M E M O

To: **You (counsel for the Respondent, Renewable Nova Scotia)**
From: **Senior Partner**
Date: **September 16, 2019**
Re: ***Attorney General of Canada v Renewable Nova Scotia***

We represent the respondent, Renewable Nova Scotia, in this civil appeal. I need you to write the factum and argue the appeal for me.

The appellant's factum is due on Friday, October 25, 2019 at 9:00 a.m. I recommend that you complete a draft of your factum before you receive the appellant's factum – you can always revise your draft to address any additional points the appellant raises that you didn't anticipate.

Our factum is due on Friday, November 1, 2019 by 9:00 a.m and must be filed electronically via Brightspace. We must also provide a copy to opposing counsel.

The appeal will be heard during the week of February 3 – 6, 2020. I am scheduled to be out of town at a discovery that week. You will need to check the Court's docket to determine the exact date and time of the appeal. Should the appeal be delayed for inclement weather, it will likely be rescheduled for the same time the following week. Please keep this time available.

The relevant facts of the case and grounds of appeal to which we have to respond are set out below. Additionally, I have provided you with the relevant portion of the reasons of the Supreme Court of Canada.

Good luck!

This is an appeal in the case of *Canada (Attorney General) v Renewable Nova Scotia*. Renewable Nova Scotia ("RNS") is a small environmental charity who challenged certain provisions in the *Canada Elections Act,* RSC 2009, c 9 (the "*Elections Act*"). RNS was advised by Elections Canada that their activities constituted "election advertising" because a candidate in the 2019 federal election expressed doubts about the legitimacy of climate change and humanity's role in causing it, and therefore climate change was now an "issue with which a candidate is associated". The

finding that RNS is engaged in "election advertising" would require RNS to take a number of administrative steps including registering with Elections Canada, appointing a financial agent, creating a separate bank account, hiring an independent auditor, and providing financial statements to Elections Canada.

RNS responded by filing an application in the Nova Scotia Supreme Court challenging the legal basis for Elections Canada's position. RNS argues that their activity was not "election advertising" because climate change could not be an "issue" as defined by the *Elections Act*. Further, RNS argues that if climate change is an "issue", then the provisions requiring them to take any administrative steps beyond registering with Elections Canada unjustifiably violate their right to free expression under s 2 of the *Charter*.

The whole matter was expedited by the courts because of the time sensitivity of the upcoming 2019 election. The judge hearing the matter found that the *Elections Act* did capture RNS's activity, and that the administrative provisions imposed on third-parties under that act relating to elections advertising did violate s 2 of the *Charter* (a position conceded by the Crown), but were saved by s 1 of the *Charter*.

RNS appealed to the Nova Scotia Court of Appeal. The Court of Appeal divided 2-1, with the majority upholding both findings of the hearing judge. RNS appealed to the Supreme Court of Canada. In a 5-4 decision, the Supreme Court of Canada reversed the decision of the Court of Appeal and the initial hearing judge. The majority found that climate change could not be considered an "issue", and in any event, all of the requirements other than registration with Elections Canada violated s 2 of the *Charter* and could not be saved by s 1. The relevant portions of the judgment are produced below.

The judgment of the Supreme Court contains some lines of argument you may consider, but you are not obligated to make the same arguments nor are you limited by them.

Here are the facts as found by the hearing judge (which are not disputed and not subject to appeal).

Renewable Nova Scotia is a very small charity based out of Yarmouth, Nova Scotia. It has been operating since 2009. It has only two part-time employees, Sarah and Mark Sanderson, both of whom are engineers. Sarah and Mark run another business together that is their primary source of income, but RNS is their passion project. RNS can usually count on about $50,000 per year in donations, which Sarah and Mark use to operate the charity.

RNS's stated purpose is to help facilitate Nova Scotia's move away from its dependence on non-renewable energy sources. RNS does this by organizing and leading seminars for community members and local businesses. These seminars discuss one of the central problems associated with reliance on fossil fuels: climate change and its terrible consequences for all of humanity if it is not seriously curbed. The seminars also present the benefits of using other energy sources, including wind and solar power, and show participants how to install solar panel technology on their properties. Sarah and Mark have even gone out to participants' homes to physically help them install said technology.

