



NS-172611  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

DAVID TRAPP

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF  
THE PROVINCE OF BRITISH COLUMBIA, and  
THE BC LIBERAL PARTY

DEFENDANTS

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**NOTICE OF CLAIM**

**Brought under the *Class Proceedings Act*, RSBC 1996, c.50**

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**This action has been started by the Plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.**

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### **Time for response to civil claim**

A response to civil claim must be filed and served on the Plaintiff,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **CLAIM OF THE PLAINTIFF**

### **Part 1: STATEMENT OF FACTS**

#### **The Parties**

##### *The Plaintiff*

1. The Plaintiff is a 63-year old Canadian citizen and 24-year resident of British Columbia. The Plaintiff is not an elected or unelected provincial public official of British Columbia.
2. The Plaintiff has contributed 22 years of active service in B.C.'s labour force, recently retiring in June 2013.
3. The Plaintiff worked in the Information Technology sector as a Network Analyst, first for Coast Mountain Bus Company, then later for TransLink when it took over the information technology section of Coast Mountain Bus Company sometime around 2010.
4. The Plaintiff contributed approximately \$4,200.00 annually in his provincial tax returns during his active years in the B.C. labour force.
5. After his retirement in 2013, the Plaintiff is contributing approximately \$1,200.00 annually in his provincial tax returns.
6. The Plaintiff was diagnosed with cancer in November of 2015.
7. In August 2016, the Plaintiff underwent surgery to remove the cancer. Just two days after his surgery, the Plaintiff was released from hospital. Only one follow-up was provided.
8. The Plaintiff concluded on the basis of his experience in the B.C. health care system that B.C.'s health care system is in great need of further provincial government funding to improve hospital services for British Columbians.

*The Defendant Government*

9. The Defendant, Her Majesty the Queen in Right of the Province of British Columbia, is the provincial government of British Columbia (the "Government"), with an address for service herein at 1001 Douglas Street, Box 928 Stn Provincial Government, Victoria BC, V8W 9J7.
10. The B.C. Ministry of Advanced Education is responsible for the Defendant Government's communications and advertising.

*The Defendant Party*

11. The Defendant, The BC Liberal Party (the "Party"), is the ruling political party in the Legislative Assembly of British Columbia, and has a mailing address of, PO Box 28131 West Pender PO, Vancouver, BC V6C 37T.
12. The Defendant Party disclosed on January 13, 2017, that it had up until that date, raised for itself \$12.5 million in 2016. In total, the Defendant Party has raised \$32.4 million for its own benefit since the last election. These numbers are readily available by accessing legitimate news sources online.

**Partisan Advertising and Non-Essential Advertising Not Clearly of a Non-Partisan Nature**

*Non-Essential Advertising by the Defendant Government, as led by the Defendant Party*

13. The test to determine whether advertising is partisan in nature is to ask whether the objective of the advertising is to foster a positive impression of the governing party. Advertising that promotes a government policy or is designed to influence public opinion on a matter which is of public controversy is partisan advertising. Advertising that enhances the image of the governing party is partisan advertising. Evidence of such advertisements taking place in advance of an election tends to show that the advertisement is for a partisan political purpose.
14. The Defendant Government, as led by the elected Defendant political Party, engaged in taxpayer-funded partisan and non-essential advertising in the lead up to the May 14, 2013 British Columbia provincial general election.
15. The Defendant Government, as led by the elected Defendant political Party, consistently engaged in taxpayer-funded partisan and non-essential advertising since being reelected in May 2013.
16. The Defendant Government, as led by the elected Defendant political Party, is currently conducting taxpayer-funded partisan and non-essential advertising in the lead up to the May 9, 2017 British Columbia provincial general election.
17. The purpose of the above-noted advertising is to enhance the image and reputation of the elected Defendant political Party and to improve their likelihood of success in the provincial election by winning enough seats to hold a majority government.

18. The Defendant Government, as led by the Defendant Party spent \$16.6 million on taxpayer funded advertisements promoting the BC Liberals Jobs Plan in the pre-election period of 2012 and 2013.

*Partisan and Non-Essential Advertising*

19. The Defendant Government, as led by the Defendant Party, over the periods described above, launched taxpayer funded non-essential advertisements including, but not limited to:
  - i. BC Jobs Plan;
  - ii. BC's LNG Industry;
  - iii. Work BC; and
  - iv. Our Opportunity is Here

*Record Keeping and Management of Documents*

20. The Defendant Government, as led by the Defendant Party, has intentionally destroyed all documents, policies, communications, emails, and correspondence related to the advertising in question, pursuant to a spoliation policy. This is reminiscent of the spoliation policies previously known as the "triple delete policy."
21. In the alternative, the Defendant Government, as led by the Defendant Party, has preserved all documents, policies, communications, emails, and correspondence related to the advertising in question, pursuant to a preservation policy.

