Court File No. CV-18-590584

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

WORKING FAMILIES ONTARIO, PATRICK DILLON, PETER MACDONALD, THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, FELIPE PAREJA, THE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION AND ON BEHALF OF THE MEMBERS OF THE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, THE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION AND LESLIE WOLFE

Applicants

and

THE ATTORNEY GENERAL OF ONTARIO and THE CHIEF ELECTORAL OFFICER OF ONTARIO

Respondents

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure* and the *Canadian Charter of Rights and Freedoms*, ss. 1, 2, 24, *Constitution Act, 1982*, s. 52 and *Constitution Act, 1867*, preamble

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May 25, 2021

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PART I - OVERVIEW

1. The Canadian Civil Liberties Association (**"CCLA"**) intervenes in support of the applicants' application for declarations that the *Election Finances Act*,[1] which imposes third party advertising restrictions for a full year prior to an election, violates the freedom of expression guaranteed by s. 2(b) of the *Charter of Rights and Freedoms*.[2] This restriction of political expression for a full year prior to an election is an affront to our democratic system of government.

2. As the Impugned Provisions clearly infringe freedom of expression, the CCLA's primary submissions concern s. 1 of the *Charter*. This case affords this Court a timely opportunity to articulate a principled approach to s. 1 in cases that engage political expression and the democratic process.

3. CCLA offers a framework for approaching s. 1 justification analysis that is consistent with the egalitarian model of election regulation and yet is suitable for checking laws driven by legislative self-interest. The structure of our democratic system of government places legislators in an inherent conflict of interest when enacting laws governing political expression and the democratic process. Courts are the only institution capable of checking this conflict of interest and ensuring the proper function of the democratic process. Accordingly, this Court should take a strict approach to the second part of the *Oakes* test, the proportionality analysis. Given that the Impugned Provisions are temporally excessive and definitionally overbroad, a rigorous application of proportionality analysis – minimal impairment, in particular – should be fatal.

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1 *Election Finances Act*, RSO 1990, c E.7, as amended by Bill 254, [*EFA*] ss 1(1), 37.0.1, 37.10.1(2), 37.10.1(3), 37.10.1(3.1), 37.10.2 (the "**Impugned Provisions**").

2 *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.

4. Regulation of third parties in Ontario has traditionally been limited to the writ period. By regulating political expression a year beyond the writ period, the Impugned Provisions limit criticism of the government during a period when the Legislature is sitting and engaging in normal governing activities.[3] The Impugned Provisions unjustifiably amplify the government's already powerful voice, while supressing other voices, which impoverishes the political discourse and compromises the formation of public opinion.

5. The definition of "political advertising" is vague and overbroad and offers imprecise criteria for third parties to determine when a given advertisement is subject to regulation, which chills political expression and captures issue-based advertising unrelated to a particular election.

PART II - BACKGROUND/FACTS

A. Regulation of Third Party Expression in Canadian Elections

6. Third parties – individuals and interest groups – have long participated in Canadian elections. They play an important role in the process of public deliberation that is distinct from that of political parties. Third parties help to set the public agenda and to define the parameters of debate in ways that mainstream political parties are often unwilling or unable to do.[4] Third parties contribute to the quality of democracy by: (a) giving voice to citizen interests, particularly those not represented in mainstream institutions; (b) providing a route through which citizens can participate; (c) supporting the development and maintenance of a culture of democracy; (d) facilitating the development of better public policy; and (e) making government more responsive

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[3] By contrast, during the writ period, the Legislature is dissolved, and normal governing activities are suspended.

[4] Colin Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48 McGill LJ 11 at 21 [Feasby, "Issue Advocacy"], Brief of Authorities of the Intervening Party, the Canadian Civil Liberties Association ("BOA"), tab 28.

to citizens.[5] Many of the contributions that third parties make to democratic governance occur outside of election campaigns.[6]

7. There is nothing inherently objectionable about third party political advertising. Third party political advertising does not undermine the values underlying the section 2(b) guarantee. In fact, courts have acknowledged that political advertising is more conducive to the values of truth-seeking, democratic discourse and self-fulfillment than commercial advertising, which has frequently benefitted from the protection of section 2(b).[7]

8. Nevertheless, the Supreme Court of Canada has recognized that unregulated third party advertising during an election could allow monied interests to acquire disproportionate influence over the electoral debate and upset the competitive balance established by political party and candidate spending limits.[8] The political finance regime in the *Canada Elections Act*,[9] which is emulated in many of the provincial elections statutes (including Ontario), attempts to mitigate the role of money in Canadian elections and has been described by the Supreme Court of Canada as an egalitarian model.[10]

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5 Lisa Young & Joanna Marie Everitt, *Advocacy Groups: Volume 5 of Canadian Democratic Audit,* (Vancouver: UBC Press, 2004) at 17, BOA, tab 34.

