Court File No. 40725

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Respondent)

- and -

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

Respondents
(Appellants)

- and -

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PART I - OVERVIEW AND STATEMENT OF POSITION

1. This appeal pits Canadians' right to fair elections, a cornerstone of democratic governance, against the government's right to regulate the electoral process. The core of this appeal is about the limits on the legislature's ability to set the rules of the electoral game.

2. Section 3 of the *Charter* is interpreted broadly to allow courts to prevent legislative excess and safeguard our democracy.[1] Section 3 protects much more than the literal right to cast a ballot. It protects the right to effective representation and meaningful participation, and by extension the right to a fair and legitimate democratic process.[2]

3. Section 3 of the *Charter* also promotes the egalitarian model of elections, which prevents wealth from compromising equal participation in the electoral process. The egalitarian model requires a careful tailoring of election regulations to achieve a *Charter*-compliant equilibrium. If regulations are too lax, those with wealth could dominate political discourse. If regulations are too restrictive, then legitimate political speech essential to a functioning democracy could be stifled.[3]

4. Electoral laws which are not carefully tailored to achieve an egalitarian equilibrium infringe s. 3 of the *Charter*. Courts should assess careful tailoring as part of the s. 3 infringement analysis without deferring to government. Although s. 3 is an individual right, it must be understood within its broader political and social structure.[4] 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 enacting laws governing their own elections.[5]

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[1] *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 27 [***Frank***].

[2] *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, at para. 26 [***Figueroa***].

[3] *Harper v. Canada (Attorney General)*, 2004 SCC 33, at paras. 62, 73, 87 [***Harper***].

[4] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 64; Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251 at 255 [**Dawood, "Democracy"**].

[5] Colin Feasby, "Freedom of Expression and the Law of Democratic Process" (2005) 29 SCLR

5. Courts should respond to the structural reality of partisan self-dealing by scrutinizing whether electoral legislation achieves careful tailoring for the egalitarian model without starting from a position of deference to the legislature. Although implementing the egalitarian model may involve complex social and political science, courts are better placed institutionally to assess whether electoral laws are carefully tailored because courts are not structurally affected by partisan-self dealing. Courts can and should determine whether the legislation is carefully tailored to protect a fair and legitimate democratic process based on the evidence marshalled by government and challenging litigants, without deference being given to the legislature's choices.

6. Placing courts in this role does not require them to scrutinize whether the impugned legislation was factually motivated by partisan self-dealing. Partisanism is built into the structure of the democratic process—informing the reviewing courts' position of scrutiny as opposed to deference—regardless of the subjective motivations underlying particular legislation.

7. The need for stringent scrutiny continues into the s. 1 justification analysis, as this Court has held,[6] including because the s. 3 right to vote is exempted from the notwithstanding clause. Given the potential for partisan self-dealing, robust judicial review is needed to ensure that the legislature's means go no further than is necessary to achieve legitimate countervailing objectives.

PART II - ARGUMENT

A. Section 3 of the *Charter* must be interpreted in light of its unique structure

8. *Charter* rights must be interpreted broadly and purposively. While the first indicator of purpose is the text of the provision, this is not the sole consideration. Courts must also consider the scheme of the *Charter* and the structure of government implemented through the Constitution.[7]

237, at 285-286 [**Feasby, "Law of Democratic Process"**].

[6] *Frank*, 2019 SCC 1, at para. 43.

[7] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at paras. 10-11; *Reference re Senate Reform*, 2014 SCC 32, at para. 26 [***Senate Reform***].

9. Section 3 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." However, this guarantee extends well beyond the literal right to place a ballot in the box. In *Reference re Provincial Electoral Boundaries*, McLachlin J. (as she then was) held that the purpose of s. 3 is effective representation. Canada's tradition of representative democracy, she 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.[8]

10. Section 3 also encompasses a "right to play a meaningful role in the electoral process."[9] 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."[10]

11. 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."[11]

12. The free flow of a diversity of opinions and viewpoints allows for robust policy debates and ensures that the political process is open to all persons.[12] 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.[13] The legitimacy of the democratic process thus hinges on the right

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[8] *Reference re Provincial Electoral Boundaries*, [1991] 2 S.C.R. 158, at pp. 183-185.

[9] *Figueroa*, 2003 SCC 37, at paras. 25-27.

[10] *Harper*, 2004 SCC 33, at para. 71.

[11] *Harper*, 2004 SCC 33, at para. 73.

[12] *Figueroa*, 2003 SCC 37, at para. 28.

