COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Reference re Election Act (BC),*
2012 BCCA 394

Date: 20121004
Docket: CA039942

IN THE MATTER OF
the *Constitutional Question Act*, R.S.B.C. 1996, c. 68

AND IN THE MATTER OF
the *Canadian Charter of Rights and Freedoms*

AND IN THE MATTER OF
a Reference by the Lieutenant Governor in Council set out in Order in Council No. 296/12 dated May 16, 2012, concerning the constitutionality of amendments to provisions in the *Election Act*, R.S.B.C. 1996, c. 106, regarding election advertising by third parties

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Hinkson

On reference from: Lieutenant Governor in Council, May 16, 2012
(Order in Council No. 296/12)

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Place and Date of Hearing:	Vancouver, British Columbia September 10, 11 and 12, 2012
Place and Date of Judgment:	Vancouver, British Columbia October 4, 2012

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] The Lieutenant Governor in Council refers to this Court a question of the constitutionality of amendments to provincial legislation that govern advertising of a political nature in advance of an election by other than political parties and candidates. The amendments, enacted but not yet in force, limit the amount of money third parties may spend on what is defined as election advertising. The amendments do so *before* as well as after the election writ is issued and the defined election campaign period begins. At issue is whether this limitation on the freedom of political expression prior to the commencement of the campaign period is reasonable and "demonstrably justified in a free and democratic society" as required by s. 1 of the *Charter of Rights and Freedoms*.

[2] The limitation on election advertising imposed by the amendments stems from the introduction of fixed-date elections in this province. The justification is said to lie in the necessity of insuring election fairness by preventing those with great financial resources from dominating or perhaps overwhelming the election dialogue thereby depriving the electorate of balanced electoral debate. The potential for unfairness is said to be particularly great when election dates are fixed because the known date facilitates the most effective timing of election advertising. It is evident third-party spending on advertising or commentary concerning matters of public concern in the period leading up to the issuing of the writ can be substantial.

[3] British Columbia was the first province to introduce fixed-date elections. It did so in 2001. Since then, eight other provinces and the Northwest Territories have done the same. Fixed-date elections are part of the federal election regime as well. Limitations on election advertising after the election writ has been issued have been enacted by the Federal Government and one other province. The constitutionality of the federal legislation has been upheld by the Supreme Court of Canada: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827. However, no limitation on election advertising prior to the writ being issued has been enacted federally or in any other province and previous legislative amendments enacted in

this province for that purpose were challenged and held to be unconstitutional by the Supreme Court of British Columbia and by this Court: *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436, [2009] 11 W.W.R. 294, aff'd 2011 BCCA 408, 343 D.L.R. (4th) 237 [*BCTF*].

[4] The Attorney General (through counsel) advances the case for the government contending the current amendments fully address the offending aspects of the legislation considered in *BCTF*, thereby rendering the limitations imposed on election advertising by third parties in advance of the campaign period now constitutionally sound. *Amicus curiae* has been appointed to respond. Broad public notice of the reference has been given. Several interested parties intervene.

The Legislation

[5] It may be useful to outline the background to the legislation before turning to the current amendments.

Background

[6] Section 23(2) of the *Constitution Act*, R.S.B.C. 1996, c. 66, provides that a general election must be held on the second Tuesday in May four years after the previous general voting day, although s. 23(1) makes it clear the Lieutenant Governor retains the traditional power to dissolve the Legislative Assembly when he sees fit.

[7] The first such election was held on May 17, 2005; the second was on May 12, 2009. The next fixed-date election is to be held on May 14, 2013.

[8] Under s. 27 of the *Election Act*, R.S.B.C. 1996, c. 106, general voting day is on the 28th day after the election is called, i.e., the writ is issued 28 days before the election day. In s. 1 of the *Election Act*, this 28-day period is defined as the "campaign period".

[9] During the (non-fixed-date) 2001 and (fixed-date) 2005 elections, third-party political advertisers (referred to as advertising "sponsors" in the *Election Act*) were required to file a disclosure report detailing their spending during the campaign period but there was no limit on their actual expenditures.

