Court File No. CV-19-00627380-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CANADIAN CONSTITUTION FOUNDATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

PEN CANADA

Intervener

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PART I—OVERVIEW

1. This case is about the extent to which the state may constitutionally censor "false" political speech during election campaigns. Section 91(1) of the *Canada Elections Act* (the "***CEA***")[1] bans certain types of "false statement[s]" during federal elections. The question is whether the falsehoods that s. 91(1) proscribes — such as false statements about a candidate's education or a party leader's "professional qualifications" — are, like hate speech, expression that the state may prohibit and punish without offending the *Charter of Rights and Freedoms*. The Applicant, the Canadian Constitution Foundation (the "**CCF**"), submits that they are not.

2. Until 2019, s. 91 provided that "[n]o person shall, with the intention of affecting the results of an election, <u>knowingly</u> make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate". In December 2018, Parliament deleted the word "knowingly". It also specified the subject matters about which — and expanded the range of individuals about whom — s. 91 prohibits false statements.

3. Section 2(*b*) of the *Charter* is content-neutral. It protects falsehoods. Prohibiting false statements at election time limits the freedom of expression. This limit fails the test for justification under s. 1 of the *Charter*, for two reasons.

4. <u>First</u>, s. 91(1) is not minimally impairing. Section 91(1) overreaches by: capturing unknowing (or at least reckless) falsehoods, including self-promoting falsehoods that candidates or party leaders have made or published about themselves; prohibiting false statements about "public figure[s] associated with … political part[ies]"; using other vague and ambiguous statutory language that has the effect of conferring unwarranted interpretive

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[1] *Canada Elections Act*, S.C. 2000, c. 9 [the "***CEA***"]. Unless otherwise indicated, all section number references are to the *CEA*.

discretion on the Commissioner of Canada Elections (the "**Commissioner**"); failing to provide for reasonable exceptions and defences; and using the blunt instrument of an outright prohibition backed by severe penalties, despite the availability of less restrictive alternatives.

5. Second, s. 91(1)'s speculative and unproven salutary effects are outweighed by its deleterious effects. The government has not adduced any evidence that s. 91(1) accomplishes what it sets out to do — *i.e.*, to prevent false statements from being made, published, or (more importantly) disseminated to electors. By contrast, the uncontroverted evidence is that s. 91(1) chills legitimate political speech, and at a time when it matters most: during the writ period.

6. Falsehoods are, and have long been, a familiar and unfortunate feature of election campaigns. Yet, even if Canada's democracy would be better off without false statements, it would also be less democratic with the state[2] as editor-in-chief. Our constitutional commitments require us to abide "false" political speech, even if many Canadians — and our political leaders — consider it to be unpleasant or even harmful. Section 91(1) is inconsistent with ss. 1 and 2(*b*) of the *Charter*. It should be declared of no force or effect.

PART II—FACTS

7. Section 91(1)'s roots trace back to the U.K. *Corrupt and Illegal Practices Prevention Act* of 1895.[3] That law made it an offence for any person, "for the purpose of affecting the return of any candidate", to "make or publish any false statement of fact in relation to the personal character or conduct of such candidate", unless the maker or publisher of the statement "had

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[2] This factum uses "government" to refer to the executive, including the Respondent, the Attorney General of Canada. By contrast, "state" also refers to legislatures and their officers.

[3] 58 & 59 Vict., c. 40. **See:** House of Commons, *Official Report of the Debates of the House of Commons of the Dominion of Canada*, 10th Parl., 4th Sess., Vol. LXXXIV, 1907-08 (March 9, 1908) (First Reading of Bill C-115), at 4568 (Affidavit of Manon Paquet affirmed January 22, 2020 ("**Paquet Affidavit**"), ¶22, Joint Application Record ("**JAR**"), Vol. II, Tab 18, at 1805).

reasonable grounds for believing, and did believe, the statement made by him to be true".[4]

8. In 1908, the Parliament of Canada adopted a nearly identical prohibition under the *Dominion Elections Act*, though it made no exception for reasonable mistakes.[5] In 1970, Parliament enacted a new *CEA* providing that "[e]very one who, before or during an election, knowingly makes or publishes any false statement of fact in relation to the personal character or conduct of a candidate is guilty of an illegal practice and of an offence against this Act".[6] In 2000, Parliament again enacted a new *CEA*, this time providing, in s. 91, that "[n]o person shall, with the intention of affecting the results of an election, make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate".[7] Only the French text included the word "*sciemment*" ("knowingly"). Parliament corrected this drafting error[8] in 2001, when it restored the word "knowingly" to the English text of s. 91.[9]

9. Following the 2015 general election, the Chief Electoral Officer of Canada (the "**CEO**"), who is responsible for the administration of Canadian elections, published a post-election report that proposed changes to the *CEA*. The CEO recommended that s. 91 be repealed. He noted that "[t]he intended scope of the provision is unclear in terms of the

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4 58 & 59 Vict., c. 40, ss. 1-2 (Joint Book of Authorities ("**JBOA**"), Tab 1, at 2).

5 *An Act to Amend the Dominion Elections Act*, S.C. 1908, c. 26, s. 35, amending the *Dominion Elections Act*, R.S.C. 1906, c. 6.

6 S.C. 1969-70, c. 49, s. 75 [emphasis added] (JBOA, Tab 2, at 6).

7 *Canada Elections Act*, S.C. 2000, c. 9, s. 91 [emphasis added].

8 Affidavit of Mylène Gigou dated January 9, 2020 ("**Gigou Affidavit**"), ¶44 (JAR, Vol. II, Tab 14, at 1288); Transcript of Cross-Examination of Mylène Gigou ("**Gigou Cross**"), QQ. 101, 107 (JAR, Vol. II, Tab 15, at 1646-48); *Debates of the Senate*, 37th Parl., 1st Sess., Vol. 139, No. 33 (8 May 2001), at 809 (Hon. Wilfred P. Moore) (explaining that certain of the 2001 amendments were intended "to correct a few anomalies that have become apparent since the new *Canada Elections Act* came into force").

9 *An Act to Amend the Canada Elections Act and the Electoral Boundaries Readjustment Act*, S.C. 2001, c. 21, s. 10.

behaviour it seeks to capture" and that "[s]erious cases of defamation or libel can be dealt with through alternative civil or criminal legal mechanisms". The CEO also reported that the Commissioner, who is responsible for ensuring compliance with and enforcing the *CEA*, had "suggested to the CEO that Parliament may wish to clarify or repeal this provision".[10]

10. The government did not take up the CEO's recommendation. In April 2018, it introduced Bill C-76,[11] an elections law reform package that, among other things, sought to "clarif[y]" and "narrow the focus [of s. 91] to information about criminal records and biographical information".[12] The amendments: (i) removed "knowingly"; (ii) expanded the list of individuals about whom false statements are prohibited to include party leaders and "public figure[s] associated with a political party"; (iii) specified the subject matters about which false statements are prohibited, to include false statements that a listed individual "has committed", "or has been charged with or is under investigation for", a federal or provincial offence, as well as false statements "about the citizenship, place of birth, education, professional qualifications or membership in a group or association" of a listed individual; and (iv) limited the prohibition's temporal application to the "election period".[13] Under ss. 486(4) and 500(5), violating the prohibition in s. 91(1) is punishable: (i) on summary conviction, by a fine of up to $20,000, imprisonment for up to one year, or both; or (ii) on conviction on indictment, by a fine of up to

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[10] Office of the Chief Electoral Officer of Canada, *An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election* (September 2016), at 71 (Gigou Affidavit, Ex. "E", JAR, Vol. II, Tab 14E, at 1437).

[11] Bill C-76, *An Act to amend the Canada Elections Act and other Acts to make certain consequential amendments*, 42nd Parl., 1st Sess., 2018 (assented to 13 December 2018), S.C. 2018, c. 31 ("***Elections Modernization Act***").

[12] *Elections Modernization Act*, *supra* note 11, Summary; *House of Commons Debates*, 42nd Parl., 1st Sess., No. 148 (10 May 2018), at 19378 (Hon. Scott Brison).

[13] The amendments were proclaimed in force on January 19, 2019: Canada, *Canada Gazette Part I*, Vol. 153, No. 3 (January 19, 2019), at 176-77.

$50,000, imprisonment for up to five years, or both. Under s. 514(3), proceedings may be commenced "at any time".

11. The Commissioner employs a "range of tools" to enforce s. 91. These tools include caution letters, undertakings, and formal prosecutions. Caution letters inform the recipient of the potential consequences of their alleged non-compliance and caution that the Commissioner expects the recipient to act in accordance with the *CEA*. While such letters "are not provided for in statute", they nonetheless "form part of the person or entity's compliance record".[14]

12. In this Application, Mylène Gigou, Director of Investigations in the Commissioner's Office, deposes that she has found records of only one case in which the Commissioner initiated charges for contravening s. 91 or any of its predecessors.[15] Those charges resulted in an unreported 2002 decision of the Alberta Provincial Court, in which the trial judge acquitted the accused and noted that "Section 91 of the *Canada Elections Act* might not withstand a challenge under Section 2 of the *Charter*".[16] Ms. Gigou does not refer to *Clarke*, a 2008 decision of the Ontario Court of Justice in which the defendant was charged with, but acquitted of, violating the prohibition in s. 91.[17] The provision's constitutionality was not put in issue in either case.

