

Constitutional Conversations

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Constitutional Conversations

Alison M. Latimer^{*}

I. INTRODUCTION

This paper examines two cases that raise questions about the capacity to secure redress for the limitation of Charter¹ rights through litigation. It gives expression to a certain litigation fatigue stemming from processes of litigation and then legislative or practice reform that at times feel dysfunctional. While the to and fro between the courts and state actors has sometimes been described as a “dialogue”,² this paper does not weigh in on the question of whether dialogue theory legitimates judicial review. It focuses instead on a consideration of a prerequisite to a functional constitutional conversation. A functional constitutional conversation would build on the insights of both speakers and thereby lean towards rights recognition and access to justice.

The prerequisite here considered is respectful attention to what is said by the participants in the conversation. In the courtroom, two different kinds of failure to attend to what is being said are examined: the first is not answering what is asked, and the second is answering what is not asked. Thus, in this context, respectful attention requires courts to address constitutional issues that properly arise in a case and are fully developed by the parties and restraint from commenting upon constitutional issues that are not framed by the parties. The benefit of that approach is that a full

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² See, e.g., Peter W. Hogg & Allison A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75; Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “Charter Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1; Jamie Cameron, “Collateral Thoughts on Dialogue’s Legacy as Metaphor and Theory: A Favourite from Canada” (2016) 35 U.Q.L.J. 157.

factual matrix with input from both parties (almost invariably including a state representative) should be available on the constitutional issues adjudicated upon. Further, considered submissions on the constitutional questions raised (almost invariably including from the Attorney General or other state representative), will likely be available to assist the court. And finally, this respectful attention would ensure that judgments are both responsive and understandable to, and of some utility to the parties who may one day have to respond to them.

On the ground, or in the legislature, this respectful attention would require that court judgments are considered and given weight by those who respond to them. Legislative or operational responses should be complete and respond to the judgments themselves, not simply reiterate positions taken and addressed by the courts in prior litigation.³ This respectful attention does not mean that state actors do not have a range of legislative or operational responses available to them, but that the range is necessarily constrained when it is part of a continuing constitutional conversation with the courts.

This paper is organized in four parts. In Part II, the principle of restraint is explored. In Part III, a critique of *Carter v. Canada (Attorney General)*⁴ and the legislative reform that followed is advanced. The focus here is on the drawbacks of the approach to the principle of restraint as applied by the Court in respect of constitutional questions that were fully developed through the litigation. In particular, how the Court's failure to comment upon each of the constitutional issues properly arising in the case interfered with a fulsome legislative response, and resulted in undesirable sequel litigation and untold human suffering. In Part IV, a critique of *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*⁵ and Elections BC's response to it is advanced. In this critique, the problem flows from the opposite direction but with similar negative impacts on the constitutional conversation. Here, the Court answered a constitutional question that no one had asked. The dysfunction arises in the wake of the litigation when the unnecessary constitutional pronouncement confounds those who must respond to it and prejudices future cases with unexamined consequences.

³ This view of what a legitimate government response to a judicial judgment entails is drawn from the jurisprudence giving content to the standard of legitimacy and rationality that relates to the judicial compensation commission process set out in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] S.C.J. No. 47, 2005 SCC 44, at paras. 23-27 (S.C.C.).

⁴ *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5 (S.C.C.) [hereinafter "*Carter*"].

⁵ *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] S.C.J. No. 6, 2017 SCC 6 (S.C.C.) [hereinafter "*BC FIPA SCC*"].

II. THE PRINCIPLE OF RESTRAINT

Notwithstanding the relaxation of the rules of public interest standing,⁶ there remains a general though not invariable principle that courts avoid making constitutional pronouncements when cases can be decided on other grounds. Citing Professor Hogg, the British Columbia Court of Appeal explained the principle of restraint as follows:

[42] The fact that a party has standing to make a constitutional argument, however, does not compel a court to rule on that argument. There is a general (though not invariable) principle that courts avoid making constitutional pronouncements when cases can be decided on less esoteric bases. Professor Hogg puts it this way:

A case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of judicial restraint is to decide the case on the non-constitutional ground. That way, the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided. For the same reason, if a case can be decided on a narrow constitutional ground or a wide ground, the narrow ground is to be preferred. If a case can be decided on a rule of federalism or under the *Charter*, the federalism ground is the narrower one, because it leaves the other level of government free to act, whereas a *Charter* decision striking down a law does not. The general idea is that a proper deference to the other branches of government makes it wise for the courts, as far as possible, to frame their decisions in ways that do not intrude gratuitously on the powers of the other branches.