[10] The move to fixed-date elections brought with it debate in the Legislative Assembly regarding concerns the new regime might compromise the third-party reporting requirements as well as the expense limits that applied to political parties. These concerns were examined in the Elections BC, *Report of the Chief Electoral Officer on Recommendations for Legislative Change* (March 2006). The ultimate result of these discussions was a series of amendments to the *Election Act* which came into force on May 29, 2008 (the "2008 amendments"). These amendments set limits on the amount third parties (individuals and organizations) could spend on election advertising; expanded the definition of "election advertising"; and required third parties to register as sponsors in order to engage in any election advertising. If the election was the result of the dissolution of the Legislative Assembly under s. 23(1) of the *Constitution Act*, the limits applied only during the campaign period. If, however, the election was a fixed-date election called under s. 23(2) of the *Constitution Act*, the spending limits began 60 days *before* the campaign period, and ran throughout, for a total of 88 days. This 60-day period became known as the "pre-campaign period".

[11] Opposition to the 2008 amendments quickly materialized in the form of the constitutional challenge led by education and public service unions in *BCTF*. They successfully contended that, while the limitation of third-party election advertising during the election period had been held to be constitutionally sound by the Supreme Court of Canada in *Harper,* a similar limitation restricting the freedom of political expression in the 60-day pre-campaign period could not be justified as required by s. 1 of the *Charter.* Given the broad definition of election advertising, the courts found the limitation would unjustifiably interfere with third-party advertising unrelated to an election (issue advocacy) outside the campaign period. The limitation would have effect when the Legislative Assembly was traditionally sitting –

when the Throne Speech was given and the budget introduced – and would limit not only advertising designed to influence the election but government action as well. As such, the limitations were not seen to meet either the minimal impairment or the proportionality requirements of the *Oakes Test* [*R v. Oakes*, [1986] 1 S.C.R. 103] for compliance with s. 1 of the *Charter* as that aspect of the test was refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12.

[12] The government went back to the drafters and, on May 1, 2012, introduced the *Miscellaneous Statutes Amendment Act (No. 2), 2012*, which revised the restrictions on third-party election advertising in the form of the current amendments. On May 16, the Lieutenant Governor in Council, acting pursuant to s. 1 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, deposited Order in Council No. 296, referring the following question to this Court:

> Do sections 80 to 86 of the *Miscellaneous Statutes Amendment Act (No. 2), 2012*, set out in the attached Schedule, which amend sections 1, 183, 198, 204, 228, 235.1 and 244 of the *Election Act*, R.S.B.C. 1996, c. 106, unjustifiably infringe section 2(b) of the *Canadian Charter of Rights and Freedoms*? If yes, in what particular or particulars and to what extent?

[13] The current amendments received Royal Assent on May 31, 2012, but the provisions have not yet been brought into force; the Lieutenant Governor in Council may bring them into force through regulation (s. 96 of the *Miscellaneous Statutes Amendment Act (No. 2), 2012*). A regulation must be promulgated now if the amendments are to have application to the May 14, 2013 election. An answer to the question is required within a few days' time.

The current amendments

[14] The current amendments were introduced as a response to this Court's judgment in *BCTF.* On second reading, as reported in British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39th Parl., 4th Sess., Vol. 36, No. 7 (May 3, 2012) at 11508-11509, the Attorney General said:

> The rationale, from our perspective, for having spending limits is simple. They prevent the wealthy from dominating the political discourse by flooding media with paid advertising. In addition, spending limits on third

parties help to maintain the integrity of spending limits on political parties, because they prevent political parties from skirting their own limits by engaging in unlimited advertising using proxy groups.

To be clear, these spending limits are limits on paid advertising. Other forms of political speech are not subject to limits, including commentaries such as interviews, editorials, debates, communications with an organization and the expression of views on a non-commercial basis on the Internet or by telephone or text messaging.

The previous limits on third-party spending were subject to a court challenge. Ultimately, the Court of Appeal struck down the previous law, primarily because it would have applied to a time period when the Legislature was potentially sitting and before the budget had passed. The court held that there was a public interest in allowing third parties to advertise during this period.

We have carefully reviewed the Court of Appeal ruling. Although it did not uphold the pre-campaign period spending limits as they were passed in 2008, it provided helpful guidance to us on how to balance the right to free speech against the legitimate wish to prevent the wealthy from dominating political discourse.

