COURT OF APPEAL FOR ONTARIO

CITATION: Working Families Coalition (Canada) Inc. v. Ontario (Attorney General), 2023 ONCA 139
DATE: 20230306
DOCKET: C70178, C70197 & C70212

Benotto, Zarnett and Sossin JJ.A.

BETWEEN

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 (Appellants)

and

The Attorney General of Ontario

Respondent (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 (Interveners)

Howard Goldblatt, Christine Davies, and Anna Goldfinch, for the appellants the Elementary Teachers' Federation of Ontario and Felipe Pareja

Paul Cavalluzzo, Adrienne Telford, Michelle Thomarat, and Kylie Sier, for the appellants Working Families Coalition (Canada) Inc. and the Ontario English Catholic Teachers' Association

Susan Ursel, Kristen Allen, Emily Home, and Natasha Abraham, for the appellants the Ontario Secondary School Teachers' Federation and Leslie Wolfe

Robert W. Staley, Jonathan G. Bell, Douglas A. Fenton, Andrew N. Sahai, and Megan E. Steeves, for the respondent the Attorney General of Ontario

Stephen Aylward and Dragana Rakic, for the intervener the Chief Electoral Officer of Ontario

Jamie Cameron, Christopher D. Bredt, Mani Kakkar, and Daniel Milton, for the intervener Centre for Free Expression at Ryerson University

Crawford Smith, Matthew Law, and Patrick Wodhams, for the intervener Democracy Watch

Lindsay Rauccio, Stephen Armstrong, W. David Rankin, and Graham Buitenhuis, for the intervener the Canadian Civil Liberties Association

Heard: June 15-16, 2022

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated December 3, 2021, with reasons reported at 2021 ONSC 7697, 158 O.R. (3d) 161.

Zarnett and Sossin JJ.A.:

OVERVIEW

[1] These appeals concern the constitutional validity of an aspect of Ontario's legislation governing the conduct of elections and election campaigns. At the heart of the legislative provisions in issue are third party spending limits – restrictions on what can be spent on political advertising by a person or entity who is neither a candidate nor a political party in the lead-up to a provincial election.[1]

[1] Although the provisions in issue go beyond third party spending limits, the application judge, and the parties before us, treated the spending limits as the crux of the matter, and our analysis focuses on them.

[2] More specifically, these appeals concern the third party spending limits most recently added to the *Election Finances Act*, R.S.O. 1990, c. E.7 ("*EFA*"), in 2021, and whether they infringe the informational component of the right to vote (i.e., a citizen's right to exercise their vote in an informed manner), which is protected by s. 3 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[3] A proper aim of third party spending limits is to advance an egalitarian model of electoral democracy. The egalitarian model recognizes that "laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others": *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47. Or, to put it more simply, limits are necessary to ensure that the voices of the well-resourced do not drown out all others. However, where spending restrictions go too far, and third parties are prevented from providing political information to voters to an extent that undermines the right of citizens to meaningfully participate in the political process and to be effectively represented, the right to vote is infringed: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 73-74.

[4] In this case, the principal question, from a *Charter*-protected right-to-vote perspective, is whether the challenged spending restrictions go too far.

[5] In 2017, the year before the 2018 provincial election, Ontario legislatively imposed a $600,000 spending limit on political advertising by third parties. The limit applied to the 6-month period prior to the writs of election being issued.[2]

[6] Ontario once again amended the *EFA* in 2021, the year before the 2022 provincial election. This time it extended the period to which that monetary limit applied from 6 months to 12 months before the writs, but with no increase in the amount that could be spent.

[7] The amendments to the *EFA* sparked constitutional challenges. The application judge heard and decided two sequential proceedings.

[8] In the first proceedings, the appellants successfully challenged the $600,000 spending limit that applied during the 12-month pre-writ period and other related *EFA* provisions on the basis that they infringed third party advertisers' rights to freedom of expression under s. 2(b) of the *Charter* and could not be justified under s. 1: *Working Families Ontario v. Ontario*, 2021 ONSC 4076, 155 O.R. (3d) 545 ("*Working Families 1*"). In the course of his s. 1 analysis, the application judge concluded that the extension of a 6-month pre-writ restricted period (which he found was appropriate to enhance electoral fairness) to one that was doubly restrictive (12 months, with no increase in the amount that could be spent) was

[2] There are also limits on what can be spent between the writ and Election Day. Those limits are not directly in issue in this litigation.

unjustifiable as it did not minimally impair the free expression rights of third party advertisers.

[9] In response to that ruling, the Ontario government announced its intention to invoke the notwithstanding clause in s. 33 of the *Charter*, and introduced Bill 307, which received Royal Assent five days later as the *Protecting Elections and Defending Democracy Act*, *2021*, S.O. 2021, c. 31 ("*PEDDA*"). Other than the addition of the notwithstanding clause, the *PEDDA* amendments to the *EFA* are identical to the amendments that were invalidated in *Working Families 1*.

[10] In the second proceedings, which give rise to these appeals, the appellants challenged the legislation as a violation of s. 3 of the *Charter*, and as an improper use of s. 33 of the *Charter*. They relied on s. 3, because, unlike free expression rights under s. 2(b) of the *Charter*, which fall within the ambit of the notwithstanding clause, voting rights under s. 3 of the *Charter* do not.

[11] The application judge concluded in the decision under appeal ("*Working Families 2*") that the use of the notwithstanding clause in enacting *PEDDA* was not improper, and that the re-enacted spending limits on third party advertising during the pre-writ period did not infringe the right to vote under s. 3.

[12] The appellants now appeal to this court on the basis that the application judge erred in his interpretation and application of s. 3 and s. 33 of the *Charter*. They raise a number of different arguments, including that he erred in finding that

a spending restriction that is twice as restrictive as the 6-month restriction he considered to be appropriate to enhance electoral fairness did not infringe voting rights under s. 3.

[13] For the reasons below, we agree that the notwithstanding clause was properly invoked. Section 33 of the *Charter* has formal requirements only, which were complied with, and therefore there is no basis for this court to substantively review the government's decision to invoke it.

[14] However, as we explain below, we conclude that the appeals should be allowed because the challenged spending restrictions infringe the informational component of the voter's s. 3 right to meaningful participation in the electoral process, as set out by the Supreme Court in *Harper.*

[15] As we will explain, *Harper* provides two proxies for determining whether a voter's right to meaningful participation in the electoral process has been infringed: whether the restrictions are "carefully tailored" and whether they permit a "modest informational campaign".

[16] In our view, the application judge erred in failing to treat the extension of the spending restrictions from 6 months, which he had found to be appropriate to enhance electoral fairness, to a restriction that was twice as long with no increase in quantum, as central to the enquiry. There was no basis, on the record and the

application judge's own findings, to consider the third party spending restrictions, as extended, as carefully tailored.

[17] Nor did the application judge make any finding that the spending restrictions are sufficient to permit a "modest informational campaign".

[18] We would declare the challenged spending restrictions invalid, but would suspend the effect of the declaration for 12 months to allow Ontario to fashion *Charter*-compliant legislation.

