THEME 8

ELECTION EXPENSES

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

DAVID SOMERVILLE

Plaintiff

and

ATTORNEY GENERAL FOR CANADA

Defendant

Elections *– Spending limits within stipulated period prior to election – whether legislation violated relevant sections of the Charter of Rights and Freedoms.*

Background facts
The applicant, David Somerville, sought a declaration that certain sections of the Canada Elections Act as amended were of no force or effect as they constituted an impermissible infringement of specific sections of the Charter of Rights and Freedoms. The sections of the Charter relied upon were those commonly referred to as freedom of expression, freedom of association, and the right to vote.

Held
That the sections of the Act complained against were in breach of the charter and therefore were of no force and effect.

Cases cited in the Judgements

National Citizens Coalition and Brown v *A.G. of Canada (1994) 5 WWR 436*
R v *Registrar (1990) 3 S.C.R. 725*
Osbourne v *Canada, (1991) 2 SCR 69*
R. v *Oakes (1986) 1 S.C.R. 103*
R v *Zundel (1992) 2 S.C.R. 731*
R v *Butler (1992) 1 S.C.R. 452*

REASONS FOR JUDGEMENT OF THE HONOURABLE MR JUSTICE MACLEOD

THE COURT

The applicant, David Somerville, seeks the following relief pursuant to the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms.

A declaration that section 213(1), 259.1(1) and 259(2) of the Canada Election Act as amended by Statutes of Canada 1993, chapter 19 are of no force or effect as 259.1(1) and 213(1) constitute an impermissible infringement of section 2(b) and 3 of the Charter of Rights and Freedoms and 259.2(2) constitutes an impermissible infringement of Sections 2(b). 2(d) and 3 of the Charter of Rights and Freedoms.

The sections under attack provide as follows:

> "213 (1) Any persons guilty of an offence who, for the purpose of promoting or opposing a particular registered party or the election of a particular candidate, directly or indirectly: (a) between the date of the issue of the writ and Sunday, the twenty-ninth day before polling day, the one day immediately preceding polling day or on polling day, advertises on the facilities of any broadcasting undertaking; or (b) procedures for publication or acquiesces in the publication, during the period described in paragraph (a), on the one day preceding polling day or on polling day of and advertisement in a periodical publication.
>
> "259.1(1) Every person who incurs advertising expenses in excess of one thousand dollars between the date of the issue of the writ and the day immediately following polling day is guilty of an offence.
>
> 259.2(2) For the purposes of section 259.1, no person shall incur advertising expenses in combination with one or more other persons if the aggregate amount of the advertising expenses incurred exceeds one thousand dollars."

"Advertising expenses" is defined as amounts paid and liabilities incurred with respect to advertising for the purpose of promoting or opposing, directly and during an election, a particular party or candidate. The penalty section provides for a find up to $5,000 and or imprisonment for five years.

The sections of the Charter relied upon are those commonly referred to as freedom of expression, freedom of association, and right to vote.

In 1984, this court had occasion in the National Citizens' Coalition and *Brown* v *Attorney General of Canada, 1994 5 WWR 436,* to consider a challenge to a predecessor section to section 259.1(1). That section provided that:

> "Every one, other than
> (a) a candidate, official agent or any other personal acting on behalf of a candidate with the candidate's actual knowledge and consent, or
>
> (b) a registered agent of a registered party acting within the scope of his authority as such or other person acting on behalf of a registered party with the actual knowledge and consent of an officer therefore, who, between the date of the issue of the writ for an election and the day immediately following polling day, incurs election expenses is guilty of an offence against the Act.
>
> The Canada Elections Act defines "election expenses" as:
>
> (a) amounts paid;
>
> (b) liabilities incurred;
>
> (c) the commercial value of goods and services donated or provided, other than volunteer labour, for the purpose of promoting or opposing, directly and during and election, a particular registered party, or the election of a particular candidate."

