Court of Appeal File No. 039942

Vancouver Registry

COURT OF APPEAL

IN THE MATTER OF:

The Constitutional Question Act, RSBC 1996, c. 68

AND IN THE MATTER OF:

The Canadian Charter of Rights and Freedoms

AND IN THE MATTER OF:

A Reference by the Lieutenant Governor in Counsel set out in Order in Council No. 296/12 dated May 16, 2012 concerning the constitutionality of amendments to provisions in the Election Act, RSBC 1996, c. 106 regarding election advertising by third parties.

INTERVENOR SUBMISSION BY FAIR VOTING BRITISH COLUMBIA

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

2001/05/16:	The 37th Provincial Election, the last prior to the introduction of fixed-date election legislation, is held.
2001:	Legislature amends *Constitution Act*, RSBC 1996, c. 66, to provide for fixed-date elections every four years on the second Tuesday in May.
2005/05/17:	The 38th Provincial Election, the first fixed-date election, is held.
2008/04/30:	The Attorney General introduces *Election Amendment Act, 2008*, SBC 2008, c. 41 ("Bill 42") into the Legislature.
2008/05/27:	Bill 42 is amended, reducing "pre-campaign period" from 120 days to 60.
2008/05/29:	Bill 42 receives Royal Assent.
2008/07/23:	The Respondents file Action S085226 (the "Action") challenging the constitutionality of the amended *Election Act*, RSBC 1996, c. 106 ("*Election Act*").
2008/11/07:	Justice Cole orders that individual union members Gloria Laurence and Wendy Weis be added as defendants to the Action, with conditions (2008 BCSC 1599).
2008/11/26:	Justice Cole orders that three paragraphs of the Statement of Defence of Laurence and Weiss be struck as exceeding the conditions of his prior order (2008 BCSC 1626).
2008/12/08:	Justice Rice rules that most of the plaintiffs' requests for disclosure, discovery and examination of government officials in the Action should be refused (2008 BCSC 1699).
2008/12/08:	The Action is heard by way of summar ytrial, along with the plaintiffs' application for a stay or injunction of the enforcement of the impugned provisions.
2008/12/19:	Justice Cole dismisses plaintiffs' application for a stay or injunction (2008 BCSC 1769). Judgment on the trial proper is reserved.
2009/02/13:	The 60-day "pre-campaign period" for the 2009 Election begins.
2009/03/30:	Justice Cole renders judgment in the Action, declaring s. 235.1 and related aspects of s. 228 of the *Election Act* unconstitutional (2009 BCSC 436).
2009/03/31:	Justice Cole gives further reasons, declining to suspend the effects of his earlier judgment (2009 BCSC 440).
2009/03/31:	Notice of Appeal is filed by Attorney General.
2009/04/03:	The Attorney General applies before Lowry J.A. of the Court of Appeal for a stay of Justice Cole's judgment pending appeal; the application is dismissed (2009 BCCA 156).

2009/04/14: The writ is issued and the 28-day "campaign period" begins.

2009/05/12: The 39th Provincial Election is held.

2011/10/12: A division of the Court of Appeal - Ryan, Lowry, and Chaisson JJ.A. - hear the appeal from the decision of Cole J. over the course of two days.

2011/10/19: The Court of Appeal renders judgment dismissing the appeal (2011 BCCA 408).

2012/05/16: The *Miscellaneous Statutes Amendment Act (No. 2) (2012)* receives Third Reading in the British Columbia Legislature, making amendments to provisions of the *Elections Act* as they relate to election advertising by third parties.

2012/05/16: Pursuant to Order in Council 296/12 the Lieutenanat Governor in Council refers the question of the constitutionality of amendments to the *Elections Act* to the British Columbia Court of Appeal for hearing and consideration.

OPENING STATEMENT

Fair Voting BC ('FVBC') is a non-partisan and non-profit society registered under British Columbia's Society Act. It was originally incorporated over 15 years ago with the aim of advocating for improvements to elections and related democratic processes in British Columbia. FVBC served as the Official Proponent of the BC Citizens' Assembly's recommendation that the province adopt the Single Transferable Voting system in the 2009 provincial referendum.