[13] Peter W. Hogg, Constitutional Law of Canada, 5th ed (Toronto: Carswell, 2023), ch. 45(4).

of each person to meaningfully participate in that process, including by hearing and expressing views on matters of political importance.[14]

13. Section 3 must also be understood in light of the other provisions of the *Charter*. Although distinct, the rights protected by s. 3 of the *Charter* bear a close relationship with freedom of expression and the communication of ideas.[15] Unlike free expression under s. 2(b), however, the right to vote is not subject to legislative override under s. 33. This structural aspect of the *Charter* calls for a generous interpretation of s. 3. The *Charter* signals the special need to protect the right to vote from legislative interference by exempting it from the notwithstanding clause.[16]

14. Section 3 must also be interpreted with an understanding of the "structure of government" that the constitution seeks to implement. 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."[17]

15. The structure of government implicit in the Constitution "connotes certain freely elected, representative, and democratic political institutions."[18] Chief Justice Wagner made an explicit connection in *Frank* between a broad reading of s. 3 and the strength and quality of democracy. He explained that "a broad interpretation of s. 3 enhances the quality of our democracy and strengthens the values on which our free and democratic state is premised."[19]

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[14] *Figueroa*, 2003 SCC 37, at paras. 29-30.

[15] *De Jong v. Ontario (Attorney General)*, (2007), 88 O.R. (3d) 335, at para. 25 (Sup. Ct. J.).

[16] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, at para. 11 [***Sauvé #2***].

[17] *Senate Reform*, 2014 SCC 32, at para. 26.

[18] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 76.

[19] *Frank*, 2019 SCC 1, at paras. 26-27.

B. Legislators' structural conflict of interest mandates strict judicial scrutiny

16. As a majority of this Court held in *Harper*, "[s]pending limits…must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters."[20] The question arises whether the reviewing court should adopt a posture of deference to the legislature's choices for carefully tailoring electoral laws. Such an attitude of deference is reflected in the application judge's approach of deferring to the legislature's choice of "one of two" reasonable alternatives for the pre-writ restricted period (*i.e.*, 12 months versus 6 months).[21]

17. In the CCLA's submission, a posture of deference is inappropriate within the s. 3 infringement analysis. To fulfill the reviewing court's role as a guardian of the constitution, it should determine in a non-deferential manner whether impugned electoral laws are carefully tailored to implement the egalitarian model.[22]

18. Although this Court has referred to the need to take a "natural attitude of deference toward Parliament when dealing with electoral laws",[23] this was in the context of s. 1 justification for infringement of free speech. Any attitude of deference ought to be limited to that context (*i.e.*, the justification analysis in the free expression cases) where the impugned law involves nuanced choices affecting free expression. In contrast, deference has no place within the s. 3 infringement analysis. Limits on the right to vote "require not deference, but careful examination".[24]

19. The need for careful examination is reflected in democratic process theory, which warns that a structural risk to the integrity of the democratic process arises from the fact that legislators

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[20] *Harper*, 2004 SCC 33, at para. 73.

[21] *Working Families Coalition (Canada) Inc. v. Ontario*, 2021 ONSC 7697, at paras. 109-112.

[22] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499 at 556-557 [**Dawood, "Electoral Fairness"**].

[23] *R. v. Bryan*, [2007] 1 S.C.R. 527, at para. 9; *Harper*, 2004 SCC 33, at para. 87.

[24] *Frank*, 2019 SCC 1, at paras. 43-44; *Sauvé #2*, 2002 SCC 68, at para. 9.

(of all parties) act in a conflict of interest when they enact laws that determine the boundaries of public debate.[25] This structural conflict of interest stems from the self-interest of legislators in ensuring that the election laws that they enact serve their political interests (*e.g.*, re-election).[26] As a result, legislators are prone to adopt election laws that are self-serving.[27] Left unchecked, the ordinary operation of the democratic system has the potential to lead to breakdowns in the democratic process.[28] 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.[29]

20. 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 exercised, interpreted, and applied.[30] Section 3 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."[31] As such, a court interpreting and applying s. 3 should be cognizant of the manner by which the exercise of democratic rights is "influenced by the larger social and political infrastructure", including, in particular, the structural conflict of interest identified above.[32]

21. Approaching the right to vote from a structural perspective protects against democratic breakdowns by ensuring a fair and legitimate democratic process. Democratic process theory

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[25] Colin Feasby, "Law of Democratic Process", at 285-286.

[26] Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57: 2 McGill L.J. 299 at 307-308, 320-328 [**Pal, "Breakdowns"**].

[27] Dawood, "Electoral Fairness", at 503.

[28] Feasby, "Law of Democratic Process", at 273-277; Pal, "Breakdowns", at 305-309, 326.

[29] Dawood, "Electoral Fairness", at 509-510.

[30] Dawood, "Electoral Fairness", at 503, 519.

[31] Dawood, "Democracy", at 255.

[32] Dawood, "Democracy", at 256; Dawood, "Electoral Fairness", at 525.

assists in this task by enabling courts to identify partisan self-dealing as an unfair and illegitimate exercise of power because it arises from legislators promoting their own interests at the expense of the common good.[33] Section 3 empowers courts to remedy this inherent structural conflict of interest and thereby safeguard the legitimacy of Canada's democratic processes and institutions.