Peter W. Hogg, *Constitutional Law of Canada* (5th ed. supplemented) (looseleaf) Toronto: Thomson Carswell, 2007 (updated to 2013), §59.5, p. 59-22⁷

In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*,⁸ the Supreme Court of Canada described the rationales for the principle of restraint, noting that “unnecessary constitutional pronouncements may prejudice future cases, the implications of which

⁶ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, 2012 SCC 45 (S.C.C.).

⁷ *R. v. Lloyd*, [2014] B.C.J. No. 1212, 2014 BCCA 224 (B.C.C.A.), revd [2016] S.C.J. No. 13, 2016 SCC 16 (S.C.C.).

⁸ [1995] S.C.J. No. 36, [1995] 2 S.C.R. 97 (S.C.C.).

have not been foreseen.”⁹ The Court highlighted that the development of Charter jurisprudence “must ... be a careful process” and that “[w]here issues do not compel commentary on these new Charter provisions, none should be undertaken.”¹⁰

The question, then, is when are constitutional pronouncements “necessary” and when do issues “compel commentary” upon constitutional grounds? Below, by examining two recent judgments of the Supreme Court of Canada, it is developed that access to justice compels commentary upon constitutional issues that properly arise in a case and are fully developed by the parties and compels restraint from commenting upon constitutional issues that are *not* framed by the parties.

III. *CARTER V. CANADA (ATTORNEY GENERAL)*

Respectful attention was lacking in the *Carter* case and the Parliamentary response that followed. Here, the Court declined to address each constitutional argument that was fully developed by the parties before it. Failing to do so, the Court essentially ignored significant aspects of what one speaker in the constitutional conversation was communicating. The judgment that followed necessarily provided less guidance to Parliament who was tasked to respond than it otherwise could have. That is a bad thing when one considers not only the temporal and financial resources such cases entail, but the human costs as well.

At issue in *Carter* was the criminal law’s absolute prohibition against physician-assisted dying. The prohibition applied to all persons suffering from all medical conditions regardless of whether or not they were decisionally capable. The appellants challenged the law arguing that the absolute prohibition engaged the rights to “life, liberty and security of the person” under section 7 of the Charter and that it did so in a manner that was not consistent with the principles of fundamental justice that laws not be arbitrary, overbroad, or grossly disproportionate.

The appellants further argued that the absolute prohibition imposed a significant burden on the materially physically disabled that was not imposed upon able-bodied person. It did so by (a) standing between them and a timely end to suffering, leaving them the choice of either suffering longer than they wish or, in order to be autonomous, acting to die earlier

⁹ *Id.*, at para. 9.

¹⁰ *Id.*, at para. 11, citing *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No 18, [1984] 1 S.C.R. 357, at 383 (S.C.C.).

than they otherwise would; (b) robbing them of the quality of their remaining life; and/or (c) subjecting them to psychological suffering related to imperilling others. In doing so, it was argued that the absolute prohibition discriminated against materially physically disabled persons.

Both sides of each argument was supported by a full factual matrix painstakingly developed by the parties. The issues were fully argued by both sides at each level of court, and substantively addressed by the trial judge, Smith J., who found the absolute prohibition to be overbroad, grossly disproportionate and discriminatory.¹¹

But the Supreme Court of Canada held that it was “unnecessary to decide” whether the absolute prohibition violates the principle against gross disproportionality in light of its conclusion that the prohibition was overbroad.¹² It held it was “unnecessary” to decide whether the absolute prohibition violates section 15 of the Charter in light of its conclusion that the absolute prohibition violates section 7.¹³

From a remedial perspective, those conclusions were sound. The absolute prohibition was declared to be void insofar as it prohibited “physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.”¹⁴ I will refer to this class of people as the *Carter* Class. The declaration was therefore broad enough to encompass the grossly disproportionate effects of the law, and its discriminatory effects.