BACKGROUND

(1) The parties

[19] There are three grouped appeals involving the following appellants:

C70178:

- Working Families Coalition (Canada) Inc. ("Working Families"): A long-standing not-for-profit civil society organization that seeks to educate and mobilize voters in respect of certain laws and policies.
- Patrick Dillon: A voting citizen who works with Working Families.
- Ontario English Catholic Teachers' Association ("OECTA"): An association that represents approximately 45,000 teachers, and regularly engages in political advertising designed to inform and mobilize the public on issues important to students, teachers, and the education system.
- Peter MacDonald: A voting citizen who works with OECTA.

C70197:

- The Elementary Teachers' Federation of Ontario ("ETFO"): The designated employee bargaining agent under s. 10(2) of the *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5, as the exclusive bargaining agent for public English-language elementary teachers in the province of Ontario.

- Felipe Pareja: A member of ETFO and (as of 2021) a Vice President of ETFO Peel Teachers' Local.

C70212:

- The Ontario Secondary School Teachers' Federation ("OSSTF"): A trade union that represents approximately 31,000 education workers and 32,000 secondary school teachers working in the education sector throughout Ontario.

- Leslie Wolfe: The former President of OSSTF's District 12 and a voter.

[20] The respondent in each appeal is the Attorney General of Ontario.

[21] Additionally, the following interveners participated in the appeals: the Canadian Civil Liberties Association, the Centre for Free Expression at Ryerson University, Democracy Watch, and the Chief Electoral Officer of Ontario.

(2) The legislative background on third party spending limits

[22] The third party spending limits for political advertising were first introduced into the *EFA*, effective January 1, 2017, as part of electoral financing reform under Bill 2. Many features of the legislation are expressly preserved in the version of the *EFA* currently in force following *PEDDA*. The objective of Bill 2 was to promote equality in political discourse, consistent with the egalitarian model and the Supreme Court's decision in *Harper* (both of which are elaborated on below). Germane to the issues on appeal, the 2017 legislative enactments introduced a

spending limit of $600,000 for political advertising by a third party in the 6-month period before the writs for a general election.

[23] Further amendments to the *EFA* were implemented under Bill 254, which received Royal Assent on April 19, 2021. One such amendment was the extension of the pre-writ period of restricted spending for third parties from 6 months to 12 months, but with no increase in the $600,000 amount that could be spent. This *EFA* provision was among those re-enacted by *PEDDA* following the decision in *Working Families 1*.

[24] In these proceedings, the appellants seek to have struck down provisions that fall within a number of categories, including: pre-writ spending limits, the definition of “political advertising”, anti-circumvention provisions, interim reporting requirements, and administrative penalties and offences. However, as noted by the application judge, it is the 12-month pre-writ period of restricted spending for third parties that is the “crux of the analysis”. The other impugned provisions, some of which pre-date Bill 254 and *PEDDA*, are ancillary to the spending limits.

(a) Pre-writ spending limits – s. 37.10.1(2) of the *EFA*

[25] As a result of *PEDDA*, the *EFA* imposes a $600,000 spending limit on political advertising by a third party during the 12-month period preceding the issuance of a writ for a fixed-date general election held in accordance with s. 9(2) of the *Election Act*, R.S.O. 1990, c. E.6. It also provides that a maximum of $24,000

may be spent in any particular electoral district. We refer to these provisions as the "challenged spending restrictions".[3] The prior *EFA* provisions, adopted in 2017, imposed the same monetary limits over the 6-month pre-writ period.

(b) Definition of "political advertising" – ss. 1(1) and 37.0.1 of the *EFA*

[26] "Political advertising" is a defined term under s. 1(1) of the *EFA*. It includes advertising in any medium with the purpose of promoting or opposing any registered party or its leader or the election of a registered candidate, but expressly excludes a number of forms of communication:

> "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,

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[3] These amounts are adjusted annually based on an indexation factor set out in s. 40.1.

> (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;

[27] This definition exists alongside s. 37.0.1, which sets out a non-exhaustive list of factors that can be considered when determining whether an advertisement is a "political advertisement":

> 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.

The text of s. 37.0.1, which was re-enacted by *PEDDA* after being invalidated in *Working Families 1*, is unchanged from the 2017 *EFA* provisions.

(c) Anti-circumvention – s. 37.10.1(3)-(3.1) of the *EFA*

[28] Since 2017 and continuing through the *PEDDA* re-enactments, the *EFA* has sought to prevent third parties from circumventing spending limits. The current version of the anti-circumvention provisions, re-enacted by *PEDDA*, prohibits third parties from circumventing or attempting to circumvent a spending limit by doing any of the following:

> (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

[29] Additionally, contributions made by one third party to another third party for the purposes of political advertising are deemed to be part of the expenses of the contributing third party: s. 37.10.1(3.1).

(d) Interim reporting requirements – s. 37.10.2 of the *EFA*

[30] Since 2021, a third party has been required to file an interim report each time its aggregate political advertising spending increases by an amount of at least $1,000 and another report upon reaching the spending limit. Elections Ontario provides a standard form for the purpose of making these reports. The Chief Electoral Officer is required to publish them online.

(e) Administrative penalties and offences – ss. 45.1, 46.0.2, 47-48 of the *EFA*

[31] As of 2021, the Chief Electoral Officer has been authorized to make orders requiring a person or organization to pay an administrative penalty for contravening particular provisions of the *EFA*, including for breaches of the spending limits (s. 37.10.1) and interim reporting requirements (s. 37.10.2). The Chief Electoral Officer can issue such an order up to two years after becoming aware of the contravention. The *EFA* prescribes maximum amounts, criteria for determining the amount, and procedures for issuing the orders: s. 45.1.

[32] Since 2017 and continuing through the *PEDDA* re-enactments, third parties that contravene spending limits are liable, in addition to other applicable penalties, to a fine of no more than five times the amount by which the third party exceeded the limit: s. 46.0.2.

[33] Additionally, a corporation or trade union that knowingly contravenes a provision of the *EFA* is guilty of an offence and liable on conviction to a fine not exceeding $50,000. Similarly, where no other penalty is provided, a person, political party, constituency association, or third party that knowingly contravenes the *EFA* is guilty of an offence and liable on conviction to a fine not exceeding $5,000: ss. 47-48.

(3) The decision of the application judge

[34] In this section, we provide a general outline of the application judge's decision. We return, in the analysis section, to some of his specific findings and conclusions.

[35] Given that the application judge decided *Working Families 1*, he emphasized at various points in his analysis that he was incorporating and building on his conclusions in that earlier decision for his analysis of the s. 3 *Charter* application. He also underscored the important differences between a s. 2(b) and a s. 3 challenge to the same provisions of legislation.

[36] The application judge began his analysis by rejecting an argument made by some of the appellants that s. 33 has its own internal limitations and cannot be invoked in certain circumstances, even with respect to rights under s. 2 of the *Charter*. He determined that the only structural limitations on the use of the notwithstanding clause are built into its very terms: it allows laws to remain operable "notwithstanding sections 2 and 7 to 15 of the *Charter*". Other than this limitation on its ambit of operation, the clause has only formal requirements, not substantive ones, controlling its enactment.

