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B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General): Mandatory Registration Rules, and Limits on Third Party Political Expression under the Charter

Michael Pal*

I. INTRODUCTION

The laws regulating political participation by third parties have long been constitutionally controversial in Canada. Third parties are generally understood to include all individuals, groups and organizations, other than political parties and their affiliated entities such as riding associations. Rules relating to political expression¹ and, especially, third party participation in provincial and federal elections have frequently been before the courts.² The central constitutional dilemma posed in these cases

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¹ *Haig v. Canada*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.); *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69 (S.C.C.); *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter "*Thomson Newspapers*"]; *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.); *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.); *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) [hereinafter "*Bryan*"].

² *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 48, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter "*Harper*"]; *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) [hereinafter "*Libman*"]; *Somerville v. Canada (Attorney General)*, [1996] A.J. No. 515, 184 A.R. 241 (Alta. C.A.); *National Citizens Coalition v. Canada (Attorney General)*, [1984] A.J. No. 2615, 11 D.L.R. (4th) 481 (Alta. Q.B.). See Leonid Sirota, "Third Parties' and Democracy 2.0" (2015) 60:2 McGill L.J. 253; Colin Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 45:3 Osgoode Hall L.J. 513; Keith Ewing, *Money*,

is relatively straightforward. Any non-trivial restriction on third party political expression violates section 2(b) of the *Canadian Charter of Rights and Freedoms*³ and harms a form of expression, namely political speech, which the Supreme Court of Canada has repeatedly said is at the “core” of the guarantee of free expression.⁴ Despite the constitutional costs imposed on third parties, however, regulating their political expression is necessary in order to ensure broader goals such as the integrity of the election and the creation of a level playing field so that politics is not simply dominated by moneyed interests.

The Supreme Court of Canada’s 2017 decision in *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*,⁵ is the most recent case to grapple with these countervailing considerations. The leading case remains *Harper v. Canada*⁶ from 2004, which saw the Court split 6-3 on what limits could be imposed on third party political expression. The Court in *Harper* upheld the federal rules requiring third parties to (1) register and disclose basic information about themselves in order to engage in political advertising during the election period; (2) adhere to spending limits; and (3) not circumvent the laws limiting their activities. The least contentious of the three holdings in *Harper* was the registration requirement imposed on third parties. Even the dissenting opinion in *Harper* accepted its constitutionality.⁷

The constitutional challenge in *BC FIPA* sought to test the boundaries of this holding from *Harper*. The British Columbia Freedom of Information and Privacy Association challenged the registration requirement in section 239 in the province’s *Election Act*,⁸ as it applied to those spending less than \$500 on election advertising, for violating section 2(b) and not being saved by section 1 of the Charter. Their main argument was that individuals or small organizations spending minute amounts of money on a T-shirt, bumper sticker, or homemade sign communicating a political message would be required to register. The organization

Politics, and Law: A Study of Electoral Campaign Finance Reform in Canada (Oxford: Clarendon Press, 1992); Andrew Geddis, “Liberté, Égalité, Argent: Third Party Election Spending and the Charter” (2004) 42 Alta. L. Rev. 429; Jay Makarenko, “Fair Opportunity to Participate: The Charter and the Regulation of Electoral Speech” (2009) 3:2 Canadian Political Science Review 38.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁴ *Bryan*, *supra*, note 1, at para. 26, *per* Bastarache J., and at paras. 99, 107, 110 and 125, *per* Abella J. (dissenting).

⁵ [2017] S.C.J. No. 6, 2017 SCC 6 (S.C.C.) [hereinafter “*BC FIPA*”].

⁶ *Harper*, *supra*, note 2.

⁷ *Id.*, at para. 1, *per* MacLachlin C.J.C. and Major J.

⁸ R.S.B.C. 1996, c. 106 [hereinafter “*BC Election Act*”].

contended that such a requirement chilled expression, harmed those who wished or had a reason to remain anonymous, and imposed a significant administrative burden on those seeking to exercise a fundamental freedom. Then-Chief Justice McLachlin, writing for the unanimous Court in *BC FIPA*, rejected these arguments and upheld the regime as being a legitimate restriction on political expression that furthered the values of openness, transparency, and accountability.⁹

This paper will analyze the implications of *BC FIPA* for campaign finance law and the scope of permissible limits on the freedom of political expression of third parties under the Charter. *BC FIPA* was the first case involving third parties and their freedom of expression under section 2(b) to reach the Court since *Harper*. It is the only one of four different constitutional challenges to the provincial *Elections Act* in British Columbia in recent years to go beyond the province's courts and reach the Supreme Court of Canada. At stake in the case was whether *Harper* should be read narrowly, as the British Columbia courts had done in the earlier cases, or whether it should instead be interpreted broadly in a manner permitting more extensive regulation of third parties. The consequences of how to interpret *Harper* are significant, given recent changes to federal and provincial campaign finance laws whose constitutionality are untested.

I will argue that *BC FIPA* hints that the Court may be open to interpreting *Harper* in a broad enough fashion to sustain many of the reforms that are needed to ensure a functioning campaign finance system in light of widespread changes to how third parties now operate. While seeking a relatively narrow remedy applying technically only to a provincial statute, the claimant could only have succeeded in *BC FIPA* had the Court accepted that registration requirements impose serious constitutional harm to third parties. Such a finding would have potentially imperilled attempts to regulate quickly evolving third party political activity. The Court's rejection of the claim in *BC FIPA* has positive implications, for example, for the constitutionality of pre-writ registration requirements that would be imposed federally by Bill C-76, the *Elections Modernization Act*,¹⁰ and which have been in place in Ontario for provincial elections since 2017.¹¹

⁹ *BC FIPA*, *supra*, note 5, at para. 51.