Mr Justice Medhurst in that case held, at page 453 as follows:

> "Care must be taken to ensure that the freedom of expression, as guaranteed by s. 2 of the Charter, is not arbitrarily or unjustifiably limited. Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before limitation can be said to be justified.
>
> In my view it has not been established to the degree required that the fundamental freedom of expression need be limited. The limitation has not been shown to be reasonable or demonstrably justified in a free and democratic society.
>
> Accordingly, I hold that the laws under review, s. 70.1(1) and s. 72 of the Canada Elections Act, are inconsistent with s. 2 of the Charter and to the extent are of no force or effect."

The case was not appealed, and in the 1994 election that followed the chief electoral officer did not attempt to enforce the section in question in any part of the country. The same situation prevailed four years later in the 1988 election. Following that election however, a Royal Commission chaired by Pierre Lortie held hearings across the country on the questions of electoral reform, and issued a report containing some 275 recommendations. A special committee in the House of Commons was struck to consider these recommendations and issued a draft bill containing provisions relating to some of them. A bill was subsequently presented in the house, was eventually debated and passed in the House and Senate, emerging as Chapter 19, Statutes of Canada 1993, which was assented to on 6th of May, 1993.

Filed in these proceedings as exhibits, by agreement of counsel, were the four-volume report of the Lortie Commission, some 20 volume of research papers commissioned by the commission, a record of the proceedings of the special committee, portions of Hansard containing the debates in the House and the Senate, and the record of the two days the Standing Senate Committee on legal and constitutional affairs considered the bill on May 5th and 6th, 1993 which was approximately one month after this application was brought.

Also before me was this affidavit of the applicant and various documents exhibited during the testimony of several witnesses called by first the Attorney General and then, in rebuttal, by the applicant. The witness were, Dr. David Bercuson, a professor of history at the University of Calgary, Dr. Barry Cooper, professor of political science also at the University of Calgary, Dr. Janet Hiebert, assistant professor of political science at Queen's University, Kingston, and Jean Marc Hamal, for many years the chief electoral officer for Canada, all called by the Attorney General, and Dr. Neil Nevitta, professor of political science at the University of Calgary, called by the applicant.

Section 1 of the Charter contemplates a two-stage process for a review of impugned legislation. First, the question whether the legislation has the effect of limiting one of the guaranteed rights or freedoms and secondly, if it does, whether the limit is a reasonable one and can be demonstrably justified in a free and democratic society.

In the case of freedom of expression, Chief Justice Dixon put the matter as follows in *R* v *Keegstra, 1990 3 SCR* at page 725:

> "Before looking to the specific facts of this appeal, however, I would like to comment upon the nature of the s. 2(b) guarantee. Obviously, one's conception of the freedom of expression provides a crucial backdrop to any s. 2(b) inquiry; the values promoted by the freedom help not only to define the ambit of s. 2(b) but also come to the forefront when discussing how competing interest might co-exist with the freedom under s. 1 of the Charter.

> In the recent past, this Court has had the opportunity to hear and decide a number of freedom of expression cases, among them *RWDSU* v *Dolphin Deliver Ltd.*, [1935] 2 S.C.R. 573; *Ford* v *Quebec (Attorney General), [1988] 2 S.C.R. 712; Irwin Toy Ltd.* v *Quebec (Attorney General), [1989]* 1 S.C.R. 927; *Edmonton Journal* v *Alberta (Attorney General), [1989]* 2 S.C.R. 1326; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.) [1990] 1 S.C.R. 1123; and *Rocket* v *Royal College of Dental Surgeons of Ontario, [1990] S.C.R. 232.* Together, the judgments in these cases provided guidance as to the values informing the freedom of expression, and additionally indicate the relationship between ss. 2(b) and 1 of the Charter."

That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognised by Canadian courts prior to the enactment of the Charter. The treatment of freedom of expression by the Court in both division of powers and other cases was examined in Dolphin Delivery Ltd., supra, at pp 583–88, and it was noted that well before the advent of the Charter – before even the Canadian Bill of Rights was passed by Parliament in 1960, c.44 on freedom of expression was seen as an essential value of Canadian parliamentary democracy. This freedom was thus protected by the Canadian judiciary to the extent possible before its entrenchment in the Charter, and occasionally even appeared to take on the guise of a constitutional protected freedom (see e.g. *Reference re Alberta Statutes, [1938]* S.C.R. 100, per Duff C J, at pp 132–33; and *Switzman* v Elbling, [1957] S.C.R. 285, per Abbot J at p 326).

