Court File No. CV-21-00665404

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E N:

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

Applicants

and

THE ATTORNEY GENERAL OF ONTARIO

Respondent

and

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

Interveners

APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure*

FACTUM OF THE INTERVENER, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

November 17, 2021

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PART I - OVERVIEW

1. This case 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, the Ontario government has staked a bold claim to exclusive jurisdiction to dictate the terms of democratic engagement. If Ontario is correct, there is little to stop federal or provincial governments from enacting laws to tilt the electoral playing field in their favour. The Court is the only institution capable of standing as a bulwark against the subversion of fair elections, and this Court must not hesitate to do so. The integrity of Canadian democracy demands nothing less.

2. In June 2021, this Court pronounced the third party spending restrictions in ss. 37.0.1, 37.10.1(2), 37.10.1(3)-(3.1) and 37.10.2 (the "**Impugned Provisions**") of the *Election Finances Act*, RSO 1990, c E. 7 (the "**EFA**") unconstitutional as contrary to s. 2(b) of the *Charter of Rights and Freedoms*.[1] Rather than appeal the decision, the Ontario government recalled the Legislature and re-enacted the Impugned Provisions in Bill 307, the *Protecting Elections and Defending Democracy Act, 2021*.[2] In an attempt to insulate the Impugned Provisions from judicial scrutiny, the Government invoked section 33 of the *Charter*—the notwithstanding clause—for the first time in Ontario history.

3. This renewed challenge to third party spending limits is based on s. 3 of the *Charter*, which is not subject to the section 33 override. Section 3—the right to vote—protects much more than

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1 *Election Finances Act*, RSO 1990, c E. 7 at s. 37.0.1, 37.10.1(2), 37.10.1(3)-(3.1) and 37.10.2 [*EFA*]; *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 [*Charter*]; *Working Families Ontario v. Ontario*, 2021 ONSC 4076 [*Working Families #1*], Brief of Authorities of the Intervener, Canadian Civil Liberties Association ("BOA"), tab 18.

2 Bill 307, *Protecting Elections and Defending Democracy Act*, S.O. 2021, c. 31 [Bill 307].

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] Section 3 is interpreted broadly to allow courts to prevent legislative excess and safeguard our democracy.[4]

4. The s. 3 right to vote is infringed where legislation is enacted with the purpose or effect of insulating incumbents from democratic accountability to the electorate. In making election laws, the government is in a "structural conflict of interest" where the "potential for partisan self-dealing poses a fundamental challenge to the democratic system".[5] Section 3 protects citizens from such breakdowns in the democratic process. This is grounded in the text and purpose of s. 3, the scheme of the *Charter*, and the foundational role of democracy within our constitutional structure.

5. There is good reason to be concerned that the Impugned Provisions are motivated by a desire to silence government critics and enhance the governing party's prospects of re-election. The 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 originally enacted alongside provisions doubling limits on contributions to political parties.[6] The combined effect of these rules muffles independent voices and advantages political insiders.

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3 *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 at para 29 [*Figueroa*], BOA, tab 5. See also Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 UTLJ 499 at 504 [Dawood, "Electoral Fairness"], BOA, tab 21.

4 *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para 27 [*Frank*], BOA, tab 6; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11 [*Sauvé #2*], BOA, tab 16.

5 *Working Families #1, supra* note 1 at paras 73-74, BOA, tab 18.

6 Bill 254, *Protecting Ontario Elections Act, 2021*, S.O. 2021, c. 5, s. 7 [Bill 254].

6. The Impugned Provisions accordingly violate s. 3 of the *Charter* and could only be justified if they satisfy a "stringent justification standard" under s. 1 of the *Charter*.[7] Deference to the Legislature is not warranted where the democratic process is at stake. On this standard, the Impugned Provisions are not minimally impairing and ought to be struck down as unconstitutional.

PART II - BACKGROUND

A. Ontario's Third Party Spending Limits Are an Unconstitutional Outlier

7. 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.[8]

8. Third parties contribute to the quality of democracy by: (1) giving voice to citizen interests, particularly those not represented in mainstream institutions; (2) providing a route through which citizens can participate; (3) supporting the development and maintenance of a culture of democracy; (4) facilitating the development of better public policy; and (5) making government more responsive to citizens.[9] These contributions have been recognized by the courts.[10]

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7 *Sauvé #2, supra* note 4 at para 14, BOA, tab 16; *Frank*, *supra* note 4 at para 25, BOA, tab 6; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 at para 148 [*Conseil scolaire*], BOA, tab 3.