But the shortfall in the Court’s reasoning manifested in the next phase of the constitutional dialogue. In response to the *Carter* decision, Parliament enacted section 241.2 of the *Criminal Code*,¹⁵ replacement legislation that permits only a subset of the *Carter* Class to access individual assessment for a physician-assisted death. Specifically left out of this replacement legislation are: (1) persons who *are unbearably suffering* from disabilities, illnesses or diseases that will either not end their lives or not end them for a long time, and whose death from some other cause like old age is not reasonably foreseeable; (2) persons who are *unbearably suffering* but who cannot (yet) be categorized as in “advanced state of irreversible decline in

¹¹ At the Court of Appeal, the majority judgment turned on the doctrine of *stare decisis* such that the trial judge’s analysis was the last substantive word on these issues.

¹² *Carter*, *supra*, note 4, at para. 90.

¹³ *Id.*, at para. 93.

¹⁴ *Id.*, at para. 127.

¹⁵ R.S.C. 1985, c. C-46.

capability”; and (3) persons who are *unbearably suffering* with medical conditions that are not “incurable”, but for whom the means of cure is personally unacceptable. This excluded group remains in exactly the same position that they were in prior to the *Carter* litigation.

And yet the *Carter* record had ample evidence concerning the effect of the absolute prohibition on this excluded group. This excluded group was very much the subject of consideration in the analysis of the absolute prohibition’s gross disproportionality and its discriminatory impact against the materially physically disabled.

Thus, Parliament should be criticized for enacting a law that failed to meet the constitutional minimums articulated by the Court in *Carter*. The parliamentary response failed to consider and give weight to the *Carter* judgment and to respond to the judgment itself rather than simply reiterating positions taken and addressed by the Court. But equally, the Supreme Court of Canada’s decision to decline to answer each of the constitutional questions developed by the parties resulted in a judgment that provided less guidance than perhaps Parliament needed in terms of the specific constraints on the range of choices available to it for corrective legislation. Sequel litigation challenging section 241.2 of the *Criminal Code* has been launched. Even if it is not assumed that the Court would have reached the same conclusion as the trial judge in respect of the law’s grossly disproportionate and discriminatory impacts, the Court’s failure to address these arguments means the parties are left to advance the same constitutional arguments without the benefit of the Court’s guidance.

More respectful attention from both the Court and Parliament in this instance, might have resulted in a more meaningful and functional constitutional conversation — one that leaned steadily towards rights recognition and access to justice instead of leaving whole subsets of the population behind and/or requiring time-consuming and expensive relitigation of the same issues.

IV. *B.C. FREEDOM OF INFORMATION AND PRIVACY ASSN. V. BRITISH COLUMBIA (ATTORNEY GENERAL)*

The *BC FIPA* case offers another example of how constitutional conversations become dysfunctional when neither participant in a dialogue gives respectful attention to the other. The problem in this instance was judicial disregard for how a law was interpreted and enforced on the ground, and a focus instead on a constitutional question that no party had

asked or contested. The judgment that followed set a problematically low watermark for rights infringement justification and failed to provide guidance to Elections BC who had to respond to the judgment.

At issue in *BC FIPA* was the restriction of vitally important political expression at a critical time in the democratic process. Section 239(1) of the *Election Act* requires individuals and organizations to register before they may “sponsor election advertising”.¹⁶ Election advertising is defined very broadly in section 228 of the Act.¹⁷ The scope of the term “election advertising” had been the subject of previous judicial commentary and was described by a unanimous British Columbia Court of Appeal as follows:

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

¹⁶ R.S.B.C. 1996, c. 106 [hereinafter “*Election Act*” or “Act”].

¹⁷ The Act, *id.*, s. 228 (now repealed, S.B.C. 2017, c. 20, s. 29), provided:

election advertising means the transmission to the public by any means, during 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. ...