In order to bring awareness of the issue of climate change and to make people aware of their existence, RNS also advertises, and has done so since its founding. RNS usually sets aside about $11,000 for advertising every year. Advertisements are essential to RNS's sustainability. Although this cost is a stretch for RNS, as all its remaining funds go toward running seminars and assisting with installations, Sarah and Mark cannot afford not to advertise. When RNS first began operating—that is, before they started running ads—they found that it was difficult to spark enough interest to run a seminar.

RNS originally only advertised in print media. This included local newspapers in South Shore communities, and also printing and posting leaflets in community halls. Wanting to modernize their approach last summer, RNS bought ad space on YouTube. They launched an ad that would play before YouTube videos that were determined by an ad agency to likely be watched by Nova Scotians. They successfully bid on a YouTube advertising space beginning on October 1, 2019 and it is slated to run until December 31, 2019. Given how YouTube advertising works, it is impossible to determine what the advertisement will ultimately cost, but RNS set the maximum it would pay at its $11,000 budget. The ad features several video clips of rural Nova Scotia, as well as wind turbines and solar panels, overlaid with the following audio recording— the same text that RNS had published in print since 2009:

> Nova Scotians enjoy a fabulous culture, not to mention climate. However, a disproportionate amount of the energy we rely on is a major contributor to climate change, which threatens what we Nova Scotians love so much about where we live. Renewable Nova Scotia has a vision for how to keep the province beautiful and sustainable. Go to our website to find out when we are holding free renewable energy seminars near you. Renewable Nova Scotia empowers you to make environmentally optimal choices.

In past years, this would not have been an issue. For nearly 20 years, "election advertising" has been defined in the *Elections Act* as advertising during the "election period" that includes "taking a position on an issue with which a registered party or candidate is associated." That definition would never have captured RNS's YouTube ad. This is because in previous years, no registered party or candidate was so clearly associated with climate change denial. However, Maxime Bernier, party leader of the recently created People's Party of Canada, is running in this year's federal election. He has been outspoken about his position on climate change, which is that if climate change is even occurring at all, humans are not responsible for it. The People's Party is the only major political party running in the federal election that denies that climate change is real and that there is a significant human component to the phenomenon.

Unaware of any of this, RNS continued its normal operations, with the YouTube advertisement running as planned throughout the first weeks of October. The ad was so successful that YouTube notified RNS it would likely exceed its maximum budget of $11,000 within the first three weeks of October. RNS seminars were full through the first two weekends in October.

However, on Tuesday, October 15, 2019, RNS received a letter from the Chief Electoral Officer of Elections Canada. In the letter, the Chief Electoral Officer stated,

> It has been brought to my attention that advertisements from your organization, Renewable Nova Scotia, have been playing during the election period for approximately two weeks. These advertisements take a position on an issue, the reality of climate change resulting from human activity, with which a candidate in this upcoming federal election is associated: Mr. Maxime Bernier. Elections Canada is aware of the cost of advertising and can only infer that you have incurred at least $500 in expenses for your election advertising. Our records further indicate that your organization has not yet registered with Elections Canada as a Third Party. Thus, it is likely that you are currently in breach of s 353(1) of the *Canada Elections Act*. Moreover, because you are not registered, we have no knowledge of your compliance with other sections of the *Canada Elections Act*, including s 354(1) [appointment of a financial agent], s 358.1(1) [creation of a separate bank account for election advertising], and possibly s 355(1)(b) [requirement to appoint an independent auditor if your advertising spending exceeds $10,000 in the election period].
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> Please comply immediately with the requirements of the *Canada Elections Act*. Non-compliance with any of these provisions constitutes an offence, as outlined at ss 496(1)(c)-(d), s 496(2)(f), and/or s 496.1(1)(a) of the *Canada Elections Act*. The punishment for these offences is outlined at ss 500(1) and (5) of the *Act*.

Sarah and Mark were devastated and angered. The additional requirements imposed on them by the Chief Electoral Officer would make it impossible to continue operating RNS, and in fact could already cripple the organization based on what RNS had already spent. They thought it absurd that just because a politician uttered something crazy, the ads they had previously run without any issue were now regulated, and moreover, that there was now a serious cost attached to merely voicing the truth and combatting the dangerous effects of climate change.