8 *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2011 BCCA 408 at para 66 [*Teachers' Federation*], BOA, tab 1, citing Colin Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48-1 McGill LJ 11 at 21, BOA, tab 25.

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

10 *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2006 BCCA 529 at para 132, BOA, tab 2.

9. Prior to 2021, the Ontario *Election Finances Act* regulated third party spending for six months before the 30-day statutory campaign period (often referred to as the "writ period").[11] Even at six months, the EFA's spending restrictions were an outlier in Canada, extending longer into the pre-writ period than any other third party spending regulation (either provincial or federal).

10. By contrast, the third party spending limits in the B.C. *Elections Act* extended for only 60 days into the pre-writ period, and the B.C. Court of Appeal twice struck this down as unconstitutional.[12] Similarly, the third party spending limits recently added to the *Canada Elections Act* extend approximately two months into the pre-writ period and have an explicit exception for issue-based advertising unrelated to a particular party or platform.[13]

11. Bill 254, the *Protecting Ontario Elections Act, 2021*, took Ontario even further afield by extending third party spending limits from six months to 12 months prior to the writ period, without a corresponding spending increase.[14] This effectively halved the spending capacity of third parties.

12. At the same time that Bill 254 reduced the capacity of third parties to communicate, it increased the capacity of political parties to communicate by increasing their contribution limits.[15] Bill 254 also created a disparity between third parties and political parties in the pre-writ period. Whereas the limitations for third parties were extended to 12 months, the equivalent limits remained six months for political parties.[16] This disparity significantly advantages political parties.

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11 *EFA*, *supra* note 1 at s. 37.10.1(2).

12 *Teachers' Federation*, *supra* note 8, BOA, tab 1; *Reference re Election Act (BC),* 2012 BCCA 394, BOA, tab 11.

13 *Canada Elections Act,* SC 2000, c 9, ss 2(1), 349.01(1), 349.1(1).

14 Bill 254, *supra* note 6 at s 15.

15 Bill 254, *supra* note 6 at ss 7(1), 15(3).

16 *EFA*, *supra* note 1 at s 38.1.

13. This Court held in *Working Families #1* that the third party spending limits in Bill 254 were unconstitutional contrary to s. 2(b) of the *Charter*. This infringement was not demonstrably justified under s. 1 because the spending limits failed the minimal impairment stage of the analysis.[17] The Chief Electoral Officer of Ontario had recommended against limiting issue-based advertising during the pre-writ period, and the government's expert evidence showed that there were less intrusive measures available—*i.e.*, a shorter period—to achieve the intended objective.[18]

14. The Court adopted the approach to s. 1 justification analysis advanced by the CCLA as intervenor. Drawing upon a body of scholarly literature, the CCLA identified that in enacting electoral laws, governments are in a structural conflict of interest and that justification under s. 1 should be approached strictly. The Court observed that "skepticism of government's motives is not misplaced where new election procedures are concerned."[19] The Court went on to conclude:

> [73] There is no justification or explanation anywhere in the Attorney General's record as to why the doubling of the pre-election regulated period was implemented. This lack of explanation has to be taken seriously. ***As counsel for the Canadian Civil Liberties Association points out, the subject of electoral design is one in which the incumbent government has a structural conflict of interest in that its interest in self-preservation may dominate its policy formulation.***
>
> [74] ***This potential for partisan self-dealing poses a fundamental challenge to the democratic system, and represents a context in which a more rights-oriented logic is called for to safeguard democratic institutions:*** […]. It is in this context that McLachlin CJ's admonition in *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 SCR 519, at para 15, is apt: 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." [emphasis added][20]

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17 *Working Families #1*, *supra* note 1 at para 75, BOA, tab 18.

18 *Ibid* at paras 64, 75, BOA, tab 18.

19 *Ibid* at para 56, BOA, tab 18.

20 *Ibid* at paras 73-74, BOA, tab 18.

15. As set out in more detail below, these same structural conflicts of interest ought to inform this Court's consideration of whether the Impugned Provisions contravene s. 3 of the *Charter*.