[37] He then turned to analyzing the legislation from the perspective of s. 3, focusing on the need to "ensure the primacy of the principle of fairness in democratic elections … [and that] all citizens are reasonably informed".

[38] The parties had agreed that s. 3 encompasses a right to engage in "meaningful participation" in the electoral process, which includes the right of citizens to be "reasonably informed" of their candidates and policy choices at election time. The s. 3 right protects the electoral process in the principled sense of ensuring that "the vote by the people will be free and informed". The application judge observed that under s. 3, restrictions on spending for political advertisements can enhance citizens' exercise of the right to vote. A fundamental premise of the egalitarian model of elections is that the right of third parties to participate in the democratic process must be meaningful, but at the same time "cannot be unlimited".

[39] The application judge reviewed the Supreme Court's decision in *Harper*, noting that "meaningful participation" in an electoral campaign was held not to be synonymous with an ability to engage in "effective persuasion campaigns" or the ability to "mount a media campaign capable of determining the outcome". In order to violate the right to vote, restrictions on spending for political advertisements would have to be fashioned "in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented". He also noted that third parties were held to be different from political parties; the candidates and their parties are the primary vehicles for informing the public of their electoral choices. While third parties play a significant role, it is one that can be restricted to ensure that "no one voice is overwhelmed by another." Violations of s. 3 are not therefore measured by comparing spending restrictions imposed on third parties with those imposed on the governing or opposition parties.

[40] In the application judge's view, there are many low-cost means of mass advertising, including social media posting and print advertisements. He considered that what was really impacted by the challenged spending restrictions were television advertisements. While noting that overly restrictive spending limits may undermine the informational component of the right to vote, and that the appellants had argued that the challenged spending restrictions were too restrictive – that they prevented organizations from effectively communicating their views on important public policy issues to their fellow citizens, in the application

judge's view, television advertisements are usually short and relatively superficial with respect to policy information.

[41] The application judge disagreed with the appellants' claim that the challenged spending restrictions are not carefully tailored to the egalitarian model of elections. He noted that, unlike the s. 2(b) analysis, which focuses on the rights of the person doing the advertising, the s. 3 analysis focuses on the impact of the restrictions on the rights of voters. The restrictions must leave room for the conduct by third parties of "modest, national, informational campaigns", but need not ensure that any third party can mount an expensive media campaign with the potential for determining election results.

[42] The application judge stated that the standard of "carefully tailored" relevant to s. 3 of the *Charter* is not equivalent to perfectly designed:

> [104] In the first place, the threshold for finding a prima facie infringement of section 3 is not as low as it is for section 2(b). The Supreme Court has been at pains to explain that "carefully tailored" does not mean perfectly designed. It has also clarified that restrictions on spending are not to be evaluated or measured by the impact of the advertisements: "Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome."
>
> [105] As the Court has recently pointed out, measuring the legislative measure by the impact that it potentially fosters or prevents would, in fact, "leave little room in the political discourse for the individual citizen" to participate in the electoral debate. The object of the exercise is to ensure that the tailoring of the legislation is carefully

> calibrated with the need for broad and egalitarian participation; it is not to ensure that the political advertisements can pack a strong punch.
>
> [106] The goal of the voting rights analysis in the first instance is not to restrain government or to make its legislative interventions as minimal as possible. Rather, it is to allow government to do what it takes to foster the kind of "equality in the political discourse [that] is necessary for meaningful participation". This means that the spending restrictions must at least leave room for the conduct by third parties of "modest, national, informational campaigns", but need not ensure that any third party can mount an expensive media campaign with the potential for determining election results. [Emphasis added; footnotes omitted.]

[43] Finally, the application judge identified the question as being whether the spending restrictions are carefully tailored to the egalitarian model of elections. He distinguished the s. 3 framework from the s. 2(b) and s. 1 frameworks he applied in *Working Famlies 1*, emphasizing that the former focuses on the electoral constituency whereas the latter focus on the speaker whose rights have been infringed. He explained:

> [88] The question with respect to the right to vote is not whether the spending restrictions on such advertisements violate free speech; they do. And it is not whether they are justifiable as being a minimal impairment of the Applicants' desired communications; they are not. Both of those questions were determined in the Applicants' favor in the last round of litigation over the *EFA*. The version of the statute in play this time around contains the section 33 clause which makes it operable notwithstanding those violations. Accordingly, the question now posed under section 3 of the *Charter*, as explained by the Supreme Court in *Harper*, is whether the

spending restrictions are “carefully tailored” to the egalitarian model of elections.

…

[100] The very same studies that were submitted in the section 2(b) case have now formed the basis of the government’s defense of its use of section 33 and the section 3 challenge. They must now be read with that legal context in mind. The speed of the new enactment therefore does not reflect a lack of care in tailoring the amendments, but rather reflects the fact that invoking the constitution’s ‘notwithstanding’ clause has changed the analytic landscape in which the amendments and their justification are now to be evaluated.

[101] Having found in my previous judgment that the impugned provisions infringed the Applicants’ rights of expression – a low threshold under section 2(b) – I then turned to analyzing whether the infringement could be justified under section 1. As indicated, I found that the government’s attempt to justify them floundered on the minimal impairment requirement. That requirement must be analyzed from the perspective of the speaker whose rights have been infringed, and asks whether the infringement impairs “‘as little as possible’ the right or freedom in question.” It is the impact of the measure on the broadcaster of the political advertisements as rights holder, and not its impact on society at large, that is the focus of that analysis.

[102] By contrast, it is the compliance of the provision with the egalitarian model of elections that is in issue in a section 3 challenge. By its very nature, this analysis focuses on the electoral constituency and the impact of the impugned legislation on that constituency of voters and their right to play a meaningful electoral role. It does not focus, first and foremost, on the speaker or broadcaster of the political advertisements. [Footnotes omitted.]

[44] The application judge reasoned that, although a 6-month period for the spending limit would be less restrictive, the 12-month period was “carefully considered” and was a reasonable option aimed at the policy objective of fostering an egalitarian electoral playing field. The tailoring of the law was “neither perfectly skintight nor to everyone’s taste”, but it was “careful enough to be appropriate to the suit this time around”. He also rejected the argument that the legislation could not be said to have been carefully tailored because the government had engaged in partisan self-dealing in enacting it. He noted that the legislation is neutral in its language and substantive content, and would equally limit the pre-writ spending of the appellants and their political adversaries.

[45] The application judge therefore concluded that the challenged spending restrictions did not violate s. 3 of the *Charter*.

ISSUES ON APPEAL & STANDARD OF REVIEW

[46] While each of the appellants raises differently framed grounds of appeal, each relies on the others’ arguments. The issues that we are required to decide may be summarized as follows:

1) Did the application judge err in interpreting and applying s. 33 of the *Charter*?
2) Did the application judge err in interpreting and applying s. 3 of the *Charter*?

3) If s. 3 is infringed, can that infringement be saved under s. 1?