¹⁰ At the time of writing, Bill C-76 had passed the House of Commons and was before a Senate Committee. It looks likely to be passed in time for the 2019 federal election.

¹¹ *Election Finances Statute Law Amendment Act, 2016*, S.O. 2016, c. 22.

Before proceeding to elaborate upon that argument, it is worth flagging the relevance of *BC FIPA* to constitutional scholars and practitioners generally. First, the Court in *BC FIPA* was unanimous despite often dividing on section 2(b) cases,¹² which may indicate possible alignment in the views of the current justices on expression. Close consideration of the broader implications for section 2(b) outside of the realm of political expression is beyond the scope of this paper, but the issue merits further investigation.

Second, *BC FIPA* is also an important moment in the debate surrounding the use of social science evidence in the justification analysis for the limitation of rights and freedoms. The Court permitted the Province's section 1 argument to succeed despite the fact that British Columbia failed to produce any social science evidence to justify the infringement. "[S]ocial science evidence may not be necessary" in some cases, McLachlin C.J.C. ruled, "[w]here the scope of the infringement is minimal".¹³ At least in cases involving political expression, the sufficiency of the social science evidence on offer has often been a key issue in the section 1 analysis.¹⁴ The Court in *BC FIPA* stated as bluntly as it ever has that rights infringements may be upheld even in the total absence of social science evidence. The Court held that where infringements of a right or freedom, while meeting the standard to proceed to the section 1 analysis as breaches of the Charter, impose relatively minimal harm to the claimant, then social science evidence need not be led by the state as part of its burden of proof under section 1.¹⁵ This approach may portend some movement in the Court's approach to section 1 generally, or at least as applied to cases engaging freedom of expression or specifically political expression.

Third, and quite controversially, the Court engaged in an exercise of statutory interpretation that significantly changed the contours of the case as argued below.¹⁶ The Court's interpretation of the Statute was alien to that on offer from any of the parties or the justices in the lower courts. Alison Latimer's contribution to this volume argues that the

¹² See, for example, *Thomson Newspapers*, *supra*, note 1 and *Harper*, *supra*, note 2.

¹³ *BC FIPA*, *supra*, note 5, at para. 58.

¹⁴ Michael Pal, "Democratic Rights and Social Science Evidence" (2014) 32:2 N.J.C.L. 151; Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election cases" (2014) 32:2 N.J.C.L. 173.

¹⁵ *BC FIPA*, *supra*, note 5, at para. 58.

¹⁶ See the paper by Alison M. Latimer in this volume for a critique of the Court's interpretive approach: "Constitutional Conversations" (2019) 88 S.C.L.R. (2d) 231.

Court acted wrongly in adopting a novel approach to the case.¹⁷ As will become clear in the course of this paper, I disagree with that argument, but the leeway envisioned by the Court for itself in *BC FIPA* to redefine the core issues in a case will certainly be of relevance to constitutional litigators as they craft their cases and seek to anticipate their reception before the Court.

The main significance of the case, however, is for what it portends for Canadian campaign finance law, which is the central subject of this paper. This paper proceeds as follows: Part II details the particulars of the *BC FIPA* case, especially the statutory regime at issue, the Court's section 2(b) approach, and its section 1 analysis. Part III fills in gaps in the Court's reasoning by analyzing the importance and, even, necessity of registration rules for functioning campaign finance systems. Part IV places the case in the context of Canadian campaign finance jurisprudence, including *Harper*. It considers the implications of *BC FIPA* for the inevitable constitutional challenge to the registration requirements in Bill C-76. I conclude in Part V by offering some thoughts on the significant legacy of now-retired Chief Justice McLachlin with regard to political expression, which was capped off by her authorship of the unanimous decision in *BC FIPA*.

II. *BC FIPA* — THE CASE

1. The British Columbia *Election Act*

The drafters of British Columbia's *Election Act*¹⁸ have had a rough go as of late. The statute that regulates most aspects of provincial elections¹⁹ has been the subject of three successful constitutional challenges in recent years in the British Columbia courts. Its third party spending limits in the pre-writ period have been struck down twice for violating

¹⁷ *Id.*

¹⁸ *Supra*, note 8.

¹⁹ Related statutes that regulate other aspects of elections and politics include: *Income Tax Act*, R.S.B.C. 1996, c. 215 (political contributions); *Financial Disclosure Act*, R.S.B.C. 1996, c. 139 (disclosure rules for elected representatives); and *Electoral Reform Referendum 2018 Act*, S.B.C. 2017, c. 22 (2018 referendum on electoral reform).

section 2(b) of the Charter,²⁰ and an earlier case disapproved of the restrictions in the Act on public opinion polling.²¹

These victories for civil society and media groups appear to have emboldened the claimant in *BC FIPA* to argue that the registration provision for third parties in the *Election Act* should be found unconstitutional on classic civil libertarian grounds. The claimant organization argued that the requirement to register in order to engage in political advertising during the election period was an undue burden that could not be justified.²² Their preferred remedy was to read in a \$500 spending threshold for when the registration requirement begins to apply. That amount is the current threshold in the federal *Canada Elections Act* for when registration is required for domestic third parties.²³ The \$500 threshold was found to be constitutional in *Harper*. The claimant in *BC FIPA* sought to transform a finding from the Court in *Harper* that the federal threshold was constitutionally compliant into a requirement for Charter conformity.