In response to the letter from Elections Canada, Sarah and Mark consulted a lawyer. RNS then filed an application in the Supreme Court of Nova Scotia, seeking two declarations: (1) that it is an incorrect interpretation of the *Elections Act* to understand "issue" in the definition of "election advertising" to include denial of facts about which there is no serious or reasonable debate; and 2) in any event, ss 354(1), 355(1), 358.1(1), and 359(1) of the *Elections Act* violate section 2(b) of the *Charter of Rights and Freedoms* and cannot be saved under section 1. Appropriate constitutional notice was given to the Attorney General of Canada and of each of the provinces.

At the hearing, RNS advanced no arguments about the impact of the *Elections Act* on its tax status as a charity and you should not advance any arguments on that point. RNS also conceded that the requirement of third parties to register with Elections Canada in s 353(1) was constitutional. It restricted its constitutional challenge to the requirements for registered third parties to go beyond that, namely, the requirement to: appoint a financial agent (s 354(1)), create a separate bank account (s 358.1(1)), appoint an auditor (s 355(1)), and file detailed expense returns (s 359(1)), and so should you. Finally, the Crown conceded that these provisions violated s 2(b) of the *Charter*, arguing only that they were saved by s 1 of the *Charter*. You need not make any submissions on s 2(b) and should restrict your argument to s 1.

The hearing judge refused to grant either declaration sought. With respect to the breadth of the word "issue" as it appears in the definition of "election advertising" in the *Elections Act*, she held that the long-accepted approach to statutory interpretation in Canada could only support the proposition that "issue" must capture *any* issue associated with a politician or political party, no matter how seemingly uncontroversial that issue may be. On the second issue, the trial judge's analysis was quite brief: she reasoned that she was bound by the Supreme Court of Canada's decision in *Harper v Canada*, 2004 SCC 33, and thus that it was not open to her to find any of the challenged provisions unconstitutional.

RNS appealed. The Nova Scotia Court of Appeal upheld the hearings judge in a 2-1 split decision. The majority upheld the view that statutory interpretation principles suggested that Parliament intended candidates and parties to define the issues, and Elections Canada had no role in assessing the credibility of issues, even ones with an overwhelming consensus. The majority found that while the bank account requirement in s 358.1(1) was new and not in issue in *Harper*, that additional requirement was not onerous and that they were bound by *Harper* on the remainder of the provisions at issue.

RNS appealed to the Supreme Court of Canada, which split 5-4, with the majority finding in RNS's favour on both issues and overturning the hearings judge and the Court of Appeal.

With respect to the first issue, on whether the word "issue" in the statutory definition of "elections advertising" captures *any* position taken by a politician or political party, the majority held in part:

> [25] E. A. Driedger's approach to statutory interpretation, as it was articulated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, continues to guide all Canadian courts on the proper construction of statutory provisions. The words of the legislation should 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. Adopting that approach yields the conclusion that the term "issue" in the definition of "election advertising" in s 2(1) of the *Elections Act* does not capture statements made by third parties that are factually true and not reasonably open to debate.
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> [26] The Oxford English Dictionary provides a definition of the word "issue" consistent with its plain and ordinary meaning: "A matter which remains to be decided; a *significant* matter for debate or discussion" (my emphasis). On this understanding of the word, it simply would not be accurate to describe the human-caused climate change thesis as an issue. The vast majority of experts agree this thesis is correct; it is as close to consensus as one can expect in the scientific community.
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> [27] Moreover, as this court recognized in both *B.C. Freedom of Information and Privacy Association v British Columbia*, 2017 SCC 6 and *Harper v Canada*, 2004 SCC 33, one of the purposes of Canadian elections legislation is to promote an informed electorate. Adopting a definition of issue that effectively prevents third parties from communicating the factual truth to the rest of Canada directly undermines that sensible purpose. Now more than ever, the electorate's views on how to tackle the challenge of climate change may be central to the political future of the country.

[28] It could not possibly have been the intent of Parliament that Elections Canada play *no role* in the determination of what constitutes an issue. A second purpose of the *Elections Act,* as found by this court in *Harper, supra* is to prevent those with greater means from dominating the electoral debate. A definition of "issue" which allows a candidate to deny a factual truth and thereby create an election issue risks precisely this very thing. A politician could make pronouncements on any manner of settled truths for political gain and thereby place bureaucratic hurdles in front of those they wish to silence.