In this submission, FVBC seeks to represent the concerns of small entities: individuals, charities, and issue-focused non-profit, non-partisan organizations. We submit that, though the legislation is ostensibly aimed at curbing the influence of the wealthy, the provisions have not been tailored so as to exempt or exclude ordinary citizens and legitimate small third parties whose Charter rights to freedom of political expression ought not to be infringed according to the aim of the legislation. In particular, we submit that the definition of election advertising is so overbroad that it captures even individuals wishing to post a handwritten sign in their own window, that it imposes onerous registration and labeling requirements on small entities and that it fails to exempt charities and voluntary contributions of labour, neither of which are targetted by or intended to be captured by this legislation.

We propose that the legislation could be readily altered to address these unjustifiable infringements on the Charter rights of small entities by redefining election advertising to exempt pure issue advocacy, exempting charities, defining the concept of a non-wealthy (small) entity and exempting them from the registration and labeling requirements, and explicitly exempting contributions of volunteer labour.

PART 1 - STATEMENT OF FACTS

Overview and Scope

1. On May 16, 2012, the Lieutenant Governor in Council referred the following question to this Court for hearing and possible consideration pursuant to s. 1 of the *Constitutional Question Act*, RSBC 1996 c 68:

> Do sections 80 to 86 of the *Miscellaneous Statutes Amendment Act (No. 2), 2012*, set out in the Attached Schedule, which amend sections 1, 183, 198, 204, 228, 235.1 and 24 of the *Election Act*, RSBC 1996, c.106, unjustifiably infringe section 2(b) of the *Canadian Charter of Rights and Freedoms*? If yes, in what particular or particulars and to what extent?

PART 2 - ISSUES ON REFERENCE

2. Both the Attorney General (AG) and the Amicus assert that the scope of the present reference may be considered to be somewhat limited.

3. In p 46 of the AG's factum, the AG asserts that "Previous judicial determinations of fact and law which are binding and have not been appealed are conclusive. Unless the Amendments are somehow distinguishable on a principled basis and therefore not governed by the previous findings, there is no need for this Court to re-visit previous findings."

4. In p 3 of the Amicus' factum, the Amicus states that "Amicus counsel agrees with the AGBC that the issues on this Reference are restricted to whether the New Amendments, when applied to the pre-campaign period, minimally impair section 2(b) of the Charter, and whether their salutary effects outweigh the deleterious effects on freedom of expression."

5. Fair Voting BC, however, takes the position that the Lieutenant Governor's question neither states nor implies any such limitation. Rather, the plain sense of the question put to this Court is whether or not any of the proposed amendments might constitute an unjustifiable infringement of section 2(b) of the *Charter of Rights and Freedoms*, regardless of whether such determinations have previously been made in

either *BCTF v. British Columbia* (henceforth referred to as BCTF 2009) or the subsequent appeal.

6. This distinction is relevant, we assert, because we wish to argue, contrary to both the AG and the Amicus, that certain aspects of the New Amendments have not been adequately examined, likely because it was not a matter of significant concern to the original plaintiffs in BCTF 2009.

Groups Affected

7. Fair Voting BC submits that the term 'third party' that has been extensively used in BCTF 2009 and the subsequent appeal, as well as in relevant precedent cases such as *Harper v. Canada* 2004 and others, does not and can not refer to a single undifferentiated type of entity. To the contrary, the term 'third party' may be applied to any or all of at least the following entities: unions, corporations, non-governmental organizations (NGOs) and individuals. Furthermore, NGOs may be further subdivided into at least the following categories: charities, issue-focused non-partisan, non-profit organizations, and ideological or partisan think tanks or foundations. In BCTF 2009, third-party advertisers from the 2005 election are classified in p 138 as follows: unions (94), business associations (10), advocacy groups (12), corporations (5) and individuals (6) (numbers in parentheses indicate the number of such organizations).

8. Given the different size, scope, focus and reach of these different entities, any consideration of the overall constitutional acceptability of a proposed provision must be tested against the situation and circumstances of each entity independently.

9. In BCTF 2009, the principal plaintiffs were unions. Unions are clearly one kind of third party organization and have certain characteristics. For example, they often represent relatively large numbers of people (e.g., the BCTF represents upwards of 40,000 teachers - see 2009 BCSC 436, p4), they have significant financial resources (e.g., the BCTF spent approximately $875,000 on election advertising in the 2005 election; see 2009 BCSC 436, p4), they conduct regular public engagement and advertising campaigns, whether or not an election is in process, and they expect to and have little difficulty complying with a requirement to register as an election advertising

sponsor. In addition, they have the financial resources and legal expertise to launch a legal challenge when they feel their rights are being impaired.