[15] The limitations in the *Election Act* for which the *Miscellaneous Statutes Amendment Act (No. 2), 2012* now provides are as follow:

> 235.1 (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 consisting of the pre-campaign period and campaign period
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> (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 pre-campaign period, but do apply to the campaign period.

(3) In respect of a by-election, the limits under subsection (1) do not apply to the pre-campaign period, but the limits under subsection (1) (a) (i) and (b) (i) do apply to the campaign period.

(4) Section 204 applies to adjust the amounts under this section.

[16] The definition of election advertising is in s. 228 of the *Election Act*, as amended by the *Miscellaneous Statutes Amendment Act (No. 2), 2012*, s. 84:

> **"election advertising"** means the transmission to the public by any means, during the pre-campaign period and 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;

[17] The central provision of the current amendments is the following addition to (a renumbered) s. 1(1) of the *Election Act* (*Miscellaneous Statutes Amendment Act (No. 2), 2012*, s. 80):

> **"pre-campaign period"** means, in relation to an election conducted in accordance with section 23(2) of the *Constitution Act*, the shorter of the following periods:
>
> (a) the period beginning 40 days before the campaign period and ending at the beginning of the campaign period;
>
> (b) the period beginning 21 days following any sitting of the Legislative Assembly and ending at the beginning of the campaign period;

This definition is rounded out with the addition of the following subsection:

> (2) For certainty, if there is a sitting of the Legislative Assembly when a pre-campaign period has started, the pre-campaign period is suspended until 21 days following the sitting of the Legislative Assembly and ends at the beginning of the campaign period.

[18] The amendments do not substantively alter either the limitations on third-party spending or the content of what constitutes election advertising from what the 2008 amendments provided. The essential difference is that rather than effectively providing for a 60-day pre-campaign period when, in addition to the 28-day campaign period, the limitations apply, the legislation effectively provides now that the limitations apply during a defined 40-day pre-campaign period, as well as the campaign period, except during a sitting of the Legislative Assembly and 21 days after. The pre-campaign period may then be as long as 40 days or, depending on the length of a legislative sitting prior to an election, no time at all. The limitations may apply from 28 to 68 days varying from one election to the next.

[19] Some concrete dates may illustrate the operation of the defined pre-campaign period. The next general election (assuming it is a fixed-date election called under s. 23(2) of the *Constitution Act*) will, as indicated, be held on May 14, 2013. The writ will therefore be issued on April 16, 2013. For there to be a 40-day pre-campaign period, the Legislative Assembly would need to stop sitting on or before February 13. If it did so, what amounts to a buffer zone would last 21 days – from February 14 to March 6 – and the restrictions would take effect on March 7. If the Legislative Assembly were to sit beyond February 13, the buffer zone would begin to eat into the 40-day pre-campaign period. If it were to sit beyond March 25, there would be fewer than 21 days between the last day of sitting and the start of the campaign period, so there would be no pre-campaign period and hence no limitations on election advertising before the writ was issued. For some context, in 2005 the Legislative Assembly's last day of sitting was March 10 (election May 17); in 2009, it was March 31 (election May 12). Under the current amendments, those dates would result in a pre-campaign period of 18 days in the first instance and no pre-campaign period in the second. Quite apart from the constitutionality of the

legislation, the lack of consistency in its application may give rise to some question of its utility.

[20] Given that the content of what constitutes election advertising is now no different than in the 2008 amendments, it remains the same as was considered in *BCTF.* Clearly the provision that such advertising includes "an advertising message that takes a position on an issue with which a registered political party or candidate is associated" means it encompasses virtually any issue that may be the subject of political expression because political issues are almost always if not invariably associated with individual politicians and their parties whether they are members of the government or otherwise. It captures a seemingly limitless range of activities in which the government may be engaged, or some may consider it should be engaged. Labour relations, health and education services, consultations with First Nations, and environmental management may be cited as an indication of the scope of the issues that invite political expression in the form of third-party advertising on a continuing basis. It appears that any public communication on government action would be seen as "taking a position" on an issue "associated with" a political party and limited accordingly during the pre-campaign as well as the campaign period. The definition is very broad indeed.