With respect to the second issue, on whether ss 354(1), 355(1)(b), 358.1(1) and 359(1) are unconstitutional, the majority held in part:

[44] The Crown conceded that the requirements for a third party to appoint a financial agent, hire an outside auditor, open a separate bank account, and produce an expense report in order to conduct election advertising violate the third party's rights to freedom of expression in s 2(b) of the *Charter*. The only issue before this Court is whether those provisions, taken as an integrated scheme, can be saved by s 1 of the *Charter*. That analysis follows the well-known test established by this court in *R v Oakes,* [1986] 1 SCR 103. We note that the respondent conceded that the registration requirement, which mandates that third parties spending over $500 in the election period register with Elections Canada, was constitutional.

[47] The Crown argued that this issue has already been decided by this Court in *Harper*, *supra* and that the "attribution, registration and disclosure requirements" of the *Elections Act* were found by the majority to be saved by s 1 of the *Charter*. With respect, I find the analysis in *Harper* on this issue to be minimal. In any event, the analysis in *Harper* is worthy of reconsideration. The additional requirement in s 358.1 of creating a separate bank account in which all election advertising donations and spending must be contained is new and was not considered by this Court in *Harper*. Much has changed in terms of advertising technology since 2004. *Harper* was concerned with limits designed to prevent large and wealthy entities from dominating the advertising landscape. However, new technologies such as social media and sites like YouTube have made it so that advertising to the country is no longer the exclusive purview of the wealthy. The silencing effect of those limits on small voices was not at issue in *Harper*. The issue here is altogether different; we are not here concerned with the possibility of a private third party spending an exorbitant amount of money on election advertising and thus having an unfair opportunity to influence the electorate. Rather, the issue here is whether those statutory requirements are justifiable when we have evidence before us that a third party *has* been discouraged from engaging in electoral advertising — a form of expression, it bears emphasizing, that lies at the very heart of the s 2(b) guarantee of freedom of expression.

[48] The majority in *Harper* found the attribution, registration and disclosure requirements serve two pressing and substantial objectives: to allow for enforcement of third-party election advertising limits and to enhance informed voting. Moreover, they also found these requirements rationally connected to those objectives, because they allow the Chief Electoral Officer to scrutinize and enforce third party spending limits and allow the

public to see which parties pay for the election ads they see. However, although rationally connected in theory, the instant case demonstrates that at least some of these statutory requirements do the opposite of what they are designed to do—that is, they fail to enhance informed voting.

[51] Although the case for rational connection is mixed, ss 354, 355, 358.1 and 359 are certainly not minimally impairing. For small charities with limited time and money, having to appoint a separate financial agent, open a separate bank account, hire an auditor, and produce a final expense report can make the difference between deciding to engage in election advertising and not. In some cases, such as the case at bar, it may be difficult or impossible for the small charity to work out which of its activities constitute "election advertising" and therefore what has to be moved into a separate account. It would be less impairing of the right to freedom of expression to have Elections Canada—the party that has the staff and resources—contact the charities who register to provide audit information, and *only if* Elections Canada deems it necessary to further scrutinize the registration information they receive from the charities that register.

The dissent disagreed on both points. With respect to the first issue, the dissent wrote in part:

[72] With respect, the majority's understanding of the meaning of "issue" as it is used in the definition of elections advertising in s 2(1) of the *Elections Act* does not adequately take account of the object and purpose of the *Act*. The object of the act is to enhance fair elections in Canada, the cornerstone of our democracy. The issues in an election are to be framed by the candidates and decided by the Canadian people. Elections Canada is meant to be a neutral facilitator of the election, not a party active in affecting it.

[73] Consistent with that purpose, the plain and ordinary meaning of "issue" does capture situations where the factual basis of the debate is clear. The Oxford English Dictionary also defines "issue" as "*a point of contention* or significance" (my emphasis). The points of contention in an election are set by the parties and candidates. If a candidate adopts an absurd position for which there is no factual support whatsoever, the remedy is rejection of that position by the polity on election day, not by Elections Canada in a boardroom.