6 Affidavit of Andrea Lawlor, sworn May 13, 2021, Application Record of the Applicant, Elementary Teachers' Federation of Ontario, Vol 2, tab 5, pp. 292-3, at paras 10 and 12.

7 *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2006 BCCA 529 at para 132, BOA, tab 4.

8 *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827 at paras 62-63 [*Harper 2004*], BOA, tab 8.

9 *Canada Elections Act*, SC 2000, c 9.

10 *Harper 2004*, *supra* note 8 at para 62, BOA, tab 8. See also, Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy Under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill LJ 5 [Feasby, "The Emerging Egalitarian Model"], BOA, tab 29.

9. Recognizing that the risk of wealth-driven distorting effects are most acute in the time proximate to voting, regulation of third party advertising in Ontario has historically mostly been limited to what is called the "writ period", [11] which is typically in the range of 30 days prior to the election day.[12] The writ period is the logical period for the regulation of third party expenditures because "[i]n parliamentary systems… there is a very clear point at which campaigns switch from low gear into high gear; namely, when an election writ is issued."[13]

10. The writ period is when third party advertising is a more plausible threat to destabilize the competitive balance established by the spending limits that apply to political parties and candidates.[14] By contrast, the dynamic between elections is not one of competition between political parties and candidates whose spending is regulated; rather, it is one where the government acts and speaks with the benefit of all of the resources of the state. Between elections, there is little risk that third parties will drown out the government's message.

11. In 2008, in connection with adopting fixed election dates, British Columbia extended its third party advertising restrictions beyond the 28-day writ period to 60 days before polling day. The extension of restrictions on third party advertising beyond the writ period was found by the B.C. Court of Appeal to be unconstitutional.[15] B.C. subsequently introduced revised legislation

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[11] In Ontario, the writ period is typically 28 days, because a writ for an election must be dated on a Wednesday and the election day must typically be the fifth Thursday after the date of the writ: *Election Act*, RSO 1990, c E.6, s 9.1(3), (5).

[12] The longest writ period in modern Canadian history was 78 days in the 2015 Federal Election.

[13] Feasby, "Issue Advocacy", *supra* note 4 at 52, BOA, tab 28.

[14] *Ibid* at 51-52, BOA, tab 28.

[15] *British Columbia Teachers' Federation v British Columbia (Attorney General)*, 2011 BCCA 408 [*B.C. Teachers*], BOA, tab 2.

that restricted third-party advertising to 40 days before polling day. This restriction was also found to be unconstitutional by the B.C. Court of Appeal.[16] In both cases, the restrictions on third party advertising beyond the writ period failed the section 1 analysis, because (irrespective of the length of the restriction), they did not minimally impair freedom of expression.

12. Subsequent to B.C.'s failed attempts to curtail political expression, pre-writ restrictions on third party political advertising were added to the *Canada Elections Act*.[17] What is noteworthy is that the *CEA* limits apply to third party "partisan advertising", not to third party issue advertising. Third party issue advertising is only regulated under the *CEA* during the writ period when the broader definition of "election advertising" applies.

PART III - ISSUE

13. The Court must consider whether the Impugned Provisions contravene section 2(b) of the *Charter*. If the answer to this question is yes, then this Court must determine whether the Impugned Provisions are reasonable limits prescribed by law under section 1.

PART IV - LAW & ARGUMENT

A. Skeptical Application of the *Oakes* Test in the Context of Political Expression

14. The Impugned Provisions are a clear restriction of freedom of expression. Accordingly, the analysis must focus on the issue of justification under s. 1 of the *Charter*. Section 1 of the *Charter* demands that legislative provisions that infringe rights: (1) pursue a pressing and

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[16] *Reference re Election Act (BC)*, 2012 BCCA 394 at para 43 [*Reference re Election Act*], BOA, tab 21.