[47] The standard of review for the application judge's interpretation of *Charter* provisions is correctness. The application judge's findings of fact and findings of mixed fact and law attract deference, and may only be disturbed if there is a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

ANALYSIS

(1) The application judge correctly concluded that s. 33 was properly invoked

[48] In adopting *PEDDA*, the Ontario legislature enacted amendments to the *EFA* that restated the identical amendments as those rendered inoperative in *Working Families 1*, with the addition of the following provision in s. 53.1(1) thereof:

> Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this Act is declared to operate notwithstanding sections 2 and 7 to 15 of the *Canadian Charter of Rights and Freedoms*.

[49] The application judge rejected the appellants' claim that s. 33 was not validly invoked, as its formal requirements were met and no other precondition to its invocation existed in law. We agree.

[50] In our view, this conclusion is entailed by the Supreme Court's decision in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. *Ford* holds that s. 33 is

subject to a requirement of form only, and that no substantive justification by a legislature for invoking the notwithstanding clause is required: at pp. 740-41.

[51] We explain briefly below why we disagree with the submissions that argue for a different result.

[52] OSSTF argues that s. 33(3), which limits the validity of an invocation of the notwithstanding clause to five years, places an internal limit on the ability of the legislature to invoke s. 33 to shield legislation that undermines electoral fairness. Such an internal limit, according to OSSTF, arises from: (i) the text of s. 33(3), (ii) the structural primacy of s. 3 in the *Charter*, and (iii) the norms and conventions for reforming election law affirmed by the unwritten principles of democracy and the rule of law.

[53] OSSTF references academic perspectives in support of its points. Professor Robert Leckey and Eric Mendelsohn describe how s. 33 is linked to general elections: Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022), 72:2 U.T.L.J. 189. Since a declaration under s. 33(1) ceases to have effect no more than five years after it comes into force by the terms of s. 33(3), and the maximum term of legislative bodies is also five years, voters act as a check on the notwithstanding clause's use. They note that, in this sense, "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”: at p. 199. As a result, OSSTF argues, s. 33 must be interpreted to place an internal limit on the legislature’s ability to reform election law; if fairness of the electoral process is undermined, the electorate would be unable to act as the ultimate check on legislative power. Section 33(3) would be without meaning.

[54] Moreover, Professor Yasmin Dawood notes that “[e]lectoral reform differs from the passage of ordinary legislation because it sets out the very ground rules by which political power is attained” and therefore such changes must be held to a higher standard of legitimacy: Yasmin Dawood, “The Process of Electoral Reform in Canada: Democratic and Constitutional Constraints” (2016), 76 S.C.L.R. (2d) 353, at p. 359. Legitimacy in electoral reform is derived from visibly following the political norms of neutrality, consultation, and deliberation. OSSTF contends that the unwritten constitutional principles of democracy and the rule of law embrace these concepts.

[55] These statements do not justify a conclusion that s. 33 was not validly invoked. Section 33(1) expressly exempts s. 3 of the *Charter* from the ambit of the notwithstanding clause. Section 3’s guarantee of rights is in full force and applicable to the legislation even though it contains the notwithstanding clause. Section 3 is either violated by the legislation or it is not. The scope and importance of the s. 3 rights cannot serve to restrict the operation of the notwithstanding clause regarding other rights to which the *Charter* says it does pertain.

[56] OSSTF further argues that the Supreme Court's decision in *Ford* is no longer an answer to the concerns it raises in light of the evolution of *Charter* jurisprudence since *Ford* was decided in 1988. We note, however, that *Ford* has not been overruled or specifically doubted by any subsequent Supreme Court decision. The core principles governing the interpretation and application of s. 33 in *Ford* must guide our review of s. 33 in this case. The notwithstanding clause was expressly and clearly invoked. The formal (and only) requirement for its invocation was complied with. The invocation will expire after five years, and the electorate will be able to consider the government's use of the clause when it votes. And, as s. 3's application to the legislation is unaffected by the invocation of the notwithstanding clause, the fact that it was validly invoked still leaves full room for s. 3 to operate.

[57] For these reasons, we would reject the argument that it was not open to Ontario to enact *PEDDA* with the notwithstanding clause, or that the manner or form of that enactment was improper.

[58] Before leaving the s. 33 issue, we note the submission of the intervener Centre for Free Expression reiterating the relationship between s. 33 and s. 3. The "sunset clause" in s. 33(3), which provides for the expiry of an invocation of the notwithstanding clause after five years, ensures any government that relies on this clause must face the electorate, protected by robust voting rights under s. 3, before it can be renewed. This symbiotic relationship between s. 33 and s. 3 militates for

a broad and robust interpretation of voting rights under s. 3 to ensure s. 33's core principle of democratic accountability.

[59] We agree that the values and principles of a free and democratic state, including democratic rights and accountability, lie at the core of s. 3 and are important to its interpretation, to which we now turn.

(2) The application judge erred in interpreting and applying s. 3

[60] Before turning to the application judge's analysis, we begin by laying out the proper analytic framework under s. 3 of the *Charter*, focusing on the informational component of a citizen's right to meaningfully participate in the electoral process.

(a) The proper analytic framework under s. 3 of the *Charter*

(i) General considerations

[61] Section 3 of the *Charter* provides:

> 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.

[62] The Supreme Court has confirmed how s. 3 should be read – broadly and in view of the principles that underlie it. "[A] broad interpretation of s. 3 enhances the quality of our democracy and strengthens the values on which our free and democratic society is premised": *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 27. As the Court put it in *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 27, "the

best interpretation of s. 3 is one that advances the values and principles that embody a free and democratic state, including respect for a diversity of beliefs and opinions."

[63] At the heart of s. 3 is the imperative "to ensure the right of each citizen to participate meaningfully in the electoral process" and "that each citizen have a genuine opportunity to participate in the governance of the country through the electoral process": *Frank*, at para. 26.

[64] At issue in these appeals is the informational component of a citizen's right to meaningfully participate in the electoral process. The informational component was described by the Supreme Court in *Harper*, at para. 71:

> This case engages the informational component of an individual's right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices": *Libman*, at para. 47. [Emphasis added.]

[65] In short, a citizen has a right to exercise their vote in an informed manner, which entails being reasonably informed of all electoral choices.

(ii) Section 3 protects the voter's right to receive information in connection with elections

[66] We agree with the Attorney General's submission that the analytic framework for a s. 3 challenge begins with a careful reading of the text. The reference in s. 3 to "[e]very citizen of Canada" having the right to vote in a provincial or federal election is inescapably directed toward participation in an election, as opposed to a right to lobby elected representatives or a free-standing right to engage in political discourse outside of elections.

[67] It follows that s. 3 protects the rights of individuals as voters in the electoral process, not the rights of third parties who hope to communicate with voters. As the application judge recognized, this distinction must be borne in mind since, in this respect, the s. 3 challenge differs from the s. 2(b) challenge, where the free expression rights of the appellants *qua* political advertisers were in issue.

[68] We do not accept several arguments the appellants raise relating to the application judge's interpretation of this informational component of s. 3.

[69] OSSTF argues that the application judge incorrectly viewed voters as only "consumers" of political information, and not purveyors of it. According to OSSTF, its actions as an advertiser are based on the democratic direction of its members, like the appellant Ms. Wolfe, whose lives are deeply affected by education and labour policy.

[70] Put at its broadest, OSSTF contends that the application judge erred by failing to situate the right to meaningful participation within the broader process of reciprocal political discourse, which is the bedrock of deliberative democracy.