The *BC Election Act* sets out the details of third party registration in sections 239 to 240. The process for registration detailed in these provisions is routine and commonplace across Canadian jurisdictions. Section 239 requires anyone who is an “election advertising sponsor” to register. Section 240 details the registration process that must be undertaken with the non-partisan electoral body, Elections British Columbia, and its Chief Electoral Officer (“CEO”). The application must include basic information, including the election sponsor’s name and address if an individual, the names of its principal officers or members if it is an organization, and a phone number. The application must also be signed. If the paperwork is complete, the CEO “must” register the election advertising sponsor “as soon as practicable” according to section 240(5). There is little discretion in the hands of the CEO, except to require that the application be in a “specified form” pursuant to section 240(4). The legislation imposes an attribution requirement as well, where information about the sponsor of the advertising must be disclosed (section 231(1)). A regulation issued by the CEO exempted certain kinds of expression from

²⁰ *Reference re Election Act (B.C.)*, [2012] B.C.J. No. 2037, 2012 BCCA 394 (B.C.C.A.); *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*, [2009] B.C.J. No. 619, 2009 BCSC 436 (B.C.S.C.), aff’d [2011] B.C.J. No. 1945, 2011 BCCA 408 (B.C.C.A.).

²¹ *Pacific Press, a Division of Southam Inc. v. British Columbia (Attorney General)*, [2000] B.C.J. No. 308, 2000 BCSC 248 (B.C.S.C.).

²² *BC FIPA*, *supra*, note 5, at para. 12.

²³ S.C. 2000, c. 9, s. 353(1) [hereinafter “*Canada Elections Act*”].

the attribution requirement, such as on “clothing”, “novelty items” and “small items of nominal value that are intended for personal use.”²⁴

It is important to note that the application and scope of the registration requirement is constrained in three pertinent ways. The obligation to register only applies to advertising that (1) occurs during the campaign period; (2) that counts as political advertising; and (3) which is “sponsored”. All three of these provisions decrease any imposition of harm on freedom of political expression.

First, the registration obligation is time-limited as it only applies to advertising during the statutorily defined official election or “campaign period”.²⁵ Elections in British Columbia occur on a fixed date, every four years, except when early elections are triggered such as by a loss of confidence in the government and dissolution by the Lieutenant-Governor.²⁶ The election campaign period is set at 28 days, with some minor exceptions.²⁷ Registration is therefore generally only required for advertising carried out during 28 out of every 1,460 days. Amendments to the legislation after the case was launched would also require registration in the 60-day period before the official campaign period, bringing the total to 88 days.

Second, the registration requirement applies only to a specific kind of communication, namely “election advertising”.²⁸ Election or political advertising can be distinguished from “issue” advertisements.²⁹ Election advertising typically advocates for the election or defeat of a particular candidate, political party or its leader. The British Columbia statute defines “campaign period election advertising” to be “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*”.³⁰ By contrast, issue advertisements express an opinion on an issue, which may be political, without tying it to an electoral outcome such as a particular candidate or party winning or losing. Citizens, associations, corporations, unions or any other entity are therefore permitted to run unlimited issue advertisements. There are no limits in British Columbia

²⁴ Election Advertising Regulation, B.C. Reg. 329/2008, s. 2.

²⁵ Section 228 (now repealed, S.B.C. 2017, c. 20, s. 29) defined “election advertising” as occurring only during “the campaign period”: BC *Election Act*, *supra*, note 8.

²⁶ *Constitution Act*, R.S.B.C. 1996, c. 66, s. 23.

²⁷ BC *Election Act*, *supra*, note 8, s. 27.

²⁸ *Id.*, s. 229.

²⁹ Colin Feasby, “Issue Advocacy and Third Parties in the United Kingdom and Canada” (2003) 48 McGill L.J. 11 [hereinafter “Feasby”].

³⁰ BC *Election Act*, *supra*, note 8, s. 1 and s. 229 (emphasis added).

on running issue advertisements that express the need to “Save the Whales”. Only if the expression indicates that you can “Save the Whales by Defeating Political Party X” is it caught by section 229 of the British Columbia statute.

The definition in section 1 of the BC *Election Act* for “campaign period election advertising” includes within it “an advertising message that takes a position on an issue with which a registered political party or candidate is associated”.³¹ This clause in the definition is not a restriction on true issue advertising, but an anti-avoidance mechanism to catch “sham issue advocacy”.³² Sham issue advertisements are communications disguised as issue advertisements that are in actuality election advertising. The *Canada Elections Act*³³ contains similar language to prevent sham issue advertising. Ontario’s legislation uses “closely associated” rather than “associated” as the standard.³⁴ Sham issue advertising is a classic form of electoral malfeasance. It typically occurs when a third party running election advertising against a candidate reaches its spending limit. Sham issue advertisers would then continue the advertisement in the same form except without a direct reference to a candidate. Without the clause capturing issues “associated” with a candidate, the simple change of eliminating a direct reference to a candidate would allow easy evasion of spending limits and registration rules that apply to political advertisements, even if the reasonable viewer would understand the message to be targeting a particular individual. This scenario is especially relevant if there is a political issue that is so closely associated with a politician that advertising on the issue is inextricable from the party or candidate.