PART III—ISSUES

13. This Application raises two main issues. First, does s. 91(1) limit the freedom of

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[14] Gigou Affidavit, ¶22 (JAR, Vol. II, Tab 14, at 1273); *Compliance and Enforcement Policy of the Commissioner of Canada Elections* (July 2019) ("***Enforcement Policy***"), at Part VII (Gigou Affidavit, Ex. "C", JAR, Vol. II, Tab 14C, at 1340-51); Gigou Cross, QQ. 228-34 (JAR, Vol. II, Tab 15, 1683-84).

[15] Gigou Affidavit, ¶39, 46 (JAR, Vol. II, Tab 14, at 1286, 1288).

[16] *R. v. Shannon Carla Jones* (unreported, Alta. Prov. Ct., 2002) ("***Jones***"), at 239 (Gigou Affidavit, Ex. "D", JAR, Vol. II, Tab 14D, at 1367).

[17] *R. v. Clarke*, 2008 ONCJ 230 ("***Clarke***"), ¶22-23. **See also:** *Ammeter v. Perrier* (1999), 139 Man. R. (2d) 214 (Q.B.), aff'd (2000) 145 Man. R. (2d) 156 (C.A.) (dealing with a provincial provision similar to s. 91).

expression guaranteed in s. 2(*b*) of the *Charter*? It does. Second, has the government shown this limit to be reasonable and demonstrably justified under s. 1 of the *Charter*? It has not. Before the Court reaches these constitutional issues, however, it must first grant the CCF public interest standing and determine the scope of s. 91(1).

PART IV—ARGUMENT

A. THIS COURT SHOULD GRANT THE CCF PUBLIC INTEREST STANDING

14. In deciding whether to grant public interest standing, a court must consider whether: (i) the proceeding raises a serious, justiciable issue; (ii) the applicant has a real stake or is engaged with the issues; and (iii) the proceeding offers a reasonable and effective way to bring the issue before the courts. Courts apply these factors purposively and flexibly.[18]

15. **This Application raises a serious, justiciable issue.** A "justiciable" issue is one that is appropriate for judicial determination, and to be "serious", the issue must be "substantial" or "far from frivolous".[19] The issue of s. 91(1)'s constitutionality is both justiciable and serious. Indeed, it is a question of law that cuts to the core of Canadians' freedom to engage freely in political discourse without fear of punishment.

16. **The CCF is engaged with the issue raised.** The CCF is a national, non-partisan charity whose mission is to protect Canadians' constitutional freedoms. Its record in *Charter* litigation and public outreach demonstrates its engagement with, and interest in, issues concerning the freedom to think, believe, and express controversial or dissenting ideas and opinions.[20]

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[18] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("***SWUAV***"), ¶23, 37.

[19] *SWUAV* (S.C.C., 2012), *supra* note 18, ¶40, 42.

[20] Affidavit of Joanna Baron sworn September 11, 2019 ("**Baron Affidavit**"), ¶2, 19-20 (JAR, Vol. I, Tab 3, at 35, 39) and Ex. "F" (JAR, Vol. I, Tab 3F, at 463).

17. **This Application offers a reasonable and effective means of determining s. 91(1)'s constitutionality.**[21] The *Charter* challenge will not be heard in a factual vacuum; the CCF relies on affidavits sworn by individuals whose political expression and participation have been chilled by s. 91(1).[22] Canadians should not have to wait until charges are laid to know what they can and cannot lawfully say during an election, particularly when the Commissioner may effectively shield s. 91(1) from *Charter* scrutiny by enforcing it through informal actions short of prosecution (such as issuing caution letters) that are not subject to judicial review.[23]

B. SECTION 91(1) PROHIBITS FALSEHOODS MADE UNKNOWINGLY

18. To assess a law's constitutionality, a court must apply the modern principle of statutory interpretation to ascertain the law's scope.[24] Legislative history is part of this analysis.[25]

i. Violating Section 91(1) Is a Regulatory Offence That Does Not Require Subjective Fault

19. There are three types of offences: (i) *mens rea* offences; (ii) strict liability offences; and (iii) absolute liability offences. Criminal offences fall into the first category, while regulatory offences *prima facie* fall into the second. Regulatory offences may qualify as *mens rea* offences only if words such as "knowingly", "wilfully", or "with intent" are used.[26] Classification of an

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[21] **See:** *SWUAV* (S.C.C., 2012), *supra* note 18, ¶44-48, 50-51.

[22] Affidavit of Cory Morgan sworn September 11, 2019 ("**Morgan Affidavit**") (JAR, Vol. I, Tab 4, at 467); Affidavit of Aaron Wudrick sworn September 12, 2019 ("**Wudrick Affidavit**") (JAR, Vol. I, Tab 5, at 498). **See:** *R. v. Zundel*, [1992] 2 S.C.R. 731, at 772; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 859, *per* McLachlin J. (dissenting, but not on this point).

[23] **See:** *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, ¶10, leave to appeal ref'd [2009] S.C.C.A. No. 139.

[24] *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, ¶17. **See also:** *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶26, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at 87.

[25] *Canada (CHRC) v. Canada (AG)*, 2011 SCC 53 ("***CHRC***"), ¶43; Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at 260-61 (JBOA, Tab 4, at 14-15).

[26] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at 1325-26. **See also:** *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, 2006 SCC 12, ¶13-16.

offence is a question of statutory interpretation, which requires the court to discern legislative intent, primarily from the text of the legislation that creates the offence.[27]

20. Section 91(1) is a regulatory offence. It is designed "to protect the public or broad segments of the public … from the potentially adverse effects of otherwise lawful activity".[28] Specifically, it is directed towards protecting the electoral process and its outcomes against the influence of false information, which may lead voters to make misinformed decisions. As such, it is "directed primarily not to conduct itself but to the consequences of conduct".[29] The existence of similar provincial prohibitions reinforces s. 91(1)'s regulatory character.[30] If s. 91(1) were a criminal prohibition, these provincial laws would be constitutionally suspect.[31]

21. The words "with the intention of affecting the results of an election" indicate that s. 91(1) requires proof of intent.[32] This is not, however, a subjective *fault* requirement, as such an intention is not, in itself, blameworthy. Further, as amended, s. 91 no longer requires proof of knowledge of falsity.

22. The government disagrees. According to Manon Paquet, an official in the Privy Council Office, the government's view is that, though Bill C-76 removed "knowingly" from s. 91, it did not alter the prohibition's substance because the "intent" element requires proof of intent and

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27 *Goldman v. The Queen*, [1980] 1 S.C.R. 976, at 994-95. **See also:** *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶10; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, ¶47.

28 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 ("***Wholesale Travel***"), at 218-19, *per* Cory J. **See also:** *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at 510-11.

29 *Wholesale Travel* (S.C.C., 1991), *supra* note 28 at 219, *per* Cory J.

30 **See:** Paquet Affidavit, Ex. "I" (JAR, Vol. II, Tab 18I, at 2049).

31 **See:** *Constitution Act, 1867*, s. 91(27) (establishing exclusive federal jurisdiction over "The Criminal Law"). **See also:** *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

32 The headings above ss. 486(3) and (4) confirm that violating the prohibition in s. 91(1) is an "[o]ffence[] requiring intent", rather than a "[s]trict liability offence[]" under Part 19 of the *CEA*.

of knowledge.[33] As Ms. Paquet's colleague, Jean-François Morin, told the Standing Committee on Procedure and House Affairs: "[A]t section 91 we … have the requirement to intend to affect the results of the election with false information".[34]

23. Evidence about the Privy Council Office's interpretation of the proposed amendments is of no consequence.[35] The government's interpretation is also incorrect, for three reasons.

24. First, it offends the presumption that "the legislature avoids superfluous or meaningless words, [and] does not …. speak in vain".[36] It would mean "knowingly" was previously surplusage; it would render meaningless Parliament's 2001 decision to add "knowingly" to the English version of s. 91; and it would read back in the very word Parliament removed in 2018. This Court need not "deem[]" the 2018 amendments to have eliminated the knowledge requirement;[37] deleting "knowingly" is a clear signal of Parliament's intent to do so.

25. Second, it erroneously conflates knowledge and intent. A person or entity need not know a statement is false to make it "with the intention of affecting the results of an election". In 2001, Parliament chose to require proof that the accused "knowingly" made or published a false statement "with the intention of affecting the results of an election". It chose differently in 2018.