[71] ETFO focuses on the right to effective representation under s. 3. ETFO emphasizes that the right to effective representation is inextricably linked to the voter's right to relevant information. The "downstream" impact of the challenged spending restrictions, therefore, limits voters from exposure to this relevant information for 13 months every four years (12 months of pre-writ spending restrictions and approximately one month of restrictions that are in effect between the writs and election day). ETFO argues that the application judge incorrectly considered only the impact of the challenged spending restrictions on elections, and not the free flow of relevant information necessary for the proper functioning of the democratic process.

[72] We do not accept that the scope of s. 3 is as broad as argued by OSSTF and ETFO. Any limit on third party spending would presumptively violate s. 3 on their reading of the scope of the voter's right to relevant information.

[73] Democracy Watch submits that a s. 3 analysis should be alive to the important differences among third party advertisers themselves. Democracy Watch highlights that the egalitarian model is concerned about the undue influence that wealthy third parties may wield in the electoral process. Third parties such as

the appellants, however, represent thousands of members who lack the resources to convey political information on their own. On this submission, they should not be subject to the same restrictions as a single or small group of wealthy businesses or individuals.

[74] While we accept that interpreting s. 3 within the egalitarian model requires sensitivity to context, we do not accept that certain third party advertisers convey information of higher value under s. 3 than others, or that the nature or make-up of third parties constitutionally requires different treatment under the egalitarian model.

(iii) The egalitarian model and the informational component of the right to vote

[75] We begin with the Supreme Court's development of the s. 3 framework in *Figueroa*, *Libman*, and *Harper*, and the Court's acceptance of the egalitarian model concerning advertising spending.

[76] In *Figueroa*, Iacobucci J. recognized, at para. 49, that "there is only so much space for political discourse; if one person 'yells' or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in the discourse." In other words, the voices of certain citizens will be drowned out by the voices of those with a greater capacity to communicate their ideas and opinions to the general public: see paras. 49-52.

[77] In *Libman*, a s. 2(b) and s. 2(d) case involving spending limits on advertising during a referendum campaign, the Supreme Court specifically affirmed the egalitarian model, recognizing the danger of allowing those with greater resources to dominate political discourse. The Supreme Court explained that spending limits are essential to ensure fair elections, at para. 47:

> … [S]pending limits are essential to ensure the primacy of the principle of fairness in democratic elections. The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate (Lortie Commission, *supra*, at p. 324). To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard. Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties. Thus, the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy (Lortie Commission, *supra*, at p. 323). Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to

> greater financial resources (Lortie Commission, *supra*, at p. 324).

[78] *Libman* recognized the influence third parties may have on elections and thus the need to extend spending limits to them, at para. 49:

> The actions of independent individuals and groups can directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. Such individuals or groups might either conduct a campaign parallel to that of one of the candidates or of a party and in so doing have a direct influence on the campaign of that candidate or party, or take a stand on a given issue and in so doing directly or indirectly promote a candidate or party identified with that issue.

[79] Similarly, *Harper* recognized the benefits of limits on third party advertising, in that case in the federal election context. In dismissing the s. 3 challenge to third party advertising limits, the Supreme Court affirmed that individuals should have an equal opportunity to participate in the electoral process and that wealth is the main barrier to equal participation: at para. 62. As Bastarache J. explained, “the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of those with less economic power”: at para. 62. Third party limits, he explained, seek to protect two groups: Canadian voters, and candidates and political parties: at paras. 80-81.

[80] Under the “egalitarian model”, it is appropriate to limit third party spending more strictly than the spending of candidates and political parties. In *Libman*, the Supreme Court explained why, at para. 50:

> It cannot be presumed that equal numbers of individuals or groups will have equivalent financial resources to promote each candidate or political party, or to advocate the various stands taken on a single issue that will ultimately be associated with one of the candidates or political parties … Although what [third parties] have to say is important, it is the candidates and political parties that are running for election. Limits on independent spending must therefore be lower than those imposed on candidates or political parties. Otherwise, owing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate.

[81] It follows that, in a s. 3 analysis, one cannot start from the proposition that any limiting of third party spending implies a breach of the right to vote in s. 3. Some level of spending limits is, on the contrary, necessary to enhance the right to vote.

[82] As the Supreme Court has made clear, however, there can come a point when a spending limit goes from being voting right-enhancing to being voting right-infringing.

[83] In *Harper*, at para. 73, Bastarache J. gave authoritative guidance on when spending limits will violate the informational component of the right to vote:

> Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties

> are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. [Emphasis added.]

[84] He went on, at para. 74, to state, with particular reference to the facts of that case:

> The question, then, is whether the spending limits set out in s. 350 interfere with the right of each citizen to play a meaningful role in the electoral process. In my view, they do not. The trial judge found that the advertising expense limits allow third parties to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns" but would prevent third parties from engaging in an "effective persuasive campaign" (para. 78). He did not give sufficient attention to the potential number of third parties or their ability to act in concert. Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression. [Emphasis added.]

(iv) When the informational component of s. 3 is infringed – the test and the proxies

[85] In our view, what the appellants must show to establish a violation of s. 3 is that the challenged spending restrictions limit information "in such a way as to

undermine the right of citizens to meaningfully participate in the political process and to be effectively represented". That is the constitutional standard for a violation.

[86] In order to determine whether the standard is violated, two proxies, or methods of ascertaining whether the restriction is constitutionally offside, are laid down by *Harper*.

Careful tailoring

[87] The first proxy is whether the restriction is "carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters", as opposed to being "overly restrictive". The requirement that the restriction be carefully tailored invites the court to examine the rationale, express or implicit, for the amount and duration of the spending limit – the express or implicit reasons why the lines were drawn where they were.

[88] The concept of careful tailoring is sometimes used when deciding whether an established *Charter* infringement can nonetheless be saved under s. 1. We have had the benefit of reading the dissenting reasons of our colleague, which emphasize that it is important not to conflate the s. 3 analysis with a s. 1 minimal impairment analysis. We make the same point. The requirement that the restriction be carefully tailored in the sense necessary to determine whether s. 3 has been infringed must be viewed differently from minimal impairment. In the s. 1 context,

careful tailoring, through the choice of a reasonable alternative, is used not to determine whether a *Charter* right is infringed by the legislation, but to help evaluate whether a *Charter* infringement is minimally impairing, which is one (but just one) of the elements of the *Oakes* test: *R. v. Oakes*, [1986] 1 S.C.R. 103. This is particularly the case with legislation that infringes a *Charter* right in the course of addressing complex social issues. As McLachlin C.J. stated in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 53:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives. [Emphasis added.]

[89] Unlike in a minimal impairment analysis, the appellants in this case bore the burden of showing an absence of careful tailoring under s. 3. While the presence or absence of an explanation for the restrictions is relevant to discerning their rationale – and thereby enabling the court to ensure the measures are not overly restrictive – the onus was not on the Attorney General to demonstrate that the restrictions were carefully tailored. Similarly, in considering whether a s. 3 infringement has taken place, the careful tailoring analysis must not focus on

whether a reasonable choice was made among alternatives that infringe the *Charter* right. Instead, the analysis must focus on whether an infringement has occurred at all. Therefore, the question is whether the challenged spending restrictions draw the line at the point of preventing the well-resourced from dominating political discussion without being overly restrictive so as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. A conclusion that a choice was in some other sense "reasonable" does not answer this question.