10. Another type of third party organization might be termed ideologically-aligned or partisan think-tanks or foundations. Examples might arguably include organizations such as the National Citizens Coalition (NCC) and the Fraser Institute on the right side of the political spectrum or the Canadian Centre for Policy Alternatives on the left. These organizations are often relatively well funded and tend to promote positions that are closely aligned to the policies of one or another of the major political parties. The NCC, in particular, has an annual budget in the range of several million dollars and in fact launched a challenge of federal election advertising rules (the results of the Supreme Court ruling, known as *Harper v Canada*, are widely cited in the Reasons in BCTF 2009).

11. In contrast, individuals are another type of third party that falls under the purview of the proposed provisions, but for the most part, individuals lack the financial resources and legal expertise to launch a legal challenge if they feel their rights are being impaired.

12. Because the BCTF and other unions launched the 2008 challenge, we are satisfied that the case addressed the provisions in the 2008 Election Act that affect and concern most unions as third parties, but we assert that the rights and interests of other types of third parties who are less able to gain access to legal remedies have not been adequately addressed in the previous proceedings (i.e., BCTF 2009, and the subsequent appeal in 2011).

13. Since the Lieutenant Governor has requested a full assessment of the constitutional implications of the proposed provisions, it is our goal in this factum to raise issues particularly relevant to those types of third parties who are unlikely to initiate a legal challenge on their own behalf. In particular, our primary goal is to raise issues relevant to individuals, charities and issue-focused non-profit (non-partisan) organizations. While some of these organizations have substantial budgets, the vast majority are relatively small and operate on a shoe-string budget. Individuals, in particular, often have extremely limited financial resources and no legal expertise.

PART 3 - ARGUMENT

Introduction

14. We will not duplicate arguments already made. However, we will highlight those places, primarily in the Amicus' factum, but also in that of the AG, where some key arguments relevant to our case are made, and we will raise our concerns within the framework for a s.1 analysis reiterated by the AG in p 55 of his factum.

Failure to Exempt Small Entities from Registration Requirement Fails Rational Connection Test

15. In p 7, the AG acknowledges that *Harper v Canada* establishes the egalitarian model for elections. The primary purpose of the election advertising restrictions held to be constitutional in that case despite the infringement on s. 2(b) of the *Charter* was that the wealthy were "to be prevented from controlling the electoral process" (or, to use language from *Libman v Quebec (AG)*, "to prevent the most affluent from monopolizing elections discourse"). In the present case, the government's principal objective as articulated during debate is recorded in Hansard: "The rationale, from our perspective, for having spending limits is simple. They prevent the wealthy from dominating the political discourse by flooding media with paid advertising." This principle is further elaborated by the Amicus in p 8-11. We acknowledge and rely on this principle in our arguments and acknowledge that this purpose for which the proposed provisions have been written is pressing and substantial for purposes of a s.1 analysis.

16. In p 8, the AG argues that the *rational connection* test for the present provisions was established by *Harper v Canada*. However, we submit that since the plaintiff in that case represented a large ideologically-aligned organization with significant financial resources, their major concerns related to the imposition and level of spending limits; it is this provision to which the rational connection test applied in *Harper v Canada* and for which rational connection has been established. Since the federal *Elections Act* provided for an exemption from the requirement to register as election advertising sponsors (EASs) for small entities, we submit that the rational connection criterion has not been established for this aspect of the proposed amendments to the BC *Elections Act*.

17. Further, in p 57c, the AG argues that Cole J. accepted the rational connection argument in connection with spending limits, but again this provides no support for the contention that rational connection has been established with regard to the requirement for small entities to register as EASs as these are separate issues.