[74] There are additional purposes of the *Elections Act*, namely transparency and encouraging public confidence in the electoral system. Parliament could not have intended that Elections Canada be anything more than a purely neutral body that does not weigh-in on any politician's choice to characterize something as an issue. It is difficult to imagine that it would inspire public confidence if the Chief Electoral Officer of Elections Canada were to be seen making personal determinations about what kinds of third-party election advertisements are and are not caught by the *Act*. There are numerous issues which vary in terms of their scientific support, such as the efficacy of vaccinations, or the intellectual capacity of certain animals. It would undermine public confidence if Elections Canada made decisions about which of those "issues" triggered the elections advertising requirements and which did not, especially if it might affect the outcome of an election.

> [75] Finally, the majority's definition of issue creates widespread uncertainty and vagueness. How will a third party, or Elections Canada for that matter, know whether a matter is sufficiently debateable so as to become an issue under the *Act?* Clear and understandable terms are always a goal of statutory interpretation, and especially important in the context of fair elections.

With respect to the second issue, the dissent wrote in part:

> [81] This court essentially pronounced on this issue 15 years ago in *Harper*. There is no reason to disturb that finding. The only additional provision that was not considered in *Harper*, the requirement to create a separate bank account in s 358.1, is a sensible extension of the requirements to appoint a financial agent and file expense reports, which were already found to be constitutional.
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> [90] Even if this issue was sufficiently different from *Harper* so as to permit a reconsideration of the holding from that decision, the result would be the same. The objectives addressed in *Harper* remain pressing and substantial: the *Elections Act* promotes fair elections and these administrative provisions serve that purpose by allowing Elections Canada a realistic means of enforcing the advertising limits and rules put in place by the act. It would make no sense to impose rules around permissible advertising and then hamstring the agency required to enforce them.
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> [91] The challenged provisions, taken as a whole, are minimally impairing. Indeed, any concerns that third parties are prevented from communicating what they believe to be the truth are much overblown. First, the requirements impose very little on the right to free expression. They impose administrative requirements only for a short period of time, during the election period. This is much shorter than the time pre-election period that affects partisan advertising. If the hurdles are so onerous that a third party cannot meet them, then they can simply confine their advertising to before and after the official election period. They could also spend less to avoid the independent auditor requirement.
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> [92] The majority would impose a serious investigatory burden on Elections Canada that would effectively undermine the scheme of the act and Elections Canada's role in it. As Justice Iacobucci stated in *R v Wholesale Travel,* [1991] 3 SCR 154, to be minimally impairing the government action must be no more than necessary to accomplish the desired objective (emphasis in the original). Any alternative less impairing proposal has to work.
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> [93] Moreover, there are many exceptions built into the definition of "election advertising" that would allow for small charities to communicate their messages without the need to abide by any of the statutory requirements that they might otherwise find onerous. For instance, nothing prevents RNS from using social media accounts to get the word out about the truth of climate change; similarly, nothing prevents either of the Sandersons from doing interviews with media organizations for the same purpose.
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> [94] Finally, the deleterious effects of these provisions, which might prevent some small charitable organizations from advancing their message for a limited period of time, are

outweighed by the salutary benefits of these provisions, without which larger and wealthier organizations could obscure their expenses and defeat the limits put in place to protect the fairness of our elections.

The Attorney General of Canada has now appealed the decision of the Supreme Court of Canada to the Supreme Moot Court of Dalhousie, on the following grounds of appeal:

1) **That the Supreme Court of Canada erred in finding that the word "issue" within the definition of "election advertising" in s 2(1) of the *Canada Elections Act* cannot include matters about which there is factual certainty.**

2) **That the Supreme Court of Canada erred in finding that ss 354(1), 355(1)(b), 358.1(1) and 359(1) are not saved under s 1 of the *Charter*.**

Note: The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to seven cases on each issue, any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources. You may cite *R v Oakes,* [1986] 1 SCR 103 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 without either counting against your seven-case limit.

If you need to cite the underlying Supreme Court of Canada decision in this case, the citation is 2019 SCC 108, and this also does not count against your seven-case limit.

Even though the 2019 federal election will be over by the time your factum is filed and the appeal is argued, the SMCD has agreed to hear the case because of the importance of the issues and you should not make any submissions related to mootness.