[90] The Attorney General contends that Bastarache J.'s reference to careful tailoring represented a "pragmatic caution" but not a controlling legal test. According to the Attorney General, the controlling legal test is whether the challenged spending restrictions limit information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.

[91] We agree with the Attorney General about the constitutional standard, but disagree that the reference to "carefully tailored" spending restrictions can be so easily distinguished from the ultimate question of whether the rights of citizens to meaningfully participate in the political process and to be effectively represented have been undermined. The two are inextricably linked. In our view, this is demonstrated by Bastarache J.'s use of the term "must" in relation to careful tailoring, as opposed to some other modifier consistent with a mere caution. The

use of the term “must”, in our view, indicates that careful tailoring is a consideration that the court is to use in determining whether the constitutional standard – the voter’s right to meaningfully participate in the electoral process – has been violated.

[92] The application judge accepted that the challenged spending restrictions had to be carefully tailored within the meaning of *Harper* in order to be found consistent with s. 3. However, as we discuss below, he erred in the way he conceptualized and applied that standard.

Modest informational campaign

[93] The second proxy in assessing whether the constitutional standard is met is the level of information campaign that the restrictions will permit a third party to conduct. *Harper* recognizes that nothing more need be permitted than a “modest informational campaign”, as opposed to a campaign that would be capable of determining the outcome. This is a fact-based, evidentiary analysis: *Harper*, at para. 115. As we discuss below, the application judge erred in the manner in which he approached this consideration. He did not make a finding that a modest informational campaign could be conducted.

Conclusion on proxies

[94] In summary, the presence or absence of careful tailoring, and the view the court takes of the level of information campaign that can be mounted in compliance

with the restrictions, are not additional tests. They are considerations that must be used to inform whether the constitutional standard has been violated by spending restrictions because they "restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented": *Harper*, at para. 73.

(b) The application judge erred in applying s. 3 to this case

(i) The required focus was the extension compared to the previous restrictions

[95] The appellants contend that the application judge erred in the conclusions he reached on each of the proxies. They stress that the application judge did not properly explain or justify how the challenged spending restrictions could be carefully tailored when he had previously (in *Working Families 1*) found them to be unnecessary to achieve electoral fairness, given that the previous restrictions accomplished the desired objective.

[96] We agree that the failure of the application judge to focus on the significance of the extended restrictions brought about by the *PEDDA* re-enactments tainted his analysis.

[97] In our view, to properly consider the proxies, the application judge was required to focus on the effect of the challenged spending restrictions re-enacted by *PEDDA*, given what had preceded them. Under the 2017 *EFA* provisions, a

third party could spend unlimited amounts with a view to providing information to voters in the seventh to twelfth month before the election period, and a further $600,000 in the 6 months preceding it. That changed with Bill 254 and then *PEDDA*, which extended the restricted period to 12 months without increasing the spending limit.

[98] The object of the *PEDDA* re-enactments was to more severely restrict what could be spent on political advertising in the 12-month pre-writ period than was the case under legislation in effect since 2017 (leaving aside the constitutionally invalid 2021 amendments struck down in *Working Families 1*). Since the definition of political advertising embraces advertising to voters to promote or oppose party leaders, parties, or the election of a candidate, and includes taking a position on issues with which any of them are closely associated, the goal of *PEDDA* was clearly to more severely restrict information being provided to voters than had previously been the case.

[99] The significance of the additional 6 months of restricted spending should have been the focus of the enquiry. Given that the *PEDDA* re-enactments were designed to restrict the ability of third parties to convey information to voters about whom they should vote for, and about the issues those vying to be their representatives were associated with, the operative question concerned the effect of the increased restrictions, in light of what had preceded them. Do they undermine the informational component of the right to vote – because they restrict

information in a more severe way than had previously been the case – such that they undermine the right of citizens to meaningfully participate in the political process and be effectively represented?

(ii) The application judge's error with respect to "careful tailoring"

[100] Against that backdrop, it is our respectful view that the application judge made three related errors in his analysis of careful tailoring. First, he failed to apply his findings from *Working Families 1* that bore on the question of careful tailoring that was raised with respect to the challenged spending restrictions. Second, he divorced the length of the spending restrictions from their quantum – matters that had to be considered together. Third, he conflated the approach to careful tailoring required in a s. 3 analysis with a different and inapplicable analysis by his reference to the impugned legislation being "one of a number of reasonable alternatives".

Failure to properly apply findings from *Working Families 1*

[101] As noted above, the "careful tailoring" aspect of the s. 3 analysis may be traced to the Supreme Court's decision in *Harper,* where Bastarache J. sought to capture the balancing of interests that lies at the heart of the egalitarian democratic model. Careful tailoring describes the line drawing between voting right-enhancing spending limits and those that are overly restrictive.

[102] The application judge quite rightly rejected the argument advanced by the appellants that the haste with which *PEDDA* was enacted following *Working*

Families 1, in and of itself, demonstrated that it was not carefully tailored to ensure that third parties are able to convey their information to voters. He also rejected the appellants' contention that s. 3 was violated because *PEDDA* constitutes partisan self-dealing by the incumbent government. The application judge found that the legislation is neutral in its language and effect, and did not constitute partisan self-dealing. We agree with these conclusions as far as they go. But they do not end the enquiry as to whether extending the restricted period from 6 to 12 months was the result of careful tailoring.

[103] The appellants bore the burden of demonstrating that the challenged spending restrictions were not carefully tailored to ensure third party advertisers are able to convey their information to voters. In doing so, the appellants were entitled to rely on the application judge's findings in *Working Families 1* that the previous restricted period of 6 months with a $600,000 spending limit was appropriate to ensure electoral equality, and that the extension of the restricted period, together with no corresponding increase in the quantum of the spending limit, was not justified or explained.

[104] The application judge considered the effect of the extension from 6 months to 12 in *Working Families 1*. He noted, at paras. 65-66, that:

> [The] government's own expert witnesses in the present case have all testified that a 6-month pre-election period was the appropriate and effective period in which spending restrictions for political advertisements should

> operate. In the predecessor litigation, the experts produced by counsel for the Attorney General – Professor Harold Jansen and former CEO Jean-Pierre Kingsley – both opined that a 6-month period of pre-writ regulation was reasonable. Those same experts have now opined that the new 12-month period introduced by Bill 254 is "also reasonable".
>
> Without meaning to stress the obvious, it is hard to see how 12 months is minimal if 6 months will do the trick.

[105] The application judge distinguished what he had decided in *Working Families 1* – whether the extended 12-month period was minimally impairing for purposes of s. 1 – and the question he had to decide in this case: "the Applicants must demonstrate here that the spending limits in the *EFA* – and, in particular, the 12-month restricted spending period – impact detrimentally on citizens' meaningful participation in elections." The application judge was right that the ultimate questions were different. But, with respect, this framing elided the question before him.