Third, registration is also obligatory only for “sponsors of election advertising”.³⁵ It was the meaning of the term “sponsor” around which the Supreme Court’s statutory analysis of the British Columbia legislation turned. Sponsorship is defined in section 229 as including those who pay for election advertising or receive it free of charge, or anyone acting on their behalves. The British Columbia legislation requires registration of any advertising sponsor. There is no monetary threshold for a minimum amount of spending before the obligation applies. The sponsorship provision in the British Columbia legislation

³¹ *Id.* The definition in s. 1 includes exceptions for the media, internal communications to shareholders or union members, or personal political views transmitted on the Internet, among other items.

³² Feasby, *supra*, note 29, at 13.

³³ *Supra*, note 23, s. 319.

³⁴ *Election Finances Act*, R.S.O. 1990, c. E-7, s. 1(1), definition of “political advertising”.

³⁵ *BC Election Act*, *supra*, note 8, s. 229.

raised the question of whether everyone who engaged in election advertising during the campaign period counted as a “sponsor” or whether spending of trivial or small amounts were exempt.

Mandatory registration and disclosure of personal or organizational information, even if not unduly intrusive, is compelled speech and therefore always has a constitutional dimension. In the lower courts, the British Columbia Freedom of Information and Privacy Association (FIPA) organization acknowledged that the *Harper* Court found compelled speech in the form of registration for third parties spending *more than* \$500 to be constitutional. The FIPA organization sought a holding that the registration provision in British Columbia was unconstitutional as it applied to those spending *less than* \$500. On its claim, small spenders, self-expressers, meaning those who put up handmade signs or wore clothing with political messages, or “lone pamphleteer[s]”³⁶ and the like should be able to engage in political advertising during the campaign period without having to register themselves with the electoral authority. Registration on this view harmed the legitimate desire of these individuals to remain anonymous, would chill political expression, and would impose an obligation to get state approval to exercise a fundamental freedom, or else face repercussions for violating the *Election Act*.

The Court at first instance and the British Columbia Court of Appeal both disagreed. They held that the section 2(b) freedom of the FIPA organization was impaired in a manner that violated section 2(b), but that these limits were justified under section 1. The Court of Appeal was divided 2-1. Justice Saunders dissented at the Court of Appeal, holding that registration was not justified given its impact on “small and independent voices” and those who for reasons of “personal security” would prefer not to register so as to remain anonymous.³⁷ Of particular relevance in the claimant’s argument and in the dissent of Saunders J.A. was the fact that Elections B.C. had in a 2010 report interpreted its home statute to oblige small spenders to register, which the organization identified as a problem requiring a legislative fix.³⁸

³⁶ *BC FIPA, supra*, note 5, at para. 38.

³⁷ *Id.*, at paras. 20 and 14.

³⁸ *Id.*, at para. 19; *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, [2015] B.C.J. No. 774, 2015 BCCA 172, at para. 22 (B.C.C.A.).

2. The Decision of the Supreme Court of Canada

BC FIPA is arguably an exception to the general rule that judicial decisions on expression cases largely turn on section 1. The Court technically resolved the case by finding that the registration requirement was an infringement of section 2(b) that was not saved by section 1. The few paragraphs dealing with section 1 in the judgment, however, are perfunctory. It is hard to conclude other than that the real analytical work happened at the section 2(b) stage. For section 2(b), it is relatively easy for most claimants with plausible arguments that their freedom has been infringed to meet the inclusive standard for expression set out by the jurisprudence of “conveys or attempts to convey a meaning”.³⁹ Nearly all kinds of communication are caught, even potentially physical actions, though with the notable exceptions of violence or threats of violence.⁴⁰ The requirement that the state be restricting expression in purpose or effect is also usually easily met. To be protected, expression must also be tied to one or more of the three purposes underlying the guarantee: (1) truth-seeking; (2) individual fulfilment or development; and (3) facilitating democracy.⁴¹ For political expression in particular, the connection between it and democracy is clear. That is why the Court has regularly held that political expression is ““at the core of the guarantee of free expression””.⁴²

In her section 2(b) analysis for the unanimous Court, McLachlin C.J.C. largely defined away the constitutional problem that had been identified by the claimant. The lower courts found that the statutory term “election advertising sponsor” applied to anyone engaging in election advertising. The point of contention was whether the registration requirement was a reasonable limit on the freedom of expression of individuals spending less than \$500. Her judgment engaged with the constitutional problem from a different angle. If the *BC Election Act* only requires registration of sponsors, she reasoned, we must first determine who is a sponsor rather than assuming it captures any individual or group that engages in election advertising. She relied on the wording of the Act and its legislative history to reach the conclusion that self-expression was *excluded* from the definition of sponsorship. On this reading, an

³⁹ *Thomson Newspapers*, *supra*, note 1, at para. 81; *Libman*, *supra*, note 2, at para. 31; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter “*Irwin Toy*”].

⁴⁰ *Thomson Newspapers*, *id.*

⁴¹ *Irwin Toy*, *supra*, note 39, at 976.

⁴² *BC FIPA*, *supra*, note 5, at para. 16.

individual putting up a sign in the window of her home or wearing a T-shirt with a slogan that amounted to election advertising (who was termed in the case to be a “self-expresser”) would not be captured by the term “sponsor” and would therefore be exempt from the registration requirement.