B. The Government Invoked the Notwithstanding Clause

16. Reflecting the structural conflict, and as a tacit acknowledgment that Bill 254 was unconstitutional, the government did not follow the ordinary procedure of appealing and seeking a stay. The government instead purported to insulate the Impugned Provisions from judicial scrutiny by re-enacting them under the cloak of s. 33 of the *Charter*, the notwithstanding clause.

PART III - LAW & ARGUMENT

17. The CCLA advances three principal submissions: (A) the right to vote enshrined in s. 3 of the *Charter* must be interpreted broadly and purposively; (B) this Court ought to scrutinize the Impugned Provisions for compliance with s. 3 in light of the structural conflict of interest inherent when legislators enact laws affecting the democratic process, and the right to vote is violated where legislation has the purpose or effect of insulating incumbents from accountability to the electorate; and (C) justification under s. 1 must be approached strictly where the right to vote is infringed.

A. Section 3 Must Be Interpreted Broadly and Purposively

18. *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.[21] Courts must also consider the scheme of the *Charter* and the structure of government implemented through the Constitution.[22]

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[21] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras 10-11, BOA, tab 10.

[22] *Reference re Senate Reform*, 2014 SCC 32 at para 26, BOA, tab 14; *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para 18 [*Harper*], BOA, tab 7.

19. ***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."[23] Canada's tradition of representative democracy, she 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.[24]

20. Section 3 also encompasses a "right to play a meaningful role in the electoral process."[25] 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".[26]

21. 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."[27]

22. ***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

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23 *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158 at p 183, 100 DLR (4th) 212, BOA, tab 12.

24 *Ibid* at pp 184-185, BOA, tab 12.

25 *Figueroa, supra* note 3 at paras 25-27, BOA, tab 5.

26 *Harper*, *supra* note 22 at para 71, BOA, tab 7.

27 *Ibid* at para 73, BOA, tab 7.

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.[28]

23. 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 for the majority in *Sauvé #2*, this structural aspect of the *Charter* calls for a generous interpretation of s. 3:

> A broad and purposive interpretation of the right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause.[29]

24. ***Structure of Government.*** Section 3 must also be interpreted with an understanding of the "structure of government" that the constitution seeks to implement.[30] 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."[31]

25. The structure of government implicit in the Constitution "connotes certain freely elected, representative, and democratic political institutions."[32] Chief Justice Wagner made an explicit connection in *Frank* between a broad reading of s. 3 and the strength and quality of democracy:

> The central purpose of s. 3 is to ensure the right of each citizen to participate meaningfully in the electoral process (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 25-26). Civic

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28 *De Jong v. Ontario (Attorney General)*, 88 OR (3d) 335, 287 DLR (4th) 90 (ONSC) at para 25 [*De Jong*], BOA, tab 4.

29 *Sauvé #2, supra* note 4 at para 11, BOA, tab 16.

30 *Senate Reform*, *supra* note 22 at para 26, BOA, tab 14.

31 *Ibid* at para 26, BOA, tab 14.

32 *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para 76 [*Toronto (City)*], BOA, tab 17.

> participation is fundamentally important to the health of a free and democratic society. ***Democracy demands that each citizen have a genuine opportunity to participate in the governance of the country through the electoral process. If this right were not protected adequately, ours would not be a true democracy*** (*Figueroa*, at para. 30).
>
> Therefore, ***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 (Figueroa, at para. 27). As a corollary, an overly narrow interpretation of the right to vote would diminish the quality of democracy in our system of government….***[33] [emphasis added]

26. The present application 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.

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

27. 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 terms of public debate.[34] This structural conflict of interest stems from the direct self-interest of legislators in ensuring that the election laws that they enact serve their political interests (principally, re-election).[35] As a result, legislators are prone to adopt election

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[33] *Frank*, *supra* note 4 at paras 26-27, BOA, tab 6.

[34] 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 24; Samuel Issacharoff & Richard Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 Stan L Rev 643, BOA, tab 27.

[35] 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 30.

laws that are self-serving.[36] Left unchecked, the ordinary operation of the democratic system has the potential to lead to breakdowns in the democratic process.[37] 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.

28. 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.[38] Section 3, in particular, should be understood as a structural right because "it is intelligible only with respect to the larger institutional infrastructure within which this right is exercised."[39] 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" within which individual rightsholders are situated, including, in particular, the structural conflict of interest identified above.[40]

29. Approaching the right to vote from a structural perspective protects against democratic breakdowns by ensuring a fair and legitimate democratic process.[41] 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

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36 Dawood, "Electoral Fairness", *supra* note 3 at 503, 547, BOA, tab 21.

