 provincial election, which was a fixed date election. There is no evidence that any party or candidate went on a spending spree. In my view, it does not accord with logic and common sense that they would have done so. Indeed, this is borne out by the evidence of Mr. Zubyk that it would be "crazy" for a political party to go on such a spending spree:

> Q Mr. Zubyk, in the 2005 provincial election which you were involved for the NDP, there were spending restrictions on the party in that election; right?
>
> A Yes.
>
> Q And the party didn't utilize its whole budget in that election, did it?
>
> A I'm not aware of that.
>
> Q Okay. But you are aware that the party began its advertising prior to the 28-day start of the election; right?
>
> A That's right. A very light buy, but, yeah.
>
> Q Yeah, it was a light buy?

A Yeah.

Q And that was just because that was good strategy and campaigning? That was the reason why they made the decision that they did; right?

A I believe that - I mean, my experience from that time was that the decision was made to show that you're in the hunt.

Q Right.

A I mean –

Q But there was never any suggestion to you by anybody in the NDP that because they had spending restrictions in the 28 days that they should go on a spending spree in terms of election advertising in the period prior to the 28 days; right?

A You would be crazy to do that.

Q They would be crazy to do that, yeah. And why would they be crazy to do that?

A I mean, it's just not effective. I mean, with a political client, generally the urge is to spend early because it settles everybody down, if you will. Look at our great ads on TV. So it is constantly a process of urging people to save the buy for the end when people are making up their minds.

There may be instances when a party starts so far behind at the beginning that they may need to try to drive the numbers a little earlier than usual. But generally my direct experience is you're always telling parties or political clients to resist the urge to spend early. It will all be good. Nobody makes up their mind until after the debate. Let's - you know, things may move on the margin in that first two weeks of the campaign, but wait for the debate and then start spending.

[261] Mr. Zubyk made a similar point when he gave the following evidence in his cross-examination:

Q. Right. And how long is the federal campaign? Around 32 days; is that correct?

A. Yeah, it varies. I think [the 2008 federal election] was 34, maybe 32.

Q. And was most of the advertising spent in that campaign as you move closer to election day?

A. Yeah. You tend to increase your buys as you get closer.

Q. Right, because the further away the ads are from election day, the less impact they may have on the voter; is that correct?

A. Research shows that people make up their mind the last 7 to 10 days, so you want to get them in that window.

Q. Okay. And a day in an election can be a significant point of time, I take it, in a campaign period?

A. Yeah, lots can happen in a day.

Q. Some people have said a week can be an eternity?

A. Yeah, no, it's –

Q. All right. And 28 days is – a great deal can happen in 28 days in an election campaign, or 32 days in the case of a federal?

A. Yes and no. I mean, to be clear, most campaigns, the actual number that each party finishes at is within the margin of error of where they start. The majority of the campaigns, you know, is kind of about holding serve, if you will. The occasional campaign has a dramatic moment where one party gets huge momentum and one party doesn't, so …

Q. All right. And it's fair to say, whatever happens in the weeks or months leading up to the campaign period, whether it's 34 days federally or 28 days provincially, can be answered and re-answered again in that 28-day period, and that happens; right?

A. Yeah.

[262] Although I did not have the advantage of observing the various experts give evidence, as this was a summary trial, the transcripts of the cross-examinations were made available and I was impressed with the evidence of Mr. Zubyk.

Mr. Zubyk is a political communications specialist with over 20 years of experience working in campaigns for the Liberal and NDP parties, both provincially and federally. His evidence in cross-examination was, in my view, fair and balanced.

[263] The thrust of Mr. Zubyk's evidence is that political parties do not spend significant sums of money prior to the beginning of the campaign period because to do so would be not be effective. This has a number of implications. Firstly, the same logic should reasonably apply to advertising by third parties insofar as that advertising seeks to influence the outcome of the election. Secondly, given that the campaign period is when political parties and candidates engage in the most effective election advertising, that is the period when the rationale for limiting third party advertising to ensure that the voices of political parties and candidates are not drowned out is most in play. Accordingly, spending restrictions during the campaign period, which the plaintiffs do not contest, would provide sufficient "breathing room" for the principal electoral players. As Mr. Zubyk indicated, whatever happens or is said in the weeks or months leading up to the campaign period can be answered and re-answered during that period.

[264] Because of the fixed date elections in 2005 and the significant increase in third party spending, the government's response was to impose spending limits on third parties, political parties and candidates that extended 60 days prior to the commencement of the campaign period. That, according to the Attorney General, was intended to promote equality in political discourse and protect the integrity of the financing regime applicable to candidates and parties.

