Federal Court  Cour fédérale

Date: 20231207

Docket: T-1249-21

Citation: 2023 FC 1650

Ottawa, Ontario, December 7, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

REBEL NEWS NETWORK LTD.

Applicant

and

CANADA (COMMISSIONER OF CANADA ELECTIONS) and THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

Nature of the Matter

[1] This is an application for judicial review of the decision [Decision] by the Commissioner of Canada Elections [Commissioner], dated July 12, 2021. The Commissioner confirmed the decision of the Deputy Commissioner of Canada Elections, dated January 11, 2021, finding that the Applicant, Rebel News Network Ltd. [Rebel News], contravened ss 352 and 353(1) of the

Canada Elections Act, SC 2000, c 9 [*Act*] and, on January 12, 2021, issuing two Notices of Violations (NOV #A-190752-1 and NOV #A-190752-2) [NOVs] imposing an administrative monetary penalty [AMP] in respect of each of the violations.

[2] Rebel News has also filed a Notice of Constitutional Question challenging "the constitutional validity, applicability and/or effect of ss. (b) of the definition of 'election advertising' at ss. 2(1) of the *Canada Elections Act*."

The Parties

[3] Rebel News is a federally incorporated company. Its sole director is Mr. Ezra Levant, who describes himself as its principal and founder. Mr. Levant describes Rebel News as often taking strong editorial positions on important public issues affecting Canadians, which positions are conveyed through various media, including websites, podcasts, paperback books and e-books. Further, he describes himself and Rebel News as long-time critics of Prime Minister Justin Trudeau, "his associates," and the Liberal Party of Canada. Mr. Levant filed an affidavit affirmed on September 10, 2021 [Levant Affidavit], in support of Rebel News' application for judicial review.

[4] The Commissioner is the Commissioner of Canada Elections [CCE] and is appointed by the Chief Electoral Officer. However, the Commissioner makes decisions and takes actions independently thereof. The Commissioner is responsible for ensuring compliance with and enforcement of the *Act*, which includes conducting investigations, instituting prosecutions for offences under the *Act* and issuing notices of violation that set out administrative monetary

penalties (*Act*, ss 509(1), 509.21, 509.2). Pursuant to the *Act*, when an application is made for judicial review of a decision of the Commissioner, the Commissioner is the respondent in respect of the application (*Act*, s 555(2)). In these reasons, I will refer to the named respondent as the CCE and the decision-maker with respect to the decision under review as the Commissioner.

[5] In this matter, the CCE is responding to Rebel News' challenge to the reasonableness of the Commissioner's decision and, in that regard, has filed the affidavit of Ms. Avril Ford Aubrey, legal counsel in the office of the CCE and one of the investigators in the subject matter involving Rebel News, affirmed on February 11, 2022 [Ford Aubrey Affidavit]. The Ford Aubrey Affidavit provides general background information as to the role of the Commissioner, the complaints process, confidentiality, AMPs, the Commissioner's review process, as well as the procedural steps taken in this matter in response to complaints received.

[6] The Attorney General of Canada [AGC], in their stated role as guardian of the public interest and protector of the rule of law, has provided submissions in response to Rebel News' constitutional challenge. In that regard, the AGC has filed the affidavit of Ms. Andrea Lawlor, an Associate Professor at King's University College at Western University in the Department of Political Science who holds a PhD in Political Science, affirmed on February 9, 2022 [Lawlor Affidavit]. The Lawlor Affidavit provides expert opinion evidence addressing four questions posed by the AGC. Specifically: identifying the principles underlying the egalitarian model of elections and the source of same; identifying the goals of regulating third party election-period advertising and if or how they relate to the achievement of the principles underlying the egalitarian model; identifying the role of anti-circumvention provisions within a regulatory

scheme based on the egalitarian model of elections; and, explaining how the Canadian approach to the regulation of third party election-period advertising compares with approaches taken in other countries, such as the United Kingdom.

Factual Background

[7] The factual background to this matter is straightforward and not in dispute.

[8] Canada's 43rd federal general election was called on September 11, 2019, and held on October 21, 2019. It was a fixed-date election. The "election period," as defined in the *Act*, means the period beginning with the issue of the writ and ending on polling day (*Act*, s 2.1). For the subject election, the election period ran from September 11, 2019, to October 21, 2019.

[9] On September 4, 2019, Rebel News, as publisher, released a book authored by Mr. Levant entitled *The Libranos: What the media won't tell you about Justin Trudeau's corruption*. The cover of the book is an artistic rendering of the Prime Minister and some of his ministers and staff, which depiction Rebel News submits is evocative of the television drama, *The Sopranos*.

[10] During the election period, Rebel News distributed lawn signs promoting the book. These included the words “Librano$.com,” “buy the book!” and “rebel news telling the other side of the story” and displayed the same graphic as the book cover.

[11] The Commissioner received six complaints about the lawn signs and had another complaint referred to it from the Alberta Election Commissioner.

[12] On December 5, 2019, the Commissioner endorsed a “Recommendation to Initiate an Investigation.” This recommended that an administrative investigation be initiated on the basis that, during the election period, Rebel News engaged in election advertising under s 2.1 of the *Act* in its production and distribution of the "Librano$" lawn signs, which lawn signs did not contain the information required by s 352 of the *Act*. Further, that the election advertising expenses incurred in regard to the lawn signs and their election advertising messages were at least, if not over, the $500.00 threshold triggering the obligation, under s 353 of the *Act*, for a third party to register as such with Elections Canada. The recommendation stated that a preliminary review of the documents and information gathered through open source and public documents gave the investigators reasonable grounds to suspect that offences under the *Act* had been committed.

[13] By letter dated December 9, 2019, the CCE Director of Investigations gave Rebel News (via Mr. Levant) notice, pursuant to s 510(2) of the *Act*, [Notice] that the Commissioner had initiated an administrative investigation into allegations that Rebel News had contravened ss 352 and 353 of the *Act* by failing to include the required information on third party election advertising as per s 352 – third party attribution requirements – and incurring over $500.00 in election advertising expenses without registering as a third party in the 2019 federal election as per s 353 – third party registration requirements. The Notice set out ss 352 and 353 and also noted that the definition of "election advertising" includes examples of communications that could promote or oppose a registered party or candidate but that do not constitute "election advertising," including "the promotion of the sale of a book […], if the book was planned to be made available to the public regardless of whether there was to be an election."

[14] The Notice stated that the fact that the Commissioner had decided to proceed by way of an administrative investigation indicated that they were of the view that the matter would best be dealt with administratively, rather than by way of a criminal prosecution. And while there was no obligation to cooperate with investigators, s 508.6(1) of the *Act* states that the provision of all reasonable assistance to the Commissioner is one of the factors taken into consideration in determining the amount of an AMP that could be imposed at the conclusion of the investigation. The Notice offered the opportunity to representatives of Rebel News, if they desired to do so, to schedule an interview with the investigators or, alternatively, to submit all relevant facts and information, as well as any written representations regarding the alleged election advertising and Rebel News' status as a third party.

[15] On January 23, 2020, Mr. Levant participated in an interview with two CCE investigators.

[16] A "Compliance or Enforcement Recommendation Report," dated March 30, 2020, was then prepared by a CCE investigator. This set out in detail the facts and information gathered in the administrative investigation and recommended that the file be referred to the CCE Compliance Unit for an assessment of the appropriate compliance measure.

[17] The Compliance Unit prepared a "Compliance Unit Recommendation Report of Compliance and Enforcement Measure" dated January 11, 2021 [Compliance Unit Recommendation Report]. Its analysis included, among other things, that the book itself is not "election advertising." However, the lawn signs were "election advertising" because they contained an advertising message, opposing a registered party, that was transmitted during the election period. Further, the illustration of communications that are not election advertising that deals with the promotion and distribution of books (paragraph (b) in the s 2(1) definition of "election advertising") did not apply because the "entire project" was planned and executed to coincide with the election. The analysis set out the factors relevant to determining that the book was planned to be made available at that time because there was to be a general election and concluded that the evidence provided reasonable grounds to believe that Rebel News contravened ss 352 and 353(1) of the *Act*, warranting AMPs of $1500 for each offence.

[18] On January 25, 2021, the Manager of the Compliance Unit served Rebel News with the two NOVs, issued by the Deputy Commissioner of CCE, stemming from Rebel News' failure to

comply with ss 352 and 353 of the *Act* and imposing the AMPs recommended in the Compliance Unit Recommendation Report.

[19] By letter dated February 4, 2021, and pursuant to s 521.14 of the *Act*, counsel for Rebel News submitted a request for review [Request for Review] by the Commissioner of the alleged violations and imposition of the AMPs. On April 1, 2021, counsel for Rebel News submitted Rebel News' written submissions and evidence in support of its Request for Review. Rebel News took the position that the CCE process and consequent issuance of the NOVs was unconstitutional, that Rebel News had been selectively and unfairly targeted and that the book and its promotion were not election advertising because they fell within the paragraph (b) category of the s 2(1) definition of "election advertising." Rebel News asserted that publically available information supported this position.

[20] By letter dated July 12, 2021, the Commissioner provided his response to the Request for Review and affirmed the contraventions of the *Act* and imposition of the related AMPs. That decision is the subject of this judicial review.

Commissioner's Decision

[21] In his decision letter, the Commissioner first provided an overview of the background facts and process leading up to his *de novo* review of the decision of the Deputy Commissioner to issue the NOVs. The Commissioner stated that in reaching his decision, he reviewed Rebel News' submissions and all of the documents contained in the disclosure package provided to Rebel News upon its request for the review. Specifically, he reviewed the Recommendation to

Initiate an Investigation (December 5, 2019), the Notice (December 9, 2019), the Compliance or Enforcement Recommendation Report and its Exhibits 1 to 29 (March 30, 2020) and the Compliance Unit Recommendation Report (January 11, 2021).

[22] The Commissioner then set out a summary of his findings, based on the submissions and the evidence, being that on a balance of probabilities:

1. the lawn signs distributed and displayed by Rebel News during the election period of the 43rd federal general election were election advertising;

2. the lawn signs did not contain the information required by s 352 of the *Act*;

3. Rebel News incurred expenses of at least $500.00 for the transmission of its election advertising message during the election period but omitted to register as a third party as required by s 353(1) of the *Act*; and

4. the Deputy Commissioner's decision to issue AMPs to Rebel News for its non-compliance with ss 352 and 353(1) of the *Act* was reasonable and not inconsistent with the *Charter*.

[23] Before explaining how he came to these conclusions, the Commissioner disposed of Rebel News' submission that it had been treated unfairly and in a selective manner as a preliminary question. The Commissioner noted that Rebel News took this positon because two other books it had identified as allegedly promoting the Prime Minister that were published during the election period were not investigated by the Commissioner's office. The Commissioner found that, under s 510 of the *Act*, he could not be prevented from investigating a

case on the basis that there are other cases that could or should be investigated and that jurisprudence supported this view (citing *Ochapowace First Nation v Canada (Attorney General*), 2007 FC 920 [*Ochapowace*]; *R v Bears*, [1988] 2 SCR 387 at 410-411). Nor had Rebel News submitted any evidence showing that the Deputy Commissioner's decision was based on any improper consideration or bias. Rather, the investigation was initiated following the receipt of seven complaints, which complaints had been disclosed to Rebel News.

[24] The Commissioner then went on to explain his reasoning for finding that Rebel News' lawn signs were election advertising as defined in s 2(1) of the *Act*. He noted that for a communication to constitute election advertising, it must: 1) be an advertising message; 2) be transmitted to the public; 3) be transmitted during an election period; and 4) promote or oppose a registered party or candidate in the election. Rebel News' position was that the lawn signs were not election advertising because they were not intended to oppose the Liberal Party of Canada, its leader or its candidates, but were designed to promote the sale of the book. However, based on the evidence before it and for the reasons summarized in the Compliance Unit Recommendation Report, the Commissioner disagreed.

[25] The Commissioner noted that Rebel News relied upon the definition of "election advertising" in s 2(1) of the *Act*, more specifically paragraph (b) of that definition, which I will set out here for ease of reference:

> **Definitions**
>
> **2 (1)** The definitions in this subsection apply in this Act.
>
> ……

> ***election advertising*** means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include
>
> ….
>
> **(b)** the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;
>
> ……

[26] The Commissioner noted that, in its submissions in its Request for Review, Rebel News coined paragraph (b) of the s 2(1). definition of "election advertising" as a "book exemption." The Commissioner stated that this provision served to clarify, for greater certainty, that election advertising does not include "the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, <u>if the book was planned to be made available to the public regardless of whether there was to be an election</u>." He stated it was clear from the underlined passage that paragraph (b) of the s 2(1) definition of "election advertising" (which for ease of reference I will refer to as "Paragraph 2(1)(b)") clearly only applied in relation to a book that would have been published whether or not the election was called.

[27] The Commissioner found that the Paragraph 2(1)(b) clarification did not apply in the matter before him because Rebel News had planned the launch of the book to coincide with the election.