**Regulation of Non-Essential Advertising**

*Prior Regulation of Non-Essential Advertising*

22. In December 2008, the BC government under Liberal Premier, Gordon Campbell, had issued a directive that stopped all "non-essential advertising" from January 12, 2009, until the provincial general election on May 13, 2009.
23. The Associate Deputy Minister, Mr. Ron Norman, of the 2009 Campbell government, wrote a memorandum to all deputy ministers stating "Non-essential advertising includes any promotional or informational activity conducted by a provincial ministry, authority or agency that is not required for statutory, emergency, health and safety or the proper function of government operations" and that examples of required advertising "include recruitment of foster parents, notification of service changes, public meetings and traffic pattern changes."

**B.C. Auditor General's Reports**

*BC Auditor General's Reports on the Issue of Government Non-Essential Advertising*

24. In 1996, the Office of the Auditor General of British Columbia (the "Office") issued a report, *Public Communications: Distinguishing Between Government Program and Partisan Political Communications*. The report recommended that the Defendant Government, "establish a general policy that explicitly prohibits the use of partisan political information in public government communications, and provide specific

guidelines which set out criteria as to information that should or should not be included in public government communications.

25. In November of 2014, the Office issued a follow up to its 1996 report making the same recommendation that it had made in its 1996 report to the Defendant Government and adding the recommendation that the Defendant Government “ensure that the policy and guidance to be established is adhered to.”

### **Certifying a Class Action**

#### *The Proposed Class*

26. The Plaintiff’s claim is brought pursuant to the *Class Proceedings Act* and is brought on behalf of all individual, private, taxpaying citizens of the Province of British Columbia, wherever they reside, who as members of this class, are affected by the Defendants’ actions relating to the use of public tax dollars for non-essential, partisan advertising leading up to the May 9, 2017 provincial general election, or such other class definition as this court may ultimately decide on the motion for certification (the “Proposed Class”).
27. The members of the Proposed Class are similarly affected as a result of the use of public tax dollars for non-essential, partisan advertising by the Defendant Government, as led by the Defendant Party.

### **Part 2: RELIEF SOUGHT**

1. The Plaintiff on his own behalf and on behalf of the Proposed Class seeks the following relief:
  - i. an order certifying this action as a class proceeding and appointing the Plaintiff as representative Plaintiff;
  - ii. an order finding that a prima facie trust relationship and fiduciary duty exists between the Plaintiff (together with all other class members) and the Defendant Government particularly with the spending of money obtained through taxation;
  - iii. an order finding that the Defendant Government, has breached the fiduciary duty towards the Plaintiff and all other class members particularly with the spending of money obtained through taxation for partisan and non-essential advertisements;
  - iv. an order finding that the Defendant Government, as led by the Defendant Party, is in breach of its fiduciary duty towards the Plaintiff and all other class members by not having established guidelines and principles that distinguish between government program, partisan political advertising and communications for members of the public service, allowing for the misuse of public funds for non-essential advertising during provincial general election years;

- v. an order finding that the Defendant Government, as led by the Defendant Party, engaged in advertising which was partisan and/or not truly of a non-partisan nature in the lead up to the May 14, 2013 and May 9, 2017 provincial general elections in British Columbia;
- vi. an order finding that the Defendant Party committed the act of conversion of British Columbian tax dollars for use in non-essential, partisan advertising leading up to the May 14, 2013 and May 9, 2017 provincial general elections in British Columbia;
- vii. an order finding that the Defendant Party have been unjustly enriched by the conversion of British Columbian tax dollars for use in non-essential, partisan government advertising that had the effect of benefiting the Defendant Party during the lead up to the May 14, 2013 provincial general election;
- viii. an order finding that the Defendant Party continues to be unjustly enriched by the conversion of British Columbian tax dollars for use in non-essential, partisan government advertising that had the effect of benefiting the Defendant Party during the lead up to the May 9, 2017 provincial general election;
- ix. an order that the Defendant Government, as led by the Defendant Party, disclose the total cost of the non-essential, partisan government advertising that took place during the lead up to the May 14, 2013 provincial general election;
- x. an order that the Defendant Government, as led by the Defendant Party, disclose the total cost of all non-essential, partisan government advertising that has taken place in the lead up to the current May 9, 2017 provincial general election;
- xi. an order that the Defendant Party shall pay back to the Province of British Columbia the cost of all non-essential, partisan government advertising leading up to the May 14, 2013 provincial general election and had the effect of benefiting the Defendant Party;
- xii. an order that the Defendant Party shall pay back to the Province of British Columbia the cost of all non-essential, partisan government advertising leading up to the upcoming May 9, 2017 provincial general election and has the effect of benefiting the Defendant Party;
- xiii. an interim injunction halting all non-essential, partisan government advertising by the Defendant Government, as led by the Defendant Party that has the effect of benefiting the Defendant Party in the lead up to the upcoming May 9, 2017 provincial general election; and
- xiv. such further order and other relief this Honourable Court may deem just and equitable in all of the circumstances.