26. Third, even if the Standing Committee did not intend to eliminate the knowledge

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[33] Paquet Affidavit, ¶31 (JAR, Vol. II, Tab 18, at 1809), Ex. "G" (JAR, Vol. II, Tab 18G, at 1980) and Ex. "H" (JAR, Vol. II, Tab 18H, at 2014); Transcript of Cross-Examination of Manon Paquet, June 4, 2020 ("**Paquet Cross**"), QQ. 181-83 (JAR, Vol. III, Tab 19, at 2221).

[34] Standing Committee on Procedure and House Affairs, *Evidence*, 42nd Parl., 1st Sess., No. 124, October 16, 2018, at 1-2 (Paquet Affidavit, Ex. "G", JAR, Vol. II, Tab 18G, at 1981-82).

[35] **See:** *Boutcher v. R.*, 2001 NFCA 33, ¶65-67; Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at 261.

[36] *CHRC* (S.C.C., 2011), *supra* note 25, ¶38, quoting Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), at 210.

[37] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 45(2). **See:** *R. v. A.A.*, 2015 ONCA 558, ¶69; *R. v. D.L.W.*, 2016 SCC 22, ¶21.

requirement, that intention cannot be imputed to Parliament as a whole. Courts interpret statutes as they are written and must not engage in "impermissible judicial redrafting" to fix a provision that fails to achieve a legislature's — or one of its committees' — objectives.[38]

ii. Any Presumption of Subjective Fault Would Be Rebutted

27. If violating s. 91(1) were a criminal offence rather than a regulatory offence, it would be subject to the rebuttable presumption that Parliament intends crimes to have a subjective fault element.[39] Here, however, Parliament's deletion of "knowingly" from s. 91(1), coupled with its inclusion of express knowledge requirements in other provisions of the *CEA*, provides a "clear expression[] of a different legislative intent".[40] This would rebut the presumption.

28. Courts presume that "a change in the language of a prior statute presumably connotes a change in meaning".[41] Removing the word "knowingly" from a statutory prohibition "reliev[es] the Crown of the burden of proving knowledge on the part of the accused".[42] To apply the presumption of subjective fault here would re-insert what Parliament chose to remove.

29. Furthermore, where Parliament has intended to prescribe a subjective fault requirement in the *CEA*, it has done so expressly. The word "knowingly" is included in other prohibitions and offence provisions in the *CEA*,[43] but Parliament removed it from s. 91 in 2018. This legislative context would rebut the presumption of subjective fault.[44]

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38 *Friesen v. Canada*, [1995] 3 S.C.R. 103 ("***Friesen***"), ¶27; *Beattie v. National Frontier Insurance Co.* (2003), 68 O.R. (3d) 60 (C.A.) ("***Beattie***"), ¶16-19.

39 *Sault Ste. Marie* (S.C.C., 1978), *supra* note 26, at 1303, 1309-10; *R. v. A.D.H.*, 2013 SCC 28, ¶23; *R. v. Zora*, 2020 SCC 14, ¶32-33.

40 *A.D.H.* (S.C.C., 2013), *supra* note 39, ¶27-29.

41 *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶87.

42 *R. v. Ireco Canada II Inc.* (1988), 43 C.C.C. (3d) 482 (Ont. C.A.), at 493.

43 **See e.g.:** *CEA*, ss. 43, 56, 111, 161(1)(5.1), 169(4.1), 126(c), 282.4(2), 482.1, 486(3)(d), 486(4)(b).

44 *R. v. Bastien*, 2017 BCCA 210, ¶9-14, 20.

30. Finally, reading a subjective fault requirement into s. 91(1) would be inconsistent with a plain reading of the provision. The *CEA* is intended to be a "complete code" that is "as clear as possible" and "minimize[s] the need for discretion to be exercised".[45] Canadians untrained in statutory interpretation, reasonably assuming that s. 91(1) applies to false statements honestly believed to be true, will refrain from engaging in political speech out of a fear that their speech may turn out to be "false".[46] If s. 91(1) were interpreted to require subjective fault, the gap between its legal interpretation and its plain reading would simply be filled by self-censorship.

iii. Even if Subjective Fault Were Required, Knowledge Would Not Be

31. The Commissioner interprets s. 91(1) as requiring proof "that the person or entity knew that the statement was false, or else that the person or entity was wilfully blind or reckless about the truthfulness of the statement".[47] Ms. Gigou argues in favour of this interpretation, claiming that "[the Commissioner's] interpretation" — which is different from the government's[48] — "is the only reasonable one when one considers the scheme of the Act as a whole".[49]

32. Ms. Gigou's advocacy is inadmissible; "legal argument belongs in a factum or brief, not an affidavit".[50] Still, even on this interpretation, the effect of removing "knowingly" was to lower the requisite *mens rea* from actual knowledge (or its substitute, wilful blindness[51]) to

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45 Paquet Affidavit, ¶7 (JAR, Vol. II, Tab 18, at 1800); Paquet Cross, QQ. 74-77 (JAR, Vol. III, Tab 19, at 2183-85).

46 **See, e.g.:** Morgan Affidavit (JAR, Vol. I, Tab 4, at 467); Wudrick Affidavit (JAR, Vol. I, Tab 5,

47 at 498). Gigou Affidavit, ¶74 (JAR, Vol. II, Tab 14, at 1305) [emphasis added].

48 Paquet Affidavit, ¶32 and Exs. "G" and "H" (JAR, Vol. II, Tab 18G and 18H, at 1980 and 2014); Paquet Cross, QQ. 153, 157 (JAR, Vol. III, Tab 19, at 2211, 2213).

49 Gigou Affidavit, ¶71-76 (JAR, Vol. II, Tab 14, at 1303-06).

50 *Chopik v. Mitsubishi Paper Mills Ltd.*, 2003 CanLII 23605 (S.C.J.), ¶26. **See also:** *Canadian Civil Liberties Association (Corporation of the) v. Canada (Attorney General of)* (1998), 40 O.R. (3d) 489 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 487.

51 *R. v. Briscoe*, 2010 SCC 13, ¶21.

recklessness, which "is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk".[52] In the context of s. 91(1), this standard would be met any time a person or entity perceives a risk that a statement may be false but makes or publishes it anyway.

33. On any of the interpretations outlined above — and, indeed, even if this Court concludes that the knowledge requirement remains intact — s. 91(1) cannot bear constitutional scrutiny.

C. Section 91(1) Limits the Freedom of Expression

34. A s. 2(*b*) *Charter* analysis proceeds in two stages. The court first asks whether the activity in question is *Charter*-protected expression. If it is, the court asks whether the purpose or effect of the impugned law is to limit such expression. If it is, the analysis shifts to s. 1.[53]

35. Activity is expressive "if it attempts to convey meaning".[54] At this stage of the analysis, the content of that meaning is generally irrelevant.[55] This is because s. 2(*b*) of the *Charter* is content-neutral;[56] it "protects the expression of both truths and falsehoods",[57] and "[t]he evaluation of the worthiness of the expression is … relevant only to the s. 1 inquiry".[58]

36. The "false statement[s]" targeted by s. 91(1) are expressive. They are therefore entitled to *Charter* s. 2(*b*)'s protection. Since s. 91(1)'s purpose is to prohibit these statements, and its

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52 *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at 582.

53 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 ("***Irwin Toy***"), at 967-73; *Zundel* (S.C.C., 1992), *supra* note 22, at 751-52.

54 *Irwin Toy* (S.C.C., 1989), *supra* note 53, at 968. **See also:** *Zundel* (S.C.C., 1992), *supra* note 22, at 753-55.

55 *Zundel* (S.C.C., 1992), *supra* note 22, at 753.

56 *Keegstra* (S.C.C., 1990), *supra* note 22, at 764, *per* Dickson C.J.

57 *Canada v. JTI-Macdonald Corp.*, 2007 SCC 30, ¶60.

58 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (supplemented) (Toronto: Thomson Reuters) (electronic loose-leaf, updated 2018), at § 43.5(d) (JBOA, Tab 3, at 10).

effect is to punish those who make or publish them, the provision limits the freedom of expression. The main issue in this Application, then, is whether the government has shown this limit to be reasonable and demonstrably justified under s. 1 of the *Charter*. It has not.

D. THE GOVERNMENT HAS NOT SHOWN SECTION 91(1)'S LIMIT ON THE FREEDOM OF EXPRESSION TO BE REASONABLE AND DEMONSTRABLY JUSTIFIED UNDER SECTION 1 OF THE *CHARTER*

37. Section 1 of the *Charter* requires the government to show that: "(1) the law creating the [limit] has a pressing and substantial objective; and (2) the means chosen are proportionate in that: (a) they are rationally connected to the law's objective; (b) they limit the *Charter* right in question as little as reasonably possible in order to achieve the law's objective; and (c) the law's salutary effects are proportionate to its deleterious effects".[59] Throughout, the burden rests on the government to present "cogent and persuasive" evidence.[60] It has not done so here.

i. The Attorney General's Expert Evidence Should Be Given Little to No Weight

38. In seeking to justify s. 91(1)'s limit on the freedom of expression under s. 1 of the *Charter*, the Attorney General seeks to adduce expert evidence from Dr. Peter Loewen.[61] Dr. Loewen's report should be given little weight. On cross-examination, he conceded that his report: does not cite any evidence supporting his empirical claim that false information generates negativity that may dissuade people from participating in politics;[62] does not support the proposition that s. 91(1) actually prevents false information from being disseminated;[63]

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[59] *R. v. Morrison*, 2019 SCC 15, ¶63. **See also:** *R. v. Oakes*, [1986] 1 S.C.R. 103.