[28] In that regard, the Commissioner stated that the evidence gathered by the investigators from readily accessible Internet sources established that Rebel News planned to launch the book and to distribute the lawn signs precisely around the time of the issuance of the writ for the election and during the ensuing election period. The Commissioner listed some of the communications published by Rebel News on its website and its Twitter account, including a video posted on Rebel News' website, and referred to an admission by Mr. Levant during his interview in which he admitted that he planned the launch of the book to coincide with the election.

[29] The Commissioner found that, instead of promoting the book, the lawn signs and lawn sign campaign were most likely designed and intended to oppose the Liberal Party and the election of its leader and some of its candidates. The Commissioner also considered Rebel News' Twitter posts and hashtags about the lawn signs, which it found were related to the election rather than the promotion of the book. Further, that Rebel News had ordered thousands of the lawn signs and requested that people contribute to the funding of its lawn signs – activities generally conducted by regulated political entities (such as candidates and political parties) and third parties. The Commissioner also agreed with the factual grounds upon which the Deputy Commissioner had relied in concluding that the lawn signs were election advertising, which the Commissioner summarized and listed.

[30] In light of all of this, the Commissioner concluded that the lawn signs distributed and displayed by Rebel News during the election period were third party election advertising.

[31] As to s 352, the Commissioner noted that this provision requires a third party that transmits election advertising during the election period to include in or on the advertising message, in a clearly visible or otherwise accessible manner, its name, telephone number, civic or Internet address and an indication that the advertising message was authorized by the third party. The Commissioner stated that this requirement has the important objective of ensuring transparency about those behind, and spending money for, election advertising. For the purposes of the 43rd federal general election, the Commissioner found that Rebel News was a third party under the *Act*. Accordingly, its election advertising messages were required to comply with s 352. As its lawn signs did not include the required information, they contravened s 352 of the *Act*.

[32] With respect to s 353(1), the Commissioner stated that this requires a person, a corporation or a group to register with Elections Canada, as a third party, immediately after having incurred expenses totalling $500.00 or more for partisan activities, election advertising and election surveys that are respectively carried out, transmitted or conducted during an election period. Rebel News had refused to provide CCE investigators with any information relating to costs it incurred for the production and distribution of its lawn signs, beyond a cartoon provided by Mr. Levant. However, information gathered from Rebel News' website, which the Commissioner described, suggested that Rebel News had most likely incurred expenses significantly exceeding the minimum threshold of $500.00 required for third party registration. The Commissioner was satisfied that, despite incurring more than $500.00 in expenses related to its election advertising messages transmitted during the election period, Rebel News failed to register as a third party and, therefore, contravened s 353(1) of the *Act*.

[33] The Commissioner also found that the AMPs imposed were in line with its *Policy for the Administrative Monetary Penalty Regime*.

[34] As to Rebel News' *Charter* arguments, the Commissioner dismissed Rebel News' argument that the Deputy Commissioner had breached its *Charter* rights because Mr. Levant had not been cautioned before being interviewed. The Commissioner pointed out that this was an administrative, not criminal, investigation and that Mr. Levant had attended the interview voluntarily. In the context of an administrative investigation, an individual can be interviewed without being cautioned (citing *Canada (Border Services Agency) v Tao*, 2014 FCA 52 at paras 26-28). Further, that it was Rebel News' conduct that was at issue and that Rebel News was the target of the investigation, not Mr. Levant. The NOVs were issued against Rebel News, a corporate entity, which is not protected by the s 11(c) *Charter* guarantee against self incrimination, which protects only individuals (referencing *R v Amway*, [1989] 1 SCR 21).

[35] The Commissioner next noted that Rebel News was not challenging the constitutionality of ss 352 and 353(1) of the *Act.* Rather, it submitted that the Deputy Commissioner's decisions were unconstitutional because they violated Rebel News' right to freedom of expression and freedom of the press, contrary to s 2(b) of the *Charter*. However, Rebel News had not submitted any argument or evidence to support that allegation.

[36] Citing *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], the Commissioner defined the test to be engaged when assessing whether a decision-maker's interpretation of an enabling statute violates a *Charter* right as a reasonableness test instilled with the "justificatory muscles"

of the test under s 1 of the *Charter* analysis – that is, a balance of proportionality. The Commissioner stated that *Doré* requires administrative decision-makers making discretionary decisions to balance the *Charter* values involved and the legislative objectives of its enabling statute.

[37] Further, the Commissioner noted that in *Harper v Canada (Attorney General)*, 2004 SCC 33 [*Harper*], the Supreme Court of Canada determined that s 352 and s 353 of the *Act* advance two compelling and substantial objectives: 1) to promote the implementation and enforcement of the third-party financing regime, and 2) to ensure transparency by allowing voters access to relevant information concerning third parties engaged in regulated activities, such as election advertising. And, while the ss 352 and 353 requirements restrict third parties' freedom of expression, the Supreme Court in *Harper* concluded that the restrictions are minimal, reasonable and demonstrably justified under s 1 of the *Charter*.

[38] The Commissioner found, in light of the compelling and substantial objectives pursued by the third-party regime under the *Act*, the restrictions imposed by the requirements at ss 352 and 353(1) of the *Act* were minimally impairing of Rebel News' freedom of expression *Charter* rights. Thus, the Deputy Commissioner's decision to issue the NOVs was reasonable and did not breach the *Charter*.

Relevant Legislative and Constitutional Provisions

Canada Elections Act, SC 2000, c 9

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

[…]

election advertising means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include

(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;

(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;

(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be;

(d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views; or

(e) the making of telephone calls to electors only to encourage them to vote.

DIVISION 2

Partisan Activities, Election Advertising and Election Surveys During Election Period

……

Prohibition — circumventing maximum amount

351 A third party shall not circumvent, or attempt to circumvent, a maximum amount set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the maximum amount or acting in collusion with another third party so that their combined partisan activity expenses, election advertising expenses and election survey expenses exceed the maximum amount.

……

Advertising to name third party

352 A third party shall include - in a manner that is clearly visible or otherwise accessible - in any election advertising message placed by it its name, its telephone number, either its civic or its Internet address and an indication in or on the message that it has authorized its transmission.

Registration Requirements for third parties

353 (1) A third party shall register immediately after having incurred the following expenses in an aggregate amount of $500:

(a) partisan activity expenses in relation to partisan activities that are carried out during an election period;

(b) election advertising expenses in relation to election advertising messages that are transmitted during that period; and

(c) election survey expenses in relation to election surveys that are conducted during that period. However, the third party may not register before the issue of the writ.

Judicial Review

555(1)

When respondent is Commissioner

(2) If an application is made for judicial review of a decision of the Commissioner, the Commissioner is the respondent in respect of the application.

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

Rights and freedoms in Canada

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.

Fundamental freedoms

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;
>
> […]

***Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11**

> *Primacy of Constitution of Canada*
>
> **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

Issues and Standard of Review

[39] The issues identified by the parties in this matter can be framed as follows:

i. Is the Commissioner's decision reasonable?

   a. Did the Commissioner apply the wrong legal test or fail to conduct the proper analysis?

   b. Did the Commissioner ignore evidence or submissions?

   c. Did the Commissioner appropriately consider *Charter* values?

ii. Does the impugned clause, Paragraph 2(1)(b), limit Rebel News' rights under s 2(b) of the *Charter*?

iii. If so, is the limitation justified under s 1 of the *Charter*?

[40] When a court reviews the merits of an administrative decision there is a presumption that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigrations) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). Rebel News and the Commissioner submit, and

I agree, that reasonableness is the standard of review applicable to the merits of the Commissioner's decision.

[41] "A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision…" (*Vavilov* at para 99). The burden is on the party challenging the decision of demonstrate that it is unreasonable and the court must be satisfied that any shortcomings or flaws raised by that party are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

Is the Commissioner's Decision Reasonable?

Rebel News' Position

[42] Rebel News first submits that the Commissioner's decision was not reasonable because there were gaps in the Commissioner's reasoning and because there was evidence that was ignored or not meaningfully addressed.

[43] Rebel News submits that although the Commissioner identified the correct inquiry under Paragraph 2(1)(b), being whether the book would have been published whether or not the election was called, the Commissioner assessed a different question, being whether Rebel News planned the launch of the book to coincide with the election. The Commissioner therefore

confused two distinct matters and became unreasonably preoccupied with the question of whether, at the time Rebel News released and promoted the book, it was Rebel News's intention to do so during the 2019 election period. This gives rise to a concern as to whether the Commissioner applied the correct legal test and/or failed to carry out the proper analysis.

[44] With respect to its evidence, Rebel News submits that it made submissions to support the fact that it would have published the book regardless of the election, and there was no evidence that it would not have released the book after the election. The Commissioner did not mention Rebel News' submitted evidence and does not appear to have considered or grappled with it. Specifically, the submitted evidence was that the original book concept was derived from a cover published in 2005, based on a television show from the 2000s; that the URL (thelibranos.com) was registered in February 2016, over three years before the election; and that Rebel News and Mr. Levant have released other books critical of the Prime Minister and the Liberal Party of Canada during non-election periods.

[45] Rebel News also submits that the Commissioner failed to consider the legislative intent of Paragraph 2(1)(b) and to "consider the wisdom of the legislature in enacting" that provision.

[46] Further, that the Commissioner unfairly targeted Rebel News on the basis that Rebel News is highly critical of the Prime Minister and the Liberal Party of Canada and ignored evidence that there were at least 20 other election-related books published in late summer or early fall 2019.

[47] Second, Rebel News submits that the Commissioner's decision violated the *Charter*. While the Commissioner considered the objectives of ss 352 and 353(1) of the *Act*, balancing them against Rebel News' freedom of expression and finding that Rebel News' rights were minimally impaired, the analysis does not consider the fundamental values reflected in the statutory definition of "election advertising," which forms an essential element of ss 352 and 353. Rebel News submits that the intention of Paragraph 2(1)(b) is to "remove from the Commissioner's scrutiny the sorts of protected expressions within democratic discourse that ought not to be hindered during an election period, including, books and the promotion thereof, and to discourage governmental intrusion into political discourse." Rebel News submits that the fundamental values of the Paragraph 2(1)(b) definition ought to have informed the Commissioner's analysis.

[48] And, while the Commissioner referred to the Supreme Court of Canada's decision in *Harper*, Rebel News submits that the decision is distinguishable and has no application to this matter. *Harper* upheld the third party election advertising limits in the *Act*, but the present case is about an express exception built into the legislation that was not scrutinized in *Harper*.

CCE's Position

[49] The CCE submits that Rebel News is asking the Court to engage in a *de novo* review of the evidence and submissions but that this is not the purpose of judicial review.

[50] Further, that the Commissioner reasonably concluded, based on the evidence and submissions before him, that the lawn signs constituted "election advertising" defined under s

2(1) of the *Act* and that the clarification found in Paragraph 2(1)(b) did not apply. The Commissioner fully considered and rejected Rebel News' submission that the lawn signs were not "election advertising" because they promoted a book that was planned to be made available to the public regardless of the election. The Commissioner reasonably interpreted Paragraph 2(1)(b) to preclude reliance on that provision where the third party deliberately planned the launch of a partisan book to coincide with the election. This interpretation has clear internal logic since a specific plan to publish and market a book during an election period cannot be said to be a plan to make the book available "regardless of whether there was to be an election." Further, there was ample evidence that Rebel News timed the launch of the book to coincide with the election, and the Commissioner engaged with this evidence.

[51] The CCE also submits that the Commissioner did not apply the wrong legal test or fail to carry out the proper analysis when determining if Paragraph 2(1)(b) applied, as suggested by Rebel News. Rather, the Commissioner reasonably interpreted the provision in light of the text, context, and purpose of the provision, and it is not the role of the Court to engage in a *de novo* review or to determine the "correct" interpretation of a disputed provision. While Rebel News may not agree with the Commissioner's interpretation, it was reasonable.

[52] Nor did the Commissioner fail to consider Rebel News' evidence. Rebel News adduced no evidence that the Commissioner targeted it or was partial in its decision-making. Further, the Commissioner explicitly stated in his reasons that he had considered Rebel News' submissions. The reasons also demonstrate that the Commissioner engaged with Rebel News' evidence and arguments. The Commissioner was not required to respond to every piece of evidence or

argument. Significantly, given the Commissioner's interpretation of Paragraph 2(1)(b), Rebel News' evidence about previous work related to the book had little probative value. That is, the evidence was rendered irrelevant by the Commissioner's interpretation of Paragraph 2(1)(b), given his focus on Rebel News' explicit intention to launch the book during the election period and the particular means of advertising used (lawn signs).

[53] In any event, the Commissioner relied on more than the timing of the book launch to support his finding that the lawn signs were election advertising, including the evidence demonstrating the ways in which Rebel News and Mr. Levant associated the book and lawn signs with the election.

[54] The CCE also submits that the decision reflects a proportionate balancing of the *Charter* protections at play and is a reasonable outcome. In the first step of the *Doré* analysis, the Commissioner considered the statutory objectives at stake. The Commissioner referenced *Harper*, where the Supreme Court found that ss 352 and 353 of the *Act* promote the implementation and enforcement of the third party financing scheme and ensure transparency by allowing voters to access relevant information concerning third parties engaged in regulated activities such as election advertising. In the second step, the Commissioner was alive to the *Charter* value of expressive freedom at stake and concluded that any restrictions were minimal – even though Rebel News did not provide any evidence that its 2(b) rights were engaged.

