British Columbia Teachers' Federation v British Columbia (2011) – Third Party Election Advertising limits in BC Election Campaigns

On November 11, 2011, the BC Court of Appeal ruled on third party election advertising limits in the *BC Elections Act*. The Court agreed that the restrictions violated section 2(b), freedom of expression rights in the *Canadian Charter of Rights and Freedoms*. They then considered whether the violation was reasonable and justifiable, given the arguments in favour of the restrictions, which were presented by the BC Government. In a unanimous decision, the Court reaffirmed the trial judge's opinion and declared the provisions unconstitutional, as they were not justified under the balancing rights provision, section 1 of the *Charter*.

The legislation

In 2001, the BC Government adopted fixed date elections. Section 27 of the *BC Elections Act* sets voting day as the 28th day after the date that the election is called—the period in between the calling of the election and the election date is known as the "campaign period."[1] The initiation of fixed date elections raised some concerns in the BC legislature about limiting the amount of money that could be spent on election advertising. There were concerns that people, other than the political candidates and parties, would want to start advertising campaigns promoting the election of political candidates or parties much earlier than in the past, when election dates were not set. There were also some concerns about the development of "free for all" spending in the days before the campaign period. Without any restrictions, this meant that people would be inclined to spend as much money as possible on election advertising before the campaign period. Therefore, in May 2008, the BC Government amended the *Act*, placing limits on third party advertising spending.[2]

There are two provisions in the *BC Elections Act* that limit third party election advertising. Section 235.1 of the *BC Elections Act* limits third party election advertising spending for the 28-day campaign period leading up to a provincial election. A third party is defined as an individual or organization other than a political candidate, party or constituency association. Third party election advertising expenditures cannot exceed $3000 in each electoral district and $150,000 overall. For instance, as a member of the public, this means that you can only spend up to $3,000 per electoral district and $150,000 overall to voice your opinion about a political issue in a radio segment. Section 228 of the *Act* also

restricts third party advertising in the 60 days prior to the campaign period, otherwise known as the "pre-campaign period." The combined effect of these provisions means that third advertising is restricted for a total of 88 days (28-day campaign period plus the 60 day pre-campaign period) leading up to an election.

Case history

A number of groups including the British Columbia Teachers' Federation (BCTF), the British Columbia Nurses' Union (BCNU) and the British Columbia Division of the Canadian Union of Public Employees (CUPE BC) brought a constitutional challenge to the *BC Elections Act in* the BC Supreme Court in 2008. The group argued that the provincial spending limits during the 60-day "pre-campaign" period violated their rights to free expression.[3]

At trial, the judge decided that limitations to third party pre-campaign election advertising violated *Charter* section 2(b) rights. In October 2009, the trial judge declared sections 235.1 and sections 228 of the *BC Elections Act* to be of no force and effect. The BC Government appealed the trial decision to the BC Court of Appeal in 2011.[4]
The issue before the BC Court of Appeal was whether the trial judge in the court below was incorrect in his findings on the constitutionality of the legislation.[5] The Court of Appeal agreed with the trial judge's reasoning.

The B.C. Court of Appeal Decision

Does legislation which limits election spending by third parties violate our *Charter* right to freedom of expression?

All parties in this case agreed that the limitations on pre-campaign election spending infringed the right to freedom of expression in section 2(b) of the *Charter*.[6] The Court recognized that the legislation was similar though not identical to the spending limits on third party federal election advertising in the *Canada Elections Act*. As a point of comparison, the Court often referred to the *Harper* case from 2004.[7] In that case, Stephen Harper, when he was President of the National Citizens Coalition, filed a constitutional challenge to the *Canada Elections Act*. Mr. Harper thought that the spending limits in the *Elections Act* were an infringement of his right to free expression because they limited the amount that he, or any third party, could spend on election advertising. The Supreme Court of Canada upheld the constitutionality of restrictions on federal third party election advertising. [8]

Can the Government justify limiting pre-campaign election advertising?