[60] *Oakes* (S.C.C., 1986), *supra* note 59, at 138.

[61] Affidavit of Dr. Peter Loewen affirmed January 27, 2020, Ex. "A" ("**Loewen Report #1**") (JAR, Vol. III, Tab 24A, at 2793).

[62] Transcript of Cross-Examination of Dr. Peter Loewen, May 27, 2020 ("**Loewen Cross**"), QQ. 235, 239-40, 287-88 (JAR, Vol. III, Tab 25, at 2898, 2899, 2910-11).

[63] Loewen Cross, QQ. 498, 504, 516, 525-27 (JAR, Vol. III, Tab 25, at 2964, 2965, 2968, 2970-71).

assumes, but does not establish, that s. 91(1) improves voters' ability to make better choices;[64] and mischaracterizes the findings of certain studies, in one instance asserting the opposite of what the study actually found.[65] Dr. Loewen's report is thus of limited value.

39. The Attorney General also seeks to adduce expert evidence from Dr. Lori Turnbull.[66] It should be given little weight. In cross-examination, she conceded: that her report, which does not comply with the *Rules of Civil Procedure*,[67] does not cite any support for many of her empirical (*i.e.*, factual) claims;[68] that s. 91(1) can help protect the integrity of elections and fortify trust in democracy only if the law actually prevents false information from being disseminated;[69] and that she is not aware of any evidence that s. 91(1) has such an effect.[70] Moreover, Dr. Turnbull's report fails to achieve the purpose of expert evidence, which is "to provide the court with the necessary technical or scientific basis to properly assess the evidence".[71] Her report does not bring to bear any expertise. Instead, it consists mainly of broad, unsupported assertions of lay opinion.

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64 Loewen Cross, QQ. 539-41 (JAR, Vol. III, Tab 25, at 2976-77).

65 Loewen Cross, QQ. 287-88, 408, 663, 755-56, 759-63 (JAR, Vol. III, Tab 25, at 2910-11, 2940, 3001, 3029-30).

66 Affidavit of Dr. Lori Turnbull affirmed January 30, 2020, Ex. "A" ("**Turnbull Report**"), at 3 (JAR, Vol. IV, Tab 33A, at 3946).

67 Dr. Turnbull's report does not set out her factual assumptions or describe her research, as required by Rule 53.03(2.1)6 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. **See:** Turnbull Report, at 6 (JAR, Vol. IV, Tab 33A, at 3951); Transcript of Cross-Examination of Dr. Lori Turnbull, June 4 ("**Turnbull Cross (June 4)**"), QQ. 190-95 (JAR, Vol. IV, Tab 34, at 4028-30); Transcript of Cross-Examination of Dr. Lori Turnbull, June 5 ("**Turnbull Cross (June 5)**"), QQ. 347-54, 421-24 (JAR, Vol. IV, Tab 35, at 4094-97, 4118).

68 **See, e.g.:** Turnbull Cross (June 4), QQ. 175-78 (JAR, Vol. IV, Tab 34, at 4022-23); Turnbull Cross (June 5), QQ. 336-40, 379-80, 407-10, 423-24, 446-51 (JAR, Vol. IV, Tab 35, at 4090-91, 4105-06, 4114-15, 4118, 4126-27).

69 Turnbull Cross (June 4), QQ. 292-99 (JAR, Vol. IV, Tab 34, at 4060-62).

70 Turnbull Cross (June 4), QQ. 296-98 (JAR, Vol. IV, Tab 34, at 4061-62).

71 *Geddes v. Bloom*, 2008 CanLII 44737 (Ont. S.C.J.), ¶31.

40. The Attorney General further seeks to adduce expert evidence on "comparative law"[72] from Dr. Keith Ewing[73] and Dr. Graeme Orr.[74] Each affiant argues that, when compared to various laws in place in the United Kingdom (in Dr. Ewing's case) and in Australia, New Zealand, South Africa, and India (in Dr. Orr's case), s. 91(1) is narrowly tailored.[75]

41. To the extent that Dr. Ewing and Dr. Orr compare s. 91(1) to foreign provisions, their evidence is inadmissible; comparative analysis does not meet the "necessity" standard set out in *Mohan*.[76] The only admissible evidence from Dr. Ewing and Dr. Orr is as to the facts[77] of foreign law in the jurisdictions in respect of which they are qualified. Dr. Ewing is qualified to give evidence on U.K. law, but is not an expert on U.S. law,[78] on which he purports to opine.[79] Dr. Orr is qualified to give evidence on Australian law, but is not an expert on South African or on Indian law and has not studied or practised law in New Zealand.[80]

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72 Transcript of Cross-Examination of Dr. Graeme Orr, May 27, 2020 ("**Orr Cross (May 27)**"), Q. 147 (JAR, Vol. IV, Tab 29, at 3611-15).

73 Affidavit #1 of Dr. Keith Ewing affirmed January 28, 2020 ("**Ewing Report #1**") (JAR, Vol. III, Tab 21, at 2615); Affidavit #2 of Dr. Keith Ewing (undated) ("**Ewing Report #2**") (JAR, Vol. III, Tab 23A, at 2743).

74 Affidavit #1 of Dr. Graeme Orr affirmed January 29, 2020 ("**Orr Report #1**") (JAR, Vol. IV, Tab 28, at 3480); Affidavit #2 of Dr. Graeme Orr (undated) ("**Orr Report #2**") (JAR, Vol. IV, Tab 31A, at 3789).

75 Ewing Report #1, ¶46-47 (JAR, Vol. III, Tab 21, at 2639-40); Orr Report #1, ¶2 (JAR, Vol. IV, Tab 28, at 3482-83).

76 *R. v. Mohan*, [1994] 2 S.C.R. 9, at 23. **See:** *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, ¶20-24. **See e.g.:** *Zundel* (S.C.C., 1992), *supra* note 22, at 766-67 (performing a comparative law analysis without referring to expert evidence).

77 *Allen v. Hay* (1922), 69 D.L.R. 193, at 195-96 (S.C.C.); *Hunt v. T&N Plc*, [1993] 4 S.C.R. 289, at 308; *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79, ¶29.

78 Transcript of Cross-Examination of Dr. Keith Ewing, June 2, 2020 ("**Ewing Cross**"), Q. 32 (JAR, Vol. III, Tab 22, at 2661-62).

79 Ewing Report #2, ¶2-4, 16 (JAR, Vol. III, Tab 23A, at 2744-45, 2751).

80 Orr Cross (May 27), Q. 53 (JAR, Vol. IV, Tab 29, at 3585-86); Transcript of Cross-Examination of Dr. Graeme Orr, June 1, 2020 ("**Orr Cross (June 1)**"), Q. 431 (JAR, Vol. IV, Tab 30, at 3714-15).

42. To the extent that Dr. Ewing's and Dr. Orr's reports are admissible, they should be given little weight. Michael Karanicolas, who leads the Initiative on Intermediaries and Information at Yale Law School, explains how Dr. Ewing and Dr. Orr's analyses overlook important textual and contextual differences between s. 91(1) and the foreign laws they consider.[81] Further, Dr. Ewing conceded that, unless restricted to knowing, material falsehoods, a prohibition like s. 91(1) could be inconsistent with Article 10 of the *European Convention on Human Rights*.[82] Dr. Orr conceded that: his report fails to acknowledge features of foreign laws that make them narrower than s. 91(1);[83] his claim that "it is generally accepted [in Australia] that a law against false electoral speech is constitutional" is not supported by the authority cited;[84] and no Australian court has upheld the constitutionality of a prohibition similar to s. 91(1).[85] Finally, Dr. Orr — and, indeed, counsel for the Attorney General — conceded that Dr. Orr is not qualified to interpret Canadian law, and so can only compare foreign provisions, as interpreted by foreign courts, with how s. 91(1) reads "on its face".[86] Such a comparison is without value.

ii. Section 91(1) Targets Expression Entitled to the Highest Level of Protection

43. In considering s. 1 of the *Charter*, the court must assess the level of protection to which targeted expression is entitled.[87] The closer it sits to the core values underpinning s. 2(*b*) — *i.e.*, (i) participation in social and political decision making; (ii) individual self-fulfillment; and (iii)

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81 Affidavit of Michael Karanicolas sworn February 21, 2020, Ex. "A" ("**Karanicolas Report**"), at 15-33 (JAR, Vol. I, Tab 6A, at 534-52).