37 Feasby, "Law of Democratic Process", *supra* note 34 at 273-77, BOA, tab 24; Pal, "Breakdowns in the Democratic Process", *supra* note 35 at 305-09, 326, BOA, tab 30.

38 Dawood, "Electoral Fairness", *supra* note 3 at 519, BOA, tab 21.

39 Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall LJ 251 at 255, BOA, tab 20.

40 *Ibid* at 256, BOA, tab 20; Dawood, "Electoral Fairness", *supra* note 3 at 525, BOA, tab 21.

41 Dawood, "Electoral Fairness", *supra* note 3 at 525-527, BOA, tab 21.

of the common good.[42] Section 3 empowers courts to remedy this inherent structural conflict of interest and thereby safeguard the legitimacy of Canada's democratic process and institutions.

30. 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 to the electorate. Finding a breach of s. 3 in these circumstances is consistent with: (a) the established purpose of s. 3 to protect citizen's right to effective representation and meaningful participation; (b) the scheme of the *Charter*, including the relationship between democratic rights and the notwithstanding clause; and (c) the unwritten principle of democracy.

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

31. As noted, s. 3 protects individual citizens' right to effective representation and meaningful participation in elections.[43] Neither of these individual guarantees is possible without a collective 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.

32. 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

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42 Dawood, "Electoral Fairness", *supra* note 3 at 526, BOA, tab 21.

43 *Figueroa, supra* note 3 at paras 25-27, BOA, tab 5.

and viewpoints allows the best policies to be chosen and ensures that the political process is open to all persons.[44] 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.[45] 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.[46]

33. 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.

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

34. 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.

35. The notwithstanding clause allows a democratically elected legislature to override specific *Charter* rights (ss. 2 and 7-15) for a period of five years.[47] 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

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44 *Figueroa, supra* note 3 at para 28, BOA, tab 5; *De Jong, supra* note 28 at para 24, BOA, tab 4.

45 Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2019, release 1), ch 45(4) [*Hogg*], BOA, tab 26.

46 *Figueroa, supra* note 3 at paras 29-30, BOA, tab 5; *De Jong, supra* note 28 at paras 23-25, BOA, tab 4.

47 *Charter*, *supra* note 1 at s. 33.

duration between elections is five years).[48] Where legislators invoke the notwithstanding clause, they are accountable to the electorate at the next election before the override could be extended.[49]

36. 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 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. This would be contrary to the purpose of the sunset clause in s. 33(3). As Dean Leckey and Mendelsohn write, "s. 33(3) hardwires into the Charter the idea that use of the notwithstanding clause requires the electorate's ongoing, or at least episodic, democratic consent."[50]

37. Justice Arbour, then of the Court of Appeal for Ontario, explained in *Sauvé #1* that s. 3 is exempted from application of the notwithstanding clause because it "must be protected against those who have the capacity, and often the interest, to limit the franchise."[51] Justice Arbour was referring to what is described in *Working Families #1* as the structural conflict of interest that governments have in regulating the electoral process. 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.

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48 *Charter*, *supra* note 1 at s. 4; Hogg, *supra* note 45 at ch 39(4), BOA, tab 27.

49 Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate", 72:2 U.T.L.J. [forthcoming 2022] at 13 [Leckey & Mendelsohn], BOA, tab 28.

50 *Ibid* at 14, BOA, tab 29.

51 *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 15.

(c) Structure of Government and Unwritten Principle of Democracy

38. The unwritten constitutional principle of democracy informs the meaning of s. 3 and supports an interpretation that protects the democratic process from partisan self-dealing with the purpose or effect of insulating incumbents.[52] Democracy is a "fundamental value in our constitutional law" and "continues to act as an essential interpretive consideration to this day".[53]

39. Without a right to a fair and legitimate democratic process, legislators could pass laws that allow them to govern without the need for the "continuous process of discussion", "compromise, negotiation, and deliberation", or consideration of "dissenting voices" required for a functioning democracy.[54] This is a strong indicator that the right to vote in s. 3 includes the structural right to a fair and legitimate democratic process protected from partisan self-dealing.

(d) Application to the Impugned Provisions

40. The Impugned Provisions contain telltale signs of partisan legislation exploiting the inherent conflict of interest for incumbents to favour their own interests in the electoral process. This is contrary to s. 3 of the *Charter* and cannot be overridden through the notwithstanding clause.