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.¹⁸

The scope of this term was not challenged in the *BC FIPA* case, nor disputed by the Supreme Court of Canada whose focus, as is explained below, was on the concept of “sponsorship”.¹⁹

Section 264(1)(h) of the *Election Act* provides that if an individual or organization contravenes section 239, they have committed an offence and are liable to a fine of not more than \$10,000, or imprisonment for up to a year, or both.²⁰

The B.C. Freedom of Information and Privacy Association (FIPA) sought a declaration that the registration requirement found in section 239(1) of the Act, to the extent that it applies to sponsors of election advertising who spend less than \$500 in a given campaign period, infringes section 2(b) of the Charter, is not saved by section 1, and is therefore of no force and effect. Thus the constitutional challenge was targeted to the absence of a minimum threshold for registration — a measure adopted in many comparable legislative instruments across Canada and an important safety valve, designed to limit the impact of the registration requirement on individuals and small spenders.

FIPA itself sought to engage in such small-scale election activities, and in particular, the homemade sign it sought to display (in addition to complying with the attribution requirements in the Act) read: “Make Freedom of Information Your Issue this election!!”.²¹ This homemade sign was raised in the pleadings and present in the evidentiary record before Court.²² The record before the Court was clear that the position taken for years by the Chief Electoral Officer (“CEO”), the independent officer of the legislature charged with enforcing the *Election Act*, was that section 239 captured self-expression including home-made signs created at low or no expense and displayed in windows and bumper

¹⁸ *Reference re Election Act (B.C.)*, [2012] B.C.J. No. 2037, 2012 BCCA 394, at para. 20 (B.C.C.A.), citing *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, [2009] B.C.J. No. 619, 2009 BCSC 436, [2009] 11 W.W.R. 294 (B.C.S.C.), aff'd [2011] B.C.J. No. 1945, 2011 BCCA 408, 343 D.L.R. (4th) 237 (B.C.C.A.).

¹⁹ *BC FIPA*, *supra*, note 5, at para. 23.

²⁰ *Election Act*, *supra*, note 16.

²¹ Notice of Civil Claim, at para. 5; Affidavit #2 of Marlene Dayman, made October 15, 2013, at Exhibit E.

²² *Id.*

stickers.²³ It is therefore not surprising that this was the position taken by the Attorney General in her Response to Civil Claim:

The plaintiff pleads an intention to spend less than \$500 on election advertising during the campaign period in the next election. On those facts, the plaintiff's obligation is simply to file a one-page application for registration with the chief electoral officer. There are no additional requirements. The plaintiff effectively alleges that the obligation to file that one page application is a breach of freedom of expression.²⁴

The trial judge dismissed FIPA's application. He found that section 239 of the Act infringed the right of free expression under section 2(b) of the Charter, but concluded that the infringement was justified under section 1.²⁵ Although the section 2(b) breach was characterized by the British Columbia Court of Appeal majority as "obvious"²⁶ it was again upheld under section 1. Justice Saunders, dissenting, found that the infringement of section 2(b) was not justified under section 1.

After a rare oral hearing at the leave to appeal stage, FIPA was granted leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada rightly framed the issue on appeal as follows: "The question on appeal is whether [the registration requirement] is a reasonable and demonstrably justified limit on persons who convey political messages through small-scale election activities like displaying homemade signs in their windows, putting bumper stickers on their cars, or wearing T-shirts with political messages on them."²⁷

The Court seemed to erroneously believe that despite the record described above, the scope of the infringement was not the subject of consideration in the courts below because it held: "The courts below did not turn their attention to the first step of the constitutional analysis — that is determining the scope and nature of the limitation on free expression that the registration requirement in s. 239 imposes."²⁸ Although the section 2(b) infringement was conceded at the Supreme Court of Canada,²⁹ it was a contested issue before the trial judge, Cohen J.

²³ Elections BC, "Guide to Election Communications for Third Party Advertising Sponsors", at 12.

²⁴ Response to Civil Claim, at para. 7.

²⁵ *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2014] B.C.J. No. 688, 2014 BCSC 660 (B.C.S.C.) [hereinafter "*BC FIPA BCSC*"].