18. Indeed, we argue that one cannot establish a rational connection between the objectives of the legislation and the requirement for small entities (i.e., non-wealthy) to register as EASs. If the primary purpose for the proposed provisions is to limit the influence of the wealthy, then by definition the provisions are not expected to and should not apply to nor affect nor limit the activities of those who are not wealthy. The BC Chief Electoral Officer (CEO) has raised (in his 2010 report) the concern that someone hanging a handwritten sign in their window without having registered as an EAS in advance would be in violation of the provisions (page 16). As this requirement in the proposed provisions would impede a non-wealthy person from exercising their rights under s.2(b), then since such a person is not the target of the legislation, there cannot be a rational connection between the legislative goal and this deleterious effect.

19. To avoid such infringements, the rational connection test therefore requires a practical definition of the term '*wealthy*' and a mechanism to prevent those who fall outside of such a definition from being affected by the infringing legislation. Since the federal *Elections Act* provides such an example in the form of an exemption from the requirement to register if the expenditures incurred fall below a specified limit, it is logically possible for BC to implement similar provisions. The failure to do so renders the referred legislation unconstitutional.

Failure to Exempt Small Entities Also Fails Minimal Impairment and Proportionate Effect Tests

20. Even if the failure to exempt small entities is deemed to satisfy the rational connection test, it cannot survive either the minimal impairment or proportionate effect tests.

21. The BCCLA has produced considerable evidence that small entities (i.e., those spending an amount below the federal exemption limit) experienced a 'chill' effect, in which they altered their intended activities in response to the presence of the provisions

in force in 2008. In particular, some organizations opted not to register as an EAS and refrained from participating in electoral discourse for fear of being found in contravention of the Act and being subject to a large fine. The Amicus refers to this behaviour as self-censorship (p 94) and argues that "the loss of their expression is a loss for the entire polity, and not just the individuals". If they opted to register, at the very least these organizations had to invest time and effort in the registration and reporting functions, and many likely had to alter previously created materials in order to comply with the labeling requirement for election advertising. Since these small entities are not the intended target of the legislation, and since simple means are available to relief them of these impacts (e.g., a reasonable exemption clause), the registration requirement fails the test of minimal impairment.

22. With regard to proportionate effect, no evidence has been put forward that spending by third party sponsors at any level, let alone these small entities who have spent less than the amount that would exempt them from the requirement to register at the federal level, has been able to produce the supposedly deleterious effect of drowning out balanced political discourse. Given the absence of any demonstrable salutary effect on these entities and the clear evidence of deleterious impacts, the registration requirement also fails the proportionate effect test.

Failure to Exempt Charities Fails Rational Connection Test

23. The Amicus discussed the situation of charities extensively in p 43-48. As described by the Amicus, charities already operate under a strict regulatory framework that prevents them from acting in a partisan manner. There has been no evidence introduced, either logical or empirical, to suggest that any charity engages in a significant amount of election advertising, let alone that such advertising could be perceived as dominating the election discourse. As the proposed provisions would impose at least two burdens on charities (the requirement to register and the requirement to relabel existing materials as 'election advertising') that would infringe their rights under s.2(b), they are clearly affected and the AG has not established a rational connection between the goals of the legislation and the requirements imposed on charities.

Inclusion of Volunteer Labour Fails Rational Connection Test

24. As discussed above, the professed goal of the provisions related to election advertising is to prevent the wealthy from dominating the electoral discourse through exerting a disproportionate influence and to facilitate equal participation in the election by all citizens. Since wealth is unequally distributed, but time is equally available to all, there is no rational connection between the intent to limit the influence of the wealthy and the provision regulating voluntary contributions of time (s.228(b) requires sponsors to include in the "value of election advertising" "the market value of preparing and conducting the election advertising, if no price is paid", which has been interpreted as including voluntary contributions). In particular, there has been no evidence, logical or empirical, presented to the effect that wealthy people can disproportionality contribute time compared with non-wealthy citizens, nor that such a contribution of time could contribute significantly to overwhelming party-related election discourse and therefore needs to be regulated.

Breadth of Definition of Election Advertising Fails the Minimal Impairment Test

25. The Amicus claims (in our view, correctly) that the definition of election advertising in the proposed amendments is overbroad and captures legitimate political speech that is not tied to the election. He devotes several paragraphs (p 56-62) to describing the numerous implications and consequences of this overbroad definition as applied to the proposed pre-campaign period. Subsequently, in p 63-74, the Amicus argues that the overbroad definition also captures election-related speech that need not be regulated in order to assure electoral fairness.