The Chief Justice relied on a plain meaning interpretation of “sponsoring”. The Act presumed in her view two scenarios for election advertising: (1) that an entity would sponsor an election advertisement by paying a service provider to “conduct” the advertising;⁴³ or (2) an entity sponsors an election advertisement but the service provider conducts it free of charge. The first scenario involves an individual or group paying a television or radio station to distribute an advertisement. The second envisions the same transaction, but as an in-kind contribution without money changing hands. In either scenario, she reasoned, there are two parties to the transaction — the sponsor and the service provider. She defines a sponsor as “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.”⁴⁴ Where self-expression is at issue, there is only one party, and can be no sponsor. She concluded that “[s]ponsorship cannot be a solitary endeavour.”⁴⁵ Understanding the statute in this manner allowed her to rule that self-expressers are not caught by the election advertising rules that only apply to “sponsors”. The legislative history also indicated in her reading that self-expression would not be captured. According to her judgment, the history revealed that it was aimed at ensuring that voters had information about those who sought to influence them at election time through advertising. With self-expression, such as a T-shirt, bumper sticker, or sign in the window of a house or business, the source of the advertisement is clear and the purpose of registration is moot.

The consequence of excluding self-expressers from the definition of election sponsor is that they have no obligation to register. With this approach to interpreting the statute, the claimant’s case dissolved into thin air. The strongest argument against the constitutionality of the impugned provisions was their application to individuals engaging in self-expression with materials that cost minimal amounts to obtain, such as markers or

⁴³ *Election Act, supra*, note 8, s. 229(1)(b).

⁴⁴ *BC FIPA, supra*, note 5, at para. 39.

⁴⁵ *Id.*, at para. 30.

paper needed for a handmade sign or photocopying costs for a pamphlet. By virtue of reading her definition of sponsorship into the Act, McLachlin C.J.C. excluded these individuals from its scope entirely. The only entities captured by the rules, and required to register, are those who pay a second entity for election advertisements or receive advertising services for free as in-kind contributions. Rather than resolving the constitutional problem posed by mandatory registration of “lone pamphleteers” that she inherited from the British Columbia courts, the then-Chief Justice opted to answer a different question. The Charter question as framed by the claimant was whether requiring registration was a justified infringement of the freedom of political expression of those spending less than \$500 on sponsoring election advertising? Chief Justice McLachlin’s statutory interpretation transformed the question into whether the infringement on the political expression of sponsors, narrowly defined to exclude self-expressers, was justified? The use of this second question as the one to be addressed on the appeal made it much easier for her to find that the limits were justified under section 1.

The section 1 analysis was brief. The pressing and substantial purpose was accepted with no analysis in two sentences.⁴⁶ Rational connection was dismissed in one sentence.⁴⁷ Minimal impairment received some more treatment, but any concerns about the scope of the harm introduced by the registration provisions were rendered trivial by the narrow definition of sponsor that excluded self-expression. “... The registration process is simple and unlikely to deter much, if any, expression”, even if some expression might be “chilled”.⁴⁸ The case became a simple application of the holding in *Harper*, common to the majority and dissent, that registration for citizens and interest groups posed no serious constitutional harm.

III. REGISTRATION RULES

One of the indirect drawbacks of the Court’s approach that defined away the heart of the section 2(b) problem was that it meant there was little investigation of the function of registration rules. The Court found that openness, transparency, and accountability were the rationales in the Act for the registration requirement.⁴⁹ There was little elaboration of

⁴⁶ *Id.*, at para. 51.

⁴⁷ *Id.*, at para. 52.

⁴⁸ *Id.*, at para. 54.

⁴⁹ *Id.*, at para. 55.

these concepts or how registration rules relate to them. A further fleshing out of the necessity and importance of mandatory registration would have positioned more clearly what was at stake.

In my view there are three distinct rationales for registration rules. First, such rules permit enforcement to occur. A registration requirement obliges the advertising entity to release details such as contact information, address, phone number, and its main or controlling directors. This information is essential for being able to hold the entity to account and to enforce violations of electoral law. The election administrator is able to identify the responsible party for the actions of the advertising sponsor.

Second, registration also provides transparency and therefore helps the cause of an informed electorate. Without a registration requirement, it would be impossible for the public to know who was trying to influence them in an advertisement. Registration is closely linked to the transparency rule that states that the advertisement must identify who sponsored it. The sponsoring entity can easily evade any meaningful transparency by using a vague name, such as Citizens for the Environment. Such an entity could be a grassroots movement of individuals, or it could be a group of oil companies. The information disclosed on the registration form provides sufficient information that an advertiser cannot hide its tracks. An informed electorate furthers the principle of deliberation. Deliberation was found to be a core component of democracy in the *Secession Reference*.⁵⁰ Mandatory registration, combined with disclosure, allows individuals to deliberate on the merits of the advertisement by including the source of it in their consideration.

Third, and related to enforcement, there is an anti-evasion rationale for requiring registration. Much of election law is geared at preventing illegal collusion between regulated political entities for the purpose of circumventing the rules.⁵¹ Third parties may collude to evade spending limits or third parties and political parties may do so as well. Third parties are required to be legally distinct from one another, just as they are obliged to be at arm's length from political parties. Registration of a third party as a distinct legal entity allows collusion to be policed.

⁵⁰ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 68 (S.C.C.). For a recent re-evaluation of the unwritten principles, including democracy, see Jean Leclair, "Constitutional Principles in the Secession Reference" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Toronto: Oxford University Press, 2017).

⁵¹ See Michael Pal, "Third Party Political Participation and Anti-Collusion Rules" (2018) 61:2 Canadian Public Administration 284.