[55] In response to Rebel News' argument that the Commissioner did not consider the "principles and fundamental values" reflected in the definition of "election advertising" and

Paragraph 2(1)(b), the CCE submits that these principles and values are directly tied to ss 352 and 353 of the *Act*. The Commissioner therefore implicitly considered the definition in balancing the *Charter* values at stake with the statutory objectives of ss 352 and 353 of the *Act*. Further, the Commissioner reasonably concluded that Rebel News was invoking its freedom of expression values and values relating to freedom of the press. Rebel News fails to articulate what additional "principles and fundamental values" are at play.

[56] In response to Rebel News' argument that the Commissioner's interpretation of Paragraph 2(1)(b) is too broad and subjects all politically expressive books and the promotion thereof released during a federal election to scrutiny, the CCE points out that that is not something the Commissioner was required to consider under the *Doré/Loyola* analysis and does not render the decision unreasonable. The issue of Paragraph 2(1)(b)'s broader implications relates only to Rebel News' constitutional challenge. Further, the test is not whether there is serious interference with a *Charter* guarantee, as Rebel News seems to imply, but only whether the interference is reasonably justified within the statutory scheme.

[57] Finally, the CCE submits that the Commissioner could only choose to either enforce or not enforce ss 352 and 353(1) of the *Act*. Only enforcing the provisions would have advanced the relevant statutory objectives. Therefore, there was no reasonable alternative that would have given effect more fully to the *Charter* protections in light of the statutory objectives. The Commissioner's *Doré* analysis merits deference, as the Commissioner was best placed to weigh the *Charter* protections with his statutory mandate in light of the specific facts of the case.

Analysis

[58] Based on the parties' submissions, the question of the reasonableness of the decision can be as divided into three distinct inquiries. I will address each of these in turn.

a. Did the Commissioner apply the wrong legal test or fail to carry out a proper analysis?

[59] Rebel News and the CCE approach this issue from somewhat different directions. Rebel News asserts that there was a shifting standard and the possibility of the application of an incorrect legal test or analysis, while the CCE asserts that the Commissioner correctly interpreted and applied Paragraph 2(1)(b) and, given the evidence, found that it was not applicable.

[60] More specifically, Rebel News submits that the Commissioner in this case failed to apply the correct legal test and/or failed to carry out a proper analysis because he confused two concepts: whether the book would have been published regardless of the election, and whether Rebel News timed the book's release and promotion to coincide with the election.

[61] When appearing before me, Rebel News emphasized that, in its view, the Commissioner's reasoning displayed shifting logical goal posts or a shifting standard. Although in paragraph 23 of his reasons the Commissioner identified the correct test or question, being whether "the book was planned to be made available to the public regardless of whether or not there was an election," in the next paragraph he went on to find that Paragraph 2(1)(b) did not apply because "Rebel News planned the launch of the book to coincide with the election." Thus,

the Commissioner answered a different question. When asked by the Court if this was a question of the Commissioner's interpretation of Paragraph 2(1)(b), Rebel News stated that it did not take issue with the interpretation, but that the problem was with the "shifting test" and the Commissioner's failure to consider if the book would have been released regardless of the election. On reply, Rebel News submitted that it had set out its interpretation of Paragraph 2(1)(b) in its Request for Review, and, while the Commissioner was not required to accept that interpretation, he had to clearly identify the applicable "test" and make his decision based on that test.

[62] The CCE submits that the Commissioner reasonably interpreted the *Act* to preclude reliance on Paragraph 2(1)(b) where a third party deliberately plans the launch and promotion of a partisan book to coincide with an election. While the Commissioner did not conduct an explicit statutory analysis of Paragraph 2(1)(b), he clearly put his mind to the definition, what was encompassed by it and whether the lawn signs fell within the definition. In paragraph 21 of his reasons, he set out the chapeau definition of "election advertising." In paragraph 22, he identified each of the four elements required by the definition. Based on the evidence, he did not accept Rebel News' position that the lawn signs were not election advertising because they were intended to promote the book, not oppose the Liberal Party of Canada, its leader or its candidates. Importantly, the Commissioner did not agree with Rebel News' submission that Paragraph 2(1)(b) was a book exemption and, referencing Elections Canada's *Interpretation Note: 2020-05 (November 2020) – Partisan and Election Advertising on the Internet* [*Interpretation Note*], found that it was simply a clarification provision. The CCE submits that the Commissioner identified the correct question, that being whether "the book was planned to

be made available to the public regardless of whether there was to be an election." Further, that in paragraph 24, in finding that Paragraph 2(1)(b) did not apply in this case, the Commissioner was not asking a new or different question.

[63] When appearing before me, the CCE submitted that, in paragraph 24, the Commissioner was making a finding of fact based on the evidence. Specifically, he found that Rebel News had planned the launch of the book to coincide with the election. The CCE submits that Paragraph 2(1)(b) requires that the Commissioner consider the promotion of the book in terms of timing (the planning and timing of when the book was to be released) and intention (whether it would be released regardless of whether there was to be an election). Thus, the Commissioner's finding that Rebel News had planned the launch of the book to coincide with the election was not answering a different question.

i. Applicable general principles

[64] The Supreme Court in *Vavilov* held that a reasonable decision is justified in light of the legal and factual constraints that bear on the decision. This surrounding context includes the governing statutory scheme, relevant common law, the principles of statutory interpretation, the evidence before the decision-maker and the submissions of the parties (*Vavilov* at paras 105-107). Because administrative decision-makers receive their powers by statute, the governing statutory scheme will usually be the most salient aspect of the legal context relevant to a particular decision. The exercise of discretion must be in accordance with the purpose for which it was given, and administrative decisions must also comport with any specific restraints imposed by the governing legislative scheme, such as statutory definitions (*Vavilov* at para 108).

[65] With respect to the principles of statutory interpretation, these are to be assessed on the reasonableness standard, and the reviewing court is to examine the administrative decision as a whole, including the reasons provided by the decision-maker and the outcome (*Vavilov* at paras 115-116). The reviewing court is to apply the "modern principle" of statutory interpretation, meaning the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Vavilov,* para 117, citing *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 at para 21, and *Bell ExpressVu Limited Partnership v Rex,* 2002 SCC 42 at para 26, both quoting E Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). This approach is required because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context. An approach to the reasonableness review must assume that those who interpret the law will do so in a manner that is consistent with this principle (*Vavilov* at para 118). Administrative decision-makers do not always have to engage in a formalistic statutory interpretation exercise, and their specialized expertise may lead them to rely on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise (*Vavilov* at para 119). Nevertheless, the interpretation must be consistent with the text, context and purpose of the provision. Where the meaning is disputed, the decision-maker must demonstrate in its reasons that it was alive to these essential elements (*Vavilov* at para 120). There may also be cases in which the administrative decision-maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision-maker from the record and determine whether the interpretation is reasonable (*Vavilov* at para 123).

ii. Purpose of the third party electoral advertising regime

[66] For context, it is perhaps helpful to briefly address the Supreme Court of Canada's decision in *Harper* at this juncture to the extent that it speaks to the purpose of limits on election spending, including third party spending. In *Harper,* the Court referred to its prior decision in *Libman v Quebec (Attorney General*), [1997] 3 SCR 569 [*Libman*], where it was asked to determine the constitutionality of the independent spending limits set out in the *Referendum Act*, RSQ c C-64.1. In *Libman*, the Supreme Court agreed that the limits on independent spending set out in the *Referendum Act* were not justified. However, it endorsed spending limits as an essential means of promoting fairness in referenda and elections (*Harper* at para 61). The Court in *Harper* noted that in *Libman*, and relying on the Lortie Report (*Reforming Electoral Democracy: Report of the Royal Commission on Electoral Reform and Party Financing* (Ottawa: Government of Canada, 1991) (Pierre Lortie)), it had endorsed several principles applicable to the regulation of election spending generally, and of independent or third party spending specifically, which the Court set out. It then held:

> 62 The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation; see C. Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999), 44 McGill L.J. 5. Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways; see O. M. Fiss, *The Irony of Free Speech* (1996), at p. 4. First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and

> political parties and by providing broadcast time to political parties. **Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another.** In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.
>
> 63 The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. The regime is clearly structured on the egalitarian model of elections. **The overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*.**
>
> (emphasis added)

[67] The Supreme Court in *Harper* ultimately found that, while the challenged provisions of the *Act*, including ss 352 and 353, infringed s 2(b) of the *Charter*, this was a reasonable limit under s 1 of the *Charter*.

iii. Analysis

[68] As indicated above, in its submissions to this Court, Rebel News does not assert that the Commissioner erred in his interpretation of Paragraph 2(1)(b). Rather, it asserts that, although the Commissioner identified the correct inquiry under Paragraph 2(1)(b), that inquiry being

whether the book would have been published whether or not the election was called, the Commissioner assessed a different question, that question being whether Rebel News planned the launch of the book to coincide with the election. According to Rebel News, this gives rise to the question of whether the Commissioner applied the wrong legal test or analysis.

[69] The CCE, in its written submissions, asserts that the Commissioner reasonably interpreted Paragraph 2(1)(b) in light of the text, context and purpose of that provision and made a finding based on the facts and evidence before him. Further, that the Commissioner's interpretation and reasoning was transparent, justified and intelligible. The Commissioner interpreted Paragraph 2(1)(b) to preclude reliance on that provision where a third party deliberately planned the launch of a book to coincide with the election. According to the CCE, this interpretation "has clear, internal logic, since a specific plan to publish and market a book during an election period cannot be said to be a plan to make the book available 'regardless of whether there was to be an election.'"

[70] In his decision, the Commissioner does not provide an explicit statutory interpretation analysis of Paragraph 2(1)(b). However, the Commissioner concluded that Paragraph 2(1)(b) did not apply where the evidence established that a third party deliberately planned the launch of the book to coincide with the election.

[71] In reaching that conclusion, the Commissioner identified four required elements of the definition of "election advertising" and rejected Rebel News' position that the lawn signs were not election advertising because they were not intended to oppose the Liberal Party of Canada,

its leader or its candidates, but were instead designed to promote the sale of the book. Based on the evidence before the Commissioner and the reasons summarized in the Compliance Unit Recommendation Report, the Commissioner disagreed with Rebel News' position.

[72] With respect to Paragraph 2(1)(b) itself, the Commissioner states:

> 23. Rebel News relies on what it calls the "Book/Promotion Exemption" [14] found in the definition of election advertising at subsection 2(1) of the Act. The relevant portion of the provision at paragraph 2(b) under "election advertising" clarifies that for greater certainty, election advertising does not include "the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election." [Emphasis added.] It is clear from the underlined passage that the so-called "book exemption" applies only in relation to a book that would have been published whether or not the election was called.
>
> 24. I am of the view that the clarification at paragraph 2(1)(b) of the Act does not apply in this case because Rebel News had planned the launch of the book to coincide with the election.

[73] Footnote 14 refers to Elections Canada's *Interpretation Note,* and a hyperlink to that document on Elections Canada's website is provided at Footnote 12. In Footnote 14, the Commissioner indicates that, in the *Interpretation Note,* Elections Canada notes that the communications described at paragraphs (a) to (e) of s 2(1) of the *Act*, in relation to the definition of "election advertising," are not exceptions. Rather, they are clarifications of the types of communications or activities that do not constitute election advertising under the *Act*.

[74] The *Interpretation Note* addresses the meaning of “election advertising”:

> **Analysis and Proposed Interpretation**
>
> **Meaning of "Partisan Advertising" and "Election Advertising"**
>
> The CEA recognizes that some electoral communications are expressions of views, opinions or information that do not qualify as advertising. Section 2 essentially defines partisan and election advertising as advertising messages that promote or oppose, directly or indirectly, an applicable political entity. It goes on to provide a list of examples of what **is not** advertising. Two elements are noteworthy.
>
> First, the list of communications that are specifically **not** advertising are presented as illustrations of what each definition already "does not include", rather than as exceptions to what would otherwise be caught by the definition. They are therefore useful to shed light on what is meant (or not meant) by the definition. This also means that the list is non-exhaustive; something that does not fit squarely in one of the paragraphs may still escape the definition. For example, while one paragraph refers to a book, a documentary film may equally escape the definition. Similarly, while another paragraph refers to the transmission of personal views by an individual on the Internet, opinions published by a group on the Internet may also escape the definition.
>
> Second, while the definition of what **is** advertising uses the message's content as a key qualifier, the illustrations of what **is not** advertising are mostly content-neutral. The only exception is a paragraph about making telephone calls only to encourage electors to vote, which was added by Bill C-23 (S.C. 2014, c. 12). This point is critical as it reinforces the fact that content alone cannot determine advertising. Partisan or election advertising must, first, be advertising and must, second, promote or oppose an applicable political entity. The fact that a message promotes or opposes the political entity is insufficient, as this could be true of an editorial, a debate or a book, etc., which are definitively not advertising.
>
> Looking more closely at the definitions, partisan and election advertising include four essential elements:
>
> 1. They must be advertising.
>
> 2. They must promote or oppose an applicable political entity. During an election period, this includes promoting

> or opposing by taking a position on an issue with which the political entity is associated.
>
> 3. They must be transmitted to the public.
>
> 4. They must be transmitted during the pre-election period (partisan advertising) or election period (election advertising).
>
> Two of the elements cannot help to explain the larger meaning of advertising. Determining whether a particular message promotes or opposes an applicable political entity, including by taking a position in an election period on an issue with which they are associated, is largely a fact-based exercise that must be done case by case. Meanwhile, "pre-election period" and "election period" are clearly defined in section 2 of the CEA, and their meaning is not subject to debate. Therefore, the following analysis focuses on the first and third elements to ascertain two things: what does it mean to transmit a message to "the public", and what exactly is advertising?