26. The AG pays scant attention to this issue of over-reach in the definition. In the Reasons for Judgment in the 2011 Appeal (p 72), Counsel for the AG is cited as claiming that "it would be almost impossible to compose an effective definition of election advertising, designed to operate in the pre-campaign period, that would not capture all political advertising." In the AG's Factum in the present reference, this issue is not addressed.

27. In contrast, Cole J. explicitly indicates that he does not accept the AG's claim. In p 72 of the original Reasons for Judgment (BCTF 2009), Cole J. states that

> "I am not persuaded that there are not other ways of dealing with election advertising that do not interfere with political speech while the Legislature is in session. For example, the fixed election date might be changed to a different time of year, the campaign period extended, or **the definition narrowed**" (*emphasis ours*).

28. While his focus in this statement was on the issue of extension of regulation to the pre-campaign period, it clearly indicates that he considers the definition of election advertising open to adjustment as a means of altering the impact of the provisions.

29. Indeed, the Amicus devotes several paragraphs to a discussion of this issue (p 63-71). The Amicus cites Bastarache J. (*Harper v Canada*) in support of the notion that only certain kinds of speech by third parties need to be limited. He further cites Feasby (McGill Law Review, 2003), who provides a definition of "pure" issue advocacy (as opposed to "sham" issue advocacy). Feasby argues that there is "**little or no case for limiting pure issue advocacy**" (ref at p22) and goes on to say that "**The only argument for regulating pure issue advocacy is pragmatic**" (*emphasis ours*). The Amicus summarizes Feasby's subsequent reasoning by saying that

> "Feasby goes on to dispute the proposition that no reasonable line can be drawn between pure and sham issue advocacy" (p 69).

30. In fact, Feasby expresses this point strongly:

> "The example of the Briffault and Bipartisan Campaign Reform Act definitions and Hasen's empirical analysis of those definitions show that **the Lortie Commission's conclusion that it is impossible to craft a definition that distinguishes between express advocacy and issue advocacy *cannot seriously be entertained***. The [...] **Canada Elections Act definitions of election expenses and restrictions on third party expenditures are *unjustifiably overbroad***" (*emphasis ours*).

31. A counter-example (in the Canadian context, even) to the AG's claim that issue advocacy cannot be distinguished from partisan advocacy is the exception to a third party spending limit found in The Elections Act, 1996 of Saskatchewan (SEA). According to Feasby,

> "The SEA features what is known as the good faith issue advocacy defence. Section 233 of the SEA prohibits all third party expenses that "directly or indirectly" promote or oppose a candidate or party. The SEA,

> however, exempts a third party from the application of the spending limit if the third party establishes that the expenses were incurred:
>
> (a) to gain support for views held by the person on an issue of public policy, or to advance the aims of any organization or association, other than a political party or an organization or association of a partisan political character, of which the person is a member and on whose behalf the expenses were incurred; and
>
> (b) in good faith and not to evade any provisions of this Act that limit the amount of election expenses that may be incurred by any other person.
>
> **If the SEA's good faith issue advocacy defence were paired with the third party expenditure ceilings in the Canada Elections Act instead of a prohibition on third party advocacy as in the SEA, it would be a complete response to the problem of overbreadth**" (*emphasis ours*).

32. Feasby goes on:

> "British Columbia's Election Act [once] contained a good faith issue advocacy exception similar in substance to that found in the SEA, as well as a five thousand dollar ceiling on direct third party expenditures. The British Columbia third party definition of "election expenses" and third party expenditure limitations were challenged in *Pacific Press v British Columbia* ([2000] 5 W.W.R. 219, 2000 BCSC 248). The court in Pacific Press, much like the court in *Somerville*, ruled that Parliament did not have a legitimate interest in regulating third party electoral expression. For that reason the court did not have regard to the scope of the definition of "election expenses"."

33. After describing certain model approaches, Feasby concludes:

> "**the proposed approach** (adopting a narrow objective test, strictly defined by parliamentary legislation, that focusses on the content of the message with very limited consideration of contextual factors) **promises to enhance** the quality and, indeed, the quantity of **political debate in elections without sacrificing spending limits and the egalitarian principle of election regulation on the altar of freedom of expression**."