82 Ewing Cross, QQ. 142-56 (JAR, Vol. III, Tab 22, at 2690-2701).

83 **See e.g.:** Orr Cross (May 27), QQ. 98, 130, 151-52, 159-61, 187-88, 191, 203-12, 216-17, 271-74, 278-86, 294-95, 310-11, 339, 342, 353-58 (JAR, Vol. IV, Tab 29, at 3598, 3607, 3515-17, 3626-32, 3644-49, 3653-54, 3660-63); Orr Cross (June 1), QQ. 542-44, 620-23, 628 (JAR, Vol. IV, Tab 30, at 3743-44, 3763-65).

84 Orr Cross (May 27), Q. 233 (JAR, Vol. IV, Tab 29, at 3635).

85 Orr Cross (May 27), QQ. 398-400 (JAR, Vol. IV, Tab 29, at 3681-82).

86 Orr Cross (May 27), QQ. 71, 147 (JAR, Vol. IV, Tab 27, at 3591, 3611-14).

87 *R. v. Lucas*, [1998] 1 S.C.R. 439, ¶34.

the search for, and attainment of, truth[88] — the more difficult it will be to justify limiting it.[89]

44. The freedom of expression is a pillar of a free and democratic society,[90] and political speech — even false political speech — is part and parcel of participation in political decision making. Nearly all forms of expression are entitled to robust constitutional protection,[91] but political speech is entitled to the very highest standard.[92] It "lie[s] at the very heart of freedom of expression"[93] and "at the core of the guarantee",[94] and is "invaluable, given its significance in our democratic process".[95] The state "must tread carefully in limiting political speech" and must "be loathe to interfere with it, especially in the midst of a federal election".[96]

45. Accordingly, limits on political speech are exceedingly difficult to justify, even when they aim to protect voters from expression that allegedly threatens electoral integrity. In *Thomson Newspapers*, for example, the Supreme Court of Canada struck down a provision of the *CEA* that prohibited publishing, disseminating, or broadcasting new political opinion survey

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88 *Ford v. Quebec*, [1988] 2 S.C.R. 712 ("***Ford***"), at 765-66; *Irwin Toy* (S.C.C., 1989), *supra* note 53, at 976; *Zundel* (S.C.C., 1992), *supra* note 22, at 752.

89 *Lucas* (S.C.C., 1998), *supra* note 87, ¶34; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 ("***Thomson Newspapers***"), ¶91.

90 *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1336; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at 583.

91 *R. v. Sharpe*, 2001 SCC 2, ¶23. Save limited exceptions such as violent expression. **See:** *Irwin Toy* (S.C.C., 1989), *supra* note 53, at 969-70; *Keegstra* (S.C.C., 1990), *supra* note 22, at 729.

92 *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, ¶60.

93 *R. v. Guignard*, 2002 SCC 14, ¶20.

94 *Harper v. Canada (Attorney General)*, 2004 SCC 33 ("***Harper #2***"), ¶66. See also *ibid.*, ¶11, *per* McLachlin C.J. and Major J. (dissenting in part, but not on this point) (stating that "[p]olitical speech, the type of speech here at issue, is the single most important and protected type of expression").

95 *Harper v. Canada (Attorney General)*, 2000 SCC 57 ("***Harper #1***"), ¶20, *per* Major J. (dissenting, but not on this point). **See also:** *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at 133, aff'd [1939] A.C. 117 (J.C.P.C.).

96 *Harper #1* (S.C.C., 2000), *supra* note 95, ¶20, *per* Major J. (dissenting, but not on this point). See also *Canada (Attorney General) v. Somerville*, 1996 ABCA 217, ¶21 (stating that "there [is] no expression more deserving of protection than electoral free speech").

results during the final days of a federal election. The Court stressed that "[t]he presumption … should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information".[97]

46. Content-based prohibitions on "false" speech are constitutionally suspect.[98] In *Zundel*, the Supreme Court of Canada struck down s. 181 of the *Criminal Code*, which provided that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment …". In doing so, the Court confirmed that even "false" statements are entitled to protection under s. 2(*b*), and stressed that "even clear falsification … may arguably serve useful social purposes linked to the values underlying freedom of expression".[99]

47. False statements about candidates can be distasteful and offensive. But the uninhibited exchange of information, beliefs, and opinions about candidates — true, false, or otherwise — is essential to a healthy and functioning election process, subject to public and private law restrictions on defamation and hate speech.[100] If the state were constitutionally permitted to impose content-based restrictions on political speech deemed "false", democratic discourse would give way to state-sanctioned discourse, and the mischief of false statements would be replaced by the greater mischief of state meddling. Contrary to the Commissioner's

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[97] *Thomson Newspapers* (S.C.C., 1998), *supra* note 89, ¶94-95, 101, 112, 119, 127, 130.

[98] To the CCF's knowledge, the Supreme Court of Canada has never upheld a content-based restriction on political speech and has only rarely done so in other contexts. **See, e.g.:** *Irwin Toy* (S.C.C., 1989), *supra* note 53 (upholding the constitutionality of provincial legislation prohibiting commercial advertising directed at persons under 13 years of age).

[99] *Zundel* (S.C.C., 1992), *supra* note 22, at 747-48, 754, 758-59, 770, 773-74.

[100] **See:** *Grant v. Torstar Corp.*, 2009 SCC 61 ("***Grant***"); *Lucas* (S.C.C., 1998), *supra* note 87.

interpretation of s. 91(1),[101] voters are entitled to decide for themselves which sources of information about candidates are "credible" and which are not.

iii. Section 91(1) Fails the *Oakes* Proportionality Test

48. The CCF concedes that s. 91(1)'s objective — *i.e.*, to protect the electoral process and its outcomes against the influence of false information, which may lead voters to make misinformed decisions — is pressing and substantial.[102] The CCF further concedes that, though the Attorney General has not adduced any evidence that s. 91(1) actually prevents false information from being disseminated during election campaigns,[103] prohibiting certain types of false statements about candidates during an election period is, as a matter of logic, rationally connected to s. 91(1)'s objective.[104]

49. However, s. 91(1) is neither minimally impairing nor proportionate in its effects. Accordingly, the limit it imposes on the freedom of expression cannot withstand the "*Oakes* test" for justification under s. 1 of the *Charter*. Section 91(1) is therefore unconstitutional.

a. *Section 91(1) Is Not Minimally Impairing*

50. To justify a limit on a *Charter* right under s. 1, the government must establish that the impugned law impairs constitutionally protected rights and freedoms "as little as reasonably

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[101] **See:** Gigou Affidavit, ¶76 (JAR, Vol. II, Tab 14, at 1305-06) (noting that, on the Commissioner's interpretation, s. 91(1) does not apply to "statements that are based on reasonable interpretations of credible information from a source reasonably expected to be knowledgeable in the matter"); Gigou Cross, QQ. 79-96 (JAR, Vol. II, Tab 15, at 1634-45).

[102] **See:** *Frank v. Canada (Attorney General)*, 2019 SCC 1, ¶55.

[103] **See:** Loewen Cross, QQ. 498, 504, 516, 525-26, 539-41 (JAR, Vol. III, Tab 25 at 2964-65, 2968, 2970, 2975-76); Turnbull Cross (June 4), QQ. 296-99 (JAR, Vol. IV, Tab 34, at 4061-62); Paquet Cross, QQ. 132-33, 244-45 (JAR, Vol. III, Tab 19, at 2203-34, 2237). See also Affidavit of Dr. David Moscrop sworn September 15, 2019, Ex. "A" ("**Moscrop Report #1**"), at 11-12 (JAR, Vol. II, Tab 9A, at 866).

[104] **See:** *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 ("***RJR-MacDonald***"), ¶153; *Oakes* (S.C.C., 1986), *supra* note 59, ¶70.

possible" or, in other words, that the law is "carefully tailored so that rights are impaired no more than necessary".[105] The essential question is "whether there is an alternative, less drastic means of achieving the [legislature's] objective in a real and substantial manner".[106]

51. Section 91(1) is not minimally impairing. It impairs the freedom of expression more than is necessary to achieve the government's objective in at least five ways: (i) it captures unknowing (or at least reckless) falsehoods, including self-promoting falsehoods that candidates or party leaders have made or published about themselves; (ii) it prohibits false statements about "public figure[s] associated with a political party"; (iii) it uses other vague and ambiguous terms that effectively give the Commissioner broad and unpredictable discretion over the prohibition's interpretation and enforcement; (iv) it fails to provide for reasonable exceptions or defences; and (v) it uses the blunt instrument of an outright prohibition backed by severe penalties, despite the availability of less restrictive alternatives.

1. *Section 91(1) Captures Unknowing, or at Least Reckless, Falsehoods*

52. As explained above, Parliament's removal of the word "knowingly" has left s. 91(1) without a subjective fault requirement. Protecting the electoral process and its outcomes against false information does not require the state to impose the threat of regulatory or criminal sanctions on those who make or publish false statements without knowing they are false.

