

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

WORKING FAMILIES COALITION (CANADA) INC., ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, PATRICK DILLON, PETER MACDONALD, ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, FELIPE PAREJA, ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION, ON ITS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION and  
LESLIE WOLFE

Appellants

- and -

THE ATTORNEY GENERAL OF ONTARIO

Respondent

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION, CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY, DEMOCRACY WATCH AND THE CHIEF ELECTORAL OFFICER OF ONTARIO

Interveners

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**FACTUM OF THE INTERVENER,  
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

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March 11, 2022

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## PART I - OVERVIEW

1. This appeal is about the limits of the Legislature’s ability to set the rules of the electoral game—the very rules that govern the process that determines who gets to sit in the Legislature. By invoking the notwithstanding clause to shield unconstitutional electoral legislation from scrutiny under ss. 2 and 7-15 of the *Canadian Charter of Rights and Freedoms*, the Ontario government has highlighted the structural conflict of interest inherent when incumbents set the rules of their re-election. This calls for a purposive interpretation of s. 3 of the *Charter* that protects the democratic system from partisan self-dealing that undermines the fairness of the electoral process.

2. Section 3 of the *Charter* is interpreted broadly to allow courts to prevent legislative excess and safeguard our democracy. Section 3 protects much more than the literal right to cast a ballot. It protects the right to effective representation and meaningful participation, and by extension the right to a fair and legitimate democratic process.

3. Approached from this perspective, courts applying s. 3 of the *Charter* ought to scrutinize whether the purpose or effect of electoral legislation is to insulate incumbents from accountability to the electorate. In making electoral legislation, the government is in a “structural conflict of interest” where the “potential for partisan self-dealing poses a fundamental challenge to the democratic system.”<sup>1</sup> Section 3 protects against this form of breakdown in the democratic process.

4. There is good reason to be concerned that the legislation at issue<sup>2</sup> was motivated by a desire to silence government critics and enhance the governing party’s prospects of re-election. The

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<sup>1</sup> *Working Families Ontario v. Ontario*, [2021 ONSC 4076](#) at paras. 73-74, Book of Authorities of the Intervener, the Canadian Civil Liberties Association (“**BOA**”), tab 12 [“*Working Families #1*”].

<sup>2</sup> *Election Finances Act*, R.S.O. 1990, c. E.7, ss. 37.0.1, 37.10.1(2), 37.10.1, and 37.10.2 [“*EFA*”].

impugned provisions significantly reduce the capacity of third parties to engage in political advertising for a full year prior to the campaign period, including for six months when no spending limits apply to political parties (including the governing party). Further, the impugned provisions were enacted alongside provisions doubling limits on contributions to political parties.<sup>3</sup> The combined effect of these provisions muffles independent voices and advantages insiders.

## PART II - LAW & ARGUMENT

5. The CCLA advances two principal submissions: (A) s. 3 of the *Charter* must be interpreted broadly and purposively; and (B) the right to vote protects against the structural conflict of interest inherent when legislators enact laws affecting the democratic process. Understood in this light, s. 3 is infringed by laws that have the purpose or effect of insulating incumbents from accountability.

### A. Section 3 Must be Interpreted Broadly and Purposively

6. *Charter* rights must be interpreted broadly and purposively. The first indicator of purpose is the text of the provision, but this is not the sole consideration. Courts must also consider the scheme of the *Charter* and the structure of government implemented through the Constitution.<sup>4</sup>

7. ***Purpose of Section 3.*** Section 3 of the *Charter* guarantees citizens “the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” This guarantee is not limited to the literal right to place a ballot in the box. In *Reference re Provincial Electoral Boundaries*, McLachlin J. (as she then was) held that the purpose of s. 3 is effective representation. Canada’s tradition of representative democracy, she

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<sup>3</sup> Bill 254, *Protecting Ontario Elections Act, 2021*, S.O. 2021, c. 5, s. 7 [“Bill 254”].