[75] While interpretation guides, like informal guidelines, are not binding on administrative decision-makers, they are useful in indicating what constitutes a reasonable interpretation of a given legislative provision. Administrative decision-makers can consider such documents in the exercise of their discretion but must also turn their minds to the specific circumstances of the matter before them and not fetter their discretion by treating such guidelines as if they were mandatory requirements (see: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32).

[76] Here the s 2(1) definition sets out the four elements that make up what is election advertising – which the Commissioner considered in his decision. It then sets out, “for greater certainty,” what is not included in the election advertising definition.

[77] I agree with the CCE that paragraphs (a) to (e) of s 2(1) are not exceptions to the definition of election advertising, but are examples to clarify what that definition does *not* capture. In that regard, I note that where the *Act* intends to create an exception, the *Act* identifies the provision as an exception by stating that the provision does not apply, or by identifying the specified exception (e.g. ss 43.1(2), 45(3), 48(3), 57(4)). The *Act* also includes provisions identified as clarifications. For example, s 71.1(4), under the heading "clarification," states, "For greater certainty," as does s 164(2). Similarly, s 91(2) states, "Subsection (1) applies regardless of…." I recognize these examples are operative provisions rather than definitions. Nevertheless, the wording of the s 2(1) definition of election advertising, which states, "For greater certainty, it does not include" paragraphs (a) to (e), more closely resembles other clarifications found in the *Act* than it does exceptions.

[78] Read together, and in the context of the chapeau definition, paragraphs (a) to (e) provide examples of the types of things that do not fall within the definition. Most of these include qualifications of one sort or another: paragraph (b) – distribution or promotion of a book *if* the book was planned to be made available to the public *regardless* of whether there was to be an election; paragraph (c) – transmission of a document *directly by a person or group to their members*…; paragraph (d) – transmission *by an individual on a non-commercial basis* on the Internet; and paragraph (e) – making telephone calls to electors *only* to encourage them to vote.

[79] Thus, a partisan book is not election advertising. Further, the distribution of such a book, or its promotion for sale, will not fall within the definition of election advertising if the book

"was planned to be made available to the public regardless of whether there was to be an election." Whether this "planning" qualification applies is a fact-based determination.

[80] Accordingly, I agree with the CCE that, in order to determine if the lawn signs were "election advertising," the Commissioner necessarily engaged in a factual inquiry as to what was planned for the promotion of the book and whether this plan was regardless of whether there was an election or not – in other words, whether the intended timing of the planned promotion was directly tied to the election. Given this, I do not agree with Rebel News that the Commissioner applied the wrong test or improper analysis. The Compliance Unit Recommendation Report found that Paragraph 2(1)(b) did not apply because, for it to do so, the book must have been "planned to be made available to the public regardless of whether there was to be an election," but "[h]ere it seems clear that the entire project was planned and executed in order to coincide with the 43rd general election, as indicated by Mr. Levant during his interview." The Commissioner agreed with the reasoning of that report and, based on the evidence, did not agree with Rebel News that the lawn signs were not intended to oppose the Liberal Party of Canada, its leader or its candidates, but were instead designed to promote the sale of the book. The Commissioner found that Rebel News had planned (intent) the launch of the book to coincide with the election (timing) and set out the evidence that supported that finding.

[81] The Commissioner's reasons demonstrate that his focus was on what Rebel News planned as to the timing of the book release and promotion and what it intended to accomplish in that regard:

> 25 The evidence gathered by investigators from information readily accessible over the Internet clearly establishes, on the

balance of probabilities, that Rebel News planned to launch the book and to distribute the lawn signs precisely around the time of the issuance of the writ for the election and during the ensuing election period.

- Rebel News launched the book on or around September 9, 2019, and started the book around the same time, continuing it during the election period. In particular, on September 9, 2019, Rebel News published on its website an article entitled: "how Rebel News will cover the Canadian election PLUS New book: The Libranos!" [Emphasis added.]. Ezra Levant states the following in the article: "… And so I am pleased to announce to you my friends, my new book, called: The Libranos…"

- In a tweet published on Rebel News Twitter account on September 9, 2020, under the heading "NEW BOOK ANNOUNCEMENT"; the following is stated @EzraLevant explains how Rebel News will cover the Canadian election and introduces The Libranos,…" [Emphasis added.];

- In "Our Plan for the Canadian election!" posted on Rebel News' website the following was found under "My new book, "The Libranos"": "I want to vet our prime minister and his all team. So I am pleased to announce another part of our campaign plan: my new book called **The Libranos: What the media won't tell you about Justin Trudeau's corruption.**", and under "Lawn signs": "…And I want to spread the word about the book through gorgeous lawn signs, just like we did for Sheila Gunn Reid's book on the Alberta election, called Stop Notley.";

- Various tweets found on Rebel News' Twitter account bear the hashtag "#elxn43". For example, a tweet published on Rebel News' Twitter account on September 18, 2019, stated "Sam and Sarah are now in #Windsor, giving out FREE thelibranos.com lawn signs! Perfect for #elxn43";

- Some of the tweets stated that the lawn signs were given just in time for the election [Emphasis added.];

- A tweet published on Rebels News' Twitter account on October 3, 2019 stated "Why not get your

Thelibranos.com lawn sign, just in time for #elxn43🗳.” [Emphasis added.];

- On October 20, 2019, Ezra Levant retweeted on Rebel News Twitter account expressing satisfaction for having seen the Rebel News lawn signs at a protest against Mr.Trudeau in Calgary: “Great to see some of our TheLibranos.com lawn signs at the Trudeau proetest (sic) last night on Calgary!” In the picture accompanying the tweet, one can see people holding the Rebel News’ lawn signs while others were holding a candidate signs;

- A video found on Rebel News’ website features an individual (identifying himself as David TheMenzoid Menzies) driving a vehicle which he says was carrying the lawn signs to Rebel News’ audience in Eastview (Red Deer, Alberta) and that Rebel supporters could come out and pick up their lawn “The Libranos” signs and put a word out their that October, 2021 (which was polling day) was a date for a regime change;

- A tweet found on Rebel News’ Twitter account states that “.@TheMenzoid and other members of the Rebel News team are crossing Canada, giving out FREE TheLibranos.com lawn signs, just in time for the #elxn43🗳;

- A script preceding a video found on Rebel News’ website states that the lawn signs were inspired by Ezra Levant’s book. It is worth noting that it was not stated that the signs were intended to promote the book;

- During an interview with investigators, Ezra Levant admitted that he planned the launch of the book to coincide with the election:

> **MR. EZRA LEVANT:** Not word for word, but I know the sentiment, which is I’m writing a book about the prime minister and why he shouldn’t be elected. Of course, I want to publish that during the election. Same reason why Aaron Wherry, John Ivison and others wrote their love letters to Justin Trudeau. You’d have to be stupid to publish it a month after the election; I wanted it in the election. And I hope I’m

> saying words right now that cause you to prosecute because we're going to break this law, fellas. We're going to break this law. If you think that that is against the law, one of us is deeply, deeply wrong and it ain't me.
>
> …
>
> Let's test this law or actually, let's test your interpretation of it because the law's pretty damn clear to me. If you think that timing an election book for an election is against the law, let's break the law, buddy. If you think that a court's going to uphold your bizarre interpretation of it, I want to be the test case.
>
> So we can conclude things right now, and you can tell mom, "we've got him; he's confessed" cause I want you to prosecute me over the timing of my book not because I want to be prosecuted, but because you guys need a serious attitude adjustment and a refresher of the Charter of Rights.

[82] In my view, in these circumstances, reviewing the evidence to determine when the launch of the book had been planned and whether it was intended to coincide with the election necessarily arises from a determination of the applicability of the Paragraph 2(1)(b) qualification of "if the book was planned to be made available to the public regardless of whether there was to be an election." Thus, the Commissioner did not err by applying the wrong test or conducting the wrong analysis. The Commissioner reasonably implicitly interpreted Paragraph 2(1)(b) to be a clarification of what was not encompassed by the s 2(1) definition of "election advertising" and, based on the facts and evidence before him, reached a reasonable factual determination that Paragraph 2(1)(b) did not apply to the subject lawn signs.

[83] It is also significant to note that Rebel News does not challenge or take issue with any of the evidence relied upon by the Commissioner in reaching this determination.

[84] Before leaving this point, I note that in its Request for Review, Rebel News took the position that the book and its promotion fell within Paragraph 2(1)(b) and aligned with the "clear intention" of that provision, the "clear intention" being:

> to remove from scrutiny a critical sphere of democratic discourse – public debate/literature during an election period. In disregarding this legislative objective, the CCE has failed to consider the wisdom of the legislature in safeguards against this sort of troubling process.

[85] Rebel News offered no legal analysis of how it arrived at its understanding of the intention of the legislature with respect to Paragraph 2(1)(b) and made the same submission in its allegation that the process followed by the CCE was unconstitutional.

[86] The Commissioner did not engage with this submission, which arguably indirectly raised the interpretation of Paragraph 2(1)(b) from the perspective of its purpose. However, on judicial review, Rebel News does not challenge the Commissioner's interpretation of Paragraph 2(1)(b), and, when appearing before me, counsel confirmed that Rebel News was not taking issue with the Commissioner's interpretation. As Rebel News does not assert that the Commissioner's interpretation was unreasonable or provide its own statutory interpretation of Paragraph 2(1)(b), it is not necessary for this Court to further address this issue.

[87] And, as I have found above, the Commissioner did not apply the wrong test or err in his interpretation and application of that provision. The Commissioner engaged with and rejected

Rebel News' submission that Paragraph 2(1)(b) was an "exception" to the definition of election advertising and that the book fell within that exception. The Commissioner agreed that Paragraph 2(1)(b) applies only in relation to a book that would have been published whether or not an election was called, and, based on the evidence before him, the Commissioner found that this was not such a circumstance, as Rebel News planned the launch of the book to coincide with the election.

[88] Given this, and in the absence of any submission beyond Rebel News' bare and unsupported assertion that the legislative objective pertaining to Paragraph 2(1)(b) was to "protect public debate and literature during an election period," the Commissioner's reasons and the record are sufficient to permit the Court to understand his interpretation and application of Paragraph 2(1)(b), which was reasonable.

b. Did the Commissioner ignore evidence or submissions?

Evidence

[89] Rebel News submits that it made submissions to support the fact that it would have published the book regardless of the election but that the Commissioner did not mention the evidence and does not appear to have considered or grappled with it.

[90] The record demonstrates that in its Request for Review, Rebel News asserted that the words "if the book was planned to be made available to the public regardless of whether there was to be an election" are the heart of the provision and that the question appears to be, "was

there an intention to release the subject book whether there would be an election or not?" According to Rebel News, this necessarily required an examination of the original development of the subject book and the promotion/sales strategy, not just the publisher/author's intention/strategy at the time of release. Had the CCE directed itself to the appropriate question, then it might have conducted basic research and considered easily accessible, publicly available information demonstrating that the book was planned well before a fixed election date, and that it would be released whether there would be an election or not.

[91] According to Rebel News, this accessible and public information included three specified items:

1. The original book concept was derived from a *Western Standard* cover published in 2005, based on a television show from the 2000s;

2. Rebel News registered the URL (thelibranos.com) in February 2016 – over three (3) years before the fixed 2019 election date; and

3. Rebel News/Mr. Levant are leading critics of the Prime Minister, his associates and the Liberal Party, and they have released other bestselling books critical of same during non-election periods (*Trumping Trudeau* (2017), *China Virus* (2020)).

[92] Rebel News submits that the Commissioner failed to address this evidence.

[93] I note that the Commissioner listed, in detail, information that was obtained from various online sources that supported his assessment that the lawn signs were “election advertising.” However, as Rebel News submits, the decision does not make reference to the above three items.