Registration rules provide clear benefits. The Court defined them as openness, transparency, and accountability. I have framed them as enforcement, an informed electorate, and anti-evasion rationales. On either account, registration rules are meaningful and essential components of a functioning electoral process.

These accounts differ significantly from the claimant BC FIPA's arguments that registration imposes serious and concrete harms. The organization argued that there is a value to speakers in remaining anonymous.⁵² Speakers may fear government retaliation for speech that criticizes political actors.⁵³ They may be at risk of losing government benefits by virtue of publicly airing their political views, in this account. The requirement to fill in the registration form also operates as prior restraint in this view. BC FIPA understood the harm as non-trivial and in fact as analogous to requiring an individual to ask state permission to attend a religious place of worship.⁵⁴ In both instances, third party political expression and religious worship, BC FIPA argued that being obliged to seek state permission to engage in a constitutionally protected freedom is equally incongruous with a free and democratic society.

The heart of the problem with the claimant's argument was that its assertions of non-trivial harm were speculative. There was no record of over-zealous prosecutors enforcing the law in a draconian way. In fact, there was no record of the law requiring registration being enforced against self-expressers at all, except for a general statement from Elections B.C. that it would do so in theory. The prospect of the state retaliating against individuals who engaged in small level advertising below a \$500 threshold was fanciful at best. The appeal failed largely because the appellant, BC FIPA, could not satisfy the Court that it or any other entity or individual suffered any meaningful harm, even if the established section 2(b) jurisprudence ensured the case would go to the section 1 stage. Reading the appellant's Factum, one could be forgiven for forgetting that the compelled activity at issue was the simple act of filling out a form during a brief window in time.⁵⁵

⁵² Factum of the appellant, British Columbia Freedom of Information and Privacy Association, at para. 53.

⁵³ *Id.*, at para. 55.

⁵⁴ *Id.*

⁵⁵ *Id.*, at para. 35. The BC *Election Act* was subject to substantial amendment in 2017 by the newly elected NDP-Green coalition government. The *Election Amendment Act, 2017* included extensive new regulation of third parties.

IV. THE BOUNDARIES OF *HARPER*: BILL C-76 AND PRE-WRIT POLITICAL ACTIVITY

BC FIPA resolved a particular dispute about registration rules for election advertising in provincial elections in British Columbia, but its importance extends beyond those relatively narrow confines. Election laws in Canada have been altered quite dramatically in the last 15 years.⁵⁶ Some of these changes raise profound constitutional questions about what limits the Supreme Court will permit on political expression in order to ensure electoral integrity and a level playing field. Litigation as to the constitutionality of new restrictions on political expression is inevitable and indeed has already begun in some circumstances.⁵⁷ The defining issue in these cases will be whether the Supreme Court will interpret *Harper* narrowly, to strike down the new restrictions on political expression, or more broadly to permit some or all of them.

BC FIPA has resonance outside of the British Columbia context because it hints, without conclusively resolving of course, how the Supreme Court may approach restrictions on political expression beyond those specifically before the Court in *Harper*. Part of the destabilizing potential of *BC FIPA* stemmed from the uncertain boundaries of the reasoning in *Harper*. *Harper* upheld mandatory registration, spending limits during the campaign period, and anti-collusion rules. *BC FIPA* offered an opportunity for the Court to narrow the potential reach of its holding in *Harper* with regard to registration, as the British Columbia courts had done in its earlier campaign finance cases with regard to spending limits. The Supreme Court declined to do so. In making that choice, it left open the possibility that *Harper* could be read broadly to uphold the constitutionality of restrictions on political expression that furthered the egalitarian ideal, namely levelling the playing field so that the wealthy or groups with resources do not dominate politics, that served to justify limiting section 2(b) freedoms in *Harper*.

These boundaries of the reasoning in *Harper* will be tested most directly in constitutional challenges to new legislation imposing

⁵⁶ On the wide-ranging changes on campaign finance law in particular, see the contributions in Harold Jansen & Lisa Young, eds., *Money, Politics, and Democracy: Canada's Party Finance Reforms* (Vancouver: University of British Columbia Press, 2011) [hereinafter "Jansen & Young"]. See generally Michael Pal, "Three Narratives About Canadian Election Law" (2017) 16:2 *Election L.J.* 255.

⁵⁷ Robert Benzie, "Coalition of unions challenging Ontario's campaign finance law as unconstitutional" *Toronto Star* (January 23, 2018), online: <<https://www.thestar.com/news/queenspark/2018/01/22/coalition-of-unions-challenging-ontarios-campaign-finance-law-as-unconstitutional.html>> [hereinafter "Benzie"].

registration rules and spending limits in the pre-writ period. The most robust election rules in Canadian jurisdictions, such as mandatory registration and spending limits, apply only during the writ period. The writ period is the official campaign period beginning with the drawing up and issuance of writs, which is the technical way elections are launched, and ending on election day. The spending limits in British Columbia, but also federally, apply only during this narrowly defined period. The juxtaposition of a relatively tightly regulated election period against a largely unregulated pre-writ period created obvious opportunities for third parties to engage in unlimited spending on political advertising before the official election campaign begins. Third parties, as well as political parties, now engage in significant spending on advertising in the pre-writ period in the larger Canadian jurisdictions.⁵⁸ Unlimited spending in this time period undermines the egalitarian values underpinning campaign finance rules that the Court upheld in *Harper*.