<sup>4</sup> *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020 SCC 32](#) at paras. 10-11, BOA, tab 6; *Reference re Senate Reform*, [2014 SCC 32](#) at para. 26, BOA, tab 8 [“*Senate Reform*”]; *Harper v. Canada (Attorney General)*, [2004 SCC 33](#) at para. 18, BOA, tab 5 [“*Harper*”].



held, is based on the Canadian experience of representative institutions where each citizen has a voice in selecting elected representatives, reflecting a diversity of views, classes, and regions.<sup>5</sup>

8. Section 3 also encompasses a “right to play a meaningful role in the electoral process.”<sup>6</sup> Participation in the electoral process leads to a wider expression of beliefs and opinions and enriches the overall political discourse. This right to play a meaningful role in the electoral process includes an “informational component”—that is, the right to “vote in an informed manner.”<sup>7</sup>

9. Based on these purposes underlying s. 3, the regulation of third party advertising will infringe the right to vote where it “restrict[s] information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.”<sup>8</sup>

10. ***Scheme of the Charter.*** Section 3 must also be understood in light of the other provisions in the *Charter*. Although distinct, the rights protected by s. 3 of the *Charter* bear a close relationship with freedom of expression and the communication of ideas. For the right to vote to remain meaningful, s. 3 must protect citizens’ rights to hear political discourse and to be heard.<sup>9</sup>

11. Unlike free expression under s. 2(b), however, the right to vote in s. 3 of the *Charter* is not subject to legislative override under s. 33. As then Chief Justice McLachlin held in *Sauvé #2*, this structural aspect of the *Charter* calls for a generous interpretation of s. 3: “The framers of the

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<sup>5</sup> *Reference re Provincial Electoral Boundaries*, [\[1991\] 2 SCR 158](#) at pp. 183-185, 100 DLR (4th) 212, BOA, tab 7.

<sup>6</sup> *Figueroa v. Canada (Attorney General)*, [2003 SCC 37](#) at para. 25-27, BOA, tab 3 [“*Figueroa*”].

<sup>7</sup> *Harper*, *supra* note 4 at para. 71, BOA, tab 5.

<sup>8</sup> *Ibid* at para. 73, BOA, tab 5.

<sup>9</sup> *De Jong v. Ontario (Attorney General)* (2007), [88 OR \(3d\) 335](#) at para. 25, 287 DLR (4th) 90 (Ont Sup Ct), BOA, tab 2 [“*De Jong*”].

*Charter* signaled the special importance of [the right to vote] not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33's notwithstanding clause."<sup>10</sup>

12. ***Structure of Government.*** Section 3 must also be interpreted with an understanding of the “structure of government” that the constitution seeks to implement.<sup>11</sup> To that end, the “assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another” must inform the “interpretation, understanding, and application of the text.”<sup>12</sup>

13. The structure of government implicit in the Constitution “connotes certain freely elected, representative, and democratic political institutions.”<sup>13</sup> Chief Justice Wagner made an explicit connection in *Frank* between a broad reading of s. 3 and the strength and quality of democracy. He explained that “a broad interpretation of s. 3 enhances the quality of our democracy and strengthens the values on which our free and democratic state is premised.”<sup>14</sup>

14. The present appeal turns on giving meaning to s. 3 of the *Charter* without undershooting its purpose. As detailed below, s. 3 is a structural right that plays an essential role in maintaining the fairness of the democratic process and the legitimacy of Canadian representative institutions. Understood in this light, meaningful participation in the democratic process and effective representation are damaged—and s. 3 is infringed—when legislators engage in partisan self-dealing with the purpose or effect of insulating incumbents from electoral accountability.

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<sup>10</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002 SCC 68](#) at para. 11, BOA, tab 10 [“*Sauvé* #2”].

<sup>11</sup> *Senate Reform*, *supra* note 4 at para. 26, BOA, tab 8.

<sup>12</sup> *Ibid* at para. 26, BOA, tab 8.

<sup>13</sup> *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#) at para. 76, BOA, tab 11.

<sup>14</sup> *Frank v. Canada (Attorney General)*, [2019 SCC 1](#) at para. 26-27, BOA, tab 4 [“*Frank*”].