[17] *Canada Elections Act*, SC 2000 c. 9, [*CEA*] ss 2(1) ("partisan advertising", "pre-election period"), 56.1(2), 349.1.

substantial objective; and (2) that the means chosen be proportional to that objective.[18] CCLA submits that the Court must approach the proportionality of means analysis with skepticism, not deference. In particular, deference is not appropriate under the second branch of the *Oakes* test. When enacting laws governing political expression, the government finds itself in a conflict of interest, because such laws protect the government from scrutiny and, in the longer run, may favour the government's re-election. This structural conflict of interest demands a rigorous assessment of the means employed to achieve the Legislature's pressing and substantial objectives.

15. The Supreme Court's guidance on deference in the context of s. 1, especially in cases touching on the democratic process, has been inconsistent.[19] The CCLA submits that deference, to the extent that it is appropriate at all, is only warranted at the first stage of the *Oakes* test. Deference at this stage of the *Oakes* test refers only to the standard of proof required to show that the legislature's objective is pressing and substantial. The Supreme Court explained in *Bryan* that what it meant by deference was "an approach that accepts that traditional forms of evidence…may be unavailable in a given case".[20] Social science evidence in cases engaging democratic rights is unlikely to ever be conclusive, because of the "clash of democratic values involved with a contested concept like democracy and the imprecision of social science when applied to specific

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[18] A law is proportionate if: (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R v Oakes*, [1986] 1 SCR 103 at 138-139 [*Oakes*], BOA, tab 18; *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 94 [*Carter*], BOA, tab 5.

[19] Deferential cases include: *Harper 2004*, *supra* note 8, BOA, tab 8; *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 [*Bryan*], BOA, tab 16. Less deferential cases include: *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 [*Thomson Newspapers*], BOA, tab 25; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*], BOA, tab 23; *Figueroa v Canada (Attorney General)*, 2003 SCC 37, [2003] 1 SCR 912 [*Figueroa*], BOA, tab 6; *Frank v Canada (Attorney General)*, 2019 SCC 1, [2019] 1 SCR 3 [*Frank*], BOA, tab 7.

[20] *Bryan*, *supra* note 18 at para 28, BOA, tab 16.

legal criteria."[21] Thus, a reasoned apprehension of harm, using logic or common sense to fill in the gaps, may suffice to establish a pressing and substantial objective.

16. Applying a lower standard of proof at the first stage of the *Oakes* test demands a more rigorous proportionality analysis. The normative and contextual factors in this case – specifically, the structural conflict of interest in regulating political expression – demands that the court not defer to the legislature in the second part of the *Oakes* test.

17. The degree of deference accorded to the government at the proportionality stage of the *Oakes* test is variable. The Supreme Court explained in *Oakes* that s. 1 demands a "stringent standard of justification".[22] In *Thomson Newspapers*, when considering a publication ban on opinion polls days before polling day, the Supreme Court noted that the contextual factors in that case indicated that a high degree of deference was not warranted.[23] The Court struck down the publication ban, finding that it was not minimally impairing of freedom of expression.

18. More recently, the Supreme Court has reaffirmed that the s. 1 justification analysis is both normative and contextual.[24] An important normative and contextual factor that bears on the appropriate degree of deference in the present case stems from the wording of s. 1, which requires

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21 Michael Pal, "Democratic Rights and Social Science Evidence" (2014) 32 NJCL 151 at 157 [Pal, "Social Science"], BOA, tab 32.

22 *Oakes*, *supra* note 18 at 136, BOA, tab 18.

23 *Thomson Newspapers*, *supra* note 19 at para 122, BOA, tab 25.

24 *Frank*, *supra* note 19 at para 38, BOA, tab 7.

that the government demonstrably justify legislated limits on *Charter* rights according to the standard of "a free and democratic society".[25]

19. The Supreme Court's jurisprudence on democracy provides helpful guidance in understanding how the words of s. 1 bear on the analysis. In the *Secession Reference*, the Supreme Court explained that "democracy" is a fundamental value in Canadian constitutional law and that the principle of democracy has always informed the design of Canada's constitutional structure, and continues to act as an essential interpretive consideration.[26] The Supreme Court has also held that the basic structure of the Constitution contemplates the existence of certain political institutions, "including freely elected legislative bodies at the federal and provincial levels."[27] Neither "Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure".[28]

20. A structural risk to the integrity of the democratic process arises from the fact that when legislators (regardless of party) enact election laws or laws that affect the terms of public debate, they are acting in a conflict of interest.[29] The conflict of interest stems from the direct self-interest of legislators in ensuring that the election laws that they enact serve their political interests (*eg.* re-

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[25] *Oakes, supra* note 18 at 136, BOA, tab 18. In *Oakes*, Dickson C.J. stated that courts conducting a s. 1 analysis are "to be guided by the values and principles essential to a free and democratic society", which serve as the "ultimate standard" against which limits on rights or freedoms must be justified. The normative and contextual importance of "a free and democratic society" has, however, not received significant attention since *Oakes*.