[265] The underlying premise of the Attorney General's position is that unrestricted third party spending prior to the beginning of the campaign would drown out the voices of the candidates and political parties. The credible evidence, however, is that it is not effective to spend large amounts of money prior to the commencement of the campaign. Moreover, to the extent that the Attorney General's position rests on the proposition that restrictions on third party election advertising are necessary during the pre-campaign period to protect the financing regime, since spending restrictions have been imposed on political parties and candidates during that same period, the reasoning is circular. If those limits on political parties and candidates did not exist (and there is no evidentiary or logical basis for their necessity), then that rationale for restricting third party spending evaporates. Consequently, the legislation does not achieve the objectives of promoting equality in the political discourse and protecting the integrity of the financial regime applicable to candidates and parties.

[266] Even according the Attorney General a healthy measure of deference, I am not satisfied that the harm sought to be addressed by extending the third party spending restrictions into the pre-campaign period has been adequately demonstrated. On the other hand, I consider their effect in impairing the plaintiffs' s. 2(b) freedoms to be anything but minimal.

[267] By operating in the 60 days prior to the campaign period, the spending restrictions encompass part of the legislative session. The significance of this is reflected in a brief review of the legislative activity that occurred in the period

between the 1st Session of the 2001 Legislative Session and the 4th Session of the 2008 Legislative Session. Out of a total of 420 government bills introduced and passed during that period, 53 bills (12.6%) took longer than 60 days to be passed. It follows that 87.4% of government bills were passed in less than 60 days. Further, there were 13 government bills that were introduced and successfully passed within the 60-day period immediately preceding the campaign period for the 2005 provincial election. In 2001, 21 government bills were introduced and successfully passed within the 60-day period immediately preceding the campaign period for the provincial election that year.

[268] While these statistics highlight the seriousness of third party spending restrictions that apply while the legislature is in session, the impact of the restrictions is greater yet since the pre-campaign period encompasses that part of the legislative session that includes the Throne Speech and the Budget, two of the most important events in the legislative calendar. To curtail the ability of third parties to engage in political speech at that crucial time in the absence of an evidentiary or logical basis as to why it is necessary to do so is not a minimal impairment of freedom of expression.

[269] Freedom of expression is a core ***Charter*** value that must be jealously guarded. The minority judges in ***Harper*** spoke emphatically and eloquently about the importance of political speech at paras. 11–12 and 16-18:

[11] Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression... [citations omitted].

[12] The right of the people to discuss and debate ideas forms the very foundation of democracy; see *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 145-46. For this reason, the Supreme Court of Canada has assiduously protected the right of each citizen to participate in political debate. As Dickson C.J. stated in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 764, "[t]he state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all."

…

[16] The ability to engage in effective speech in the public square means nothing if it does not include the ability to attempt to persuade one's fellow citizen through debate and discussion. This is the kernel from which reasoned political discourse emerges. Freedom of expression must allow a citizen to give voice to her vision for her community and nation, to advocate change through the art of persuasion in the hope of improving her life and indeed the larger social, political and economic landscape; see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at para. 32; *U.F.C.W., Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 43.

[17] Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public – as viewers, listeners and readers – have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal, supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67.

[18] This is not a Canadian idiosyncrasy. The right to receive information is enshrined in both the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. 810, at 71 (1948), and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right; see *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), at p. 390; *Martin v. City of Struthers*, 319 U.S. 141 (1943),, at p. 143. The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972),

at p. 775, ring as true in this country as they do in our neighbour to the south:

> [T]he right to speak and hear – including the right to inform others and to be informed about public issues – are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth. [Citations omitted.]

[270] The Court in ***Harper*** recognized that minimal impairment cannot be measured with too much precision when setting limits on third party election advertising. Even accepting the necessity of approaching the question with deference, I am not satisfied that the impugned provisions are minimally impairing. I ground this conclusion on the overly broad definition of election advertising together with the application of the spending restrictions to the pre-campaign period.

3. Proportionality

[271] This final stage of the s. 1 analysis requires the Court to weigh the deleterious effects against the salutary effects of the impugned provisions.