[106] *PEDDA* did not establish a restricted period of 12 months and a spending limit of $600,000 in that period out of whole cloth. Rather, *PEDDA* re-enacted Bill 254's amendments to the prior *EFA* provisions by extending the restricted period for third party advertisers from 6 months to 12 months before the election period, while leaving the spending limit the same at $600,000. The change to the third party pre-election restrictions is impugned by the appellants on these appeals. And the change was to extend restrictions beyond an already existing restriction

that the application judge accepted, in *Working Families 1*, was an "appropriate and effective period in which spending restrictions for political advertisements should operate" – one that would "do the trick".

[107] In other words, *PEDDA* drew the line in a different place than it had previously been drawn. The previous line, drawn at a spending limit of $600,000 over 6 months, was redrawn at 12 months with no increase in monetary amount. The careful tailoring question involved an examination of the move.

[108] In *Working Families 1*, at paras. 73-75, the application judge had noted in his s. 1 analysis that there was no explanation for why the extension of the restricted period to 12 months, 6 months longer than one that already accomplished the desired objective, was necessary:

> 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 …
>
> It is self-evident that if a six-month impairment on free expression accomplishes the desired objective, a twelve-month impairment cannot be the least drastic means. It does not matter that both a 12-month and a 6-month restricted period are "reasonable" in the view of the experts. A 12-month impairment is twice as long, and twice as restrictive, as a 6-month impairment, and so by definition is not minimal.

[109] Although these findings were made in connection with their implications for a s. 1 analysis in *Working Families 1*, where a violation of the *Charter* right to free

expression was conceded, the underlying factual findings are important in the careful tailoring analysis required here. The absence of any explanation for the extended restriction, given that the existing restriction was appropriate to accomplish the electoral fairness objective, tells heavily against a finding of careful tailoring. So is the finding that the extended restriction is twice as long and twice as restrictive as one that was appropriate, given that Bastarache J. used the term "careful tailoring" to describe the punctilious drawing of a line between what would enhance the right to vote and what was overly restrictive. On the findings from *Working Families 1* that the application judge made, the 6-month restriction was voting right-enhancing. It "[accomplished] the desired objective" and "[did] the trick". We agree with the appellants that doubling the restricted period without increasing the quantum, a result that was twice as restrictive as what had been found appropriate, without explanation, does not denote careful tailoring.

[110] The Attorney General submits that whether or not the challenged spending restrictions could be said to be carefully tailored, the extension of the restricted period in this case (from 6 to 12 months) does not undermine the voter's right to meaningful participation, as election-related advertising more than a few months from the date of an election is unlikely to have an impact.

[111] We do not accept this argument.

[112] The legislation itself is premised on third party advertising mattering, at least to some voters, between 6-12 months prior to the election period. Even if most voters may not be paying attention, s. 3 does not protect aggregate rights but rather individual ones. If at least some voters are prevented from exposure to political information of value from third parties in the 6 to 12-month period, their right to meaningful participation under s. 3 may be undermined.

Failure to consider the length and quantum of the challenged spending restrictions together

[113] While the focus of the application judge's analysis was the 12-month restricted period, as stated above, this issue cannot be viewed in isolation from the actual spending limits over that period as well. In our view, the duration of spending restrictions and the monetary amount of those restrictions must be considered together. By doubling the length of the restricted period and leaving in place the quantum of permitted spending, the *PEDDA* re-enactments did change the spending limits for third party advertisers. This change forced third parties to make a choice. They could spend nothing in the 6 to 12 months before the election period. Or, if they wished to spend anything during that period, they would have to spend that much less in the 6 months before the writs were issued.

[114] The application judge did not squarely address the quantum of the spending restriction in his analysis of careful tailoring. Rather, he addressed the question of

careful tailoring by reference to the length of the restricted period alone. Because, in his view, the record in *Working Families 1* disclosed that some experts believed both a 6-month and a 12-month restricted period were reasonable, the application judge concluded that the appellants had not established that the legislation was not carefully tailored for purposes of the s. 3 analysis. He stated "[t]he tailoring of the law, to use the Supreme Court of Canada's phrase, is neither perfectly skintight nor to everyone's taste; but it is careful enough to be appropriate to the suit this time around" (emphasis added).

[115] In our view, it is no answer to the question of whether the legislation was carefully tailored to point to evidence that the length of the extended restriction could be seen as reasonable. The question is whether the extension of this restricted period from a 6-month period that "did the trick" to 12 months, without increasing the spending limits, and without explanation, was carefully tailored. The application judge erred by not addressing this question.

[116] The Attorney General addresses the rationale for enacting the challenged spending restrictions in his factum. He points to the testimony of the Chief Electoral Officer of Ontario, Greg Essensa, who appeared before a legislative committee in March 2021. Mr. Essensa voiced support for extending the restricted period from 6 months to 12 months, on the basis that there were indications in 2018 that third parties engaged in advertising prior to the 6-month restricted period then in place.

Mr. Essensa, however, also called for the spending limits to be increased if the restricted period was extended:

> As I indicated in my commentary in 2016, Ontario is an outlier in Canadian jurisdictions. Our third-party advertisers spend much more money than any third-party advertising in the country, including federally. At one point, we had third-party advertisers who were spending more money than political parties. As I have always indicated, a fair and level playing field is the most important consideration or principle that guides me in this regard. I have been a big proponent of greater transparency around third-party advertising—who is funding those, and over a greater period of time. I have seen, over time, third parties begin advertising well in advance of the six-month period that is currently in place, as much as up to nine or 10 months before an election. I am in support of extending the period to 12 months. However, I do believe the bill would be enhanced by increasing the amount that the third parties could spend. They are currently allowed to spend $600,000 over six months, and I am recommending that that number should be increased. If they're going to be having to file financial statements in regard to the 12-month period, then there should be consideration given to increasing that amount. [Emphasis added.]

Accordingly, this evidence underscores the error in not considering both the length of the restriction and its quantum.

[117] In these appeals, the Attorney General has referred to no evidence in support of the need for the actual changes re-enacted by *PEDDA* – that is, doubling of the restricted period, together with leaving in place the same spending limits – that would provide a basis for challenging the application judge's findings from *Working Families 1* made as part of his s. 1 analysis.

Conflating careful tailoring with reasonable alternatives

[118] In his discussion of careful tailoring, the application judge noted that the Supreme Court had observed that carefully tailored does not mean perfectly designed. With respect, this is not a statement that the Supreme Court made in *Harper*. In addition, when expressing his conclusion that the legislation was "careful enough", the application judge stated that it was one of the reasonable alternatives.

[119] These comments reflect a conflation between s. 1 and s. 3. The Supreme Court's distinction between carefully tailored and perfectly designed, and its reference to reasonable alternatives, are s. 1 concepts, not s. 3 concepts. As we have explained above, although selecting from one of a number of reasonable alternatives may be relevant to whether a *Charter* breach is minimally impairing, it is not the test for whether an infringement has occurred.