## B. Section 3 Requires Scrutiny of the Legislators' Structural Conflict of Interest

15. The right to vote must be viewed in the context of the “rules of the electoral game.” Democratic process theory warns that a structural risk to the integrity of the democratic process arises from the fact that legislators (regardless of party) act in a conflict of interest when they enact laws that determine the boundaries of public debate.<sup>15</sup> This structural conflict of interest stems from the self-interest of legislators in ensuring that the election laws that they enact serve their political interests (principally, re-election).<sup>16</sup> As a result, legislators are prone to adopt election laws that are self-serving.<sup>17</sup> Left unchecked, the ordinary operation of the democratic system has the potential to lead to breakdowns in the democratic process.<sup>18</sup> These breakdowns occur when legislators (of all political stripes) enact self-serving laws privileging their own interests, undercutting other viewpoints and, ultimately, undermining their accountability to the electorate.

16. As a response to this structural conflict of interest, Professor Dawood developed the idea of a “structural dimension” to constitutional rights, or “structural rights.” The structural approach implores courts to take into account the institutional framework within which constitutional rights are interpreted and applied.<sup>19</sup> Section 3, in particular, should be understood as a structural right

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<sup>15</sup> Colin Feasby, “Freedom of Expression and the Law of Democratic Process” (2005) [29 SCLR 237](#) at 285-86, BOA, tab 17 [“Feasby, “Law of Democratic Process”]; Samuel Issacharoff & Richard Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process” (1998) [50 Stan L Rev 643](#), BOA, tab 20.

<sup>16</sup> Michael Pal, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) [57: 2 McGill LJ 299](#) at 307-08, 320, 328, BOA, tab 22 [“Pal, “Breakdowns in the Democratic Process”].

<sup>17</sup> Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) [62 UTLJ 499](#) at 503, BOA, tab 14 [“Dawood, “Electoral Fairness”].

<sup>18</sup> [Feasby, “Law of Democratic Process”](#), *supra* note 15 at 273-77, BOA, tab 17; [Pal, “Breakdowns in the Democratic Process”](#), *supra* note 16 at 305-09, 326, BOA, tab 22.

<sup>19</sup> [Dawood, “Electoral Fairness”](#), *supra* note 17 at 519, BOA, tab 14.

because “it is intelligible only with respect to the larger institutional infrastructure within which this right is exercised.”<sup>20</sup> As such, a court interpreting and applying s. 3 should be cognizant of the manner by which the exercise of democratic rights is “influenced by the larger social and political infrastructure”, including, in particular, the structural conflict of interest identified above.<sup>21</sup>

17. Approaching the right to vote from a structural perspective protects against democratic breakdowns by ensuring a fair and legitimate democratic process. Democratic process theory assists in this task by enabling courts to identify partisan self-dealing as an unfair and illegitimate exercise of power because it arises from legislators promoting their own interests at the expense of the common good.<sup>22</sup> Section 3 empowers courts to remedy this inherent structural conflict of interest and thereby safeguard the legitimacy of Canada’s democratic process and institutions.

18. Reflecting the structural nature of the right to vote, s. 3 guarantees a fair and legitimate democratic process. This requires the Court to scrutinize election legislation to determine whether it reflects partisan self-dealing with the purpose or effect of insulating incumbents from accountability. Finding a breach of s. 3 in these circumstances is consistent with: (a) the established purpose of s. 3 to protect citizens’ right to effective representation; and (b) the structure of the *Charter*, including the relationship between democratic rights and the notwithstanding clause.

**(a) Purpose of Section 3 and a Fair and Legitimate Democratic Process**

19. As noted, s. 3 protects individual citizens’ right to effective representation and meaningful participation in elections. Neither of these individual guarantees is possible without a collective

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<sup>20</sup> Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) [51 Osgoode Hall LJ 251](#) at 255, BOA, tab 13.

<sup>21</sup> *Ibid* at 256, BOA, tab 13; [Dawood, “Electoral Fairness”](#), *supra* note 17 at 525, BOA, tab 14.

<sup>22</sup> *Ibid*, at 526, BOA, tab 14.

right to a fair and legitimate democratic process. If breakdowns in the democratic process are left unaddressed, the link between voters and representatives will erode. Representation would lose its “effective” quality, as diverse interests would cease to be represented in the institutions of government. Eventually, voters’ role in the democratic process would lose its meaning, as partisan self-dealing would come to insulate incumbents from accountability to the electorate. As such, promoting a fair and legitimate democratic process advances the purpose of the right to vote.