[94] It is true that the reasonableness of a decision may be jeopardized where the decision-maker has failed to account for the evidence before it (*Vavilov* at paras 126, 305). In his reasons, the Commissioner (at paragraphs 15 and 17) did state that he had reviewed Rebel News’ submissions. Thus, the question is whether the three items identified by Rebel News were of such significance that the Commissioner’s decision was rendered unreasonable because he failed to specifically address them. As stated in *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160 [*Khir*], “[n]ot every unmentioned fact, or any mistake or misunderstanding of the evidence will warrant intervention by a reviewing court. Peripheral or inconsequential evidence will not normally constrain a decision maker, whereas central or critical evidence *may* constitute a constraint that urges an outcome or that *may* have to be addressed in the decision maker’s reasons” (at para 42; see also paras 40-50). Further, based on *Cepeda-Gutierrez v Canada (Citizenship and Immigration)*, [1998] 1 FC 53, this Court has held that “a failure to consider evidence may lead to the decision being set aside only where the non-mentioned evidence is critical, the evidence contradicts the tribunal’s decision and the reviewing court determines by inference that its omission means the tribunal did not have regard to the material before it” (*Khir* at para 48).

[95] I note that Rebel News' three evidentiary submissions were made in the Request for Review, but no documentation was provided to support them, nor was any elaboration of their significance provided.

[96] In that regard, it is not apparent to me how evidence that the book concept was derived from a cover published in 2005, based on television show from the 2000s, could establish that the book was planned well ahead of the fixed date election. The book is concerned with Mr. Levant's views about Prime Minster Trudeau and others in the Liberal Party of Canada. Prime Minister Trudeau did not run for office and was not elected until 2015. It is unclear to me how the book could have been planned ten years in advance of the Prime Minster coming into power. Nor does this evidence establish that the book would be released whether or not there was an election. How this evidence supported the Applicant's position was not explained in the Request for Review.

[97] As to the URL, a printout of what is presumably the link provided with the Request for Review is attached as an exhibit to the Levant Affidavit. This does indicate that thelibranos.com was created in February 2016 (and updated in 2021), the registrar being GoDaddy.com LLC. However, Rebel News points to nothing on this printout or the website that addresses when the book was written or if it would be released whether or not there was an election.

[98] Moreover, the fact that Rebel News released other books critical of the Prime Minister and others during non-election periods does not establish that the subject book was planned before the election or that it would be released whether or not there was an election. When

appearing before me, counsel for Rebel News suggested that the book was part of a series of three books. However, as counsel for the CCE pointed out, there is no evidence in the record to support this suggestion. Nor did Rebel News make this submission to the Commissioner in its Request for Review or support it with any information suggesting that there was a pre-existing timeline for the release and promotion of the book as part of a series of books.

[99] Further, and in any event, the Commissioner's interpretation of Paragraph 2(1)(b) led to his finding that it had no application because Rebel News intended to launch the book to coincide with the election (and therefore the book was not "planned to be made available to the public regardless of whether there was to be an election"), with the result that the lawn signs fell within the definition of "election advertising." In this context, evidence of what Rebel News may have previously intended became irrelevant and of little probative value.

[100] In sum, while it would have been preferable had the Commissioner specifically referenced these three submissions, given the limited information that they provide and their lack of probative value, the failure to do so is not a fatal error. The Commissioner's decision does engage with Rebel News' central issue – being that the lawn signs are not election advertising, as they fall within the Paragraph 2(1)(b) definition.

[101] It should also be noted that in the Notice sent to Rebel News, to the attention of Mr. Levant, the CCE advised that it was alleged that Rebel News engaged in election advertising in its production and distribution of the lawn signs during the election period. Mr. Levant was afforded the opportunity to attend an interview with investigators or to provide investigators with

any documentation in response to that concern. At the interview, Mr. Levant was advised repeatedly that the book and its content were not the subject of the investigation. Rather, the investigators advised that they were trying to determine whether the lawn signs were a promotion of the book or political advertising, and they sought Mr. Levant's input on this issue.

[102] When asked if there was a communication plan or a marketing plan for advertising the book, Mr. Levant replied that there was a huge marketing plan that included "every imaginable thing." When asked for an example of this, his response was "everything you don't like. We don't like Justin Trudeau. We don't like overweening bureaucrats who censor us. It's all the stuff you hate." When asked again what his marketing plan was, Mr. Levant responded, "I just told you: Irritate the Liberals. Irritate nosey bureaucrats, get under their skin." Later he stated that he was writing a book about the Prime Minister and why he should not be elected. He then said, "of course, I want to publish that during the election…You'd have to be stupid to publish it a month after the election; I wanted it in the election."

[103] In short, Mr. Levant offered no indication during the interview as to the planning of the book or its promotional plan – other than planning to publish it during the election. It is also of note that the Compliance or Enforcement Recommendation Report indicates that the CCE wrote to Rebel News' legal counsel on February 10, 2020, providing the opportunity to Rebel News to share copies of any documents that it believed were relevant to the investigation, including documents relating to the cost of the production and distribution of the lawn signs. This letter and the subsequent communications described below are in the Certified Tribunal Record. Among other things, the letter explained that the purpose of the administrative investigation was

to determine whether or not the use of lawn signs to promote the book during the 2019 election period fell within the definition of "election advertising" under the *Act*. As no response was received, the CCE followed up with an email. On March 2, 2020, Rebel News' legal counsel responded indicating that they understood that Rebel News would shortly be submitting documents to the CCE. On March 3, 2020, Mr. Levant responded indicating that he was attaching a copy of Rebel News' planning document for the *The Libranos* book. The following drawing was attached:

[104] Although Mr. Levant stated his desire to send T-shirts with this depiction to CCE members, no other documents or records were provided.

[105] Thus, the record establishes that Rebel News was afforded opportunities to provide documentation to demonstrate that the lawn signs were intended as promotion for the book and that the book was planned to be made available to the public regardless of whether there was an election. In other words, Rebel News was given opportunities to provide evidence demonstrating

that the timing of the book release and promotion only coincidentally overlapped with the election period. I agree with the CCE that the writing, publication and promotion of a book can reasonably be expected to be surrounded by objective evidence as to the publication and promotion plan. Rebel News failed to provide any such evidence. Therefore, the Commissioner reasonably relied on information gathered by the investigators in reaching his conclusion that the lawn signs were election advertising.

[106] I appreciate that the Levant Affidavit, filed in support of this application for judicial review, states that Rebel News, as part of the promotion of the sale of the book, developed and implemented "a guerilla marketing campaign styled with elements traditionally associated with political campaigns. One such element was the creation and distribution of election-style lawn signs promoting the Book and encouraging passers-by to 'Buy the Book.'" However, that information was not before the Commissioner when the decision was made.

[107] In sum, in these circumstances, the failure by the Commissioner to specifically refer to the three pieces of evidence submitted by Rebel News did not render the decision unreasonable.

Bias

[108] Rebel News also submits that the Commissioner erred in failing to engage with its submission alleging bias.

[109] In its Request for Review, Rebel News asserted that the CCE had been selective and unfair in targeting it. Rebel News submitted that there were over 24 election-related books that

were published in late summer and early fall of 2019, but that only the subject book was selected for scrutiny, investigation and penalty by the CCE, referencing the transcript of the interview of Mr. Levant. And, while the CCE claimed this selectivity was the result of public complaints, Rebel News took the position that it was open to the CCE to investigate matters on its own initiative. In the Request for Review, Rebel News identified two "Trudeau-friendly" books said to have been published in the same period as the subject book and submitted that these books and their extensive promotion avoided scrutiny by the CCE.

[110] On judicial review, Rebel News asserts that this issue was not meaningfully addressed by the Commissioner. I disagree.

[111] First, there is no merit to the suggestion that the Commissioner ignored or overlooked this submission. The decision directly engaged with the assertion:

> 18. In its submissions, Rebel News argued that it has been treated unfairly and in a selective manner in this matter, because two other books identified by Rebel News as allegedly promoting the Prime Minister, and that were published during the election period, were not investigated by my Office. This argument cannot be given effect to.
>
> 19. As Commissioner, under section 510 of the Act, I cannot be prevented from investigating a case for the reason that there are other cases that could or should also be investigated. Relevant case-law supports this position[11].
>
> 20. Rebel News has not submitted any evidence showing that the Deputy Commissioner's decision to issue the NOVs in question was based on any improper considerations or bias. To the contrary, and as mentioned before, the investigation was initiated following the receipt of seven complaints that have been disclosed to Rebel News.

[112] Section 510 of the *Act* states that the Commissioner, on his or her own initiative or in response to a complaint, may conduct an investigation. The Commissioner's Footnote 11 referenced in paragraph 19 above is to *Ochapowace*, which, in the criminal law context, held that the jurisprudence "put[s] to rest any notion that prosecutorial discretion should be subjected to judicial review like any other administrative decisions" (at para 44), although such discretion is not absolute. The courts will intervene in cases of flagrant impropriety or malicious prosecution, but the threshold to demonstrate that kind of improper behaviour will be very high (para 47). Courts should be extremely reluctant to review an exercise of police or prosecutorial discretion and should only do so in the clearest of cases, where flagrant impropriety can be demonstrated (at para 54). It is not clear to me how this supports the Commissioner's statement that he cannot be prevented from investigating a case for the reason that there are other cases that could or should also be investigated. However, it does speak to his discretion to decide whether to prosecute.

[113] In that regard, s 510 states that the Commissioner "may conduct an investigation." The *Act* does not specify any factors to be considered in determining whether or not to do so. Thus, the Commissioner has broad discretion to decide what matters warrant investigation under s 510 (see, by way of analogy, *Endicott v Office of the Independent Police Review Director*, 2013 ONSC 2046 at para 43; *Dolan v Ontario (Civilian Commission on Police Services)*, 2011 ONSC 1376 at para 42). Here, Rebel News is not challenging the reasonableness of the Commissioner's decision not to prosecute other publishers or authors; it is instead alleging bias.

[114] The test for a reasonable apprehension of bias is well established. It asks, "what would an informed person, viewing the matter realistically and practically – and having thought the matter

through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (*Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369, adopted by much subsequent jurisprudence). There is a presumption of impartiality, and the threshold for rebutting that presumption and making a finding of real or perceived bias is high. The onus of demonstrating bias lies with the person who is alleging its existence and requires cogent evidence (see, for example, *R v S(RD)*, [1997] 3 SCR 484 at paras 113-114, 117; *Cojocaru v British Columbia Women's Hospital and Health Centre,* 2013 SCC 30 at para 22).

[115] Here, Rebel News appears to submit that it was the subject of actual bias (selective targeting). However, whether the allegation is based on a reasonable apprehension of bias or actual bias, the Commissioner correctly found that Rebel News pointed to no evidence establishing that it was unfairly "targeted." Nor does it do so in support of this application for judicial review.

[116] Rather, the record includes the seven complaints about Rebel News' lawn signs that led to the investigation. Rebel News does not suggest that complaints about the promotion of other election-related books were received and ignored by the Commissioner. I would also note that when Mr. Levant asserted during his interview that "not a single other loving book of Trudeau is being investigated," he was informed that he could bring a complaint if he believed there was a basis for one. His response was:

> **MR. EZRA LEVANT:** No, because I'm not a censor like you. I'm not a bully and a censor. I'm not a bureaucrat looking to justify my budget like you. I go out and earn my living every day fella.

> You call in authors to grill them about a book criticizing your boss. Think about who you are.

[117] There is no evidence that Rebel News, or others, brought a complaint that the distribution or promotion of any other books fell within the definition of "election advertising." I would also again point out that the CCE's concern was not with the content of Mr. Levant's book, but with its release and promotion by way of the lawn signs during the election period.

[118] In short, the Commissioner engaged with Rebel News' submission and explained why he was not persuaded that Rebel News was "targeted." While Rebel News may not agree with the Commissioner, that does not render the finding unreasonable.

c. Did the Commissioner appropriately consider Charter values?

[119] Rebel News acknowledges that the Commissioner considered the objectives of ss 352 and 353(1) of the *Act,* balancing them against Rebel News' freedom of expression and finding that Rebel News' rights were minimally impaired. However, Rebel News submits that the analysis failed to consider the fundamental values reflected in the statutory definition of "election advertising," which forms an essential element of ss 352-353.

[120] Conversely, the CCE submits that these principles and values are directly tied to ss 352 and 353 of the *Act*. The Commissioner therefore implicitly considered the definition in balancing the *Charter* values at stake with the statutory objectives of ss 352 and 353 of the *Act.* Further, the CCE submits that Rebel News fails to articulate what additional "principles and fundamental values" are at play.

[121] I note that the Request for Review, under the heading "Unconstitutional Process: Stifling/Chilling Free Expression and Disregarding Legislative Intent," states Rebel News' view that the CCE process, findings and Notices are unconstitutional and in violation of basic rights to free expression and freedom of the press. Rebel News expresses its view that the process served to muzzle public discourse, chilling free press/expression in a manner that undermines democracy. Further, Rebel News again states that the "clear legislative intent" of Paragraph 2(1)(b) is to "remove from scrutiny a critical sphere of democratic discourse – political literature coinciding with an election period. In disregarding this legislative objective, the CCE has failed to consider the wisdom of the legislature in placing safeguards against this sort of troubling process."

[122] Thus, Rebel News raised issues of freedom of expression and freedom of the press in the context of Paragraph 2(1)(b). The Commissioner recognized this when he stated that Rebel News was not challenging the constitutionality of ss 352 and 353(1), but rather the Deputy Minister's decisions, which Rebel News alleged were unconstitutional because they violated its freedom of expression and freedom of the press, contrary to s 2(b) of the *Charter*. The Commissioner also accurately noted that Rebel News had not made any arguments or produced evidence to support that allegation.