Without explicit protection under a written constitution, however, the freedom of expression was not always accorded careful consideration in pre-Charter cases (see Clare Beckton, "Freedom of Expression" in C-A. Beaudoin and E. Ratushny, Canadian Charter of Rights and freedom (2nd ed. 1989). Moreover, pre-Charter jurisprudence used freedom of expression primarily in relation to political expression, a context which restricted somewhat the content of the freedom and led this court to remark in Ford, *supra*, at p 764:

> The pre-Charter jurisprudence emphasized the importance of political expression because it was a challenge to that form of expression that most often arose under the division of powers and the "implied bill of rights" where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society.

While the pre-Charter era saw a role for the freedom of expression, then, with the Charter came not only its increased important, but also a more careful and generous study of the values informing the freedom.

As is evident from the quotation just given, the reach of s 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual societal values in a free and democratic society." In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in Irwin Toy perhaps goes further towards stressing as primary the "democratic commitment said to delineate the protected sphere of liberty (p 971). Moreover, the Court has attempted to articulate more precisely some of the convictions fuelling the freedom of expression, those being summarised in Irwin Toy (at p 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

Although Ford commented upon the values generally seen to support the freedom of expression, the decision was also sensitive of the need to consider these values within the textual framework of the Charter. Consequently, the Court stated as pp 765–66 that:

> While..... attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most important of them, they tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interest protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian Charter and the Quebec Charter. These are two distinct questions and call for two distinct analytical processes.

It is the presence of section 1 which makes necessary this bifurcated approach to Canadian freedom of expression cases. Indeed, the application of this approach in Ford in part permitted the Court to give a large and liberal interpretation to section 2(b) on the facts of the case leading to the inclusion of commercial expression within its ambit, and to state that the weighing of competing values would "in most instances" take place in section 1 (p 766)

Irwin Toy can be seen as at once clarifying the relationship between sections 2(b) and 1 in freedom of expression cases and reaffirming and strengthening the large and liberal interpretation given the freedom in section 2(b) by the Court in Ford. These aspects of the decision flow largely from a two-step analysis used in determining whether section 2(b) has been infringed, an approach affirmed by this Court in subsequent cases, for example Reference sections 193 and 195.1(c) of the Criminal code (Man.), *supra*, and Royal College of Dental Surgeons, *supra*.

The first step in the Irwin Toy analysis involves asking whether the activity of the litigant who alleges and infringement of the freedom of expression falls within the protected section 2(b)

sphere. In outlining a broad, inclusive approach to answering this question, the following was said (at p 968):

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinion, beliefs, indeed all expression of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has suppressive content and *prima facie* falls within the scope of the guarantee" (p 969). In other words, the term "expression" as used in section 2(b) of the Charter embraces all content of expression irrespective of the particular meaning or message sought to be conveyed (Reference re. sections 193 and 195.1(1)(c) of the Criminal Code (Man.), supra, at p 1181, per Lamer J).

> "The second step in the analysis outlined in Irwin Toy is to determine whether the purpose of the impugned government action is to restrict freedom of expression. The guarantee of freedom of expression will necessarily be infringed by government action having such a purpose. If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermine the principles and values upon which freedom of expression is based."

Mr. Shaw, counsel for the Attorney General, while not formally conceding that in this case there is a breach under sections 2(b) and 2(d), offered no argument that there was not. He did submit however, that it was appropriate that I make no finding with respect to section 2(d) and that there was no breach of section 3.