[26] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 61-62 [*Secession Reference*], BOA, tab 22; Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 288-89, BOA, tab 33.

[27] *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at 57, BOA, tab 13.

[28] *Ibid.*

[29] Colin Feasby, "Freedom of Expression and the Law of Democratic Process" (2005) 29 SCLR 237 at 285-86 [Feasby, "Law of Democratic Process"], BOA, tab 27.

election).[30] As a result, legislators are prone to adopt election laws that are self-serving.[31] Left unchecked, the ordinary operation of the democratic system has the potential to lead to breakdowns in the democratic process.[32] These breakdowns occur when legislators (of all political stripes) enact self-serving laws that privilege their own interests, undercutting marginal viewpoints and, ultimately, undermining the legislators' accountability to the electorate.[33]

21. Courts have an essential role to play in defending the integrity of the democratic process from anti-competitive behaviour and democratic breakdowns. McLachlin C.J. stated in *Sauvé* that it is "when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system."[34] Robust judicial review of the Legislature's means of implementing its objectives is normatively and contextually demanded by the constitutional imperative to secure the "basic infrastructure of democracy".[35] The role of the judiciary as the "guardian of the constitution"[36] is to maintain the basic structure of Canadian democracy through robust judicial review of the Legislature's means of implementing its objectives. The legitimacy

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30 *Ibid*; Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57 McGill LJ 299 at 307-08, 320, 328 [Pal, "Breakdowns in the Democratic Process"], BOA, tab 31.

31 Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62:4 UTLJ 499 at 503,547 [Dawood, "Structural Rights"], BOA, tab 26.

32 Feasby, "Law of Democratic Process", *supra* note 29 at 273-77, BOA, tab 27; Pal, "Breakdowns in the Democratic Process", *supra* note 30 at 305-09, 326, BOA, tab 31.

33 Pal, "Breakdowns in the Democratic Process", *supra* at 308, 313, BOA, tab 31.

34 *Sauvé*, *supra* note 19 at para 15, BOA tab 23.

35 Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21:1 UBC L Rev 87 at 157, BOA, tab 30. See also *Secession Reference*, *supra* note 26 at para 78, BOA, tab 22. Judicial scrutiny of election laws that inhibit political expression aligns with the idea that constitutionalism and judicial review are complementary to, and facilitative of, democratic governance.

36 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, BOA, tab 9.

of Canadian democratic institutions is preserved when the judiciary intervenes to prevent legislators from enacting self-serving laws that insulate themselves from public criticism or accountability to the electorate.[37].

22. Courts should not be deferential when it comes to safeguarding the basic ground rules of democracy.[38] If breakdowns in the democratic process are allowed to fester, the public's confidence in the electoral process and the legitimacy of democratic institutions will inevitably erode.[39] Thus, without sufficient checks on their powers, legislators could pass laws that allow them to govern without the need for a "continuous process of discussion", "compromise, negotiation, and deliberation", or consideration of "dissenting voices" required for a functioning democracy.[40]

23. Once it is determined that the government is in a conflict of interest in making a law that concerns elections or the terms of public debate, a court should strictly apply the proportionality elements of the s. 1 analysis – rational connection, minimal impairment, and balancing of salutary and deleterious effects.[41] Given that the Impugned Provisions are temporally excessive (beyond the writ period) and definitionally overbroad, a rigorous application of proportionality analysis – minimal impairment, in particular – should be fatal.

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37 Pal, "Breakdowns in the Democratic Process", *supra* note 30 at 308-09, BOA, tab 31.

38 Feasby, "Law of Democratic Process", *supra* note 29 at 285-86, BOA, tab 27; Dawood, "Structural Rights", *supra* note 31 at 557, BOA, tab 26; Pal, "Social Science", *supra* note 21 at 165, BOA, tab 32.

39 Pal, "Breakdowns in the Democratic Process", *supra* note 30 at 326, BOA, tab 31.

40 *Secession Reference*, *supra* note 26 at para 68, BOA, tab 22.