41. ***First***, the Impugned Provisions constrain the free-flow of information and negatively impact the right of each voter to properly inform themselves on key issues and to engage in issue-based advocacy. The capacity of third parties to participate in the electoral discourse and to provide opinions on governmental policy and the proper functioning of public institutions is hamstrung by

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52 *Toronto (City), supra* note 32 at para 55, BOA, tab 17.

53 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 61-62, 161 DLR (4th) 385 [*Secession Reference*], BOA, tab 13; Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 288-89, BOA, tab 32.

54 *Secession Reference, supra* note 53 at para 68, BOA, tab 13.

the 12-month limit on political advertising. This advantages incumbents by reducing third party criticism of the government for an entire calendar year leading up to each successive election cycle.

42. By constraining the information available to voters, the Impugned Provisions interfere with the right of each citizen to play a meaningful role in the election process, and to be well-informed when casting their vote. This advantages incumbents and interferes with a citizen's capacity to be effectively represented.

43. ***Second***, the Impugned Provisions are not carefully tailored. Restrictions on political advertising that are not "carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters"[55] are a strong indicator of a partisan purpose.

44. 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 as an "egalitarian model"),[56] but, in operation, they merely advance the interests of the governing party while knee-caping opposition parties or third-party issue advocacy.[57] 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.

45. The Impugned Provisions go further than necessary to achieve a legitimate purpose. This Court in *Working Families #1* found them to be at least twice as long as required to achieve the stated purpose.[58] Furthermore, this Court concluded in *Working Families #1* that the 12-month

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55 *Harper*, *supra* note 22 at para 73, BOA, tab 7; *De Jong, supra* note 28 at para 32, BOA, tab 4.

56 *Harper*, *supra* note 22 at para 62, BOA, tab 7.

57 Dawood, "Electoral Fairness", *supra* note 3 at 555, BOA, tab 21; Colin Feasby, "Constitutional Questions about Canada's New Political Finance Regime" (2007) 45 Osgoode Hall LJ 514 at 517, 528-9, BOA, tab 22.

58 *Working Families #1, supra* note 1 at para 75, BOA, tab 18.

pre-writ spending limit for third parties "is disproportionate in terms of the deleterious effects that it imposes."[59] This alone should be sufficient to find an infringement of s. 3.

46. ***Third***, the Impugned Provisions restrict the voice of third parties while simultaneously increasing the capacity of political parties to engage in paid political advertising. For example, Bill 254 (which originally enacted the Impugned Provisions) also raised the ceiling on contributions to political parties.[60] 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.[61] As a result, political parties are able to drown out different or dissenting voices by exacerbating the already existing advantages for political parties, in particular the governing party.

47. ***Fourth***, all of this must be considered in light of the fact that government advertising is exempt from the EFA,[62] 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 unlimited public purse that can be deployed to promote government initiatives.[63]

48. In sum, there is good reason to be concerned that the Impugned Provisions were motivated by a desire to silence government critics and enhance the governing party's prospects of re-election. This is precisely the kind of partisan self-dealing that s. 3 was intended to guard against. The Impugned Provisions undermine the fairness and legitimacy of the democratic process by

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59 *Working Families #1, supra* note 1 at para 80, BOA, tab 18.

60 Bill 254, *supra* note 6 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 23.

61 *EFA*, *supra* note 1 at s. 38.1.

62 *EFA*, *supra* note 1 at s. 37.0.2.

63 Bryan Schwartz and Andrew Buck, "Partisan Advertising by Incumbent Governments" (2008) 5 Man LJ 25 at 25-26, BOA, tab 33; *2017 Annual Report Volume 2* (Toronto, The Office of the Auditor General, 2017), ch 5, BOA, tab 19.

disproportionately insulating the governing party from criticism. As such, these provisions infringe the right to vote.

49. It is essential to understand the Impugned Provisions as a limit on the right to vote, as this is what protects the democratic process from legislative override. As noted, the purpose of the five-year sunset clause in s. 33 is to ensure that legislatures are democratically accountable to the electorate for invoking the notwithstanding clause. There must be a free-flow of information regarding the impact on *Charter* right for the electorate to fulfill this constitutional role.[64] Third parties have an important function in providing that information. If the constitutional flaw in the Impugned Provisions were limited to the unjustifiable limit of s. 2(b) rights (as this 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.[65]

C. Infringements of Section 3 Are Subject to Stringent Justification Under Section 1

50. Courts have an essential role under s. 1 of the *Charter* to defend the integrity of the democratic process from partisan self-dealing, particularly when addressing infringements of s. 3.