[21] The requirements for the registration of third parties wishing to engage in election advertising established in the 2008 amendments are not altered by the current amendments except to the extent they now encompass the pre-campaign period. Section 244(1) requires any individual or organization (a third party) spending more than $500 in election advertising in the pre-campaign and campaign periods combined to file a disclosure report as specified in s. 245 with the Chief Election Officer within 90 days of a general election. The report must place a value on any volunteer services such that even if an individual did not actually spend money a report would have to be filed if their voluntary services amounted to $500 or more. Further, and more significantly, s. 239 prohibits third-party sponsoring of any election advertising unless the third party has first registered. There is no minimum amount that may be spent without registration. In the result, in both the

pre-campaign and campaign periods, individuals and organizations must formally register before engaging in any form of election advertising however minimal.

[22] Apart from the limitation on third-party election advertising in the pre-campaign period, the current amendments render the legislation in this province generally parallel to the provisions of the federal legislation that was considered in *Harper.* What is defined as the "campaign period" equates to what is federally defined as the "election period". Where the provincial campaign period is 28 days, the federal election period must be not less than 36 days (see ss. 2(1) and 57(1.2) of the *Canada Elections Act*, S.C. 2000, c. 9). The spending limits and the definitions of election advertising are essentially the same. The federal legislation does not, however, prohibit any individual or organization from participating in election advertising before registering and no third party is required to register until the amount of the limitation has actually been spent.

The Issue

[23] Freedom of expression, as guaranteed by s. 2(b) of the *Charter,* certainly lies at the very foundation of a democracy. In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336, 64 D.L.R. (4th) 577, Mr. Justice Cory said:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

[24] And, as Mr. Justice Bastarache, who spoke for the majority, observed in *Harper* at para. 66, "[m]ost third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression". More particularly, he said:

> [84] Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, [Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, Ottawa: Supply and Services Canada, 1991] at p. 340). As such, the election advertising of third parties

> lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection. As Dickson C.J. explained in *Keegstra*, [*R. v. Keegstra*, [1990] 3 S.C.R. 697], at pp. 763-64:
>
> > The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

[25] Interfering with the freedom of political expression must then be justifiable only where there are the clearest and most compelling reasons for doing so. That said, at least some measure of restriction is recognized as essential where it is necessary to preserve the fairness of the election process. Unlimited third-party election advertising can undermine the fairness of an election where it permits those with the resources to monopolize the election discourse. As Bastarache J. said:

> [72] ... For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In 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. The respondent's factum illustrates that political advertising is a costly endeavour. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out; see *Libman*, [*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569]; *Figueroa*, [*Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37], at para. 49. 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 voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore, contrary to the respondent's submission, s. 3 does not guarantee a right to unlimited information or to unlimited participation.

[26] It then becomes a question of the extent to which interference with political expression can be *demonstrably justified* as required by s. 1 of the *Charter.* The answer is to be found in the application of what this Court stated in *BCTF* (para. 37) to be the trial judge's concise formulation of the refined *Oakes Test*:

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.

[27] As in *BCTF*, it is accepted the amendments to the *Election Act* are directed toward a pressing objective – election fairness – that is sufficiently so to justify limiting election advertising, and the measures chosen are rationally connected to the objective. It remains to determine whether the limitations impair the freedom of political expression as little as possible to achieve the objective – whether they are minimally impairing – and whether their salutary effects (enhanced election fairness) outweigh their deleterious impact (the interference with the freedom of political expression).

Discussion

[28] The Attorney General takes *BCTF* as her starting point and contends the current amendments are responsive to and remedy *the* constitutional deficiency identified by the trial court, as upheld by this Court, which she maintains was the restriction on political expression when the Legislative Assembly is sitting. In particular, she says that by defining a shortened pre-campaign period (up to 40 days instead of 60 days) during which election advertising is to be limited, as well as providing for no limitation when the Legislative Assembly is sitting and for 21 days thereafter, freedom of political expression will be impaired to no greater extent than is necessary to preserve election fairness. Impairment is minimal.