With respect to section 2(d), Mr. Shaw referred to the comments of Mr. Justice Sopinka in *Osbourne* v *Canada*, 1991 2 S.C.R 69 at p 93, as follows:

> "Having reached the conclusion that s. 33 of the Act is inconsistent with freedom of expression under s. 2(b) of the Charter, I do not consider it necessary or appropriate to determine whether there is also a violation of freedom of association under s. 2(d) of the Charter. The parties have devoted their arguments

> almost entirely to the discussion of freedom of speech, and while it would appear that there is an infringement of s. 2(d) independently of the violation of s. 2 (b), the nature of the analysis to be undertaken, as well as the consideration to be taken into account, are not necessarily the same, and I would prefer to consider this question separately on another occasion having the benefit of the full submissions of the parties."

With respect to section 3, Mr. Shaw concedes that the right to vote is the right to an informed vote, as submitted by Mr. Hunter, counsel for the applicant, but Shaw argues that:

> "The evidence in this case... cannot demonstrate, that the spending restrictions prevent voters from receiving sufficient information. This is a restriction not on information, but on availability on a delivery system for that information. We submit that if there is evidence that the regulation of third party spending has the potential effect of reducing the quality of the vote, there is no evidence of the extent to which the vote quality is reduced as applied to any standard.
>
> Therefore, there is no evidence that Mr Somerville's vote is not a sufficient vote, and the Applicant has not led evidence that would establish that the limitation on direct advertising would have that effect."

In my view, it is clear on the face of the section involved, the absence of argument by the Attorney General, and on the evidence that there is a breach of sections 2(b) and 2(d), I acknowledge the remarks of Mr. Justice Sopinka quoted, but here while the point was not argued by the Attorney General, it certainly was at some length by Mr. Hunter and Mr. Groody, and I believe it is appropriate to make the finding on both sections.

With respect to section 3, accepting that it is a question of sufficient information to make an informed vote, considering the evidence of the applicant in his affidavit and the following remarks in the Lortie commentary, as follows:

> "The effect of this limit would most likely be to restrict the amount of money spent on media advertising. Although this amount is insufficient for those who wish to mount national media campaigns to promote issues or to assess the positions of political parties, the centrality of fairness in the electoral process justifies this limit. If individuals or groups wished to conduct broader campaigns they could do so by supporting existing parties and candidates (including independent candidates) or by forming a political party and fielding candidates. Moreover, federal election campaigns are relatively short and would be shorter still under our recommendation (less than 50 days)."

I think it is apparent that voters are effectively precluded from receiving third party views from other parts of the country, and there is a breach of section 3, and I so find.

Having found breaches of the impugned sections, I must now turn to the second step in the process. Counsel agree that the basic test is still that found in *R* v *Oakes, 1986* 1 S.C.R.103, although Mr. Shaw suggests the test has been shown to be perhaps more flexible with respect to the "proportionality" aspect by subsequent cases decided in the Supreme Court namely, Keogetra, Irwin Toy, Edwards Books, and McKinney.

Reading from the judgement in Oakes, beginning at p 136:

> "The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit.

The standard of proof under section 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of a probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in section 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case.

The case may be proved by a preponderance of probability, but there may be a degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I wish, however, to emphasise that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved, it must be reasonably satisfied, and that whether or not it will be so satisfied, must depend on the totality of the circumstances on which its judgement is formed, including the gravity of the consequences.

Having regard to the fact that section 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a section 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit... a court will also need to know that alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the section 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R* v *Big M Drug Mart Ltd.* The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a protection. It is necessary, at a minimum, that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

Second, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test", *R* v *Big M Drug Mart.* Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective and question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R* v *Big M Drug Mart.* Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

The latest pronouncement of the Supreme Court of Canada on the question of freedom of expression is R.V. Zundel 1992 2 S.C.R. 731. Madam Justice McLachlin, writing for the majority, having found that the section in question violated section 2(b) of the Charter, continued at page 760:

> "Section 1 requires us to weigh the intrusion of rights represented by the impugned legislation against the state's interest in maintaining the legislation. In this case that translates to weighing the state's interest in proscribing expression which it deems 'likely to cause injury or mischief to a [matter of] pubic interest'

> on pain of criminal sanction against the individual's constitutional right to express his or her views."