51. Given this role, courts should not be deferential when it comes to safeguarding the basic ground rules of democracy.[66] Chief Justice McLachlin (as she then was) stated in *Sauvé #2* 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

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64 Leckey & Mendelsohn, *supra* note 4 at 16-17.

65 *Ibid* at 13.

66 Feasby, "Law of Democratic Process", *supra* note 34 at 285-86, BOA, tab 25; Dawood, "Electoral Fairness", *supra* note 3 at 557, BOA, tab 21; Michael Pal, "Democratic Rights and Social Science Evidence" (2014) 32(2) NJCL 151 at pp 8-12, BOA, tab 31.

protect the integrity of this system."[67] 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".[68] The role of the judiciary as the "guardian of the constitution"[69] is to maintain the basic structure of Canadian democracy through robust judicial review of the Legislature's means of implementing its objectives.

52. The importance of the rights guaranteed by s. 3 and the risk presented by the structural conflict of interest in the electoral context demands that the Court apply the s. 1 justification analysis strictly. Chief Justice McLachlin (as she then was) explained in *Sauvé #2*, and Chief Justice Wagner reiterated in *Frank*, that "any intrusions on this core democratic right are to be reviewed on the basis of a stringent justification standard."[70] Recently in the context of minority language education rights, Chief Justice Wagner reiterated that a strict approach to s. 1 justification is required where the infringed right is exempt from the notwithstanding clause:

> [Section] 23 is not subject to the notwithstanding clause in s. 33 of the Charter. The decision in this regard reflects the importance attached to this right by the framers of the Charter as well as their intention that intrusions on it be strictly circumscribed. In *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, which concerned the right to vote of Canadians residing abroad, I reiterated McLachlin C.J.'s statement in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, that the framers had signalled the special importance of that right by excluding it from the scope of the notwithstanding clause. ***I added that, because of this exemption, any intrusions on the right are to be reviewed***

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67 *Sauvé #2, supra* note 4 at para 15, BOA, tab 16.

68 Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21:1 UBC L Rev 87 at 157, BOA, tab 29. See also *Secession Reference, supra* note 53 at para 78, BOA, tab 13. 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.

69 *Hunter et al v. Southam Inc*, [1984] 2 SCR 145 at p 155, 11 DLR (4th) 641, BOA, tab 9.

70 *Frank, supra* note 4 at para 25, BOA, tab 6; *Sauvé #2, supra* note 4 at para 14, BOA, tab 16.

on the basis of a stringent justification standard (Frank, at para. 25; Sauvé, at paras. 11 and 14). This also applies in the context of s. 23.[71]

53. The B.C. Court of Appeal in *Henry v. Canada* rejected a deferential approach to s. 1 where an infringement of s. 3 had been found. The B.C. Court of Appeal concluded that "it was not open to the trial judge to formulate a new test which permits Parliament 'some level of deference.'"[72]

54. The Attorney General submits that the Impugned Provisions are merely an attempt to reinforce the egalitarian model of elections endorsed by the Supreme Court in *Harper*.[73] Levelling the playing field to promote equity is a legitimate goal. This does not mean, however, that the objective motivating any specific third party spending limit is noble and pure, or even ascertainable with any certainty. Accepting a high-level objective like reinforcing the egalitarian model of elections and then applying strict scrutiny is the same approach as taken in *Frank,* where the Court accepted the over-arching objective of the "fairness of the electoral system" in limiting voting to residents of Canada but applied the proportionality analysis strictly to invalidate the legislation.[74]

55. The objectives of electoral legislation are easily framed in high-minded terms, and self-interested motives are rarely admitted candidly. The structural conflict of interest inherent in electoral legislation demands that the means chosen to achieve objectives must be strictly scrutinized as a way of preventing self-interested legislation dressed up with a seemingly noble purpose from passing constitutional muster.[75]

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71 *Conseil scolaire, supra* note 7 at para 148, BOA, tab 3.

72 *Henry v. Canada (Attorney General)*, 2014 BCCA 30 at para 84, BOA, tab 8.

73 *Harper, supra* note 5 at para 62, BOA, tab 7.