Governments have responded to this growth of pre-writ activity by attempting to introduce mandatory registration and spending limits in the pre-writ period. British Columbia's early attempts were struck down, but on the basis of the particular political context in the province and the design flaws in the legislation.⁵⁹ Among other changes as part of a wholesale rewrite of its campaign finance rules, Ontario in 2017 introduced a six-month pre-writ period with mandatory registration and a spending limit, which was in place in the lead up to the provincial election on June 7, 2018. There is currently a constitutional challenge to the third party rules in that legislation, though it will only be heard well after the end of the election.⁶⁰ Federally, Bill C-76, the *Elections Modernization Act*, also imposes a modest pre-writ period. Introduced in April, 2018, the constitutionality of multiple provisions of the Bill regulating pre-writ political activity by third parties is likely to be eventually in dispute before the courts, including its registration and spending limit provisions. These provisions directly limit the

⁵⁸ See Jansen & Young, *supra*, note 56; Michael Pal, "Is the Permanent Campaign the End of the Egalitarian Model of Elections?" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds., *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, forthcoming 2018).

⁵⁹ See the references in note 20, *supra*. After its amendments in 2017, the BC *Election Act* includes pre-writ registration rules in the 60-day period prior to the election: see the definitions of "pre-campaign period"; "pre-campaign period election advertising"; and "election advertising" in s. 1. There is, however, no corresponding pre-writ spending limit. The registration rules largely operate to promote transparency and to assist in oversight of contributions. See ss. 239-245 for the registration requirement. There is a \$1,200 contribution limit as set out in s. 235.05.

⁶⁰ Benzie, *supra*, note 57.

expressive freedom of third parties. *BC FIPA* and *Harper* will be directly relevant in determining the constitutionality of these provisions.

The 2019 fixed date federal election is scheduled for October 21. Bill C-76 would create a regulated pre-writ zone from June 30 until the start of the official election campaign, which would be limited to a minimum of 37 and a maximum of 50 days prior to October 21. A spending limit would apply during this pre-writ period, with a separate amount permitted in the writ period.⁶¹ On top of the introduction of a pre-writ limit, the Bill expands the list of third party activities to which the spending limit applies. Not only political advertising, but also polling, Get Out the Vote (GOTV) or other activities captured within the category of “partisan activities” would be subject to the limit. The Bill would also make partisan activities occurring during the campaign period subject to the writ period spending cap. Mandatory registration would be required for any third party spending more than \$500 in the pre-writ period, just as it is in the official campaign.

The constitutionality of the cap on spending is likely to be at the heart of any constitutional challenge to the legislation. The Bill attempts to manage or decrease this risk in a host of ways. The pre-writ period is much shorter, likely two or two-and-a-half months, than the Ontario legislation, which has a six-month range. The definition of political advertising in the pre-writ period will capture less speech than the definition that is used in the writ period.⁶² The spending limits are also relatively generous.

A challenge to mandatory pre-writ registration, however, will surely be on the table as well. Registration is compelled speech, as the Court found in *Harper* and *BC FIPA*, and therefore always raises constitutional issues. In my view pre-writ registration rules should be seen as compliant with the Charter. The justification for registration in the pre-writ period is the same as it is during the writ period. Registration is necessary for enforcement and administration, to foster an informed public and democratic deliberation, and to police collusion or regulatory avoidance. Mandatory registration has an impact on the freedom of political expression of citizens

⁶¹ The *Elections Modernization Act*, *supra*, note 10, s. 349.1(1) sets out a pre-writ spending limit of \$700,000 for third parties, which increases according to an inflation adjustment factor for each election calculated by virtue of s. 348 and s. 349(4). When the inflation adjustment is calculated, this amount rises to \$1,000,000. Political parties will have a limit of \$1.5 million once inflation is taken into account.

⁶² *Id.*, s. 2(7), definition of “partisan advertising”.

and interest groups that must be taken seriously. These harms, however, are relatively minimal. Third parties may be critiqued for the political views that they express; they may also be subjected to prosecution for violation of the rules. A healthy democracy requires no less, however, and there is no evidence of any other more harmful repercussions. Because of spending in the pre-writ period by political parties and third parties, there can be no level playing field in Canadian elections without pre-writ registration and spending limits.

There are two central counter-arguments to this analysis. The first is simply the classic libertarian view that the state should not restrict political speech in any way and that *Harper* was wrongly decided. Much ink has been spilled on the relative merits of egalitarian versus libertarian approaches to campaign finance law⁶³ and I do not have space here to repeat that debate. Suffice it to say that egalitarianism has clearly won the day in the jurisprudence; *BC FIPA* suggests that there is no appetite on the current Court to wholly reject *Harper* as precedent. The caveat of course is that the composition of the Court has changed. Chief Justice McLachlin, the author of *BC FIPA* and the *Harper* dissent, has now retired and replaced on the Court. There is a new Chief Justice. Current Chief Justice Wagner, however, sat on *BC FIPA* and signed off on the unanimous opinion. Justice Martin has now taken a spot on the Court. There is nothing in Martin J.'s background to suggest her views on political expression are off-side those of her new colleagues. In short, *Harper* remains the controlling authority and it is hard to see that being revisited. The question is still the boundaries of the reasoning in the case.