20. In particular, a fair and legitimate democratic process includes protecting political discourse, which is essential to the democratic process. The free flow of a diversity of opinions and viewpoints allows for robust policy debates and ensures that the political process is open to all persons.<sup>23</sup> Wherever restrictions on the free flow of information are imposed, the right to vote may be limited by the resulting reduction in information available to voters.<sup>24</sup> The legitimacy of the democratic process thus hinges on the right of each person to meaningfully participate in that process, including by hearing and expressing views on matters of political importance.<sup>25</sup>

21. The fairness and legitimacy of the democratic process—and thus the right to vote—is undermined where legislators engage in partisan self-dealing that has the potential to insulate incumbents from accountability. The Court must therefore scrutinize the purpose and effect of laws which affect the democratic process to determine whether they reflect partisan self-dealing.

22. Some regulations may, on their face, appear to advance a non-partisan, even laudable objective (such as mitigating the role of money in Canadian elections, which has been described

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<sup>23</sup> *Figueroa*, *supra* note 6 at para. 28, BOA, tab 3.

<sup>24</sup> Peter W Hogg, *Constitutional Law of Canada*, 5th ed ([Toronto: Carswell, 2007](#)) (loose-leaf updated 2019, release 1), ch 45(4), BOA, tab 19.

<sup>25</sup> *Figueroa*, *supra* note 6 at paras. 29-30, BOA, tab 3; *De Jong*, *supra* note 9 at paras. 23-25, BOA, tab 2.

as an “egalitarian model”),<sup>26</sup> but, in operation, they merely advance the interests of the governing party while knee-capping opposition parties or third-party issue advocacy.<sup>27</sup> Courts should not hesitate to find an infringement of the right to vote when such laws go further than necessary to achieve their facially legitimate objective or when a disparate partisan impact is discernable.

23. There is good reason to be concerned that the legislation at issue was motivated by a desire to silence government critics and enhance the governing party’s prospects of re-election. Significantly, the impugned provisions restrict the voice of third parties in the electoral process. Third parties—individuals and interest groups—play an important role in the electoral process that is distinct from that of political parties. They help to set the public agenda and define the parameters of debate in ways that mainstream political parties may be unwilling or unable to do.<sup>28</sup>

24. Where the sitting Legislature imposes restrictions on third parties, the potential for partisan self-dealing ought to be scrutinized in light of other changes to electoral process. In this case, the Legislature restricted third parties while simultaneously increasing the capacity of political parties to engage in paid political advertising. Bill 254 raised the ceiling on contributions to political parties.<sup>29</sup> Additionally, whereas third parties are regulated for 12 months prior to the election with no amendment to the spending cap, political parties’ spending is regulated for only six months.<sup>30</sup>

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<sup>26</sup> [Harper](#), *supra* note 4 at para. 62, BOA, tab 5.

<sup>27</sup> [Dawood](#), “[Electoral Fairness](#)”, *supra* note 17 at 555, BOA, tab 14; Colin Feasby, “Constitutional Questions about Canada's New Political Finance Regime” (2007) [45 Osgoode Hall LJ 514](#) at 517, 528-9, BOA, tab 15.

<sup>28</sup> *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*, [2011 BCCA 408](#) at para. 66, BOA, tab 1; Colin Feasby, “Issue Advocacy and Third Parties in the United Kingdom and Canada” (2003) [48-1 McGill LJ 11](#) at 21, BOA, tab 18.

<sup>29</sup> Bill 254, *supra* note 3 at s. 7; Colin Feasby, “Continuing Questions in Canadian Political Finance Law: Third Parties and Small Political Parties” (2010) [47:4 Alta L Rev](#) at 994-995, BOA, tab 16.

<sup>30</sup> *EFA*, *supra* note 2 at s. 38.1.