74 *Frank, supra* note 4 at paras 55-57, BOA, tab 6.

75 Feasby, "Law of Democratic Process", *supra* note 34 at p 289.

56. The Court's approach to justification in *Working Families #1* is a good model for the approach to be taken in this case. The Court accepted that at "the highest level the objective of the spending restrictions in the *EFA* can be seen as genuine."[76] However, the Court went on to apply the proportionality analysis strictly, finding that the third party limits were not minimally-impairing and that the deleterious effects outweighed the salutary effects.

57. 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 s. 1 analysis. Given that the Impugned Provisions are temporally excessive and definitionally overbroad, a rigorous application of the justification analysis should be fatal.

PART IV - CONCLUSION

58. 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 with that purpose or effect contravenes s. 3 and must be justified on a stringent standard under s. 1.

59. Applying this framework, the Impugned Provisions undermine the fairness and legitimacy of the democratic process by insulating the governing party from criticism from third parties in the 12 months preceding an election period, while simultaneously amplifying the governing party's ability to conduct political advertising of its own. This Court has the opportunity and the duty to defend the integrity of our democratic process by striking down this blatant partisan self-dealing.

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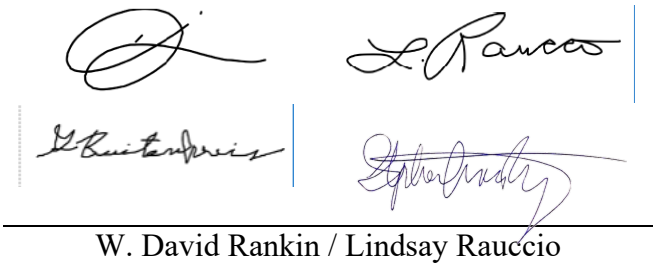
[76] *Working Families #1, supra* note 1 at para 56, BOA, tab 18.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2021.



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SCHEDULE "A"

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2. *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2006 BCCA 529
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4. *De Jong v. Ontario (Attorney General)*, 88 OR (3d) 335, 287 DLR (4th) 90 (ONSC)
5. *Figueroa v. Canada (Attorney General),* 2003 SCC 37
6. *Frank v. Canada (Attorney General)*, 2019 SCC 1
7. *Harper v. Canada (Attorney General)*, 2004 SCC 33
8. *Henry v. Canada (Attorney General)*, 2014 BCCA 30
9. *Hunter et al v. Southam Inc*, [1984] 2 SCR 145
10. *Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 32
11. *Reference re Election Act (British Columbia),* 2012 BCCA 394
12. *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158
13. *Reference re Secession of Quebec*, [1998] 2 SCR 217
14. *Reference re Senate Reform*, 2014 SCC 32
15. *Sauvé v. Canada (Attorney-General)* (1992), 7 O.R. (3d) 481 at 486, 89 DLR (4th) 644 (Ont CA)
16. *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68
17. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34
18. *Working Families Ontario v. Ontario*, 2021 ONSC 4076

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21. Dawood, Yasmin, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 UTLJ 499

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24. Feasby, Colin, "Freedom of Expression and the Law of Democratic Process" (2005) 29 SCLR 237

25. Feasby, Colin, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003) 48-1 McGill LJ 11

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27. Issacharoff, Samuel & Pildes, Richard, "Politics as Markets: Partisan Lockups of the Democratic Process" (1998) 50 Stan L Rev 643

28. Leckey, Robert & Mendelsohn, Eric, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate", 72:2 U.T.L.J. [forthcoming 2022]

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31. Pal, Michael, "Democratic Rights and Social Science Evidence" (2014) 32(2) NJCL 151

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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Definitions

2 (1) ***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)

…

Definitions

349.01 (1) The following definitions apply in this Division.

advertising means the transmission to the public by any means of an advertising message that promotes or opposes a registered party or eligible party or the election of a potential candidate, nomination contestant, candidate 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)

…

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.

***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 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.

…

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.

Election Finances Act, R.S.O. 1990, c. E.7 **(following Bill 307 Amendments)**

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 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. 2021, c. 31, s. 2.

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. 2021, c. 31, s. 2.

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. 2021, c. 31, s. 2.

WORKING FAMILIES ONTARIO et al. Applicants	and	**THE ATTORNEY GENERAL OF ONTARIO** Respondent	Court File No: CV-21-00665404

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