²⁶ *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2015] B.C.J. No. 774, 2015 BCCA 172, at para. 1 (B.C.C.A.).

²⁷ *BC FIPA SCC*, *supra*, note 5, at para. 2.

²⁸ *Id.*, at para. 19.

²⁹ *Id.*, at para. 2.

In the British Columbia Supreme Court, the Attorney General of British Columbia (the “Attorney General”) conceded only that the registration requirement captured conduct that fell within the protected sphere of conduct under section 2(b). It was argued, however, that there was no Charter breach of section 2(b) because the *purpose* of the provision was not to restrict speech, and because the burden of the registration requirement was so trivial or insubstantial that it did not warrant Charter protection.³⁰ Justice Cohen found that the registration requirement had a restrictive effect on spontaneous political expression.³¹ In light of the “fundamental importance” of political expression, Cohen J. found that this provision infringed of section 2(b) of the Charter and that the infringement occasioned by section 239 of the *Election Act* was not “trivial or insubstantial”, as the Attorney General had argued.³²

No cross-appeal was pursued on this issue and thus the Attorney General conceded the breach of section 2(b) at the British Columbia Court of Appeal. Nevertheless, at the hearing of the appeal, the scope and nature of the limitation on free expression was again the subject of significant judicial interrogation and considered submissions by the parties. The Court questioned counsel extensively about the meaning of the word “sponsor” in the Act and whether it captured independent activity by a single person or entity or was restricted to a third person doing something on behalf of someone else.³³

FIPA’s submission in the British Columbia Court of Appeal was that the language of “sponsorship” in the Act referred to sponsoring an idea. Sponsorship could be undertaken by a single individual on their own behalf including by wearing a branded T-shirt or displaying a bumper sticker with “election advertising” on it, it was submitted.³⁴

The Court questioned the Attorney General on this issue who endorsed the interpretation posited by FIPA:

SAUNDERS, J.A.: Is — is your friend correct that something such as a bumper sticker or a messaged T-shirt, technically under the legislation, worn or displayed during the currency of a — of a campaign would require registration?

³⁰ *BC FIPA BCSC, supra*, note 25, at paras. 116-127.

³¹ *Id.*, at paras. 121, 142.

³² *Id.*, at paras. 123-126.

³³ Transcript of BCCA proceeding, at 9, 12.

³⁴ *Id.*, at 12-14.

MS. HORSMAN: It would, My Lady, if it wasn't caught by what I think my friend referred to as the archived provision. I mean, if it's a bumper sticker that existed on a car —

SAUNDERS, J.A.: Well, how about —

MS. HORSMAN: — historically —

SAUNDERS, J.A.: Yeah. How about a T-shirt? I mean, messaged T-shirts are all over the place, you know.

MS. HORSMAN: Yes. It — that could conceivably fall within the definition of election advertising. And just to be clear, there's no dispute in this courtroom that the definition is very broad and captures a lot of speech.

SAUNDERS, J.A.: A person doesn't generally have to register to advance a view. We all grew up hearing about Hyde Park Corner with people able to stand on their soapbox and engage in political discourse, public discourse, all sorts of discourse.

MS. HORSMAN: Yes, My Lady. And — and so the legislation that we're concerned with here does depart from the general rule that you don't have to register to engage in speech by requiring registration during a campaign period prior to a provincial election where the speech consists of political advertising.

SAUNDERS, J.A.: That's hugely broad. Because if there is ever a topic upon which one wants to encourage discussion, it is in the political public democratic process.³⁵

The Attorney General's position at the British Columbia Court of Appeal was therefore consistent with evidence in the record of how the Act was being interpreted and enforced by the CEO.

While maintaining her position on the scope of "election advertising", at the Supreme Court of Canada, for the first time, the Attorney General advanced the argument that the registration requirement for those who "sponsor" election advertising had only limited application to the public broadcast of views on election issues by individuals and organizations acting on their own behalf for the purposes of self-expression. The primary argument was not that sponsorship required third party involvement but that "*sponsoring* election advertising captures only election advertising of greater-than-nil market value".³⁶

³⁵ *Id.*, at 43-44.

³⁶ Attorney General of British Columbia Factum, at para. 64.