[123] In *Doré*, the Supreme Court held that, when an administrative decision-maker is applying *Charter* values in the exercise of statutory discretion, they are to balance the *Charter* values through a two-step approach. First, they are to consider the statutory objectives. Second, they are to ask how the *Charter* value at issue will best be protected in view of the statutory objectives

(*Doré* at paras 55-56). At its core, this is a proportionality exercise: "On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play" (*Doré* at para 57). If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable (*Doré* at para 58; see also para 6).

[124] *Doré* requires that *Charter* protections be affected as little as reasonably possible in light of the state's particular objectives. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test (*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 40 [*Loyola*], citing *Doré* at para 5; *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7 at paras 69-70 [*Oakes*]). A proportionate balancing is one that gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate (*Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 111, citing *Loyola* at para 39).

[125] As restated by the Supreme Court in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*TWU*] (predating *Vavilov*):

> [79] In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a *robust* proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach" (*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para.

> 32). *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision "falls within a range of possible, acceptable outcomes", it will be reasonable (*Doré*, at para. 56). As this Court noted in *Doré*, "there is …conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives" (para 57).

[126] In this matter, the Commissioner correctly identified the requirements of *Doré /Loyola.*

[127] The Commissioner also correctly noted that, in *Harper*, the Supreme Court determined that the objectives pursued by ss 352 and 353 of the *Act* are pressing and substantial, and the requirements of those provisions advance two compelling and substantial objectives: 1) to promote the implementation and enforcement of the third-party financing regime, and 2) to ensure transparency by allowing voters access to relevant information concerning third parties engaged in regulated activities, i.e., election advertising in this case. While recognizing that the requirements of ss 352 and 353 of the *Act* restrict third parties' freedom of expression, the Court concluded that the restrictions are minimal, reasonable and demonstrably justified under s 1 of the *Charter*.

[128] Indeed, in *Harper*, the Supreme Court considered, among other provisions of the third party spending provisions of the *Act*, ss 350 to 357, 359, 360 and 362, the attribution, registration and disclosure provisions of the *Act*. There, the respondent challenged the various sections of the attribution, registration and disclosure provisions under ss 2(b), 2(d) and 3 of the *Charter*.

[129] The Supreme Court held that the attribution, registration and disclosure provisions are interdependent. Thus, their constitutionality was determined together. The Supreme Court held that the attribution, registration and disclosure provisions infringe s 2(b) of the *Charter*, as they have the effect of limiting free expression (*Harper* at para 138). However, the infringement was justified under s 1 of the *Charter*. I have set out the Court's reasoning in full below, as it provides context:

> The Section 1 Justification Applicable to the Infringement of Freedom of Expression
>
> 142 The attribution, registration and disclosure provisions advance two objectives: first, the proper implementation and enforcement of the third party election advertising limits; second, to provide voters with relevant election information. As discussed, the former is a pressing and substantial objective. To adopt election advertising limits and not provide for a mechanism of implementation and enforcement would be nonsensical. Failure to do so would jeopardize public confidence in the electoral system. The latter objective enhances a *Charter* value, informed voting, and is also a pressing and substantial objective.
>
> 143 The registration and disclosure requirements are rationally connected to the enforcement of the election advertising regime. The registration requirement notifies the Chief Electoral Officer of which individuals and groups qualify as third parties subject to the advertising expense limits. The reporting requirement allows the Chief Electoral Officer to determine the extent to which third parties have advertised during an election. These measures enable the Chief Electoral Officer to scrutinize spending more easily. Certain provisions facilitate the supervision of third parties. The appointment of a financial agent or auditor as the designated person accountable for the administration of contributions to the

third party advertising expenditures facilitates the reporting process and provides the Chief Electoral Officer with a contact who is responsible for all advertising expenses incurred by the third party. The Chief Electoral Officer is also empowered to request any original bill or receipt of an advertising expense greater than $50.

144 The disclosure requirements add transparency to the electoral process and are, therefore, rationally connected to providing information to voters. Third parties must disclose the names and addresses of contributors as well as the amount contributed by each. The Chief Electoral Officer, in turn, must disclose this information to the public. In conjunction with the attribution requirements, this information enables voters to identify who is responsible for certain advertisements. This is especially important where it is not readily apparent who stands behind a particular third party. Thus, voters can easily find out who contributes and who spends.

145 The attribution, registration and disclosure provisions are minimally impairing. The disclosure and reporting requirements vary depending on the amount spent on election advertising. The personal information required of contributors, name and address, is minimal. Where a corporation is a contributor, the name of the chief executive officer or president is required. The financial information that must be disclosed, contributions and advertising expenses incurred, pertains only to election advertising. The appointment of a financial agent or auditor is not overly onerous. Rather, it arguably facilitates the reporting requirements.

146 The salutary effects of the impugned measures outweigh the deleterious effects. The attribution, registration and disclosure requirements facilitate the implementation and enforcement of the third party election advertising scheme. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal. The burden is certainly not as onerous as the respondent alleges. There is no evidence that a contributor has been discouraged from contributing to a third party or that a third party has been discouraged from engaging in electoral advertising because of the reporting requirements.

[130] As a starting point, it must be kept in mind that the issue here is whether the Commissioner's decision to uphold the issuance of the NOVs under ss 352 and 353(1) was reasonable. Thus, the question I must address is whether the Commissioner, in making that decision, properly balanced the *Charter* considerations in play.

[131] Accordingly, I do not agree with Rebel News that *Harper* has no application. The Commissioner was required to balance the statutory objectives that would be advanced by enforcing ss 352 and 353(1) of the *Act* with Rebel News' freedom of expression. *Harper* articulated those objectives and found them to be constitutional. And, as will be discussed below, the objectives of Paragraph 2(1)(b) itself only become relevant in assessing the constitutionality of that provision. In his *Doré* analysis, the Commissioner was required to assess the impact of ss 352 and 353 of the *Act* and whether the enforcement of ss 352 and 353 of the *Act* would limit more than necessary Rebel News' right of freedom of expression. That is what the Commissioner did.

[132] There is no error in the Commissioner's finding, which essentially repeats *Harper*, that in light of the compelling and substantial objectives pursued by the third party regime under the *Act*, the restrictions imposed on Rebel News do not limit more than necessary the *Charter* rights invoked by Rebel News. The Commissioner considered the statutory objectives at stake, was alive to the *Charter* value of freedom of expression and found that the restrictions of ss 352 and s 353 were minimal. The Commissioner conducted the required *Doré* analysis and reached a reasonable conclusion.

[133] Rebel News submits, however, that the Commissioner did not consider the "principles and fundamental values" reflected in the s 2(1)(b) definition, "which forms an essential element of ss. 352-353." Rebel News asserts, given its interpretation of that definition, that the Commissioner simply assessed the importance of third party attribution and registration requirements – with which Rebel News does not take issue – against its *Charter* concerns, without considering the "fundamental value, importance, and application of the meaning and strictures of the Act's definition of 'election advertising' that ought to have informed this analysis." Further, that the Commissioner's interpretation of the Paragraph 2(1)(b) definition reflects a "profound interference with the Charter's free expression/press guarantee, the scope of which subjects all politically-expressive books and the promotion thereof released during a federal election to political scrutiny, investigation, and sanction."

[134] As the CCE points out, Rebel News does not articulate what additional or different principles and fundamental values are at play with respect to the Paragraph 2(1)(b) definition of "election advertising," and the Commissioner clearly engaged with free expression values and values relating to freedom of the press. I also agree that the definition of election advertising is directly tied to ss 352 and 353. Indeed, in *Harper*, the Supreme Court found that the whole of the third party advertising scheme had to be considered together. As the Paragraph 2(1)(b) definition is part of that scheme, it is difficult to see how it would be assessed separately and differently in the context of the required *Doré* analysis.

[135] Further, Rebel News' submission is based on its view that Paragraph 2(1)(b) is an exemption for books from the definition of election advertising. However, as discussed above, that is not how the Commissioner interpreted Paragraph 2(1)(b).

[136] And, to the extent that Rebel News is suggesting that the intention of Paragraph 2(1)(b) is to preserve a sphere of political expression and that this is a discrete legislative objective, I am having some difficulty with the idea that a definition, in and of itself, can reflect the objectives of the third party advertising statutory scheme to which it applies. Rebel News provides no authority in support of that position. The definition is part of the overall statutory mandate. Its intention is to describe what is "election advertising" and to clarify that the distribution or promotion of books (in this case, the promotion of the subject book by way of the lawn signs) planned to be made available to the public regardless of whether there was to be an election is not encompassed by that definition. Thus, while I agree that one of the effects of Paragraph 2(1)(b) is to preserve a sphere of expressive activity from the *Act*'s regulation by clarifying that coincidental election advertising by way of book promotional activity is *not* captured by the statutory scheme, this is ancillary to the objectives of ss 352 and 353 and the third party election scheme as a whole.

[137] Moreover, I agree with the CCE that the Commissioner was faced with only two options: to enforce or not enforce ss 352 and 353(1) of the *Act*. Given the statutory objectives of those provisions, as part of the third party advertising legislative scheme, not enforcing them against Rebel News would not have advanced the relevant statutory objective. Therefore, there was no

reasonable alternative possibility that would give effect more fully to the *Charter* protections (see *TWU* at para 104).

[138] As to Rebel News' assertions regarding the scope of Paragraph 2(1)(b) and its concern that it has broader implications for other politically expressive books and promotional materials, this was not part of the *Doré* analysis required of the Commissioner. Rather, these concerns would be relevant to Rebel News' constitutional challenge, on judicial review, to that provision. This was not at issue before the Commissioner.

[139] In sum, in this matter, the Commissioner stated that he had weighed the important objectives pursued by ss 352 and 353 against the *Charter* protections invoked by Rebel News and concluded that the informational and registration requirements at s 352 and s 353(1) minimally impair Rebel News' freedom of expression. In my view, the Commissioner reasonably balanced the *Charter* values at play with the statutory objectives and reasonably upheld the Deputy Commissioner's decisions to issue the two NOVs, which pertain to contraventions of ss 352 and 353.

[140] Finally, to the extent that Rebel News submits that the investigation process was unfair, I point out that its notice of application does not submit that there was a breach of the duty of procedural fairness owed to Rebel News in that regard, nor does it challenge any of the investigation powers or provisions of the *Act*.

Does Paragraph 2(1)(b) violate Rebel News' rights under s 2(b) of the *Charter*?

Rebel News' Position

[141] Rebel News submits that Paragraph 2(1)(b) unjustifiably violates s 2(b) of the *Charter*. It submits that there can be little doubt that ss 352 and 353 restrict freedom of expression (which I note was the finding in *Harper*) and, therefore, that the analysis must focus on justification under s 1 of the *Charter*. Under *Oakes*, s 1 of the *Charter* requires that legislative provisions that infringe rights must pursue a pressing and substantial objective and that the means chosen must be proportional to that objective.

[142] In that regard, Rebel News first submits that Paragraph 2(1)(b) is void for vagueness. Section 1 of the *Charter* requires that a *Charter* right or freedom be "prescribed by law," meaning that the law must be sufficiently precise and accessible and, as a corollary to this, that laws must not be impermissibly vague (citing *3510395 Canada Inc v Canada (Attorney General)*, 2020 FCA 103 at para 132, 136 [*351 Inc*]). While the Supreme Court in *Harper* reviewed the definition of "election advertising" (then s 319) generally within the *Act* and found it not to be unconstitutionally vague, it did not delve into Paragraph 2(1)(b) with any specificity. In particular, Rebel News submits that applying the Commissioner's analytical framework means that a conviction under ss 352-353 of the *Act* would necessarily flow from the Commissioner's decision to prosecute the promotion of a politically expressive book that was released during an election. Further, that determining whether an election-timed, politically expressive book "would have been published whether or not the election was called" is unknowable and speculative.

[143] As an example of the alleged indeterminacy of Paragraph 2(1)(b), Rebel News asserts that the Commissioner based his decision on a finding that Rebel News planned to release and promote the book *during* the election, as opposed to engaging with the correct question of whether it would have released the book *regardless* of the election. Rebel News submits this suggests that even the Commissioner was not clear about the appropriate interpretation, as demonstrated by his shifting analysis.

[144] Rebel News expresses its view that the provision does not give clear guidance to authors and publishers and may lead to arbitrary enforcement ("Orwellian, backroom investigations of authors and publishers"). This ambiguity may lead authors and publishers to choose not to publish or promote a book during an election cycle, thereby limiting their expression (or the impact of their expression) for fear of contravening the law.

[145] As to the *Oakes* three-part proportionality test, Rebel News agrees, as found in *Harper*, that there is a pressing and substantial objective for the *Act*'s overall third party election scheme and, specifically, to defining "election advertising" for the purposes of the regime. It also agrees that the Paragraph 2(1)(b) definition is rationally connected to the objectives of the *Act*'s third party election advertising scheme.