34. We therefore submit that by including issue advertising in its provisions, the government has over-reached and the resulting infringement of constitutionally protected speech is significantly beyond what can be justified under the minimal impairment standard.

35. Interestingly, following his discussion of Feasby (p 69), the Amicus then goes on to explain that the motivation for including issue advocacy in the definition of election advertising can be traced to the Lortie Commission report and their concern that advertisements in the 1988 federal election implicitly favoured the Progressive Conservative Party (p 70-71). Because the constitutionality of including issue advocacy in the definition of election advertising has never been tested, it is within the scope of the current reference for the Court to make a determination as to this question.

Towards a Rationally Connected, Minimally Impairing, Proportionate Policy

36. While we believe the arguments put forward above are sufficient to establish that a number of the provisions under examination unjustifiably infringe s. 2(b) of the *Charter*, we also believe that it might be helpful to provide a concrete counter-example of a coherent policy proposal that would likely satisfy the tests of constitutional acceptability. The contrast between this policy and the current provisions may help demonstrate that the existing policy at the very least is not proportionate in the balance it strikes between salutary and deleterious effects with regard to small entities, that it is not minimally impairing, even according due deference to the legislature, and that it lacks rational connection in capturing both small entities and pure issue advocacy. In particular, we propose that a coherent, acceptable policy could likely be developed to address the following issues:

37. **Narrowing of Definition of Election Advertising** (*cf* p 228, BC Elections Act (BCEA)): "election advertising" could be redefined to mean "the transmission to the public by any means, during the campaign period, of an advertising message that explicitly promotes or opposes, by name or commonly accepted reference, a registered political party or the election of a candidate, but excludes" [exceptions (a)-(d) in the current legislation]. Such a definition, which deletes the reference to issues associated with candidates or parties, would be intended to open space for organizations, whether or not they are small entities, to continue to engage in pure issue advocacy.

38. For greater clarity, **pure issue advocacy** could be defined along the following lines (following Feasby's suggestion that the test should be narrow, objective and focused on the content of the message): a pure issue advocacy advertisement could be

one that (a) relates to advocating a position on a matter of public policy, (b) does not refer to a political party or figure by name, image or other commonly accepted reference and (c) does not refer to an upcoming election. We note that there is a related provision in the Canada Elections Act (s.350(2)) that defines advertising related to promoting candidates in a particular riding as advertising that involves

> "(a) naming them;
> (b) showing their likenesses;
> (c) identifying them by their respective political affiliations"

39. The existence of this definition demonstrates that it is possible to provide a reasonable test to define a particular form of political advertising. Pure issue advocacy, defined as we suggest above, could be explicitly exempted from the scope of the definition of election advertising. As pointed out in *Ontario v. Canadian Pacific Ltd (*p 79), a test does not have to be completely unambiguous, but must only be susceptible to reasonable judicial interpretation.

40. **Definition and Exclusion of Volunteer Contributions** - such a definition could be virtually identical to that laid out in s.180(5) of the BCEA defining volunteer contributions to parties and candidates. Alternatively, a simple exclusion similar to that described in the Canada Elections Act (at s.349-"expenses"(c)) could be used in defining spending: e.g., "other than volunteer labour".

41. **Definition of Small Entity** - The Canada Elections Act (s.353(1)) states: "A third party shall register immediately after having incurred election advertising expenses of a total amount of $500[1] and may not register before the issue of the writ." The BCEA could be modified to include such a provision and to exempt such entities from the requirement to identify themselves as election sponsors on their advertising until they have crossed this threshold. Charitable organizations could be explicitly excluded.

[1] We note that the exemption level is $1000 in Alberta and $12,000 for non-registered election advertising sponsors in New Zealand, which has a population roughly equal to that of BC, so higher levels might reasonably be considered.

PART 4 - NATURE OF ORDER SOUGHT

42. Fair Voting BC submits that the constitutional question referred to this Court should be answered in the positive and that accommodations should be made to address the particular situations of individuals, charities and issue-focused non-profit, non-partisan organizations, ideally by redefining election advertising to exempt pure issue advocacy, exempting charities, defining the concept of a non-wealthy (small) entity and exempting them from the registration and labeling requirements, and explicitly exempting contributions of volunteer labour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2012.

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Antony Hodgson

President, Fair Voting BC

LIST OF AUTHORITIES