1) Why advertising limits exist in the first place: the Egalitarian model strikes again

The Court pointed out that the advertising constraints spring from the Parliament's egalitarian election model. The idea behind such a model is that advertising spending limits are necessary to prevent the most affluent citizens from monopolizing the election process.[9] The objectives of the egalitarian model have been endorsed as constitutionally

acceptable in a series of Supreme Court of Canada decisions including the *Harper* case.[10] Citing Justice Bastarache in the *Harper* case, the Court made it clear that it must give deference to Parliament's choice of this election model.[11]

2) The Section 1 test: Are the advertising limits justifiable?

When the Court determines that a *Charter* right has been infringed, it must then assess whether the government's reasons for wanting to restrict that right are reasonable and justifiable. In order to help the Court determine whether the legislation, in this case the legislation limiting advertising spending by third parties, is a reasonable limit, it uses a balancing rights 'test'. This is known as the section 1 test. The test assists the Court by providing it with a series of questions it must answer about the legislation:

Step 1 - Pressing and substantial objective: Does the legislation have a pressing and substantial objective?

Step 2 - Proportionality: Are the means used to restrict a *Charter* protected right proportionate to achieve the Government's legislative objectives?

a) Rational Connection: Are the means rationally connected to the objectives?
b) Minimal Impairment: Does the infringement minimally impair rights?
c) Proportionate Effect: Do the benefits of the legislation outweigh the harms – that is the harms of infringing a *Charter* protected right?

Step 1 - The legislative objectives are pressing and substantial

The first step of the test is to identify the objectives of the legislation in question. The objectives must be "pressing and substantial" - that is, they must be important enough to justify overriding *Charter* rights.

The B.C. Court of Appeal accepted the reasoning of the judge in the lower trial court. At trial, the judge accepted the Government's claim that the legislative objectives were:

- to promote electoral fairness by establishing equality in the political discourse;
- to protect the integrity of the financial regime applicable to candidates and parties, and
- to ensure voter confidence in the electoral process.

The trial judge also decided that the objectives of the legislation were pressing and substantial. [12]

Step 2 – Proportionality: The means are proportionate to achieve the legislative objectives

The second step of the section 1 test is to consider whether the means used to achieve the legislative objectives are proportionate in that they do not breach *Charter* rights more than necessary. This step contains sub-parts, which involve determining:

- whether there is a rational connection between the legislation and its objectives;
- whether the legislation minimally impairs the Charter protected right;
- whether the benefits of the legislation are proportional to the harms effected by the violation of the*Charter* right.

Rational connection

At the rational connection stage of the inquiry, the Court has to determine whether there was a rational connection between the legislation that violates the *Charter* and the pressing and substantial objectives that the legislation was meant to address.

The trial judge ruled that the objectives were rationally connected to the measures taken by the government. He accepted that the spending limits would promote equality in political discourse. In the absence of it, the voices of the wealthy could dominate electoral debate and effectively drown others out. The trial judge was especially troubled by the fact that third party spending restrictions in the Elections Act applied to the 60- day pre-campaign period, which he later addressed in the minimal impairment inquiry.[13]

Minimal impairment

At the minimal impairment stage of the inquiry, the Court must assess whether the legislation infringes the right to free expression in a way that it does not impair the *Charter* protected right more than necessary. The legislation must be measured and carefully tailored to the legislation's goals.
The trial judge pointed out that third party advertising restrictions are not imposed during the pre-campaign period in any other Canadian jurisdictions that have fixed date elections. He noted that the *BC Elections Act* differed from its federal counterpart because the restriction on third party advertising would coincide with the time that the legislation was still sitting.[14] As a result, the broad definition of "election advertising" would have a different significance — the definition was broad enough to cover advertising that fell outside of election advertising.[15] The trial judge pointed out that curtailing the ability of third parties to engage in political speech at election time without evidence or any logical reason to do so is not a minimal impairment of freedom expression.[16] As such, the trial judge concluded that the spending limits in the legislation do not minimally impair the *Charter* right to freedom of expression.[17]

Proportionate Effect

The last stage of assessing the legislation involves weighing the benefits of the legislation against the harms of the legislation.