On page 764 she continues:

> "Can it be said in these circumstances that the Crown has discharged the burden upon it of establishing that the objective of the legislation is pressing and substantial, in short, of sufficient importance to justify overriding the constitutional guarantee of freedom of expression? I think not. It may be that s. 181 is capable of serving legitimate purposes. But no objective of pressing and substantial concern has been identified in support of its retention in our Criminal Code."

And on page 76:

> "The fact that s. 181 has been so rarely used despite its long history supports the view that it is hardly essential to the maintenance of a free and democratic society."

Finally, on page 767:

> "In the absence of an objective of sufficient importance to justify overriding the right of free expression, the state's interest in suppressing expression which may potentially affect a public interest cannot outweigh the individual's constitutional right of freedom of expression."

What the Attorney General, through Mr. Shaw, submits is the objective or purpose which is pressing and substantial was summarised by Mr. Shaw at the end of his argument on the first part of the Oakes test, as follows:

> "Third party spending limits are an essential part of the comprehensive electoral financing regime which seeks to promote fairness in the electoral process by equalizing the opportunity of all to participate in democratic debate in a meaningful way regardless of financial resources. The specific objective of third party limits is to preserve the integrity and effectiveness of arty and candidate spending limits. As noted by Lortie, without third party limits, the purpose of electoral finance laws would be destroyed, the reasonably equal opportunity legislation seeks to establish would vanish and the overall goal of restricting the role of money in unfairly influencing election outcomes would be defeated. The foregoing, we submit, demonstrates the objective of the third party spending limit. Bill C-114 relates to concerns that are pressing and substantial."

Having heard the very able arguments on this point of Mr. Shaw and Mr. Hunter and having considered all of the evidence before me, I am unable to conclude that the third party spending limits within this comprehensive electoral financing régime are sufficiently pressing and substantial so as to outweigh the Charter rights and freedoms in question here. I say that for the following reasons:

The first, the inclusion within the regime, apart from the impugned provisions, of additional, apparent Charter breaches, namely the limits on candidate and party spending.

Two, the apparent lack of any interest on the part of the Chief Electoral Officer, after two elections without third party limits, and having had at least one phone call from a disgruntled defeated candidate, to make any investigation to confirm the validity or non-validity of the notion that third party advertising influences election results.

Thirdly, the almost complete lack of attention paid by Mr Hamel or the three experts called by the Attorney General to the provincial jurisdictions where there are no spending limits. And indeed, the surprising admissions by Mr. Hamel, a long-time chief electoral officer, and Dr Bercuson, called as an expert on election spending, that they were unaware that Alberta was one of those jurisdictions.

Four, the lack of attention paid by the two experts, other than Dr. Hiebert, called by the Attorney General, to the only two quantitative studies referred to in the evidence put before the court as to the effect of interest group spending on public opinion and elections. And in the case of Dr. Hiebert the use by her without the qualification of a tentative conclusion by the authors of the study of the 1988 election when she knew, apparently before the publication of her paper, certainly before she gave evidence, that the authors had concluded their tentative conclusion was invalid. That study was co-authorised by Dr. Roger Johnston of the University of British Columbia and was referred to in the evidence of Dr. Nevitt as follows:

> "Q. Sir, are you aware of any study of the 1988 election, and in particular, of the impact of effect of third-party or independent advertising in that election?
> A. Yeah. "Let the People Decide," which is the book that came from the 1988 election study, which was co-authorised by Richard Johnston, Andre Blais, Henry Brady and John Crate, that addresses the issue.
> Q. Sir, I'm going to hand you an extract from that text, and there's a copy for His Lordship. Looking at the face page of what you have in your hand, is that the book to which you're referring?
> A. Yeah, this is the book."