The Court disregarded the Attorney General's position that sponsorship captured self-expression as follows:

It is true that, at one point in oral argument, counsel for the Attorney General of British Columbia appeared to concur in the suggestion that an individual who produces homemade signage containing an advertising message during an election campaign, having paid for the materials with which that signage is produced, could be a "sponsor of election advertising" for the purposes of the Act and subject to the registration requirement in s. 239. The Attorney General's position on the record, however, is clear: s. 239 does not capture the cases of political expression on which the appellant relies.³⁷

Thus, the Court concluded that the registration requirement did not catch small-scale election advertising that it had correctly identified as the very subject of the question on appeal³⁸ and it dismissed the appeal.³⁹

The Court held that section 239:

[I]s directed only at those who undertake organized advertising campaigns — that is, "sponsors" who either pay for advertising services or who receive those services without charge as a contribution. In no case does the registration requirement apply to those engaged in individual self-expression.

...

For the reasons discussed, I conclude that a "sponsor" required to register is an individual or organization who receives a service from another individual or organization in undertaking an election advertising campaign, whether in exchange for payment or without charge as a contribution. Individuals engaged in political self-expression do not come within the definition of "sponsor" in s. 229(1), and need not register.⁴⁰

The Court noted the implications of its interpretation of sponsorship extended beyond section 239 of the Act — the only provision challenged on the appeal:

The foregoing interpretation limits not only the scope of the Act's registration requirement, but also of its attribution requirement (s. 231), its disclosure requirement (s. 244) and its expenditure limits (s. 235.1).

³⁷ *BC FIPA SCC*, *supra*, note 5, at para. 42.

³⁸ *Id.*, at para. 2.

³⁹ *Id.*, at para. 3.

⁴⁰ *Id.*, at paras. 21 and 39.

An individual working entirely on his own, without paying for or receiving any service in the creation or dissemination of election advertising, is not required to comply with any of these provisions of the Act. This is consistent with the legislative purpose of the Act's third party advertising provisions, which, as I have discussed, is to provide the public with information about those engaged in organized advertising campaigns during an election period, not to put conditions on individual self-expression. When an individual himself distributes handmade flyers, there is no question of who is responsible for that advertising, and so the attribution and disclosure provisions — like the registration requirement — would serve no purpose.⁴¹

Despite the record of how the Act was being enforced on the ground, the Attorney General's oral submissions at the Supreme Court of Canada and submissions at each previous hearing, the Court held that the interpretation it had arrived at was consistent with the Attorney General's position "[t]hroughout this action".⁴²

The Court had defined away the constitutional question that it had framed, that the courts below had considered, and that the appellant had advanced on appeal — the limit on the expressive rights of persons who convey political messages through small-scale election activities like displaying homemade signs in their windows, putting bumper stickers on their cars, or wearing T-shirts with political messages on them. The Court declined to opine upon the constitutional impact of this apparently erroneous interpretation of the legislation. Such a judgment might have been of some utility to those charged with enforcing the Act and who had to change their practices in response to the judgment. But no such guidance was given.

Certainly respectful attention does not require courts to answer constitutional questions posed that the court judges to be the wrong question. However, having declined to address the issue framed (a course of action that *is* consistent with respectful attention), the Court ought to have ended its constitutional analysis. Instead, the Court identified a different Charter breach — "the limit on the expression of [newly defined] sponsors who receive services in undertaking election advertising campaigns and who spend less than \$500 is justified under s. 1."⁴³ FIPA did not meet that definition and the Court correctly noted that no one — not even the appellant — contended this breach was unjustified under section 1.⁴⁴

⁴¹ *Id.*, at para. 40.

⁴² *Id.*, at para. 41.

⁴³ *Id.*, at para. 46.

⁴⁴ *Id.*, at para. 45.