25. All of this must be considered in light of the fact that government advertising is exempt from the EFA,<sup>31</sup> and the fact that the Legislature sits throughout the pre-writ period, which grants the governing party a significant advantage in the form of press conferences, media coverage, and the substantial public purse that can be deployed to promote government initiatives.<sup>32</sup>

26. This is the kind of partisan self-dealing that s. 3 (and its exclusion from the scope of s. 33) was intended to guard against. The impugned provisions undermine the fairness and legitimacy of the democratic process by disproportionately insulating the governing party from criticism.

**(b) Structure of the *Charter* and the Relationship with the Notwithstanding Clause**

27. The exemption of s. 3 from the scope of the notwithstanding clause is an important indicator that s. 3 is breached by legislation that insulates incumbents from electoral accountability.

28. The notwithstanding clause allows a democratically elected legislature to override specific *Charter* rights (ss. 2 and 7-15) for a period of five years. The five-year sunset clause ensures that the same legislature cannot invalidate *Charter* rights indefinitely. The override will automatically expire unless it is renewed by a newly elected legislature (given that the maximum duration between elections is five years). Where legislators invoke the notwithstanding clause, they are accountable to the electorate at the next election before the override could be extended.<sup>33</sup>

29. Democratic rights—in particular, ss. 3, 4, and 5 of the *Charter*—are specifically exempted from override by s. 33 because the proper functioning of Canadian democratic institutions is an

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<sup>31</sup> *EFA*, *supra* note 2 at s. 37.0.2.

<sup>32</sup> Bryan Schwartz and Andrew Buck, “Partisan Advertising by Incumbent Governments” (2008) [5 Man LJ 25](#) at 25-26, BOA, tab 23.

<sup>33</sup> R. Leckey & E. Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts, and the Electorate”, [72:2 U.T.L.J. \[forthcoming 2022\]](#) at 13, BOA, tab 21 [“Leckey & Mendelsohn”].

assumption underlying the text of the notwithstanding clause. If democratic rights were subject to legislative override, incumbents could entrench themselves and renew the override indefinitely.<sup>34</sup>

30. Section 3's exemption from the scope of s. 33 recognizes that legislators have the interest and the ability to implement electoral rules that favour their re-election at the expense of the fairness and legitimacy of the democratic process. Justice Arbour, then of the Court of Appeal for Ontario, explained in *Sauvé #1* that s. 3 is exempted from application of s. 33 because it "must be protected against those who have the capacity, and often the interest, to limit the franchise."<sup>35</sup>

31. If the constitutional flaw in the challenged legislation were limited to the unjustifiable limit of s. 2(b) rights (as the Superior Court already held in *Working Families #1*), then incumbents could shield themselves from criticism—and thus democratic accountability—for invoking s. 33. That would not be a legitimate exercise of the notwithstanding clause, as the invocation of s. 33 draws its legitimacy from democratic support.<sup>36</sup> A broad and purposive understanding of s. 3 helps to insulate significant changes to the electoral process from legislative override.

### PART III - CONCLUSION

32. Courts are the only institutions that can defend democracy from self-interested legislation that debases the democratic process. The right to vote in s. 3 of the *Charter* protects the democratic process from partisan self-dealing with the purpose or effect of insulating incumbents from accountability to the electorate. Legislation of that character infringes s. 3, and the government bears a heavy burden to justify the limit on a stringent standard of justification under section 1.<sup>37</sup>

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<sup>34</sup> *Ibid* at 14, BOA, tab 21.

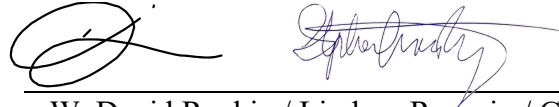
<sup>35</sup> *Sauvé v. Canada (Attorney-General)* (1992), [7 OR \(3d\) 481](#) at p 10, 89 DLR (4th) 644 (Ont CA), aff'd on other grounds, [1993] 2 SCR 43 [*Sauvé #1*], BOA, tab 9.

<sup>36</sup> [Leckey & Mendelsohn](#), *supra* note 33 at 13, BOA, tab 21.

<sup>37</sup> [Frank](#), *supra* note 14 at para. 43, BOA, tab 4.