In the trial decision, the judge was not satisfied that the benefits of the legislation, which were identified in the *Harper* case, existed in relation to the pre-campaign period in this case.[18] He was of the opinion that the right to speak out against (or for) the government is vital for the health of any democracy and that limiting pre-election advertising spending restricts the ability of third parties to engage in such political expression.[19] Both the trial judge and the BC Court of Appeal concluded that the legislation restricting third party advertising was not justified in a free and democratic society.[20]

The Definition of Election Advertising

The BC Court of Appeal also made some extra commentary on the definition of election advertising in justifying its decision. The BC government argued that the trial judge lost sight of the legislation's role in preventing the voices of the wealthy from dominating the election process.[21] However, the BC Court of Appeal did not accept the Government's argument because the trial judge had indeed recognized that the restrictions would "enhance equality in the pre-campaign period."[22] Instead, the Court emphasized that the trial judge's conclusion turned on the definition of election advertising.[23] The Court of Appeal agreed with the trial judge that that the definition of election advertising could capture advertising outside of an election. For example, criticism of a government issue not related to an election could be captured under the definition of "election advertising". The Court of Appeal also agreed with the trial judge that this impact of the legislation was harmful because it limited the freedom of expression too much. Furthermore, this harmful effect would far outweigh the benefits of the legislation.[24]

The BC government also argued that it would be almost impossible to compose an effective definition of election advertising that would not capture all political advertising during a pre-campaign period. The Court was not convinced that there were no other ways of dealing with election advertising that do not interfere with political speech while the Legislature is in session. For instance, the Court pointed out that the fixed election date might be changed to a different time of year, the campaign period could be extended or the definition of election advertising could be narrowed. However, the Court says that it should be the Legislature's responsibility to consider and implement such ideas.[25]

The legislative response

In May 2012, the BC Legislature introduced Bill 41, which consisted of amendments to the *BC Elections Act*.[26] The Bill seeks to address the BC Court of Appeal concerns about third party advertising restrictions by replacing the 60-day pre-campaign term with 40 days.[27] This means that third party advertising restrictions would be in place for a shorter duration than in the previous legislation.

Despite concerns over the Bill's constitutionality in the legislative debate process, the bill has since passed third reading and will likely become law soon.[28] BC Minister of Justice and Attorney General Shirley Bond says that the Government will refer the amended version of the law to the courts.[29] Will the courts find the provisions unconstitutional again? Only

time will tell.

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[1] BC Elections Act, RSBC 1996, c 106.

[2] *British Columbia Teachers' Federation v British Columbia (Attorney General)*, 2011 BCCA 408 at paras 5-8 .

[3] *BCTF*, supra note 2 at para 9.

[4] *Ibid* at para 11.

[5] *Ibid* at paras 15, 29, 31.

[6] *Ibid* at para 1.

[7] *Harper v Canada*, [2004] 1 SCR 827, 2004 SCC 33 at para 3 .

[8] *BCTF supra* note 2 at para 3.

[9] *Ibid* at para 32.

[10] *Ibid* at para 33.

[11] *Ibid* at para 34.

[12] *Ibid* at paras 40-41.

[13] *Ibid* at paras 42-43.

[14] *Ibid* at para 45.

[15] *Ibid* at para 46.

[16] *Ibid* at para 47.

[17] *Ibid* at para 51.

[18] The trial judge disagreed with some of the alleged benefits of the legislation: protecting the integrity of the political party and candidate spending limits during the pre-campaign period and increasing confidence in the electoral process. But the trial judge did agree with the benefit of enhancing equality in the political discourse. See *Ibid.*

[19] *Ibid* at para 53.

[20] *Ibid* at paras 54, 72.

[21] *Ibid* at para 62.

[22] *Ibid* at para 64.

[23] *Ibid*.

[24] *Ibid* at paras 65-70.

[25] *Ibid* at para 72.

[26] BC Ministry of Justice, Information Bulletin, "Miscellaneous Statutes Amendment Act introduced" (1 May 2012).

[27] Bill 41, *Miscellaneous Statutes Amendment Act*, 4th Sess, 39th Leg, British Columbia, 2012 (passed third reading 16 May 2012).

[28] British Columbia, Legislative Assembly, *Hansard*, 39th Leg, 4th Sess, (16 May 2012) at 1535.

[29] *Ibid* at 1520.