Predictably, given the issue was uncontested and not supported by any factual record or submissions from the parties, the section 1 analysis that followed was thin and perhaps even the low watermark of section 1 justification in the jurisprudence. Although section 1 justification generally requires “cogent and persuasive”⁴⁵ evidence, in this case the Court opined that demonstrable justification under section 1 did not preclude justification of a Charter infringement despite a complete absence of “social science evidence”.⁴⁶ That observation might not be too surprising except that in this case, not only was there no *social science evidence*, there was no evidence *at all* in aid of the Attorney General’s task of justification. Instead, the Court simply imagined possible deleterious and salutary effects of the law which it then upheld.⁴⁷

The Court’s analysis may be explicable by the fact that it was a purely hypothetical exercise based on a Charter breach it imagined and which was neither raised on the record before it nor championed by any party before it. While the analysis may be explicable, it nevertheless had unfortunate consequences not only for the development of the section 1 jurisprudence but also, as is explained below, for the response to the decision that followed.

The Supreme Court of Canada’s decision was pronounced January 26, 2017. Section 239 was upheld so that no legislative response was required. But the reality, on the ground, was that a change in practice was required because the interpretation adopted by the Court was at odds with that understood by the CEO who was tasked with enforcing the Act.

Less than a week after the judgment was released, on February 1, 2017, Elections BC issued a bulletin (mis)interpreting the Court’s decision entitled “Handmade Election Advertising”. Elections BC said this:

To be a provincial election advertising sponsor, an individual must pay others for advertising services, receive free advertising services from others, or produce and personally hand-out more than 25 copies of homemade signs or pamphlets during the campaign period. Therefore, individuals who:

1. use their own supplies and equipment to make their own election advertising materials, such as handmade signs or pamphlets,
2. do not work with others on either preparing or transmitting the advertising,

⁴⁵ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 138 (S.C.C.).

⁴⁶ *BC FIPA SCC*, *supra*, note 5, at para. 58.

⁴⁷ *Id.*, at paras. 53-54.

3. make 25 or fewer of their own signs or pamphlets, and
4. hand-deliver those signs or pamphlets directly to 25 or fewer other individuals

are not advertising sponsors.

There must be no question of who is responsible for the advertising. This means that the advertising must be hand-delivered directly to another person, not dropped in a mailbox or otherwise distributed anonymously.⁴⁸

There is no support in the *BC FIPA* judgment for any of the underlined portions in the above explanation of what it means to be an “election advertising sponsor”. Self-expression does not become sponsorship by a third party when a 25-copy threshold is passed. And again, the Court was express that “[i]n no case does the registration requirement apply to those engaged in individual self-expression.”⁴⁹ Nor could there be any requirement for hand-delivery given that, as noted, the Supreme Court of Canada was express that the attribution requirements in the Act also do not apply to self-expression.⁵⁰

The Bulletin went on to say that “[g]roups of individuals or organizations that conduct any sort of election advertising are advertising sponsors and must register with Elections BC before sponsoring the advertising.”⁵¹ But the exclusion of groups is equally unsupportable given that the factual basis of the *BC FIPA* judgment was free expression made in the campaign period by FIPA, an organization, and the *BC FIPA* judgment made clear that organizations would not be considered “sponsors” so long as they were not engaging in paid advertising or receiving a service from another individual or organization in undertaking an election advertising campaign.

How could Elections BC get it so wrong? One answer may be that Elections BC simply failed to consider and give weight to the Court’s judgment and failed to respond to the judgment itself rather than simply reiterating positions taken by the Attorney General. Another explanation is that the Court’s failure to address the Attorney General’s actual position resulted in a state of confusion stemming from the inconsistency

⁴⁸ Emphasis added. This content is no longer accessible on <<https://elections.bc.ca>>.

⁴⁹ *BC FIPA* SCC, *supra*, note 5, at para. 21.

⁵⁰ *Id.*, at para. 40.

⁵¹ Bulletin, *supra*, note 48.

between what is said in the Court's judgment, and how the proceedings actually unfolded. Elections BC would undoubtedly have been following the case and would have read the judgment. It would have been familiar with the Attorney General's position advanced at each level of court. It would no doubt have been surprised and/or confused, then, to read a judgment so divorced from the Attorney General's position which purported to side with it. An attempt to rationalize the position actually advanced by the Attorney General and the issues raised by the parties, with the judgment rendered by the Court might conceivably have resulted in misinterpretation of the judgment and ultimately the Bulletin that was issued.