[29] She says the limitations the current amendments impose in the pre-campaign period, being essentially the same as those found to be constitutionally sound in *Harper* as recognized by the courts in *BCTF*, are equally sound: the earlier period is but a natural extension of the latter, there being nothing of significance in this regard

in the issuing of the writ in a fixed-date election. Nothing said in *Harper* or *BCTF* precludes the campaign period limitations being imposed before that period begins. Given that there is substantial election advertising in the pre-campaign period, logic and common sense dictate it must be limited then as it is in the campaign period in the interest of preserving election fairness. Where to draw the line, she says, is a matter of political choice in the electoral system that regulates many aspects of an election and the courts should not substitute judicial opinion for the Legislative Assembly's attempt to balance competing values.

[30] The Attorney General then contends the salutary benefits of enhanced electoral fairness necessarily outweigh the deleterious impact of the limitations on political expression in the pre-campaign period in the same way as it is accepted they do in the campaign period. The benefit outweighs the impact of what the Attorney says are minimal restrictions on political expression in the pre-campaign period such that the current amendments are constitutionally sound.

[31] To be clear, the current amendments are less impairing of the freedom of political expression before the election writ is issued than were the 2008 amendments. As explained (para. 18), they are less restrictive. But that is somewhat beside the point. The reference question seeks the Court's determination of the constitutional validity of the current amendments, not whether they address the frailties of the 2008 amendments considered in *BCTF.*

[32] That said, *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, continues to be a leading authority for the burden borne by the government at the minimal impairment stage of the s. 1 analysis. It was summarized by Madam Justice McLachlin, as she then was, for the majority, as follows:

> [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: ...

[33] But the legislation in question need not constitute the least impairing option. In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, McLachlin C.J.C. for the majority stated:

> [96] This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: ...

[34] The trial judge in *BCTF* gave full consideration to the 2008 amendments in terms of the minimal impairment analysis. Of particular concern to him was the definition of election advertising capturing publication that took a position on an issue that a party or candidate was associated with. He found the definition was essentially the same as the definition in *Harper* considered to be acceptable for the election (or campaign) period, and accordingly focused his analysis on concerns stemming from the extension of this definition to the pre-campaign period. He identified the fact that the definition captured advertising unconnected to an election as the source of overbreadth. He said:

> [253] ... 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.

And further:

> [256] ... 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.

[35] This Court endorsed what was said to be the judge's "principal concern" with respect to minimal impairment saying:

> [31] … the appellant's arguments ignore the principal concern of the trial judge, which was that restricting third-party advertising during the pre-campaign period would unjustifiably interfere with third parties' issue advocacy, lobbying activity, and other advertising endeavours unrelated to the election.

And further:

> [59] … the trial judge was concerned that the broad definition of "election advertising" would limit the ability of third parties to speak out in advertisements about such things as ongoing labour negotiations or the content of proposed legislation currently before the Legislature. ...

The ultimate conclusion of this Court was stated as follows:

> [70] … The effect of the impugned legislation overshoots its overall objective of electoral fairness. It follows that it cannot be said that the infringement minimally impairs the right to freedom of expression. Its deleterious effect – that it captures otherwise constitutionally protected speech commenting on the wisdom of proposed legislation, or legislation left out of the agenda, for example, – far outweighs the salutary effect of equalizing political discourse during the pre-campaign period. …

[36] Certainly the discussion in the judgments in *BCTF* was focused on the impact the limitations in the 2008 amendments could have on political expression during a sitting of the Legislative Assembly as being a particularly unsatisfactory aspect of the legislation from a constitutional perspective. But the underlying concern lay with the overbreadth or overreaching of the definition of election advertising that could not be said to be minimally impairing because it captured political expression well beyond what could be said to have as its purpose the influencing of an election in the pre-campaign period.

[37] With respect to what constitutes the content of election advertising, the definition has, as explained, not been altered in the current amendments. It is the same definition this Court has found to be overbroad rendering the 2008 amendments other than minimally impairing in the pre-campaign period. The current amendments address the concern with respect to the sitting of the Legislative

Assembly but, by virtue of the definition of election advertising, they continue to apply to a broad range of advertising unconnected with the election. Given that, insofar as they limit political expression in the pre-campaign period, this Court has held the 2008 amendments to be constitutionally invalid principally because of the overbreadth of the definition of election advertising, it is difficult to see on what basis the current amendments could be said to be constitutionally sound in respect to the same period when they contain essentially the same definition.