53. Dr. David Moscrop, a postdoctoral fellow in the Department of Communication at the University of Ottawa, is an expert in "the psychology of political decision making and democratic deliberation".[107] He should be qualified accordingly. He holds a Ph.D. in political

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105 *RJR-MacDonald* (S.C.C., 1995), *supra* note 104, ¶160.

106 *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, ¶55.

107 Moscrop Report #1, at 1 (JAR, Vol. II, Tab 9A, at 866).

science and has researched and written on information flows and threats to democracy.[108] He opines that, to the extent s. 91(1) captures falsehoods made unknowingly (*i.e.*, misinformation[109]), it is problematic because "[i]t is the combined creation and dissemination of false information for anti-democratic purposes", not falsehoods made unknowingly — which may reflect human error, sloppy fact-checking, or partisan biases — that poses the real threat to the integrity of the electoral process.[110] Dr. Loewen disputes this conclusion yet accepts that misinformation may begin as disinformation and that "[i]f [false] information is stopped at its source, the integrity of elections can be enhanced".[111]

54. Censoring those who innocently or recklessly disseminate falsehoods is vastly broader than is necessary to achieve the government's objective. According to Dr. Loewen, the "many citizens" who are "directional[ly] motivated" (*i.e.*, driven by partisan, ideological, and social identities) are more likely to share information that is congenial to their preferences, whether it is true or false.[112] Hence, even if s. 91(1) does require subjective fault — *i.e.*, at least recklessness as to a statement's falsity — it will criminalize individuals who recklessly share

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108 Moscrop Report #1, at 1 (JAR, Vol. II, Tab 9A, at 866).

109 As Dr. Moscrop and Dr. Turnbull explain in their respective expert reports, "misinformation" refers to "the inadvertent sharing of false information", whereas "disinformation" refers to "the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain": Moscrop Report #1, at 2 (JAR, Vol. II, Tab 9A, at 867); Turnbull Report, at 3 (JAR, Vol. IV, Tab 33A, at 3948). Both rely on: U.K. House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News': Final Report*, 8th Report of Session 2017-19 (February 2019) (Exhibits to the Cross-Examination of Dr. Lori Turnbull, Ex. 6, JAR, Vol. IV, Tab 36F, at 4188).

110 Moscrop Report #1, at 11 (JAR, Vol. II, Tab 9A, at 876) [emphasis added].

111 Loewen Report #1, at 5 (JAR, Vol. III, Tab 24A, at 2793).

112 Loewen Report #1, at 5-6 (JAR, Vol. III, Tab 24A, at 2797-98); Loewen Cross, QQ. 353, 360, 363 (JAR, Vol. III, Tab 25, at 2926, 2928-29). **See also:** Digital Democracy Project, *Lessons in Resilience: Canada's Digital Media Ecosystem and the 2019 Election* (Public Policy Forum and the Max Bell School of Public Policy at McGill University, 2020) at 5 (Loewen Cross, Ex. "F", JAR, Vol. III, Tab 26F, at 3125).

false information because it aligns with their politics. Section 91(1) is even more likely to capture this sort of conduct in the age of social media, which encourages users to share information reflexively, not reflectively.[113] Section 91(1) need not prohibit less-than-thoughtful partisanship in order to achieve the law's objective. This lack of careful tailoring — which cannot be cured by prosecutorial discretion[114] — renders s. 91(1) unconstitutional.

2. *Section 91(1) Unjustifiably Prohibits False Statements About "Public Figure[s] Associated with a Political Party"*

55. The December 2018 amendments to s. 91(1) listed "public figure[s] associated with a political party" as a category of individuals about whom certain false statements would henceforth be prohibited. Because s. 91(1) uses the disjunctive "or", such "public figure[s]" cannot include candidates, prospective candidates, or party leaders.[115] Nothing in the legislative record indicates whom Parliament intended to include as a "public figure associated with a political party", and the government has not offered any evidence on this point.[116]

56. The Attorney General has not shown, and cannot show, that false statements about this category of individuals has any effect whatsoever on the electoral process or its outcomes. Nor is it even clear who such individuals are. Absent evidence that false statements about this amorphous category of individuals has an effect on the election process or its outcomes, its inclusion alone renders s. 91(1) overbroad and thus not minimally impairing.

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[113] Moscrop Report #1, at 11 (JAR, Vol. II, Tab 9A, at 876); Turnbull Report, at 7 (JAR, Vol. IV, Tab 33A, at 3952).

[114] *Zundel* (S.C.C., 1992), *supra* note 22, at 773; *R. v. Nur*, 2015 SCC 15, ¶91.

[115] **See:** Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), at 100-03 (JBOA, Tab 5, at 22-25).

[116] **See:** Paquet Cross, QQ. 136-42 (JAR, Vol. III, Tab 19, at 2204-07).

3. *Section 91(1) Uses Other Vague and Ambiguous Terms*

57. Certainty is "of particular importance when defining the scope of criminal offences".[117] As McLachlin J. stated in *Keegstra*, "[t]he more vague the language … , the greater the danger that right-minded citizens may curtail the range of their expression against the possibility that they may run afoul of the law".[118] Vague laws may fail the minimal impairment test.[119]

58. Section 91(1) is vague and ambiguous. Could "membership in a group" capture a "false" statement that a candidate is "a socialist" or "a member of the alt-right"? Could "professional qualifications" capture Andrew Scheer's 2019 claim that he worked as an insurance broker, despite never having received his accreditation?[120] Could "public figure[s] associated with a political party" include former politicians? Or a party leader's spouse? Or celebrities who publicly endorse candidates? The answer to all these questions is ostensibly "yes". To the extent there is any uncertainty, that alone is enough to chill speech.

59. These ambiguities are all the more troubling given that the Commissioner — an agent of the state — has sole discretion to interpret and enforce the prohibition.[121] This makes it all the more important that the means chosen to advance the government's objective be as clear, predictable, and narrowly tailored as possible. Section 91(1) falls well short of the mark.

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[117] *R. v. Jarvis*, 2019 SCC 10, ¶97, *per* Rowe J. (concurring). **See also:** *D.L.W.* (S.C.C., 2016), *supra* note 37, ¶54.

[118] *Keegstra* (S.C.C., 1990), *supra* note 22, at 859-60, *per* McLachlin J. (dissenting, but not on this point). **See also:** *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at 964, *per* McLachlin J. (dissenting in part, but not on this point) (stating that vague laws "may well deter more conduct than can legitimately be targeted").

[119] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at 627, 630-32.

[120] "Scheer Accused of Breaking Law, Falsely Claiming He Was Once an Insurance Broker", *National Post* (30 September 2019); Campbell Clark & Adam Radwanski, "Andrew Scheer, a Work in Progress: Where the Conservative Leader Comes From and How He Really Thinks", *The Globe and Mail* (28 September 2019, updated 16 October 2019).

[121] Gigou Affidavit, ¶17-31 (JAR, Vol. II, Tab 14, at 1279-84) and Ex. "C" (JAR, Vol. II, Tab 14C, at 1331); Gigou Cross, QQ. 97-100, 230-34 (JAR, Vol. II, Tab 15, at 1645-46, 1684-86).

60. Moreover, some of the categories of prohibited statements in s. 91(1) are not amenable to a simple true/false dichotomy. Whether an individual "committed an offence" (s. 91(1)(a)) may depend on one's interpretation of events and of the law. Asserting that an individual is "poorly educated" is to make a statement "about" that individual's "education" (s. 91(1)(b)), and may be grounds for prosecution if the state takes a different view. These examples illustrate how "[t]he question of falsity of a statement is often a matter of debate".[122]

61. Sections 91(1)'s vagueness leaves Canadians uncertain about what they can and cannot say during an election period. As the evidence shows,[123] they may err on the side of caution and soft-pedal or self-censor their speech. Section 91(1) may thus chill speech outside its intended scope. It is overbroad and fails the test of minimal impairment under s. 1 of the *Charter*.

4. *Section 91(1) Fails To Provide for Reasonable Exceptions and Defences*

62. Section 91(1) makes no exception for parody, satire, or hyperbole. These forms of expression do not threaten the electoral process or its outcomes. To the contrary, they serve important purposes linked to the core values underpinning s. 2(*b*) of the *Charter*.[124] Yet, s. 91(1) treats sarcastic quips and deliberate lies alike. This distinguishes it from s. 480.1(1) (the "impersonation" offence) and s. 481(1) (the "misleading publications" offence), both of which allow for a parody/satire exception.[125] These exceptions were added as part of the same 2018 elections law reform package that amended s. 91(1).[126] Parliament deliberately carved out a parody/satire exception for other prohibitions, but not for the "false statements" prohibition.

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122 *Zundel* (S.C.C., 1992), *supra* note 22, at 747, 756.