41 Feasby, "Law of Democratic Process" *supra* note 29 at 285-86, BOA, tab 27.

B. Freedom of Expression and the Political Process

24. An analysis of section 2(b) should have regard to the values it was designed to protect: (1) truth-finding; (2) democratic discourse; and (3) self-fulfillment.[42] Chief Justice McLachlin and Justice Major explained in *Harper* that each of these values reflect that freedom of expression protects "not only the individual who speaks the message, but also the recipient."[43]

25. The U.S. Supreme Court has recognized freedom of expression "'serves significant societal interests' wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."[44]

26. When the context for expression engages the political process, the interest of the public in receiving information is both an individual interest and a collective interest. The individual interest in receiving information is connected to self-fulfillment and the formation of individual opinion. The collective interest is the formation of public opinion that is essential to holding governments accountable between elections and to voting during elections.

27. The Supreme Court explained in the *Secession Reference* that a functioning democracy requires consensus building through dialogue, compromise, negotiation, and deliberation, as well as a commitment to hearing dissenting voices.[45] Chief Justice Dickson in *Keegstra* described "[t]he

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42 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976, BOA, tab 10.

43 *Harper 2004*, *supra* note 8 at para 17, per McLachlin CJ and Major J (dissenting, but not on this point), BOA, tab 8.

44 *Pacific Gas & Electric Co v Public Utilities Commission*, 475 US 1 (1986) at 8, BOA, tab 15.

45 *Secession Reference*, *supra* note 26 at para 68, BOA, tab 22.

connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee" and went on to explain that this flows from "the Canadian commitment to democracy."[46] The Supreme Court recently remarked that freedom of expression is fundamental to enhancing participation in political institutions, because "the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society".[47]

28. Voices other than the government are particularly important to listeners and for the formation of public opinion. In 1938, the Supreme Court warned in *Reference re Alberta Statutes* that freedom of speech "cannot be curtailed without affecting the right of the people to be informed *through sources independent of the government* concerning matters of public interest."[48] The Court's emphasis on information coming from sources independent of government distinguished the Canadian system of government from the totalitarian regimes then stalking the World.

29. The collective interest in the formation of public opinion after hearing diverse voices requires the Court to consider the impact of the Impugned Provisions on democratic government. Freedom of expression is, in this sense, not just an individual right, it is also what Professor Dawood calls a structural right.[49] Taking a structural perspective means that when considering a restriction on expression that engages the political process, a court must be cognizant of the incentives that influence political actors and the function of democratic institutions. The

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46 *R v Keegstra*, [1990] 3 SCR 697 at 763-64, BOA, tab 17.

47 *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 1, BOA, tab 1.

48 *Reference re Alberta Statutes*, [1938] SCR 100 at 145-46 [emphasis added], BOA, tab 20.

49 Dawood, "Structural Rights", *supra* note 31 at 503, BOA, tab 26.

arguments that follow take a structural perspective on the role freedom of expression in democratic government.

C. Regulating Beyond the Writ Period

30. The egalitarian model of election regulation is concerned with ensuring economic advantage is not transformed into political advantage during the crucible of an election.[50] An electoral system that reliably privileges the voices that enjoy economic advantages and thereby condones the perpetuation of those advantages will lose legitimacy over time. Put differently, if the wealthy can "monopolize the election discourse," then dissenting voices will be silenced, at the expense of the voter's right to be adequately informed of all views.[51]

31. The third party spending limits found to serve an egalitarian objective in *Harper* applied *only during the writ period*. The fact that the Legislature is dissolved and is not engaged in the normal process of governing sets the writ period apart from normal politics. The *EFA*'s regulation of political expression for a full year prior to the writ period stymies the political discourse necessary to hold the government accountable.

32. The Supreme Court explained in the *Secession Reference* that "[t]he Constitution mandates government by democratic legislatures, and an executive accountable to them, 'resting ultimately on public opinion reached by discussion and the interplay of ideas.'"[52] The Court went on to explain that "[a] democratic system of government is committed to considering those dissenting

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[50] *Harper 2004*, *supra* note 8 at paras 62-63, BOA, tab 8. See also, Feasby, "The Emerging Egalitarian Model", *supra* note 10, BOA, tab 29.

[51] *Harper 2004*, *supra* at para 72, BOA, tab 8.

[52] *Secession Reference*, *supra* note 26 at para 68, citing *Saumur v City of Quebec*, [1953] 2 SCR 299 at 330, BOA, tab 22.

voices, and seeking to acknowledge and address those voices… ."[53] Between elections, third parties are the voices that play a crucial role in the public discussion and the interplay of ideas that is the lifeblood of our democratic system of government.