The second counter-argument is that while *Harper* and *BC FIPA* decided the constitutionality of mandatory registration during the writ or official campaign period, a similar obligation in the pre-writ period is more harmful to political liberty and therefore on weaker constitutional ground. Bill C-76 would impose restrictions on political expression over a larger time period than is currently the case. It would also do so outside of the immediate context of an election. It is undeniable that Bill C-76, and pre-writ registration and spending limits in general, limit section 2(b) freedom to a greater extent than would be the case in their absence.

⁶³ See Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Democratic Process Under the *Charter*: The Emerging Egalitarian Model" (1999) 44:1 McGill L.J. 5; Christopher Manfredi & Mark Rush, *Judging Democracy* (Peterborough, ON: Broadview Press, 2008), at 97-117; Yasmin Dawood, "Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality" (2012) 26 C.J.L.J. 293.

Whether the harms imposed by pre-writ registration are significant enough to fail section 1 justification is a different matter. The Court viewed mandatory registration in *BC FIPA* as being only marginally harmful to the freedom of political expression in section 2(b) and easily passing the threshold for being upheld under section 1. There would be a longer time period in which registration is required under Bill C-76 with its pre-writ registration period, but the harm remains of the same relatively minimal quantum. The Court simply did not see mandatory registration as imposing any serious constitutional damage. Mandatory registration in the two months or so leading up to an election is likely to be seen in the same light. It is not a free-standing requirement for registration in order to exercise a fundamental freedom, but a relatively unobtrusive obligation during a defined time period tied to the goal of furthering a level playing field in elections. The fact that the Court in *BC FIPA* unanimously and comfortably rejected the claim that registration rules impose serious harm bodes well for the constitutionality of pre-writ registration rules.

V. CONCLUSION — CHIEF JUSTICE MCLACHLIN'S LEGACY ON DEMOCRATIC RIGHTS AND FREEDOMS

BC FIPA reached the Supreme Court as a narrowly framed case. It was on the surface about whether registration rules apply to third parties under British Columbia's provincial legislation. The remedy sought was also limited to the Court reading into the provincial legislation the federal threshold of \$500 for registration that had been upheld in *Harper*. The Supreme Court interpreted the provincial statute so as to exclude a requirement of registration for self-expressers and upheld the provision under section 1. Had the decision gone the other way and accepted the claimant's arguments, as narrowly framed as they were, the ramifications would have been widespread for Canadian campaign finance law. Mandatory registration is a component of functioning campaign finance systems and is therefore a necessary evil, despite constituting compelled speech. The constitutionality of mandatory registration in the pre-writ period is likely to be one of the central constitutional questions in upcoming litigation around Bill C-76 and related regimes in the provinces. Given the unavoidable need to limit political expression in order to prevent the dominance of money in the political process, the decision in *BC FIPA* was a welcome one.

The decision was authored by now-retired but then-Chief Justice Beverley McLachlin. It is worth a final reflection on what the case says about her legacy on democratic rights and freedoms under section 3 (the right to vote) and section 2(b) of the Charter. The former Chief Justice has the longest record of decision-making on democratic rights cases in the Charter era. She co-wrote the majority decision in what remains the leading case on electoral boundaries, *Reference re Provincial Electoral Boundaries (Saskatchewan)*.⁶⁴ She was the author of the majority opinion in *Sauvé v. Canada (Chief Electoral Officer)*,⁶⁵ which ruled unconstitutional the denial of the right to cast a ballot to prisoners. It is the leading case on the right to cast a vote, at least until the Supreme Court issues its ruling on the constitutionality of depriving Canadian citizens living abroad from voting in *Frank v. Canada*.⁶⁶ *Frank* was originally scheduled to be heard in February 2017, but was postponed until early 2018 at the request of the Department of Justice after Parliament tabled legislation that would amend the impugned provision. One of the consequences of the delay in the hearing was that Chief Justice McLachlin was no longer on the Court. We are therefore deprived of learning how she would apply the central precedent in the case, *Sauvé*, which she wrote, to the situation of non-resident citizens.

Her dissent in *Harper*, discussed in this paper, was of central importance in *BC FIPA*. One could characterize *BC FIPA* as simply reiterating a simple point that was not in dispute between the majority and minority in *Harper* — that registration requirements for third parties are constitutional and legislatures have broad latitude with which to craft the particularities of the obligation. On the other hand, the claimants in *BC FIPA* were clearly inspired by the Chief Justice's obvious reticence in the *Harper* dissent to permit restrictions on third party expression. The *Harper* dissent is the classic version of the civil libertarian argument as applied in the campaign finance context. *BC FIPA* is therefore consistent with her *Harper* dissent, for upholding registration rules. It appears, however, to also reflect a shift in her opinion on these matters. The reasoning in *BC FIPA* reflects much more ease with the government restricting political liberty in order to further other values. The skepticism

⁶⁴ [1991] S.C.J. No. 41, [1991] 2 S.C.R. 158 (S.C.C.).

⁶⁵ [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.).

⁶⁶ *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 536 (Ont. C.A.), overturning *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907 (Ont. S.C.J.). The Supreme Court heard the case on March 21, 2018: *Frank v. Canada (Attorney General)*, [2015] S.C.C.A. No. 396 (S.C.C.).

of modern campaign finance rules that was evident in her *Harper* dissent is simply not present in *BC FIPA*. If anything, the former Chief Justice's decision for the entire Supreme Court in *BC FIPA* is dismissive of the classic civil libertarian approach that she adopted in her reasons in the *Harper* dissent. *BC FIPA* therefore perhaps reflects an evolution in her thinking on political expression by the end of her career.