There follows several pages of analysis of the extract of the book and then:

"Q. What does the table tell us about the impact of advertising on – opinion on the Free Trade Agreement through the total of the six periods?
A. Well, if you look at the "Total" column at the bottom, the right-most column you have a standard error of .028 which is higher than the – some of the estimates there, which would tell us that we can't have any there is no net effect at all on that, no reliable way of interpreting the cumulative impact of advertising on attitudes towards the Free Trade Agreement.
Q. Is that conclusion written in English in the text anywhere, sir?
A. Yeah. This is not easy material, not easy to boil it down.
Q. I appreciate that. I'm looking at the bottom of page 163?
A. Yeah, that's right. Third party advertising coefficients defy substantive interpretation. That means they look at the estimates and the standard errors, and they've made the right decision, I think, to not try to interpret those data."

Further along:

"Q. **Mr Groody:** Carrying on with the sentence that you alluded to it, reads, and I quote: 'Third party advertising coefficients defy substantive interpretation: some are large and significant, but the pattern is off setting, and the total coefficient effectively zero."
A. That's right.
Q. Now, what does that mean?
A. What that means is that when you work through the two columns I've identified on that table and you try to assess whether or not there's any coherent pattern to those findings, when you dismiss those particular results that are reliable because of the size of the standard error, what it shows is that the cumulative impact of advertising is nothing, there is none."

The other study which was conducted that I referred to was conducted under the auspices of the University of Chicago and was referred to by Dr. Nevitt in his evidence as follows:

"Q. **Mr Groody**: Dr. Nevitte, do you know of any other authoritative research that agrees or that substantiates or that would lend support to the conclusion that the advertising on the Free Trade Agreement in the 1988 election may not have had any effect on voter intentions, that counter-intuitive conclusion that you just referred to?

A. Yes. There is a, what I take to be the most systematic study conducted in the United States out of the National Opinion Research Centre, University of Chicago."

Further on:

> "... in the 1970s, I believe they turned their attention to the issue of advertising, and, in fact, tried to assess the relative importance of third-party advertising, as it's been called, and, say, the impact of the news, be it T.V., newspaper, and to try and discover what was the – what was the most important factor that would affect public opinion, or – I think the title of the place was, in fact, "What Moves Public Opinion?" And that study determined that third-party advertising had no effect on people's vote intentions."

Fifth, some of the remarks before the select committee on these issues by Mr. Hawkes, who was the chairman of the special committee, and Mr. Andre, the minister responsible for Bill C-114 which became chapter 19, as follows. Mr. Hawkes in issue 8 of the committee minutes at page 21:

> "If I may summarize for a minute, the situation in Quebec has controls on everybody. It is supported by the population and it works pretty well. The situation in Alberta has no controls on anybody. It is supported by the population and it works pretty well. The situation in Ontario has controls on parties and candidates and constituency associations but not on third parties, and that is getting to be a bigger problem. The trend line is that something will have to be done about that because the third-party effort is growing."

And at page 97, just before asking a couple of questions of a witness, Mr. Hawkes says:

> "First, I want to indicate my bias. I am not sure that fairness can ever be achieved by any scheme that begins with the notion of limits. I have said that publicly and I have said it in the House of Commons. Intellectually, I find a lot of difficulty with that notion."

Then Mr. Andre found in issue 10 of the committee minutes at page 16. He is appearing as a witness and being questioned by Mr. Wilson and then by the committee:

> "The question I want to ask you, Mr. Andre, is whether you feel that elections can be bought. Does victory always go to the biggest spender?
>
> **M. Andre:** That has certainly not been by experience. Indeed, I can think of several examples of where candidates prior to the law change – indeed, candidates who spent their money prior to the election period – have ended up paying a price by the accusation, you're trying to buy the election; how come you're spending so much money?
>
> There's no question that you need a certain amount of money to run a campaign. There's no question about it. I know you're looking at limits and so on, and I

guess I would argue that in my constituency those limits are inhibiting. I don't have enough money under those limits to do normal kinds of things, which really means just getting the campaign literature in the hands of each of your electors and putting up an appropriate number of signs and so on. But there is no evidence that I see anywhere to suggest that the person who spends the most is likely to win. There isn't any such correlation that I am aware of.