33. As described above, the dynamic outside the writ period is not electoral competition between regulated and evenly matched competitors; instead, the government holds a privileged or even dominant position in public discourse. Outside of elections, the government occupies the bully pulpit and has a disproportionate ability to set the agenda for public debate through both paid and unpaid media. The *EFA* further shifts the balance in favour of the government in two ways. First, it allows the government to promote its policies with the unlimited purse of the state, while curtailing the rights of third parties to speak out against those same policies. Second, the third-party advertising limits exacerbate the already massive advantage that the government enjoys in unpaid media by reducing the opportunities for other voices to speak and be heard.

34. Spending limits can curtail the diversity of perspectives heard and assessed by the electorate. [54] Accordingly, the Majority in *Harper* explained that spending limits must be "carefully tailored," since overly restrictive limits can infringe on voters' right to information, thereby "undermin[ing] the rights of citizens to meaningfully participate in the political process."[55]

35. The Impugned Provisions are not carefully tailored to their purpose and are not minimally impairing because they go well beyond the writ period.[56] The Impugned Provisions entrench the

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53 *Ibid.*

54 *Harper 2004*, *supra* note 8 at paras 19, 73, BOA, tab 8.

55 *Ibid* at para 73, BOA, tab 8.

56 The full extent of the *EFA*'s failure to "carefully tailor" its restrictions of the *EFA*'s definition of political advertising is discussed in greater detail in Section D, below.

power of the government to dominate discourse and shape public opinion outside elections. In turn, this insulates the government from the informed criticism essential to the proper functioning of our democratic system of government.

D. The Election Finances Act is Vague and Overbroad

36. The Impugned Provisions are also not minimally impairing of freedom of expression because they are vague and overbroad.[57] Although vagueness is relevant in assessing whether an infringing statute is "prescribed by law", vagueness also informs the minimal impairment inquiry.

37. A basic principle of the rule of law is that the law must be sufficiently clear that citizens can govern their conduct knowing whether or not they are in breach of the law.[58] This principle is especially salient in the area of freedom of expression, where uncertainty over the borderlines of legality can chill expression.[59] Because vague laws are unclear in the outer limits of their application, a citizen who wishes to stay within the law may have no choice but to err on the side of caution by saying less than is prohibited or by saying nothing at all.[60] Thus, a vague law is liable

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[57] The CCLA's submissions here centre on minimal impairment to provide concise submissions for the Court. This is not intended to suggest that the Attorney General has satisfied its onus of justification with respect to any of the other requirements of the *Oakes* test.

[58] The Court in *Sunday Times v United Kingdom*, [1979] 30 ECHR (Ser A) 1, BOA, tab 24 also discussed this concept in the context of considering the term "prescribed by law" at para 49:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able-if need be with appropriate advice–to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

[59] *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 610 at para 78 [*JTI-Macdonald Corp*], BOA, tab 3.

[60] *Ibid*.

to be found overbroad because "[g]enerality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits."[61]

38. The Attorney General must show two things to refute a claim of vagueness and overbreadth: (1) the Impugned Provisions must give adequate guidance to those expected to abide by them; and (2), the Impugned Provisions must limit the discretion of state officials responsible for their enforcement.[62] The definition of "political advertising" in s. 1(1), as further delineated in s. 37.0.1, fails both tests.

39. While the stated purpose of the *EFA* is to safeguard the integrity of Ontario's elections, its definition of "political advertising" is a blunt instrument.[63] By including advertising that takes a position on an issue closely associated with a registered party, its leader, or a candidate, the definition fails to distinguish between political advertising and true "issue advocacy" – paid communication concerned with public issues and bearing no significant connection to an election.

40. Indeed, the definition in the *EFA* is capable of capturing nearly all advertising on issues of public importance – political expression of the sort vital to a free and democratic society. In the context of a nearly-identical definition of political advertising, the British Columbia Court of Appeal warned in *Reference re Election Act* that such a definition "encompasses virtually any issue

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61 *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 94-95, per Sopinka J., BOA, tab 14. As an example, in *R v Zundel*, [1992] 2 SCR 731 at 769-70 [*Zundel*], BOA, tab 19 the Supreme Court found a prohibition on spreading false news that causes "injury or mischief to a public interest" vague, overbroad, and thus not minimally impairing, because "public interest" was such a broad, undefined phrase that it could not be said to be minimally impairing of freedom of expression.