Of course, even if Elections BC had not misinterpreted the judgment, it could have had no understanding from it of the significance of the breach of section 2(b) Charter rights that the CEO's (and at least on some occasions the Attorney General's) historic or more recent interpretation of section 239 occasioned. Thus, it could not have factored in those Charter impacts in approaching how to best respond to the judgment. It would have understood, though, that even if such impacts were occasioned, they could apparently be justified in the absence of any evidence. In the result, Elections BC's response to the judgment perpetuated many of the same constitutional problems raised by the parties and left unaddressed in *BC FIPA* — problems that could only be addressed by further litigation. That potential future litigation would have to contend with the poor section 1 analysis undertaken by the Court in the absence of any evidence or arguments to ground it.

V. CONCLUSIONS

This paper has considered two case studies of arguably dysfunctional constitutional conversations.

In *Carter*, the Court's disregard of the factual matrix and considered submissions of the parties led to a judgment that was of less utility to Parliament (and the parties) than it might have been. Parliament's failure to consider or give adequate weight to that judgment resulted in a parliamentary response that reiterated rationales and positions taken and addressed in the *Carter* litigation. This failure has resulted in sequel litigation in British Columbia that seeks only to vindicate the rights of those recognized by judgment in *Carter* but left behind by Parliament's legislative response to it. One significant initial battleground in this

sequel litigation is the extent to which the findings of fact in *Carter* will be binding or will need to be proven again.⁵² The *Carter* judgment's silence on some of the constitutional questions raised and Parliament's response to that judgment, impose significant deleterious impacts on those individuals left behind by Parliament's response and also on access to justice.

In *BC FIPA*, the Court's invention of a new constitutional issue that was neither developed in the factual matrix before it, nor addressed by the parties to the litigation, resulted in development of the section 1 jurisprudence in a manner that occludes respectful attention in the courtroom. In particular, if demonstrable justification under section 1 requires no evidence and no argument, it is hard to imagine how judgments will be responsive, understandable and of some utility to those who must respond to them. The Court's disregard of the Attorney General's position in the litigation and of how the Act was being enforced on the ground resulted in a judgment that appeared to be of little utility to Elections BC who ultimately had to respond to the judgment. Like the legislative response that followed *Carter*, the response here left many of the same constitutional rights in jeopardy. That issue would have to be addressed through further litigation although no sequel litigation has yet been initiated.

Both *Carter* and *BC FIPA* serve as useful reminders to litigants that a court judgment is not an end in itself. The judgments of even the highest court must be interpreted, applied and responded to by others. Cases are carefully crafted, often on a *pro bono* basis, and argued through multiple levels of court over the course of many years. Even with *pro bono* legal assistance, for many litigants the incidental costs of such litigation are overwhelming and even insurmountable. Despite the extensive outlay of financial, temporal and human resources, often courts refuse to adjudicate upon constitutional arguments that are fully developed, likely because of a misplaced adherence to the principle of restraint. At other times, constitutional issues that are not disputed by the parties are adjudicated upon by the courts while the arguments advanced are disregarded. One solution to this morass is to insist on respectful

⁵² The plaintiffs have argued the factual findings from *Carter* are binding (pursuant to the doctrines of abuse of process or issue estoppel) unless they can be impeached by fresh evidence. The Attorney General has argued, and the British Columbia Supreme Court agreed, that the findings of fact from *Carter* Findings are not binding and may all be relitigated: *Lamb v. Canada (Attorney General)*, [2018] B.C.J. No. 1248, 2018 BCCA 266 (B.C.C.A.). Leave to appeal to the Supreme Court of Canada has been sought. Alison Latimer is co-counsel to the plaintiffs/appellants in *Lamb*.

attention when embarking upon a constitutional conversation. This respectful attention would ensure that dialogue theory fulfils its promise to promote legislative responses and ensure that those who must implement judgments are not disadvantaged in understanding the constraints that may exist on the range of constitutionally compliant responses left open by the litigation. Such respectful attention will also promote public respect for the judicial and legislative roles and, ultimately, promote rights recognition and access to justice.