[146] However, Rebel News submits that Paragraph 2(1)(b) is not minimally impairing. The vagueness of the definition, coupled with the qualifying condition within the definition (which Rebel News interprets as an effort to qualify the type of books and book promotions captured by the definition), has the effect of including that which the legislature sought to remove from

scrutiny, inviting broad administrative scrutiny of all politically expressive books released and promoted during an election.

[147] Rebel News submits that subjecting authors and publishers to governmental registration requirements, or in the alternative, investigation and sanction, is not justified in a free and democratic society. According to Rebel News, the *Act* "endows the Commissioner with vast investigatory powers to determine whether the Book Exemption applies. This necessarily requires a troubling examination of an author/publisher's writing, marketing plans, etc, and in some cases, as in this case, leads to government bodies scrutinizing and sanctioning political writers." Rebel News submits that, "By suppressing and chilling legitimate expression, the Book Exemption undermines the democratic election process in the name of protecting it" and that the detrimental effect of Paragraph 2(1)(b) on the freedoms guaranteed by s 2(b) of the *Charter* outweighs its benefits.

[148] As a remedy, Rebel News asks the Court to retroactively sever and declare to be invalid the qualification portion of item (b) of the s 2(1) definition of "election advertising," being the words "if the book was planned to be made available to the public regardless of whether there was to be an election."

AGC's Position

[149] The AGC first sets out the background to the egalitarian model of elections, referencing the Lawlor Affidavit. The AGC notes that the model is the contextual background of Part 17 of the *Act*, including ss 352 and 353(1). The scheme explicitly puts spending limits and registration

and disclosure requirements on third parties who incur election period expenses. To protect the integrity of third party spending limits – and, by extension, the broader egalitarian framework – the *Act* contains anti-circumvention provisions. These are the comprehensive definitions of "election advertising" and "partisan advertising," which ensure that the third party spending limits apply across different media, and s 351, which prohibits a third party from circumventing or attempting to circumvent the spending limits. The AGC also submits that there is empirical support for the egalitarian model, which it sets out.

[150] The AGC submits that the first step in any *Charter* challenge – particularly one involving allegations of unconstitutional vagueness – is an exercise in statutory interpretation. Properly interpreted, in its entire context and harmoniously with the legislative scheme, Paragraph 2(1)(b) has a much narrower reach than Rebel News suggests. Neither the *Act* nor the impugned clause limit the content, creation or sale of politically expressive books – indeed, any books. Rather, in the context of commercial book production, the *Act*'s reach is limited to "commercial advertising for a book, containing an advertising message that triggers the definition of election advertising because it promotes or opposes a registered party or the election of a candidate, and timed intentionally to coincide with an election period." Even then, such advertising is not prohibited, but must adhere to third party spending limits and registration and disclosure requirements.

[151] The AGC submits that Rebel News fundamentally misinterprets the nature and effect of Paragraph 2(1)(b).

[152] Contrary to Rebel News' position, Paragraph 2(1)(b) is not accurately characterized as a "book exemption." Paragraph 2(1)(b) is not about books as such, but is aimed at the distribution or promotion for sale of books in specific circumstances. Nor does Paragraph 2(1)(b) have the effect of "exempting" anything from the chapeau definition. The statutory language reflects an intent to clarify that, in the specific circumstances described, the definition of "election advertising" is not engaged. The promotional activities described were not intended to fall within the definition of "election advertising" in the first place.

[153] The AGC submits that the qualifying condition in Paragraph 2(1)(b) ("… if the book was planned to be made available to the public regardless of whether there was to be an election") delineates the scope of election advertising taking the form of book promotion based on the advertiser's purpose or intent. It clarifies that when partisan book promotion occurs during an election, it does not constitute "election advertising" and is not subject to the relevant regulatory rules if the book was planned to be made available to the public regardless of whether there was to be an election.

[154] The AGC submits that the verb "plan" refers to the notion of advanced arrangement, while "regardless" indicates an intention to proceed without concern as to whether or not there was to be an election (referencing *The Oxford English Dictionary*). The impugned clause thus asks whether the overriding *purpose* of the book's being made available to the public is so tied to the occurrence of an election that the standard rules governing election advertising ought to apply, so as to achieve their purpose within the egalitarian model.

[155] Further, the AGC submits that the core concern of the egalitarian model is that, left unregulated, those with a superior capacity to spend money will dominate electoral discourse. Restrictions on advertising spending is the primary means by which the *Act* addresses this concern. Consistent with this purpose, the *Act*'s definition of "election advertising" is engaged only where a book is promoted or distributed during an election period and: (a) the book promotes or opposes a registered party or the election of a candidate, and (b) the public availability of the book was intentionally timed to coincide with an election period.

[156] The AGC submits that the qualifying condition in Paragraph 2(1)(b) thus preserves expressive freedom while also serving the overarching purposes of the *Act*'s third party advertising regime by preventing abuse of the unregulated space left for commercial book promotion that promotes or opposes a registered party or the election of a candidate. Without the requirement that the overlap between book promotion and election advertising be coincidental, third parties could circumvent spending limits and disclosure requirements by framing election period advertising within the pretense of a book promotion. Paragraph 2(1)(b) is designed to avoid precisely this mischief.

[157] The AGC also submits that s 2(b) of the *Charter* is not engaged. It first notes that Rebel News was not consistent in whether it was alleging that Paragraph 2(1)(b) or ss 352 and 353 violated its s 2(b) *Charter* rights. However, only Paragraph 2.1(b) appears in the Notice of Application, and so the Court must decline to consider the "revised *Charter* claim."

[158] The AGC next argues that Paragraph 2(1)(b) does not limit an expressive activity in either purpose or effect and, therefore, does not violate s 2(b) of the *Charter*. Rebel News has not met its onus, as it has not met the third prong of the test of whether an impugned law violates s 2(b) of the *Charter*. Specifically, as a matter of statutory interpretation, the impugned clause does not have any limiting impact on expressive rights. Rather, its purpose and effect is to *preserve* a sphere of expressive activity from the *Act*'s regulation by confirming that coincidental election advertising by way of book promotional activity is *not* captured by the statutory scheme. As such, the impugned clause serves to confirm and protect a broader scope of unregulated expressive activity than might otherwise fall obviously outside the chapeau definition. Any limitation on Rebel News' expressive rights flows not from the impugned clause, but from the *Act*'s broader scheme for regulating third party election advertising, which was found constitutional in *Harper*.

[159] In response to Rebel News' argument that Paragraph 2(1)(b) does not provide enough guidance and may have a chilling effect on publications, the AGC makes two points. First, properly construed, Paragraph 2(1)(b) is not ambiguous or at risk of unduly broad enforcement discretion. Rather, the clause goes to whether a book's being made available is intentionally timed to coincide with an election period, such that any associated partisan promotional activities fall within the scope of the rules governing third party advertising. Second, Rebel News provides no evidence speaking to the alleged chilling effect, which the Supreme Court of Canada has held must be proven with evidence and can only be inferred in the most obvious of cases (citing *R v Vice Media Canada Inc*, 2018 SCC 53 at paras 25-32 [*Vice Media*]; *R v Khawaja*, 2012 SCC 69 at paras 78-84).

[160] Alternatively, if the Court finds that Rebel News' expressive freedoms are limited, then the impact is justified. Paragraph 2(1)(b) preserves a sphere of expressive activity (partisan book promotion that just happens to take place during an election period) from the third party advertising regime, while simultaneously serving an anti-circumvention function (preventing third parties engaged in election advertising from avoiding registration and disclosure requirements by framing their activities as book promotion). The clause's effect is rationally connected to its purpose, is minimally impairing of expressive freedoms and carries none of the deleterious effects alleged by Rebel News. It satisfies the proportionality framework set out in *Oakes*.

[161] The AGC submits that Paragraph 2(1)(b) is "prescribed by law" for the purposes of s 1 of the *Charter* in a manner that is not unconstitutionally vague. Read in the context of the chapeau definition, the clause's focus on advance planning indicates that the relevant legal standard relates to a third party's intention. By asking whether a book was planned to be made available whether or not there was an election, the clause seeks to uncover whether the intersection of book promotional activities and elections advertising was intentional or merely coincidental. The AGC submits this is a clear and ascertainable legal standard. Specific questions about what types of proof may be required to demonstrate engagement of paragraph (b) are matters left to the discretion of the Commissioner. The existence of such administrative discretion does not make the law unconstitutionally vague.

[162] The AGC submits that Paragraph 2(1)(b) is rationally connected to its purpose of protecting a sphere of expressive freedom while maintaining the integrity of the scheme. The

provision's dual purpose is easily inferred from its text and context. Specifically, the purposes are to enhance and preserve expressive activity relating to the promotion or distribution of books and to preserve the integrity of the *Act*'s third party election advertising regime by preventing the use of book promotion to circumvent restrictions on third party advertising in service of the *Act*'s broader egalitarian model.

[163] The AGC submits that Paragraph 2(1)(b) is minimally impairing because it is tailored to achieve its objective in the least restrictive way possible. The AGC highlights several internal limits, as follows:

1. There are no prescriptive criteria in relation to the types of proof necessary to trigger the clause's application, allowing for a flexible and contextually responsive regulatory approach;
2. Writing, selling or publishing a book is not an advertising message and is not captured by the *Act*'s regulation of third party election advertising ;
3. Promotional activity must be both partisan and intentionally timed to coincide with an election period;
4. The provision imposes no restrictions outside of an election period and therefore applies only for a matter of weeks every several years; and
5. The focus on advance planning is a content-neutral means of assessing intention to engage in election advertising for which objective evidence should be readily available and entirely within the control of the third party.

[164] The AGC again emphasizes that expressive activity that is captured by the definition of "election advertising" is not prohibited by the statutory scheme. The third party must simply comply with the spending, registration and disclosure requirements, all of which were found to be minimally impairing of expressive freedoms in *Harper*.

[165] On proportionality, the AGC submits that Paragraph 2(1)(b) does not have any deleterious effects. Even if that were not the case, any deleterious effects are outweighed by the salutary effects of enhancing expressive freedom (by protecting partisan book promotion that occurs only coincidentally with elections) and preventing efforts to circumvent requirements of the third party election advertising regime.

[166] As to remedy, the AGC submits that severance of the paragraph (b) qualifying condition of the "election advertising" definition would not be an appropriate remedy because doing so would have the result of exempting all book promotional activities, even if they were transparently intended to circumvent the third party election advertising rules. This would be clearly inconsistent with Parliament's objective. Rather, if the Court finds that there is an unjustifiable violation of Rebel News' expressive rights, any remedy should be tailored to the precise extent of the unconstitutionality, such as appropriate reading in or reading down to the extent necessary. Alternatively, the Court could declare the entirety of paragraph (b) to be of no force and effect.

Analysis

[167] As a preliminary point, the AGC submits that Rebel News attempts to raise a new constitutional issue in its written submissions. This assertion arises from Rebel News' statement in paragraph 51 of its written submissions that there can be little doubt that ss 352 and 353 restrict freedom of expression and, accordingly, that the *Charter* infringement argument must focus on s 1 of the *Charter*. However, viewed in whole, it is clear that Rebel News intended to and did argue that Paragraph 2(1)(b) violates the *Charter*. The Notice of Application, the Notice of Constitutional Question and the analysis under s 1 in Rebel News' memorandum all indicate this. Accordingly, I do not agree that Rebel News has raised a new *Charter* argument. Whether the constitutionality of Paragraph 2(1)(b) is discrete from the constitutionality of ss 352 and 353 (indeed, the third party advertising scheme as a whole as set out in the *Act*) is a different issue.

[168] Section 2(b) of the *Charter* protects freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. As stated in *Harper*, "[T]hird party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, supra, at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection" (para 84). However, while acknowledging that freedom of expression is a crucial aspect of the democratic process and finding that the attribution, registration and disclosure provisions of the *Act* infringe s 2(b) of the *Charter*, as they have the effect of limiting free expression, the Supreme Court ultimately found that those provisions advance two important objectives and are minimally impairing.

[169] As set out by the AGC, to determine whether a law violates s 2(b), the Court must ask three questions: (1) does the activity in question have expressive content, thereby bringing it within 2(b) protection; (2) if so, does the method or location of this expression remove that protection; (3) if the expression is protected by s 2(b), then does the impugned law limit that expressive activity in either purpose or effect (citing *Montreal (City) v 2952-1366 Quebec Inc*, 2005 SCC 62 at paras 56-57; *Irwin Toy v Quebec*, [1989] 1 SCR 927, 58 DLR (4th) 577 at 967-973).

[170] Only the third question is at issue in this case. The AGC submits that Rebel News has not met its burden on the third prong of the test, i.e., that it has not established that Paragraph 2(1)(b) limits expressive activity in either purpose or effect.

[171] In that regard, and as discussed above, Rebel News and the AGC have different understandings of Paragraph 2(1)(b). Rebel News frames Paragraph 2(1)(b) as a "Book Exemption" that removes expressive activity from the third party advertising regime. Paragraph 2(1)(b)'s qualification ("if the book was planned to be made available to the public regardless of whether there was to be an election") places limits on expressive activity that would otherwise be exempt. Conversely, the AGC interprets the purpose and effect of Paragraph 2(1)(b) as preserving a sphere of expressive activity by confirming that coincidental election advertising by way of promotional book activity is not captured by the statutory scheme. That is, Paragraph 2(1)(b) serves to confirm and protect a broader scope of unregulated expressive activity than might otherwise fall obviously outside the chapeau definition.