[38] Further, the Attorney General advances no real support, evidentiary or authoritative, for her contention that what the Supreme Court of Canada found to be minimally impairing in the election period in *Harper* must necessarily be equally so in the pre-campaign period. Indeed, while the Report of the Chief Election Officer, which lay behind the 2008 amendments to the *Election Act,* contained a large number of recommendations, none were concerned with limiting third-party advertising prior to the campaign period.

[39] It may be accepted that, without the imposition of limitations, there will be substantial third-party spending on advertising for the purpose of influencing voters in respect of election issues before the writ is issued. But the Attorney General puts forward no basis on which it could be said limitations in the pre-campaign period are necessary because advertising in that period will have the same or a similar impact on voters and the election dialogue as in the campaign period – it will dominate or overwhelm the election discourse even though it is limited in the campaign period. She says only that it is a matter of logic and common sense in respect of which the court must show deference to the Legislative Assembly, citing in particular what was said in *Harper* regarding judicial deference (paras. 87 and 111). But in *Harper*, the court had the benefit of social science evidence that was directed at the effect of third-party advertising in the election period with which the legislation being considered was concerned. The majority reasons draw on what is referred to as the Lortie Report [Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, Ottawa: Supply and Services

Canada, 1991] and discuss some of the volume of other social science evidence adduced. Here there is nothing.

[40] The Attorney General's contention that the issuance of the writ in a fixed-date election changes little in terms of the effect of election advertising may not be well placed. The campaign period is the time during which the electorate becomes focused on the election and on the dialogue generated by politicians, political parties, and third parties. The Legislative Assembly is dissolved; and, while it may not necessarily be established convention, government activity can be expected to be restrained. It is a distinctly different time, a time when the concern for election fairness may be said to be most acute.

[41] None of the evidence discussed in *Harper* was concerned with any period of time preceding the election period and the reasons of the majority emphasize the limitations considered did not apply to advertising in the pre-election period (para. 57). Indeed, the limitations were to some extent seen to be justified because they were confined to the election period:

> [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.

[42] Given what was said there, the Attorney General's reliance on logic and common sense to say limiting election advertising in the pre-campaign period is a natural extension of limiting such in the campaign period may be ill-founded.

[43] The current amendments are not shown to be demonstrably justified in respect of the defined pre-campaign period: they do not minimally impair the freedom of political expression. They fail to meet the requisite criteria to be

constitutionally sound in the main for the same reason the 2008 amendments were held to be constitutionally flawed. The definition of election advertising is overly broad. It captures virtually all political expression regardless of whether such is intended to influence the election, and, as explained, all individuals and organizations are affected even if their election advertising is voluntary. Further, there is no clear and compelling reason to conclude the limitations on election advertising, and hence the freedom of political expression, in the campaign period are equally necessary in the pre-campaign period to preserve election fairness.

[44] It is then not necessary to take the analysis further: the determination of whether what are said to be the salutary effects of the current amendments outweigh the deleterious impact.

Conclusion

[45] On this analysis, the reference question is to be answered in the affirmative. While the breadth of the definition of election advertising does not impair the constitutionality of the limitations on political expression imposed by the current amendments in the campaign period, the same cannot be said for the same limitations the definition serves to impose in the pre-campaign period. The current amendments unjustly interfere with the rights guaranteed by s. 2(b) of the *Charter* to the extent the freedom of political expression is limited in the pre-campaign period.

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

[47] One person, Gloria Laurence, was granted party status on this reference as she was in *BCTF.* She is a member of a trade union who disapproves of her union's expenditure on advertising concerning public issues and therefore sees a benefit to be taken from the current amendments. In *BCTF*, the courts were of the view that the benefit is merely incidental to a limitation on election advertising and not relevant

to the s. 1 analysis. Ms. Laurence remains in the same position. Her submission supports but does not add materially to that of the Attorney General in any event.

Disposition

[48] I would answer the reference question in the affirmative.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Hinkson"