**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of March, 2022.



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## SCHEDULE “A”

### LIST OF AUTHORITIES

#### Jurisprudence

1. *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*, [2011 BCCA 408](#)
2. *De Jong v. Ontario (Attorney General)* (2007), [88 OR \(3d\) 335](#), 287 DLR (4th) 90 (Ont Sup Ct)
3. *Figuroa v. Canada (Attorney General)*, [2003 SCC 37](#)
4. *Frank v. Canada (Attorney General)*, [2019 SCC 1](#)
5. *Harper v. Canada (Attorney General)*, [2004 SCC 33](#)
6. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020 SCC 32](#)
7. *Reference re Provincial Electoral Boundaries*, [\[1991\] 2 SCR 158](#)
8. *Reference re Senate Reform*, [2014 SCC 32](#)
9. *Sauvé v. Canada (Attorney-General)* (1992), [7 OR \(3d\) 481](#) at 486, 89 DLR (4th) 644 (Ont CA)
10. *Sauvé v. Canada (Chief Electoral Officer)*, [2002 SCC 68](#)
11. *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#)
12. *Working Families Ontario v. Ontario*, [2021 ONSC 4076](#)

#### Secondary Sources

13. Dawood, Yasmin, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) [51 Osgoode Hall LJ](#)
14. Dawood, Yasmin, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) [62 UTLJ 499](#)
15. Feasby, Colin, “Constitutional Questions about Canada's New Political Finance Regime” (2007) [45 Osgoode Hall LJ 514](#)
16. Feasby, Colin, “Continuing Questions in Canadian Political Finance Law: Third Parties and Small Political Parties” (2010) [47:4 Alta L Rev](#)
17. Feasby, Colin, “Freedom of Expression and the Law of Democratic Process” (2005) [29 SCLR 237](#)

18. Feasby, Colin, “Issue Advocacy and Third Parties in the United Kingdom and Canada” (2003) [48-1 McGill LJ 11](#)
19. Hogg, Peter, *Constitutional Law of Canada*, 5th ed ([Toronto: Carswell, 2007](#))
20. Issacharoff, Samuel & Pildes, Richard, “Politics as Markets: Partisan Lockups of the Democratic Process” (1998) [50 Stan L Rev 643](#)
21. Leckey, Robert & Mendelsohn, Eric, “The Notwithstanding Clause: Legislatures, Courts, and the Electorate”, [72:2 U.T.L.J. \[forthcoming 2022\]](#)
22. Pal, Michael, “Breakdowns in the Democratic Process and the Law of Canadian Democracy” (2011) [57: 2 McGill LJ 299](#)
23. Schwartz, Bryan & Buck, Andrew, “Partisan Advertising by Incumbent Governments” (2008) [5 Man LJ 25](#)

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### 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(b)** Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

...

##### **Democratic rights of citizens**

**3** Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

##### **Maximum duration of legislative bodies**

**4 (1)** No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

##### **Continuation in special circumstances**

**4 (2)** In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

##### **Annual sitting of legislative bodies**

**5** There shall be a sitting of Parliament and of each legislature at least once every twelve months.

...

##### **Exception where express declaration**

**33 (1)** Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

### **Operation of exception**

**33 (2)** An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

### **Five year limitation**

**33 (3)** A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

### **Re-enactment**

**33 (4)** Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

### **Five year limitation**

**33 (5)** Subsection (3) applies in respect of a re-enactment made under subsection (4).

### **Election Finances Act, R.S.O. 1990, c. E.7 (before Bill 254 amendments)**

### **Considerations re political advertising**

**37.0.1** In determining whether an advertisement is a political advertisement, the Chief Electoral Officer shall consider, in addition to any other relevant factors,

- (a) whether it is reasonable to conclude that the advertising was specifically planned to coincide with the period referred to in section 37.10.1;
- (b) whether the formatting or branding of the advertisement is similar to a registered political party's or registered candidate's formatting or branding or election material;
- (c) whether the advertising makes reference to the election, election day, voting day, or similar terms;
- (d) whether the advertisement makes reference to a registered political party or registered candidate either directly or indirectly;
- (e) whether there is a material increase in the normal volume of advertising conducted by the person, organization, or entity;
- (f) whether the advertising has historically occurred during the relevant time of the year;
- (g) whether the advertising is consistent with previous advertising conducted by the person, organization, or entity;
- (h) whether the advertising is within the normal parameters of promotion of a specific program or activity; and

- (i) whether the content of the advertisement is similar to the political advertising of a party, constituency association, nomination contestant, candidate or leadership contestant registered under this Act. 2016, c. 22, s. 33.