[172] In that context, the question is whether Paragraph 2(1)(b) is an exemption from the overarching scheme such that the qualification re-introduces limits to otherwise unregulated expressive activity, or if it is a clarification that simply points to expressive activity that was never intended to be captured by the definition of "election advertising" in the first place. As discussed above, I agree with the CCE and the AGC that Paragraph 2(1)(b) is a clarification. The items listed in (a) to (e) clarify that the types of expressive activities described therein were not intended to be captured by the s 2(1) definition of "election advertising."

[173] Accordingly, I also agree with the AGC that any limitation on Rebel News' expressive rights flows not from Paragraph 2(1)(b), but from the broader regulation of third party election advertising, which was found to be constitutional in *Harper*.

[174] I would add, with respect to purpose, that classifying Paragraph 2(1)(b) as an "exemption" would not reflect the statutory objectives. An "exemption" suggests that certain expressive activities are excluded *even if* they threaten the egalitarian model. Thus, creating such exemptions would weaken the regime's ability to achieve its purpose.

[175] In sum, in my view, Paragraph 2(1)(b), properly interpreted and in and of itself, does not limit expressive activity in either purpose or effect. Viewed more broadly and in context, the definition is part of the third party advertising regime. It informs and is encompassed by ss 352 and 353 of the *Act*, which provisions the Supreme Court found to be constitutional in *Harper*.

If Paragraph 2(1)(b) limits s 2(b) *Charter* rights, is the limitation justified under s 1 of the *Charter*?

[176] Given my finding above, I need not consider this issue. However, I will do so in the event that I have erred.

[177] Section 1 of the *Charter* guarantees the rights and freedoms set out, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The *Oakes* test holds that a limit to a constitutional guarantee can be sustained if two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." Specifically, three criteria must be satisfied: 1) there must be a rational connection between the limitation and the objective of the legislation; 2) the impugned provision must minimally impair the *Charter* right or freedom; and 3) there must be proportionality between the effect of the measure that limited the *Charter* right or freedom and the objective of the legislation.

Vagueness

[178] Rebel News submits that vagueness can be raised under s 1 of the *Charter* as a threshold issue and is also relevant to the minimal impairment stage of the *Oakes* test. Rebel News argues that a law must not be so devoid of precision in its content that a conviction would automatically flow from the decision to prosecute (citing *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 at 636 [*NS Pharma*]). Further, that a conviction would automatically flow from the Commissioner's decision to prosecute book promotion under ss 352 and 353 if the book was released during an election, and that the question of whether an election-timed,

politically expressive book "would have been published whether or not the election was called" is speculative and unknowable.

[179] As the AGC submits, an unconstitutionally vague law contains no intelligible standard capable of judicial discernment that could guide citizen behaviour or check enforcement discretion (citing *NS Pharma* at 621-643).

[180] In *Harper*, the Supreme Court addressed vagueness as follows:

> 90 A provision will be considered impermissibly vague where there is no adequate basis for legal debate or where it is impossible to delineate an area of risk; see *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, at pp. 639-40. The interpretation of the terms at issue here must be contextual. It is clear that a regulatory regime cannot by necessity provide for a detailed description of all eventualities and must give rise to some discretionary powers — a margin of appreciation. What is essential is that the guiding principles be sufficiently clear to avoid arbitrariness. While no specific criteria exist, it is possible to determine whether an issue is associated with a candidate or political party and, therefore, to delineate an area of risk. For example, it is possible to discern whether an issue is associated with a candidate or political party from their platform. Where an issue arises in the course of the electoral campaign, the response taken by the candidate or political party may be found in media releases (Lortie Report, *supra*, at p. 341). Whether the definition is impermissibly broad is a matter for legal debate and is more properly considered at the minimal impairment stage of the justification analysis.

[181] In *Harper*, the respondent argued that the entire third party advertising expense regime was too vague to constitute a limit prescribed by law on the basis that the legislation provided insufficient guidance as to when an issue is "associated" with a candidate or party. Thus, it was unclear when advertising constitutes election advertising and is subject to the regime's

provisions. The Supreme Court rejected that argument as unfounded. Further, it held, “The definition of election advertising in s. 319, although broad in scope, is not unconstitutionally vague” (*Harper* at para 89). This is significant, as former s 319 is now the s 2(1) definition of election advertising.

[182] Thus, the Supreme Court has already determined that the definition of election advertising – which includes paragraph (b) – is not unconstitutionally vague.

[183] Further, properly interpreted, Paragraph 2(1)(b) is not vague. It is clear that the promotion of the sale of a book will not be election advertising “if it was planned to be made available to the public regardless of whether there was to be an election.” This is not unknowable or speculative. The authors and publishers of books can reasonably be expected to plan the timing of the promotion of their books. If, as in this case, they intentionally chose to promote a partisan book during an election period, then that promotion will be “election advertising.” If the book was coincidentally planned to be promoted during an election, then the promotion will not be “election advertising.” The timing and intent of such promotion is clearly knowable and can reasonably be expected to be demonstrated by authors and publishers by way of objective evidence. Paragraph 2(1)(b) is a clear and ascertainable legal standard. It is not so vague that the limit is not prescribed by law.

[184] As to Rebel News’ submission that a conviction would automatically flow from the Commissioner’s decision to prosecute book promotion under ss 352 and 353 if the book was released during an election, I do not agree.

[185] A determination that there was a lack of compliance with those provisions will be based on whether or not the book was planned to be made available to the public regardless of whether there was to be an election. As discussed above, when, based on the evidence, the CCE finds that an author or publisher intended to distribute or promote a partisan book during an election period (thereby engaging in election advertising), then the Commissioner may elect to take enforcement action (either by imposing an AMP or by bringing criminal charges). Conviction is not automatic. It is fact and evidence driven, as it was in this case.

Oakes Test

[186] Rebel News concedes that, as found in *Harper*, the *Act*'s overall third party election advertising scheme has a pressing and substantial objective, and that scheme involves defining "election advertising" for the purposes of its provisions, including ss 352 and 353. Rebel News also concedes that Paragraph 2(1)(b) is rationally connected to the objectives of the *Act*'s third party election advertising scheme. The next question is whether Paragraph 2(1)(b) is minimally impairing. As stated in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*]:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives (at para 53; see also para 54, citing *RJR MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160).

[187] Further, "[t]he test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner" *(Hutterian Brethren* at para 55).

[188] Rebel News asserts that Paragraph 2(1)(b) is not minimally impairing of its s 2(b) *Charter* rights or freedoms because the vagueness of the provision, coupled with the qualification, has the effect of including that which the legislature sought to remove from scrutiny, inviting broad administrative scrutiny of all politically expressive, election-timed books and the promotion thereof.

[189] First, I have found above that Paragraph 2(1)(b) is not unconstitutionally vague. Second, this argument relies on Rebel News' view that Paragraph 2(1)(b) is an exception to s 2(1), whereas I agree with the Commissioner and the interpretation proposed by the AGC that Paragraph 2(1)(b) is a clarification.

[190] I also note that in response to Rebel News' submissions, the AGC essentially makes two arguments. First, Paragraph 2(1)(b) is carefully tailored to achieve its objective in the least restrictive way possible because it contains internal limits that enlarge freedom of expression as much as possible while ensuring the integrity of the *Act*'s third party advertising scheme. For instance, the writing, publication and sale of a book does not constitute an advertising message and is therefore not captured by the *Act*'s regulation of third party advertising. This limit is notable because Rebel News interprets Paragraph 2(1)(b) to apply to books themselves, rather than just to their promotion. Paragraph 2(1)(b) is much less impairing of the s 2(b) *Charter*

freedom than Rebel News asserts if the limit only applies to book *promotion*. Second, even if the promotion of a particular book is "election advertising," such promotion is *not* prohibited. The third party must simply comply with the requirements of the *Act* that apply to all third party election advertisers. These submissions are compelling.

[191] Paragraph 2(1)(b) will be minimally impairing if it infringes Rebel News' freedom of expression rights as little as possible in order to achieve the objectives of the third party election advertising regime. In my view, for the reasons set out above, Paragraph 2(1)(b) is minimally impairing.

Proportionality

[192] The final step of the *Oakes* test asks whether the "benefits of the impugned law are worth the costs of the rights limitation" (*Hutterian Brethren* at para 77; see also *351 Inc* at para 188).

[193] On proportionality, Rebel News makes the general assertion that releasing and promoting a book during an election ought not to be prohibited, and subjecting authors and publishers to governmental registration requirements, or in the alternative, investigation and sanction, is not demonstrably justified in a free and democratic society. Rebel News takes issue with the "vast investigatory powers" that the *Act* grants the Commissioner to determine if Paragraph 2(1)(b) applies. According to Rebel News, determining the applicability of Paragraph 2(1)(b) requires an examination of an author or publisher's writing and marketing plans and may lead to scrutiny and sanction of political writers. Rebel News again voices concern about a possible chilling effect on publishers of politically expressive books.

[194] I first note that, contrary to Rebel News' submission, promoting a book during an election is not prohibited by Paragraph 2(1)(b) or otherwise by the *Act*. Rather, book promotion that falls within the definition of "election advertising" requires that authors or publishers comply with the spending, registration and disclosure requirements of the *Act* that apply to all third party election advertisers.

[195] Second, Rebel News has not challenged the provisions of the *Act* that address the investigative authority of the Commissioner to investigate potential violations. And, as discussed above, it should not be overly onerous for an author or a publisher to demonstrate what their intention was as to the timing of the promotion.

[196] Third, Rebel News has not put forward any evidence of the alleged chilling effects (see *Vice News* at para 28), and I agree with the AGC that the spectre raised by Rebel News of censorship, prohibitions on book publication and government scrutiny of political writing is not supported by the legislative text of the subject provision.

[197] As discussed above, I also agree with the AGC that Paragraph 2(1)(b) itself does not have any limiting impact on expressive freedoms because, in purpose and effect, it serves to confirm and protect partisan book promotion that occurs only coincidentally with an election.

[198] However, if there has been an infringement, then the question is whether the salutary effects of the provision outweigh any deleterious effects. In my view, Rebel News overstates the deleterious effects of Paragraph 2(1)(b). As discussed above, the impact of that provision is

limited to requiring those who choose to promote partisan books during an election period to comply with the third party election advertising attribution, registration and disclosure requirements of the *Act*.

[199] I also note that the definition of election advertising in s 2(1) of the *Act* is an integral part of the third party advertising scheme set out in the *Act* and, for the purposes of this matter, in particular ss 352 and 353. Those provisions have been found to infringe s 2(b), as they have the effect of limiting free expression (*Harper* at para 138). However, they have also been found to be minimally impairing, and the salutary effects have been found to outweigh the deleterious effects (*Harper* at paras 145, 146):

> 146 The salutary effects of the impugned measures outweigh the deleterious effects. The attribution, registration and disclosure requirements facilitate the implementation and enforcement of the third party election advertising scheme. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal. The burden is certainly not as onerous as the respondent alleges. There is no evidence that a contributor has been discouraged from contributing to a third party or that a third party has been discouraged from engaging in electoral advertising because of the reporting requirements.

[200] As the AGC submits, the salutary benefits of Paragraph 2(1)(b) are that it enhances expressive freedom by expressly protecting a sphere of coincidental and partisan book promotion activity during an election period. Further, by confirming that partisan book promotion intentionally timed to coincide with an election period is captured by the regulatory regime, Paragraph 2(1)(b) serves an anti-circumvention function and, as such, is integral to the integrity of the third party election advertising regime.

[201] In my view, the salutary effect of Paragraph 2(1)(b) in terms of its anti-circumvention function outweighs the deleterious effects of the possible requirement that a third party comply with spending, registration and disclosure requirements.

[202] In the result, I find that if Paragraph 2(1)(b) limits s 2(b) *Charter* rights then this is a reasonable limit pursuant to s 1 of the *Charter*.

Conclusion

[203] The Commissioner's decision was certainly not perfect. However, it is not required to be. Viewing the decision and the record in whole, I am satisfied that the decision was reasonable for the reasons set out above. I also find that Paragraph 2(1)(b), if it engages s 2(b) of the *Charter*, minimally impairs Rebel News' freedom of expression rights (minimal impairment being the only aspect of the *Oakes* proportionality test challenged by Rebel News). The provision therefore prescribes a reasonable limit pursuant to s 1 of the *Charter*.

Costs

[204] The parties have agreed that, should Rebel News be successful in its application for judicial review, the CCE and the AGC will each pay the all-inclusive sum of $5000 in costs to Rebel News ($10,000 in total). In the event that Rebel News is not successful, then it will pay the all-inclusive sum of $5000 to each of the CCE and the AGC ($10,000 in total).

JUDGMENT IN T-1249-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and
2. Rebel News shall pay the all-inclusive sum of $5000 in costs to each of the Commissioner of Canada Elections and the Attorney General of Canada ($10,000 in total).

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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