62 *JTI-Macdonald Corp*, *supra* note 59 at para 79, BOA, tab 3.

63 *EFA*, *supra* note 1 at s.1(1) ("political advertising").

that may be the subject of political expression because political issues are almost always if not invariably associated with individual politicians and their parties".[64]

41. Take for example third party advertising on environmental issues. Virtually all parties take a position on environmental issues, and the Green Party is a party dedicated to environmental issues. Does the close association of the Green Party to environmental issues mean that all advertising about environmental issues is captured by the definition of political advertising? Does that, in turn, mean that any paid public messages by environmental organizations unrelated to the Green Party are nevertheless regulated? There is no explanation as to when an issue is sufficiently "closely associated" with a party or candidate that it attracts regulatory attention. On its face, the definition of political advertising appears broad enough to capture any environmental issue on the basis that the Green Party is closely associated with the environment. However, many advertisements encouraging environmental initiatives or sustainable practices may be entirely unconnected to an election or a political party.

42. Another problem with regulating political expression on issues that are closely associated with a candidate or political party is that the candidate and political party agendas are not fixed. An issue that was not closely associated with a candidate or political party a year before an election may become closely associated with a candidate or political party during that year. Shifting policy

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64 *Reference re Election Act*, *supra* note 16 at para 20, BOA, tab 21. The impugned definition, found at paragraph 16, reads: "election advertising" means the transmission to the public by any means, during the pre-campaign period and 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.

positions and associations of candidates and political parties make the question of close association a minefield for third parties planning advertising campaigns in the year prior to an election.

43. The *EFA* provides no guidance to third parties for evaluating whether their expression falls within the broad scope of the definition of political advertising in these liminal cases. Thus, the legislation carries the significant risk that third parties, unable to assess whether their political speech is governed by the *EFA* and faced with a burdensome regulatory regime and stiff penalties, will be discouraged from engaging in the type of issue-based advocacy essential to democracy.

44. Similarly, Section 37.0.1 of the *EFA*, which provides a list of non-exhaustive factors for the Chief Electoral Officer to consider when determining whether an advertisement is a political advertisement, fails to meaningfully rein in his or her discretion.[65] Thus, accompanying the *EFA*'s vague definition of political advertising are a host of similarly indeterminate "factors". These factors fail to limit the discretion of the Chief Electoral Officer and will chill political speech, because:[66]

(a) There is no explanation as to how the factors must be considered or what weight ought to be given to one or any of the factors.

(b) The factors contain various terms that are themselves vague or indeterminate – for example, how does the Chief Electoral Officer determine whether an advertisement is "within the normal parameters of a specific program or activity"? What parameters should be considered? What is "normal" evaluated with reference to?

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65 *EFA*, *supra* note 1 at s 37.0.1.

66 *JTI-Macdonald Corp*, *supra* note 59 at para 78, BOA, tab 3; *Zundel*, *supra* note 61 at 769-70, BOA, tab 19.

(c) There is no explanation as to how the factors ought to be interpreted or used by reference to the definition of political advertising, which averts to the purpose of the advertisement as well as to advertisements that might be considered "closely associated" with a party or candidate.

45. The indeterminate and sweeping definition of political advertising exceeds the *EFA*'s purpose of equalizing expression to ensure fair elections and diminishes the legitimate role that third parties play in Ontario politics. The definition is particularly troubling when combined with the 12-month pre-writ period. The further one gets from the election period, the more the *EFA*'s vague and overbroad regulation of political expression strays from its purpose. As pointed out by the trial judge in *B.C. Teachers*, "[w]ithout temporal proximity to the election to guide the determination of whether an issue is associated to a political party or candidate […] the definition has the effect of capturing more expression than is necessary to achieve the legislature's objective of electoral fairness. This risks undermining the legitimate role of third parties in Canadian society while failing to advance the purpose of the legislation."[67]

46. The *EFA*'s definition of political advertising, with its vagueness, expansive scope, and significant duration, is a disproportionate response to concerns about third party political advertising during the pre-election period, which cannot be saved under s. 1 of the *Charter*.

PART V - CONCLUSION

47. The regulation of third party political advertising for a full year prior to an election is a significant overreach entirely unjustified by the egalitarian principles that underlie most regulation

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[67] *B.C. Teachers*, *supra* note 15 at para 46, BOA tab 2.

of election finance. The timing of the government's adoption of the 12-month regulated period shortly prior to the commencement of the period has thrust third parties into a difficult and uncertain position, and has functionally silenced government critics. The Court should take this opportunity not only to strike down the Impugned Provisions as unconstitutional, but also to articulate a principled approach to the *Oakes* test in cases where the structural conflict of interest inherent in our democratic system of government leads legislators to enact self-serving laws.