### **Non-application re government advertising**

**37.0.2** For greater certainty,

- (a) nothing in this Act affects government advertising by the Government of Canada, the Government of Ontario, the government of another province or territory of Canada, or the government of a municipality, or by any part of such a government;
- (b) no government or part of a government mentioned in clause (a) is a third party for the purposes of this Act. 2016, c. 22, s. 34.

...

### **Same, non-election period**

**37.10.1 (2)** No third party shall spend,

- (a) more than \$24,000 in any electoral district for the purpose of third party political advertising in that district during the six-month period immediately before the issue of a writ of election for a general election held in accordance with subsection 9 (2) of the Election Act, multiplied by the indexation factor determined under section 40.1 for the calendar year in which the election period begins and rounded to the nearest dollar; or
- (b) more than \$600,000 in total for the purposes of third party political advertising during the six-month period immediately before the issue of a writ of election for a general election held in accordance with subsection 9 (2) of the Election Act, multiplied by the indexation factor determined under section 40.1 for the calendar year in which the election period begins and rounded to the nearest dollar. 2016, c. 22, s. 43.

### **No combination to exceed limit**

**37.10.1(3)** No third party shall circumvent, or attempt to circumvent, a limit set out in this section in any manner, including by,

- (a) acting in collusion with another third party so that their combined political advertising expenses exceed the applicable limit;
- (b) splitting itself into two or more third parties;
- (c) colluding with, including sharing information with, a registered party, registered constituency association, registered candidate, registered leadership contestant, or registered nomination contestant or any of their agents or employees for the purpose of circumventing the limit;
- (d) sharing a common vendor with one or more third parties that share a common advocacy, cause or goal;
- (e) sharing a common set of political contributors or donors with one or more third parties that share a common advocacy, cause or goal;

- (f) sharing information with one or more third parties that share a common advocacy, cause or goal; or
- (g) using funds obtained from a foreign source prior to the issue of a writ for an election.

### **Contributions**

**37.10.1 (3.1)** Any contribution from one third party to another third party for the purposes of political advertising shall be deemed as part of the expenses of the contributing third party.

...

### **Interim reporting requirements**

**37.10.2 (1)** Every third party shall promptly file the following interim reports with the Chief Electoral Officer, in the prescribed form:

1. When it has paid or committed to any person or entity to spend any funds on paid political advertising, it shall report the amount spent or committed, with a separate report being required each time its aggregate spending increases by an amount of at least \$1,000.
2. When it has reached the applicable spending limit under section 37.10.1, it shall report that fact.

### **Posting**

**37.10.2(2)** The Chief Electoral Officer shall publish every report filed under subsection (1) on the website of the Chief Electoral Officer within two days of receiving it.

### **Percentage**

**37.10.2(3)** Based on the interim reports, the Chief Electoral Officer shall determine the amounts spent or committed to be spent by each third party as a percentage of the maximum spending that is permitted for a third party under section 37.10.1, and publish the percentages on the website of the Chief Electoral Officer.

### **Purpose**

**37.10.2(4)** The purpose of the percentages determined under subsection (3) is to permit persons or entities that sell advertising to be aware that the third party is at risk of exceeding its spending limit, and to make informed decisions about selling advertising to the third party.

...

### **Non-campaign expenses**

**38.1** The total political advertising expenses incurred by a registered party during the six-month period immediately before the issue of a writ of election for a general election held in accordance with subsection 9 (2) of the Election Act, shall not exceed \$1,000,000, multiplied by the

indexation factor determined under section 40.1 for the calendar year and rounded to the nearest dollar. 2016, c. 22, s. 48.

**Protecting Ontario Elections Act, 2021, S.O. 2021, c. 5 - Bill 254**

**7 (1)** Subsections 18 (1) to (1.4) of the Act are repealed and the following substituted:

**Maximum contributions**  
**Registered parties**

**(1)** The contributions that a person makes to any one registered party shall not exceed, in a calendar year, \$3,300 plus \$25 for each calendar year that has begun on or after January 1, 2022.