[272] Bastarache J.'s analysis of proportionality in ***Harper*** comprised the following two paragraphs at 120-121:

> 120 Section 350 has several salutary effects. It enhances equality in the political discourse. By ensuring that affluent groups or individuals do not dominate the political discourse, s. 350 promotes the political expression of those who are less affluent or less capable of obtaining access to significant financial resources and ensures that candidates and political parties who are subject to spending limits are not

> overwhelmed by third party advertising. Section 350 also protects the integrity of the candidate and political party spending limits by ensuring that these limits are not circumvented through the creation of phony third parties. Finally, s. 350 promotes fairness and accessibility in the electoral system and consequently increases Canadians' confidence in it.
>
> 121 The deleterious effect of s. 350 is that the spending limits do not allow third parties to engage in unlimited political expression. That is, third parties are permitted to engage in informational but not necessarily persuasive campaigns, especially when acting alone. When weighed against the salutary effects of the legislation, the limits must be upheld. As the Court explained in *Libman*, *supra*, at para. 84:
>
> > [P]rotecting the fairness of referendum campaigns is a laudable objective that will necessarily involve certain restrictions on freedom of expression. Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process. [First emphasis in original; second emphasis added.]
>
> Accordingly, s. 350 should be upheld as a demonstrably justified limit in a free and democratic society.

[273] The Attorney General submits that the salutary effects identified by Bastarache J. exist in the case at bar, while the deleterious effects are fewer. This is because the spending limits are effectively higher, the small number of wealthy speakers affected has been identified with some precision, and the alternative methods of inexpensive communication have improved both in terms of quantity and democratic quality.

[274] On the other hand, the plaintiffs take the position that the deleterious effects of the impugned provisions on their constitutionally protected freedom of expression

are severe. The only salutary effect that the Attorney General identified when introducing the legislation was the avoidance of a spending spree prior to the campaign, a proposition that Mr. Zubyk described as “crazy”. The plaintiffs say that even if the Court accepts that the objective of the impugned provisions is electoral fairness, the fact that the government is exempt from the restrictions by virtue of s. 3.1 of the ***BC Act*** tilts the playing field in favour of the governing party.

> 3.1 (1) For greater certainty, nothing in this Act affects an officer, director, employee or agent of one of the following bodies in the doing of an act necessary for carrying out the proper function of the body:
>
> (a) the government as reported through the consolidated revenue fund;
>
> (b) a government corporation within the meaning of the Financial Administration Act other than one that is a government corporation solely by reason of being, under an Act, an agent of the government;
>
> (c) a corporation or organization that, under generally accepted accounting principles, is considered to be controlled by
>
> (i) the government as reported through the consolidated revenue fund, or
>
> (ii) a government corporation within the meaning of the Financial Administration Act other than one that is a government corporation solely by reason of being, under an Act, an agent of the government.
>
> (2) For greater certainty, nothing in this Act affects a member of the Legislative Assembly in the doing of an act necessary for the performance of the member's duties.

The provisions therefore do not achieve its objectives and thus have no salutary effects.

[275] The individual defendants were granted party status in these proceedings primarily to argue in support of the constitutionality of ***Bill 42*** under this stage of the

justification analysis. They submit that not only do the impugned provisions have salutary effects with respect to protecting the fairness of the electoral process in general and the public at large, but that they also have significant salutary effects in protecting their constitutional interests as dissenting union members. Specifically, by engaging in election advertising, the plaintiffs are forcing union members who do not support the political views of their unions to be identified with, and to financially contribute to, the election advertising of the unions. The individual defendants say that because unions are not voluntary political organizations and because they use their members' mandatory dues payments for the purposes of election advertising, the impugned provisions therefore have the salutary effect of protecting the s. 2(b) and 2(d) rights of dissenting union members.

[276] The plaintiffs respond, in part, to the individual defendants' submissions with the argument that the only salutary effects a court is permitted to take into account in the justification analysis are those that relate to the objective of the legislation. Unintended effects of legislative action, they submit, do not constitute salutary effects for the purposes of s. 1. For a court to uphold legislation that is found to infringe the ***Charter*** on the basis of unintended and incidental side effects would be an illegitimate exercise of judicial power and one that would transform the court's function from adjudicative to legislative.