123 Morgan Affidavit (JAR, Vol. I, Tab 4, at 467); Wudrick Affidavit (JAR, Vol. I, Tab 5, at 498).

124 *Zundel* (S.C.C., 1992), *supra* note 22, at 753, 755.

125 *CEA*, ss. 480.1(2) and 481(3).

126 *Elections Modernization Act*, S.C. 2018, c. 31, ss. 322-23.

63. Section 91(1) also fails to provide for defences that are available under defamation law. For example, it fails to provide for defences akin to the defence of responsible communication on matters of public interest, the innocent dissemination defence, or the fair comment defence,[127] even though s. 91(1) could capture certain statements that might be considered "opinions", such as a claim that a candidate is "not fit to govern" or is "a socialist". Parliament cannot lawfully deny political speakers the protection of these defences, which may be constitutionally required.[128] Yet that is precisely what s. 91(1) purports to do.

5. *The Government Has Not Shown That Less Restrictive Alternatives Are Cumulatively Insufficient To Achieve Parliament's Objective*

64. By enacting s. 91(1), Parliament chose the most restrictive intervention possible: an outright prohibition backed by severe penalties. The government cannot resort to such a severe response without first demonstrating that alternative measures are cumulatively insufficient to advance Parliament's objective.[129]

65. Dr. Moscrop identifies a number of less restrictive alternatives to outright prohibitions backed by severe penalties.[130] So do the government's affiants.[131] So do a range of major reports on misinformation and disinformation. For example, in March 2018, a group of experts convened by the European Commission issued a report on online disinformation recommending

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[127] *Grant* (S.C.C., 2009), *supra* note 100, ¶126; *Crookes v. Newton*, 2011 SCC 47, ¶20; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, ¶1.

[128] **See:** *Grant* (S.C.C., 2009), *supra* note 100, ¶65.

[129] *Zundel* (S.C.C., 1992), *supra* note 22, at 774.

[130] Moscrop Report #1 at 6-10 (JAR, Vol. II, Tab 9A, at 871-75). **See also:** Affidavit of David Moscrop affirmed February 21, 2020, Ex. "A" ("**Moscrop Report #2**"), at 4-5 (JAR, Vol. II, Tab 10A, at 1040-41). On cross-examination, Dr. Loewen conceded that there is social science evidence to support pursuing capacity-building initiatives to mitigate the effects of false information on campaigns: Loewen Cross, QQ. 393-94 (JAR, Vol. III, Tab 25, at 2938).

[131] Paquet Affidavit, ¶35-48 (JAR, Vol. II, Tab 18, at 1810-15) and Ex. "L" (JAR, Vol. II, Tab 18L, at 2081); Affidavit of Chris Beall sworn January 23, 2020 ("**Beall Affidavit**") (JAR, Vol. II, Tab 13, at 1182).

a multi-pronged response: (i) enhance the transparency of online news; (ii) promote media and information literacy; (iii) develop tools for empowering news consumers and journalists to tackle disinformation; (iv) safeguard the diversity and sustainability of the news media ecosystem; and (v) continue research on disinformation. The experts recommended against using censorship to address disinformation, noting that it can produce "chilling effects on freedom of expression" and is "neither justified nor efficient for disinformation".[132]

66. The government has not shown that less restrictive alternatives are cumulatively insufficient to achieve Parliament's objective. Without such a showing, it cannot constitutionally resort to the most restrictive means possible.

b. *Section 91(1)'s Speculative and Unproven Salutary Effects Are Outweighed by Its Deleterious Effects*

67. To be justified under s. 1 of the *Charter*, an impugned law's salutary effects must outweigh its deleterious effects.[133] This involves "weigh[ing] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good".[134] Section 91(1) fails this final step of the *Oakes* proportionality test.

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[132] European Commission, *Final Report of the High Level Expert Group on Fake News and Online Disinformation* (March 2018) at 5-6, 14, 30. **See also:** Public Policy Forum, *Democracy Divided: Countering Disinformation and Hate in the Digital Public Sphere* (August 2018), at 17-19, 28 (Baron Affidavit, Ex. "E", JAR, Vol. I, Tab 3E, at 447-49, 458); Canada, House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly* (December 2018), at 1-6, 40 (Baron Affidavit, Ex. "D", JAR, Vol. I, Tab 3D, at 348-53, 387); Samantha Bradshaw, "Responding to Fake News Through Regulation and Automation" in *Fake News, Authentic Views* (a Carter-Ruck report, 2018) 13, at 14; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media & OAS Special Rapporteur on Freedom of Expression, "Joint Declaration on Freedom of Expression and Elections in the Digital Age" (April 2020).

[133] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 ("***Dagenais***"), at 889.

[134] *Carter v. Canada (Attorney General)*, 2015 SCC 5, ¶122.

1. *Section 91(1)'s Salutary Effects Are Speculative and Unproven*

68. As noted above, the government has not adduced any evidence that s. 91(1) actually[135] reduces the volume of false statements made or published during an election period or mitigates their effects on the electoral process or its outcomes.[136] Nor has the government adduced any evidence that s. 91(1) prevents the "many citizens" who are "directional[ly] motivated" from sharing false information, despite perceiving a risk that it is false, because it is congenial to their political preferences.[137] Nor has the government adduced any evidence that s. 91(1) has any effect on foreign disinformation campaigns.[138] In short, despite the uncontroverted evidence of the prohibition's chilling effect, and the jurisprudence confirming the same, the government has not offered any, let alone "cogent and persuasive",[139] evidence that s. 91(1) actually does what it is supposed to do.

69. Insofar as s. 91(1) seeks to protect candidates and other listed individuals against reputational harm caused by false statements, civil and criminal defamation laws provide adequate and appropriate remedies.[140] In this context, s. 91(1)'s salutary benefits are marginal

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[135] **See:** *Dagenais* (S.C.C., 1994), *supra* note 133, at 887-88 (stating that the court must weigh the "actual salutary effects" of the law against its deleterious effects).

[136] Loewen Cross, QQ. 498, 504, 516, 525-26, 539-41 (JAR, Vol. III, Tab 25, at 2964-65, 2968, 2970, 2975-76); Turnbull Cross (June 4), QQ. 296-99 (JAR, Vol. IV, Tab 34, at 4061-62); Paquet Cross, QQ. 132-33, 244-45 (JAR, Vol. III, Tab 19, at 2203-04, 2237-38). **See also:** Moscrop Report #1, at 11-12 (JAR, Vol. II, Tab 9A, at 876-77).

[137] Loewen Report #1, at 5-6 (JAR, Vol. III, Tab 24A, at 2797-98); Loewen Cross, QQ. 353, 360, 363 (JAR, Vol. III, Tab 25, at 2926, 2928-30).

[138] Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Controlling Foreign Influence in Canadian Elections* (June 2017), at 3 (acknowledging that, in cases of foreign interference, "conducting an investigation and bringing the people responsible for this before justice can pose very significant problems and in some cases perhaps insurmountable problems"). **See also:** Moscrop Report #1, at 4-6, 12 (JAR, Vol. II, Tab 9A, at 869-71, 877).

[139] *Oakes* (S.C.C., 1986), *supra* note 59, at 138.

[140] The Supreme Court of Canada upheld the constitutionality of Canada's criminal defamation laws (*Criminal Code*, ss. 298-301) in *Lucas* (S.C.C., 1998), *supra* note 87.

at best. And, like the false speech law struck down in *Zundel*, "[t]he fact that [the provision] 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".[141] The same may be said here.[142]

2. *Section 91(1)'s Deleterious Effects Are Significant*

70. The evidence in this case establishes that s. 91(1) chills legitimate political speech. Cory Morgan, an active political commentator on social media and on his website, deposed at the outset of the 2019 federal campaign that s. 91(1) would "keep [him] from fully engaging in the electoral process" and that, as a result of s. 91(1), he "will hesitate to share [his] political views during the election period — and will likely keep some to [himself]". He also voiced his concern that "key commentators will not contribute during this election out of fear of censure", and as a consequence he would "not be able to hear the diversity of opinions that would allow [him] to properly understand the diversity of political opinions in Canada".[143]

71. In his affidavit sworn on the second day of the 2019 election period, Aaron Wudrick, a spokesperson for and Federal Director of the Canadian Taxpayers Federation (the "**CTF**"), described the consequences s. 91(1) would have — and had already had — on his organization. He deposed that s. 91(1) "will affect [the CTF's] advocacy during [the 2019] federal election campaign" and gave concrete examples of how s. 91(1) had already caused the organization to reduce its political communications planned for the election period.[144]

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[141] *Zundel* (S.C.C., 1992), *supra* note 22, at 766.

[142] **See:** Gigou Affidavit, ¶39, 46 (JAR, Vol. II, Tab 14, at 1286, 1288); *Jones* (A.P.C., 2002), *supra* note 16, at 239 (Gigou Affidavit, Ex. "D", JAR, Vol. II, Tab 14D, at 1367); *Clarke* (O.N.C.J., 2008), *supra* note 17.