**Constituency associations, nomination contestants**

**(1.1)** The contributions that a person makes to registered constituency associations and registered nomination contestants of any one registered party or to the constituency association of any independent member shall not exceed, in a calendar year, \$3,300 plus \$25 for each calendar year that has begun on or after January 1, 2022.

**Candidates of party**

**(1.2)** The contributions that a person makes to registered candidates of any one registered party shall not exceed, in a campaign period, \$3,300 plus \$25 for each calendar year that has begun on or after January 1, 2022.

**Non-party candidates**

**(1.3)** The contributions that a person makes to all registered candidates not endorsed by a registered party shall not exceed, in a campaign period, \$3,300 plus \$25 for each calendar year that has begun on or after January 1, 2022.

**Leadership contestants**

**(1.4)** The contributions that a person makes to any one registered leadership contestant of a registered party shall not exceed, in a calendar year that falls during a leadership contest period or during which the contestant is required to be registered by virtue of subsection 14 (2.1), \$3,300 plus \$25 for each calendar year that has begun on or after January 1, 2022.

...

**15 (1)** Clause 37.10.1 (2) (a) of the Act is amended by striking out “six-month period” and substituting “12-month period”.

**15 (2)** Clause 37.10.1 (2) (b) of the Act is amended by striking out “six-month period” and substituting “12-month period”.

**15 (3)** Subsection 37.10.1 (3) of the Act is repealed and the following substituted:



### **No combination to exceed limit**

**(3)** No third party shall circumvent, or attempt to circumvent, a limit set out in this section in any manner, including by,

- (a) acting in collusion with another third party so that their combined political advertising expenses exceed the applicable limit;
- (b) splitting itself into two or more third parties;
- (c) colluding with, including sharing information with, a registered party, registered constituency association, registered candidate, registered leadership contestant, or registered nomination contestant or any of their agents or employees for the purpose of circumventing the limit;
- (d) sharing a common vendor with one or more third parties that share a common advocacy, cause or goal;
- (e) sharing a common set of political contributors or donors with one or more third parties that share a common advocacy, cause or goal;
- (f) sharing information with one or more third parties that share a common advocacy, cause or goal; or
- (g) using funds obtained from a foreign source prior to the issue of a writ for an election.

### **Contributions**

**(3.1)** Any contribution from one third party to another third party for the purposes of political advertising shall be deemed as part of the expenses of the contributing third party.

...

**16** The Act is amended by adding the following section:

### **Interim reporting requirements**

**37.10.2 (1)** Every third party shall promptly file the following interim reports with the Chief Electoral Officer, in the prescribed form:

1. When it has paid or committed to any person or entity to spend any funds on paid political advertising, it shall report the amount spent or committed, with a separate report being required each time its aggregate spending increases by an amount of at least \$1,000.
2. When it has reached the applicable spending limit under section 37.10.1, it shall report that fact.

### **Posting**

**(2)** The Chief Electoral Officer shall publish every report filed under subsection (1) on the website of the Chief Electoral Officer within two days of receiving it.

### **Percentage**

(3) Based on the interim reports, the Chief Electoral Officer shall determine the amounts spent or committed to be spent by each third party as a percentage of the maximum spending that is permitted for a third party under section 37.10.1, and publish the percentages on the website of the Chief Electoral Officer.

**Purpose**

(4) The purpose of the percentages determined under subsection (3) is to permit persons or entities that sell advertising to be aware that the third party is at risk of exceeding its spending limit, and to make informed decisions about selling advertising to the third party.



**No selling over limit**

(5) No person or entity shall sell advertising to a third party when the person should reasonably be aware, based on the reporting under this section, that the sale would cause the third party to exceed a limit imposed by section 37.10.1.

**WORKING FAMILIES  
COALITION (CANADA)  
INC., et al.**

Applicants (Appellants)

and

**THE ATTORNEY GENERAL  
OF ONTARIO**

Respondent  
(Respondent in Appeal)

Court File Nos.: C70178, C70197, C70212

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

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**FACTUM OF THE INTERVENER,  
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

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