[277] Among the authorities the plaintiffs cite are ***Dagenais*** at para. 93; ***Thomson Newspapers*** at para. 125; ***Sauvé v. Canada (Chief Electoral Officer)***, 2002 SCC 68, [2002] 3 S.C.R. 519 at para. 175; ***Gosselin v. Quebec*** (Attorney General), 2002

SCC 84, [2002] 4 S.C.R. 429; and ***Newfoundland (Treasury Board) v. N.A.P.E.***, 2004 SCC 66, [2004] 3 S.C.R. 381 at paras. 98-99. In ***Sauvé***, for example, Gonthier J. stated as follows at para. 175:

> [175] The final prong of the *Oakes* test demands that the effects of the limiting measure (the impugned provision) must not so severely trench on *Charter* rights that the legislative objective, albeit important, is outweighed by the infringement of the rights. The basic test for determining proportionality is that the objectives must be balanced with the actual effects of the impugned provision: *Oakes*, *supra; Edwards Books, supra; McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. This basic test, however was restated and modified by Lamer C.J. in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Therein, it was held that in cases where a measure fully, or nearly fully, meets its legislative objective or objectives, then the conventional *Oakes* analysis stands: weigh the objectives with the actual effects of the impugned provision. Where a measure only partially achieves its legislative objective or objectives, the proportionality requirement is dual: not only must there be proportionality between the deleterious effects of the measure which are responsible for the limiting of the right in question and the objective, but there must also be proportionality between the deleterious and the salutary effects of the measures.
>
> [Emphasis added]

[278] However, the individual respondents dispute that this is the correct approach, and cite ***Dagenais***, at para. 95, where the Court refined the third assessment of the proportionality of a legislative measure in ***Oakes*** to include explicit consideration of the deleterious and salutary effects of the legislative measure:

> In my view, characterizing the third part of the second branch of the *Oakes* test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will

> not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measure which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measure.
>
> [Emphasis in original]

[279] At the end of the day, it is not necessary that I decide this issue. Even if I were to give maximum effect to the individual defendants' submissions and add the protection of their constitutional interests as dissenting union members to the balance as a salutary effect, I would not be satisfied that the overall salutary effects of the impugned provisions outweigh their very significant deleterious effects.

[280] While I accept that the salutary effects identified in ***Harper*** exist in the present case insofar as the campaign period is concerned, I am not satisfied that they all exist in relation to the pre-campaign period. As is evident from my discussion of minimal impairment, I do not consider that the impugned provisions are necessary to protect the integrity of the political party and candidate spending limits during the pre-campaign period. I also do not consider that they increase confidence in the electoral process, given the extent to which they unnecessarily inhibit political speech while the legislature is in session. I do, however, accept that they enhance equality in the political discourse. As well, for the purposes of this analysis, I will consider the protection of the constitutional interests of dissenting union members as a salutary effect.

[281] These salutary effects must be balanced against the singularly deleterious effect of the impugned provisions in limiting the expressive freedoms of third parties during the pre-campaign period. The right to speak out against (or for) the government is vital for the health of any democracy, and the impugned provisions restrict the ability of third parties to engage in such political expression at a time when the government is sitting and when its Throne Speech and Budget are in political play.

[282] As noted, the plaintiffs argue that the fact that the government is exempt from the spending restrictions by virtue of s. 3.1 of the ***BC Act*** tilts the playing field in favour of the governing party. They say that as a matter of statutory interpretation, as confirmed by s. 3.1, the provincial government is not bound by the spending restrictions contained in s. 235.1, other than by those it assumes voluntarily. The result is an imbalance in the advertising available to the governing party on the one hand, and to third parties on the other. The Attorney General, on the other hand, submits that the provincial government *is* subject to the spending limits in s. 235.1, subject only to the exemption provided by s. 3.1 of the ***BC Act***.

[283] In light of the outcome, it is also not necessary that I decide this issue. Even if I were to resolve this issue in favour of the Attorney General, I would still be amply satisfied that the deleterious effects of the impugned provisions exceed their salutary effects.

V. REMEDY

[284] In light of the foregoing, I am satisfied that the deleterious effects of the impugned provisions outweigh their salutary effects, and even giving due deference to the legislative decision, I conclude that the impugned provisions cannot be upheld as a demonstrably justified limit in a free and democratic society. Accordingly, I declare that s. 235.1 and s. 228 to the extent that it is incorporated into s. 235.1 of the ***BC Act*** is of no force and effect insofar as it relates to the pre-campaign period.

[285] Because there are spending limits for registered political parties and candidates during the 60-day pre-campaign period (election expenses of $1.1 million for political parties under s. 198(1)(a) and $70,000 for candidates under s. 199(1)(a)) it would be patently unfair to have those restrictions apply when there are none for third parties.

[286] The Attorney General takes the position that since there was no notice under the ***Constitutional Question Act***, that I have no jurisdiction to deal with those particular sections of the act. I agree with the Attorney General. I therefore leave it up to the legislature to take the necessary corrective action in respect to this unfairness to the political parties and the candidates during the pre-campaign period.

The Honourable Mr. Justice F. W. Cole