48. The CCLA submits that the seriousness of the breach and the public interest militate in favour of an immediate, rather than suspended, declaration of invalidity.[68]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2021.

Colin Feasby, QC

[68] *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 126,131, BOA, tab 12.

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SCHEDULE "A"

LIST OF AUTHORITIES

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4. *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2006 BCCA 529
5. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331
6. *Figueroa v Canada (Attorney General)*, 2003 SCC 37, [2003] 1 SCR 912
7. *Frank v Canada (Attorney General)*, 2019 SCC 1, [2019] 1 SCR 3
8. *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827
9. *Hunter et al v Southam Inc*, [1984] 2 SCR 145
10. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927
11. *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569
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13. *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2
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15. *Pacific Gas & Electric Co v Public Utilities Commission*, 475 US 1 (1986)
16. *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527
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19. *R v Zundel*, [1992] 2 SCR 731
20. *Reference re Alberta Statutes*, [1938] SCR 100
21. *Reference re Election Act (BC)*, 2012 BCCA 394
22. *Reference re Secession of Quebec*, [1998] 2 SCR 217
23. *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519
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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canada Elections Act, SC 2000 c. 9

Definitions

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

…

partisan advertising means the transmission to the public by any means during a pre-election period of an advertising message that promotes or opposes a registered party or eligible party or the election of a potential candidate, nomination contestant or leader of a registered party or eligible party, otherwise than by taking a position on an issue with which any such party or person is associated. For greater certainty, it does not include

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

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

(c) the transmission of a document by a Senator or a member the expense of which is paid by the Senate or House of Commons;

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

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

(f) the making of telephone calls to electors only to encourage them to vote. (*publicité partisane*)

…

pre-election period means the period beginning on the June 30 before the day set in accordance with subsection 56.1(2) for the holding of a general election and ending on the day before the earlier of

(a) the first day of an election period for a general election, and

(b) the 37th day before the Monday referred to in subsection 56.1(2) or, if the Governor in Council makes an order under subsection 56.2(3), the 37th day before the alternate day referred to in that order. (*période préélectorale*)

…

Election dates

56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.

…

Maximum pre-election period expenses

349.1 (1) Subject to section 349.4, a third party shall not incur the following expenses in an aggregate amount of more than $700,000:

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

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

(c) election survey expenses in relation to election surveys that are conducted during that period.

Maximum pre-election period expenses — electoral district

(2) Not more than $7,000 of the maximum amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more potential candidates or nomination contestants in a given electoral district.

Expenses — party leader

(3) The maximum amount set out in subsection (2) only applies to an amount incurred with respect to a leader of a registered party or eligible party to the extent that it is incurred to promote or oppose his or her election in an electoral district.

Third party inflation adjustment factor

(4) The amounts referred to in subsections (1) and (2) shall be multiplied by the inflation adjustment factor referred to in section 384 that is in effect on the first day of the pre-election period.

***Election Act*, R.S.O. 1990, c. E.6**

First Thursday in June

9 (2) Subject to the powers of the Lieutenant Governor referred to in subsection (1), general elections shall be held on the first Thursday in June in the fourth calendar year following polling day in the most recent general election.

…

Polling day

9.1 (5) Polling day shall be the fifth Thursday after the date of the writ.

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

Interpretation

1 (1) "political advertising" means advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or its leader or the election of a registered candidate and includes advertising that takes a position on an issue that can reasonably be regarded as closely associated with a registered party or its leader or a registered candidate and "political advertisement" has a corresponding meaning, but for greater certainty does not include,

(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news,
(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,
(c) communication in any form directly by a person, group, corporation or trade union to their members, employees or shareholders, as the case may be,
(d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views, or
(e) the making of telephone calls to electors only to encourage them to vote; ("publicité politique", "annonce politique")

…

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.

…

Same, non-election period

37.10.1 (2) No third party shall spend,

(a) more than $24,000 in in any electoral district for the purpose of third party political advertising in that district during the 12-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 12-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.

WORKING FAMILIES ONTARIO et al.	and	**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND THE CHIEF ELECTORAL OFFICER**	Court File No: CV-18-590584
Applicants		Respondents	

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