**Part 3: LEGAL BASIS**

1. The Plaintiff is a resident and taxpaying citizen of British Columbia. The Plaintiff and all other members of the class are vulnerable to the power and exercise of discretion by the Defendant Government, as led by the Defendant Party. In this regard, the Defendant Government, as led by the Defendant Party, are in a relationship where a fiduciary duty may be found.
2. The *indicia* of a fiduciary relationship as outlined in *Frame v. Smith*, [1987] 2 S.C.R. 99, and confirmed by the Supreme Court of Canada in *Hodgkinson v. Simms* (1994), 117 D.L.R are: (1) the fiduciary has scope for the exercise of some discretion or power, (2) the fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiary's legal or practical interests, and (3) the beneficiary is subject to a peculiar vulnerability to the exercise of that discretion or power. The Court further states that, "the fiduciary principle is characterized by concepts such as, "trust", independence from outside interests, and disregard for self-interest."
3. The existence of a fiduciary duty between elected officials and those they serve has been affirmed in *Toronto v. Bowes* (1854), 4 Gr. 489; affirmed (1856), 6 Gr. 1 (C.A.) where the Court found that (1) the mayor, Bowes, was in law the agent of the city of Toronto and thereby owed a duty to his principal, and (2) that there was a duty owed by officials of a municipal corporation to the effect that the public policy would not allow activity inconsistent with a strict duty to the city itself.
4. The existence of a fiduciary duty between unelected officials and those they serve was confirmed in *Ottawa (City) v. Letourneau* (2005), CarswellOnt 224 by the Superior Court of Ontario. The Court stated, "A municipal officer is one who holds a permanent position of responsibility with definite rights and duties prescribed by statute or by-law...an officer has, in the performance of his or her duties, some discretionary authority and has a responsibility to perform vital duties of the corporation."
5. Section 228 of the *Election Act*, [RSBC 1996] c.106 defines election advertising as the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated.
6. The Defendant Government, as led by the Defendant Party, has engaged in partisan and non-essential advertising in the periods leading up to the May 14, 2013 and May 9, 2017 provincial general election.
7. In *Ast v Mikolas*, 2010 BCSC 127 at para 126, the Court discussed the elements needed to establish the tort of conversion, namely (a) a wrongful act by the defendant involving the goods of the plaintiff, (b) the act must consist of handling, disposing, or destroying the goods, and (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

8. In the circumstances here, the Defendant Government has wrongfully used monies belonging to the Plaintiff and the Proposed Class to purchase and display partisan advertising to the benefit of the Defendant Party. This necessarily involved handling and disposing of the taxpayer monies, and had the effect of eliminating any benefit the taxpayer may have to the monies that were unlawfully used to fund the advertisements.
9. The Defendant Party has used provincial tax dollars (which the Plaintiff and all other members of the class have contributed to) to fund partisan and non-essential government advertising that are not clearly of a non-partisan nature in the run up to the provincial general elections of May 14, 2013 and May 9, 2017. Such action constitutes conversion as described in *Ast*.
10. The Defendant Party has engaged in a conspiracy to commit the conversion described above. The parties acted in combination and in concert to advance a common intention to benefit the Defendant Political Party. The use of the taxpayer monies to fund partisan advertising to advance political goals is unlawful. This directly affects taxpayers and anybody who relies on the services of the British Columbia Government, whose access to services is restricted or limited as a result of unjustly and unlawfully converted taxpayer monies. The Defendant Party knows or ought to know that injury to the Plaintiff and the proposed class is likely to result from the misdirection of taxpayer monies in the impugned fashion.
11. As a result of the Defendant Party's conversion of provincial taxpayer dollars to fund non-essential, partisan government advertising during the lead up to the May 14, 2013 and May 9, 2017 provincial general elections, the Defendant Party has been unjustly enriched.
12. The Defendant Government as led by the Defendant Party has distorted the electoral process by using taxpayer money to fund an election campaign.
13. The Defendant Government has breached their fiduciary duty to the Plaintiff and the Proposed Class and continues to breach this duty.

### **Enactments**

1. The Plaintiff relies on the following enactments:

*Election Act*, [RSBC 1996] c.106



Plaintiff's addresses for service:

**Acumen Law Corporation**  
210 - 837 Beatty Street  
Vancouver, BC V6B 2M6  
Attn: **Paul C. Doroshenko**

Fax number addresses for service:

Acumen Law Corporation  
604-685-8308

E-mail addresses for service:

N/A

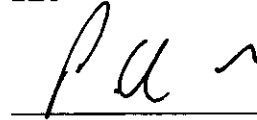
Place of trial:

Vancouver, British Columbia

The address of the registry is:

800 Smithe Street, Vancouver, BC, V6Z  
2E1

Date: March 20, 2017



\_\_\_\_\_  
Signature of lawyer 1 for the Plaintiff  
Paul C. Doroshenko



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Signature of lawyer 2 for the Plaintiff  
David N. Fai

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

**APPENDIX**

**Part 1: CONCISE SUMMARY OF THE CLAIM:**

The Plaintiff, on his own behalf, and on behalf of the Proposed Class, is seeking declaratory, mandamus, and injunctive relief of the Defendants' breach of a fiduciary duty that is owed to both the Plaintiff and to members of the Proposed Class.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

a class action

**Part 4:**

*Election Act*, [RSBC 1996] c.106  
*Canada Elections Act*, S.C. 2000, c. 9