I think when we arrived at these compromises in 1973, for putting on limits, there was certainly a perception about – it becomes part of the mythology. It's a myth that's stated and keeps getting repeated. It becomes a matter of fact simply because of repetition, that you can buy elections. Of course, that infers an electorate who is not as bright as we know them to be.

But on the other hand, when you do have limits, it's very helpful to the political parties. It's helpful in budgeting, it's helpful in raising money, and it means that you can concentrate more on the election itself and discussion of the issues, getting your message out and so on and so forth. When you don't have limits, there's incredible pressure to raise and spend more – incredible wastage.

With regard to the American system. I've never heard anybody say that somebody has bought the election because they have money. What I hear criticized about their system is that they spend all their time raising money. In this raising of money, sometimes they have to make commitments in terms of support to lobbyist groups, and so on and so forth, which causes the public to be a little bit apprehensive. But it's funny, it's on the raising side, not the spending side.

So on balance, I guess if I were the czar, I probably would go for a no-limit system as being purer, in a philosophical sense. But I certainly recognize that there are real benefits to me and to everybody else in the system in having limits. You're right, they only work if third parties can't come in. You can't have limits on the candidates and parties without limiting third parties."

And at page 26:

"Those who were disappointed in the last election are building a myth that third-party ads affected the outcome. Our political campaigners will argue to the nth degree that the money spent by these industry groups to promote free trade was basically severed in terms of its impact."

Finally at page 35:

> "For goodness sake, I can't think of an election anywhere that was altered by somebody spending too much and so on."

My finding on the first part of the Oakes test makes it unnecessary to conduct a full analysis under the second part, proportionality. However, in view of the likelihood a federal election will be called soon and that this matter may well proceed through the appellate courts, it may be useful for me to indicate my views on some aspects of the second part of the test, at least insofar as they relate to the evidence before me.

The second part of the test is set out in the passage quoted earlier of Chief Justice Dixon. Counsel have abbreviated the three aspects as one: rational connection; two: minimum impairment; and three: harshness versus importance of the objective.

With respect to the rational connection requirement, accepting Mr. Shaw's submission that what is required is a reasoned apprehension of harm, as described by Mr. Justice Laforest in *R* v *Butler,* 1992 1 S.C.R. 452 at pages 486–511, and referred to in other cases, I would conclude, for the same reasons set out with respect to the question of a pressing and substantial concern, that this case is distinguishable from Butler and those other cases, and that from the evidence before me a reasoned apprehension has not been made out.

With respect to the latter two aspects of the second part, in view of the apparent thrust of Dr. Hiebart's criticism of the spending in the 1988 election of very large amounts, that is greater than $50,000, and the evidence of the applicant that the $1,000 limit precludes any national expression, and Mr Lortia's concession to that effect in the commentary of the commission, together with the comments at various stages of the select committee as to alternate methods such as disclosure and registration schemes as a possible remedy, I would hold that the $1,000 limit fails the latter two aspects as well.

In the result I find that sections 259.1(1) and 213(1) are in breach of section 2(b) and 3 of the Charter, and that section 259.2(2) is in breach of sections 2(b), 2(d) and 3, none are justified under section 1, and therefore all are of no force and effect.

Costs may be spoken to at this time or at some later time convenient to counsel. Are there any submissions as to costs or otherwise?

Mr. Hunter: My Lord, I would propose that we appear before you to make submissions with respect to costs.
The Court: Very well.
Mr. Hunter: If that's agreeable. And I can be available on short notice, whatever suits Your Lordship on that.
The Court: I will be away from July 1st on.
Mr. Hunter: Would Tuesday be possible, My Lord, for the purpose.

The Court: Yes, what time.
Mr. Shaw: Any time on Tuesday would be fine.
The Court: Could we make it 1.30?
Mr. Hunter: That's fine, My Lord.

PROCEEDINGS CONCLUDED

Delivered orally at the Court House, Calgary, Alberta on 25th day of June, A.D. 1993.

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For the Plaintiff

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K. Coughlan, Ms.
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Lynna Rafferty, Ms., CSR(A)
Official Court Reporter

CAT – 25th June, 1993