22. Reflecting the structural nature of the right to vote, s. 3 should guarantee a fair and legitimate democratic process. This requires courts to carefully examine election legislation to determine whether it strikes the *Charter*-compliant equilibrium required for the egalitarian model.

23. The fairness and legitimacy of the democratic process—and thus the right to vote—is undermined where legislation in effect has the potential to insulate incumbents from accountability. The Court must therefore scrutinize the effect of laws which affect the democratic process to determine whether they are carefully tailored to implement the egalitarian model without skewing the electoral system. This may involve social and political science evidence marshalled by the government justifying the electoral law, and of any litigants challenging the law.

24. Some regulations may, on their face, appear to advance a laudable, non-partisan objective (such as mitigating the role of money in elections) but, in operation, they mostly advance the interests of the governing party while knee-capping opposition parties or third-party advocacy.[34] Courts should find an infringement of the right to vote when such laws go further than necessary to achieve their facially legitimate objective or where a disparate partisan impact is discernable.

25. Deference to incumbent legislatures can leave breakdowns in the democratic process unaddressed, thereby eroding the link between voters and representatives. 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.

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[33] Dawood, "Electoral Fairness", at 526.

[34] Dawood, "Electoral Fairness", at 555; Colin Feasby, "Constitutional Questions about Canada's New Political Finance Regime" (2007) 45 Osgoode Hall L.J. 514, at 517, 528-529.

26. The exemption of s. 3 from the scope of the notwithstanding clause also indicates that deference to the legislature's choice is not appropriate when considering whether a breach of s. 3 has occurred.[35] The five-year sunset provision of the notwithstanding clause ensures that the same legislature cannot invalidate *Charter* rights indefinitely (as five years is the maximum duration between elections). Thus, where legislators invoke the notwithstanding clause, they are accountable to the electorate at the next election before the override can be extended.[36] The right to vote is exempted from override because, otherwise, incumbents could entrench themselves and renew the override indefinitely.[37] The *Charter* thus protects elections "against those who have the capacity, and often the interest, to limit the franchise."[38] It would be inconsistent with this structural protection built into the *Charter* for courts to defer too readily to incumbent legislatures.

C. Breaches of Section 3 are subject to stringent justification under Section 1

27. Courts also 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.

28. Given this role, courts should not be deferential when it comes to safeguarding the basic ground rules of democracy.[39] 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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[35] This Court reached a similar conclusion in respect of the application of s. 1 to s. 3 infringements: *Frank*, 2019 SCC 1, at para. 25; *Sauvé #2*, 2002 SCC 68, at para. 14.

[36] R. Leckey & E. Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate", 72:2 U.T.L.J. 189, at 13 [PDF] [**Leckey & Mendelsohn**].

37 Leckey & Mendelsohn, at 14 [PDF].

[38] *Sauvé v. Canada (Attorney-General)*, (1992), 7 O.R. (3d) 481 at p. 10 (Ont. C.A.), aff'd on other grounds, [1993] 2 S.C.R. 43.

[39] Feasby, "Law of Democratic Process", at 285-86; Dawood, "Electoral Fairness", at 557; Michael Pal, "Democratic Rights and Social Science Evidence" (2014) 32(2) N.J.C.L. 151 at pp. 8-12.

protect the integrity of this system."[40] Robust judicial review of legislative action is normatively and contextually demanded by the constitutional imperative to secure "basic infrastructure of democracy".[41] The role of the judiciary as the "guardian of the constitution"[42] is to maintain this basic structure of Canadian democracy.

29. 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."[43] 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.[44]

30. 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.'"[45]

31. 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

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[40] *Sauvé #2*, 2002 SCC 68, at para 15.

[41] Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21:1 U.B.C. L. Rev. 87 at 157.

[42] *Hunter v. Southam Inc*, [1984] 2 S.C.R. 145, at 155.

[43] *Frank*, 2019 SCC 1, at para 25; *Sauvé #2*, 2002 SCC 68, at para. 14.

[44] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 148.

[45] *Henry v. Canada (Attorney General)*, 2014 BCCA 30 at para. 84.

system" in limiting voting to residents of Canada but applied the proportionality analysis strictly to invalidate the legislation.[46]

32. 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."[47] 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.

33. 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.

PART III - ORDER SOUGHT

34. The CCLA takes no position on the disposition of these appeals. It does not seek costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 1ST DAY OF MAY, 2024

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Osler, Hoskin & Harcourt LLP

Lawyers for the Canadian Civil Liberties Association

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[46] *Frank,* 2019 SCC 1, at paras. 55-57.

[47] *Working Families Ontario v. Ontario*, 2021 ONSC 4076, at para. 56.

PART IV - TABLE OF AUTHORITIES

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