[143] Morgan Affidavit (JAR, Vol. I, Tab 4, at 467), ¶10-11, 15, 17, 20 (JAR, Vol. I, Tab 4, at 469-70). **See:** *Ford* (S.C.C., 1988), *supra* note 88, at 767; *Harper #2* (S.C.C., 2004), *supra* note 94, ¶17, *per* McLachlin C.J. and Major J. (dissenting in part, but not on this point).

[144] Wudrick Affidavit, ¶7, 11 (JAR, Vol. I, Tab 5, at 499-500).

72. The Supreme Court of Canada's judgments in *Thomson Newspapers* and *Zundel* confirm s. 91(1)'s unconstitutionality. Like the law struck down in *Thomson Newspapers*, s. 91(1) targets political speech — the most assiduously protected form of expression — when it matters most: during the election period.[145] This is precisely when civic engagement and the free and uninhibited exchange of information, beliefs, and opinions — including about the candidates — are most essential.[146] Accordingly, as in *Thomson Newspapers*, "[t]he impact on freedom of expression in this case is profound".[147] Moreover, like the law struck down in *Zundel*, s. 91(1) is particularly invasive because it uses an outright prohibition backed by severe penalties to effect its ends.[148] And like the law struck down in *Zundel*, s. 91(1)'s chilling effect does not depend on its being enforced through the laying of charges; the fear of sanction is enough.[149]

73. In sum, s. 91(1)'s deleterious effects far outweigh its speculative and unproven salutary effects. The right to express and share information, beliefs, and opinions — even those the state deems "false" — is fundamental to our democracy. It protects even speech that "offend[s], shock[s] or disturb[s] the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[150]

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[145] See *Harper #1* (S.C.C., 2000), ¶20, *per* Major J. (dissenting, but not on this point) (stating that the state should be loathe to interfere with political speech "especially in the midst of a federal election").

[146] *Bowman v. The United Kingdom*, [1998] ECHR 4, ¶42.

[147] *Thomson Newspapers* (S.C.C., 1998), *supra* note 89, ¶127.

[148] *Zundel* (S.C.C., 1992), *supra* note 22, at 774.

[149] *Zundel* (S.C.C., 1992), *supra* note 22, at 772. See also *Keegstra* (S.C.C., 1990), *supra* note 22, at 859, *per* McLachlin J. (dissenting, but not on this point).

[150] *Irwin Toy* (S.C.C., 1989), *supra* note 53, at 969, quoting *Handyside*, E.C.H.R. (29 April 1976), Series A No. 24, at 23.

E. THE APPROPRIATE REMEDY IS TO DECLARE SECTION 91 TO BE OF NO FORCE OR EFFECT

74. Section 91 limits the freedom of speech in a way that is neither reasonable nor demonstrably justified in a free and democratic society. It is therefore inconsistent with ss. 1 and 2(*b*) of the *Charter*. The appropriate remedy is to declare s. 91 to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982* and leave it to Parliament to determine how — if at all — to respond. Reading down s. 91, or reading in qualifiers in an attempt to cure its constitutional deficiencies, would amount to impermissible judicial redrafting.[151]

PART V—ORDERS REQUESTED

75. The CCF seeks: (i) a declaration that s. 91 of the *CEA* is inconsistent with ss. 1 and 2(*b*) of the *Charter* and is therefore of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*; and (ii) such further relief as this Court deems just.

76. The CCF does not seek costs and asks that no costs be awarded against it, on the basis that this Application is in the public interest.[152]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of July, 2020.

Adam Goldenberg / Connor Bildfell
McCarthy Tétrault LLP
Lawyers for the Applicant

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[151] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at 169; *R. v. McIntosh*, [1995] 1 S.C.R. 686, ¶26; *Friesen* (S.C.C., 1995), *supra* note 38, ¶27; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, ¶66; *Beattie* (Ont. C.A., 2003), *supra* note 38, ¶16-19.

[152] **See:** *St. James' Preservation Society v. Toronto (City)*, 2006 CanLII 22806 (Ont. S.C.J.), ¶12-33 (see also the cases cited at footnote 4), rev'd on other grounds 2007 ONCA 601; *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 732, ¶19-29.

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SCHEDULE "B"
RELEVANT STATUTES

***Canada Elections Act*, S.C. 2000, c. 9**

Interpretation

Definitions

2 (1) The definitions in this subsection apply in this Act.

…

candidate means a person whose nomination as a candidate at an election has been confirmed under subsection 71(1) and who, or whose official agent, has not yet complied with sections 477.59 to 477.72 and 477.8 to 477.84 in respect of that election.

…

election means an election of a member to serve in the House of Commons.

…

election period means the period beginning with the issue of the writ and ending on polling day or, if the writ is withdrawn under subsection 59(1) or is deemed to be withdrawn under subsection 31(3) of the *Parliament of Canada Act*, on the day that the writ is withdrawn or deemed to be withdrawn.

…

potential candidate means a person whose nomination as a candidate at an election has not been confirmed under subsection 71(1) but who

> **(a)** is selected in a nomination contest;
>
> **(b)** is deemed to be a candidate under section 477;
>
> **(c)** is a member or, if Parliament is dissolved, was a member on the day before the dissolution; or
>
> **(d)** has the support of a political party to be a candidate of that party.

…

PART 6 – Candidates

…

Prohibitions

…

Publishing false statement to affect election results

91 (1) No person or entity shall, with the intention of affecting the results of an election, make or publish, during the election period,

> **(a)** a false statement that a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party has committed an offence under an Act of Parliament or a regulation made under such an Act — or under an Act of the legislature of a province or a regulation made under such an Act — or has been charged with or is under investigation for such an offence; or
>
> **(b)** a false statement about the citizenship, place of birth, education, professional qualifications or membership in a group or association of a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party.

Clarification

(2) Subsection (1) applies regardless of the place where the election is held or the place where the false statement is made or published.

…

PART 19 – Enforcement

…

Offences

General Provisions

Impersonation

480.1 (1) Every person is guilty of an offence who, with intent to mislead, falsely represents themselves to be, or causes anyone to falsely represent themselves to be,

> **(a)** the Chief Electoral Officer, a member of the Chief Electoral

Officer’s staff or a person who is authorized to act on the Chief Electoral Officer’s behalf;

(b) an election officer or a person who is authorized to act on an election officer’s behalf;

(c) a person who is authorized to act on behalf of the Office of the Chief Electoral Officer;

(d) a person who is authorized to act on behalf of a registered party or a registered association; or

(e) a candidate or a person who is authorized to act on a candidate’s behalf.

Exception

(2) A person does not commit an offence under subsection (1) if they establish that the representation was manifestly for the purpose of parody or satire.

Misleading publications

481 (1) Every person or entity is guilty of an offence that, during an election period, distributes, transmits or publishes any material, regardless of its form, that purports to be made, distributed, transmitted or published by or under the authority of the Chief Electoral Officer, or a returning officer, political party, candidate or prospective candidate if

(a) the person or entity was not authorized by the Chief Electoral Officer or that returning officer, political party, candidate or prospective candidate to distribute, transmit or publish it; and

(b) the person or entity distributes, transmits or publishes it with the intent of misleading the public into believing that it was made, distributed, transmitted or published by or under the authority of the Chief Electoral Officer, or that returning officer, political party, candidate or prospective candidate.

…

Exception — parody or satire

(3) A person or entity does not commit an offence under subsection (1) if they establish that the material was manifestly distributed, transmitted or published for the purpose of parody or satire.

…

Offences under Part 6 (Candidates)

Offences requiring intent — dual procedure

486 (3) Every person is guilty of an offence who

…

(c) contravenes subsection 91(1) (making or publishing false statement to affect election results); or

(d) knowingly contravenes section 92 (publishing false statement of withdrawal of candidate).

…

Offences requiring intent — dual procedure

(4) Every entity is guilty of an offence that

(a) contravenes subsection 91(1) (making or publishing false statement to affect election results); or

(b) knowingly contravenes section 92 (publishing false statement of candidate's withdrawal).

…

Punishment — offences requiring intent (dual procedure)

500 (5) Every person who is guilty of an offence under any of subsections … 486(3) and (4) … is liable

(a) on summary conviction, to a fine of not more than $20,000 or to imprisonment for a term of not more than one year, or to both; or

(b) on conviction on indictment, to a fine of not more than $50,000 or to imprisonment for a term of not more than five years, or to both.

<u>*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11</u>

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

…

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

…

***The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

> **52. (1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

***Interpretation Act*, R.S.C. 1985, c. I-21**

Amendment does not imply change in law

45(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

EXPERT WITNESSES

Experts' Reports

53.03 …

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

    i. a description of the factual assumptions on which the opinion is based,

    ii. a description of any research conducted by the expert that led him or her to form the opinion, and

    iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Canadian Constitution Foundation and **Attorney General of Canada**
Applicant Respondent

Court File No.: CV-1900627380-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at **TORONTO**

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