[120] In a s. 3 analysis, carefully tailored may not mean perfectly designed, but it does in the end require assiduous attention to whether the restriction falls on the right side of the line. Since the application judge approached this issue from the wrong perspective, we are unable to conclude that he properly found careful tailoring. It cannot be said, based on his conclusion that the government had chosen a reasonable alternative, that he found the challenged spending restrictions to be "carefully tailored to ensure that candidates, political parties and

third parties are able to convey their information to voters" without being "overly restrictive": *Harper*, at para. 73.

Conclusion on careful tailoring

[121] In the face of the application judge's findings in *Working Families 1* as to the lack of justification for the changes to third party advertising restrictions, on which the appellants now rely for a different purpose, and no new intervening evidence produced by the Attorney General in *Working Families 2* to counter this finding, we conclude that the challenged spending restrictions cannot be said to have been carefully tailored.

[122] As we have noted above, careful tailoring is only one of two proxies that a court should consider in deciding whether a violation of the constitutional standard has occurred. We therefore turn to the second proxy – whether the challenged spending restrictions permit third parties to mount a modest informational campaign.

(iii) The application judge made no finding that a modest informational campaign could be mounted

[123] While the application judge found that the 12-month restricted period was "reasonable", he did not specifically make a finding that third party advertisers could mount modest informational campaigns notwithstanding the doubling of the

length of the restricted period without any corresponding increase to the spending limit.

[124] The application judge noted that s. 3 did not entitle the appellants to mount an influential media campaign. He stated, at para. 104:

> [T]he threshold for finding a prima facie infringement of section 3 is not as low as it is for section 2(b). The Supreme Court has been at pains to explain that "carefully tailored" does not mean perfectly designed. It has also clarified that restrictions on spending are not to be evaluated or measured by the impact of the advertisements: "Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome." [Footnote omitted.]

[125] The application judge's analysis focused on what he considered to be the main informational tool the spending limits would restrict – television advertisements. He concluded that television advertisements do not tend to relate to "policy discourse" and added, at para. 83:

> In fact, anyone who has ever watched a 30-second television commercial will know that while the medium is effective, an ability to review policy matters or convey any detailed information is not what makes it so. To expect policy options to be canvassed in a commercial would be akin to expecting serious information about the chemical properties of cleansing agents to be conveyed in a laundry detergent commercial, or a biologically sound anatomical analysis of the digestive process to be contained in an ad for antacid tablets.

[126] The application judge contrasted television advertisements with other media the appellants could use to convey their message, stating, at para. 77:

> Blogs, advertisements in print media, op-eds, press releases, interviews, radio spots, mass mailings (via email or traditional post), tweets, Facebook posts and other social media disseminations, can all be engaged in without great expense and readily within the *EFA*'s spending limits. It is not realistic to say that the statute works to "silence" any viewpoint or any electoral discourse in today's multi-media environment. These various media choices are all "highly effective", to use the Supreme Court's description, in engaging with and informing the public of election issues. [Emphasis added; footnote omitted.]

[127] It does not follow that everything less than an influential media campaign is a modest informational campaign. It also does not follow from a finding that television is not the only way to mount a modest informational campaign that the challenged spending restrictions allow for such a campaign. The application judge referred to no evidence in relation to the cost of the other forms of media he mentioned, either individually or in combination. Nor did he make any finding about the appellants' evidence that the limits are too low to mount a campaign consisting of other forms of media, such as mailings, radio, digital media, and newspaper advertisements.

[128] The appellant Working Families argues that the Attorney General produced no evidence on the sufficiency of the quantum of the spending restriction generally. In his factum, the Attorney General refers to no such evidence, but rather argues

that if a $100,000 limit during the writ period is sufficient (which is not impugned on these appeals), then $600,000 during the pre-writ period “cannot possibly violate s. 3”. We do not interpret the application judge as having drawn that conclusion.

[129] Of the Attorney General’s experts referred to by the application judge, Professor Jansen does not appear to have expressly opined about why the quantum of the spending limit was sufficient, and Mr. Kingsley did so only to the extent of refering to the $600,000 amount as not being “small change”. Neither addressed the costs of the components of the media campaign (without television) the application judge referred to. Neither specifically addressed what modest informational campaign could be run in light of the newly-restricted period of 6-12 months before the writs.[4]

[130] The application judge’s brief references to the availability of several media platforms that he viewed as less expensive than television, and which he considered could be used to convey information and messages within the $600,000 monetary limit, did not amount to a finding that the appellants could mount a modest informational campaign. Nor did they entail a broader conclusion

[4] Expert evidence for the respondent was also given by Tamara Small. The application judge did not refer to her evidence and the Attorney General did not cite or rely upon her evidence in this court with respect to this point.

that the challenged spending restrictions enabled the meaningful participation of voters for purposes of s. 3 of the *Charter*.

[131] The application judge's approach may be contrasted with the findings made by the trial judge in *Harper v. Canada (Attorney General)*, 2001 ABQB 558, 295 A.R. 1. In that decision, the trial judge reviewed the extensive record on the actual costs of various media (local and national print, radio, and television costs) and concluded, at para. 88: "With respect to the spending limits themselves, I find that third parties can engage in modest, national, informational campaigns and reasonable electoral district informational campaigns, within the spending limits set out in the Act." Subsequently, in the Supreme Court's decision in *Harper*, Bastarache J. relied on those findings in setting out his conclusion on the application of s. 3: at para. 74 (quoted above).

[132] In this case, the application judge focused on the appellants' position that the challenged spending restrictions would impair their ability to conduct a multimedia persuasive campaign. He referred to the appellants' expert Stephen Freeman, who testified that a "minimally effective", two-week advertising campaign would cost at least $1.2 million, but where effective was measured by the ability to change voter behaviour. The application judge concluded that s. 3 did not entitle third party advertisers to mount campaigns that would persuade or influence voters. However, after *Harper*, the question was whether the challenged

spending restrictions permitted a modest informational campaign. He did not go on to consider whether any evidence allowed him to conclude that they did.

[133] The application judge did not refer to evidence in the record before him in this regard. Rather, he referred to the Supreme Court's decision in *Harper*, where Bastarache J. commented, at para. 115, that "third parties [can] engage in a significant amount of low-cost forms of advertising". That comment from *Harper*, however, was grounded in the evidentiary findings made at trial in that case.

[134] For these reasons, we do not see the application judge's observations about low-cost methods of advertising as addressing the ultimate question of whether a modest informational campaign could be mounted.

[135] The burden of showing a constitutional violation is on the appellants. But here, the question of whether the challenged spending restrictions permit a modest informational campaign had to be addressed from the standpoint of the restrictions extending beyond the 6-month period previously found to achieve the desired goals. The modest informational campaign had to be one that could be mounted given the 12-month restricted period. The fact that the Attorney General points to no evidence that a modest informational campaign could be mounted within the challenged spending restrictions is telling on the ultimate question.

(c) Conclusion on s. 3

[136] Adopting the reasoning from *Harper*, we conclude that because the challenged spending restrictions were not carefully tailored, and there is no finding that they would permit a modest informational campaign, they overly restrict the informational component of the right to vote. They therefore undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. Consequently, in our view, they infringe s. 3 of the *Charter*.

(3) The infringement of s. 3 is not saved by s. 1 of the *Charter*

[137] In *Figueroa*, at para. 31, the Supreme Court emphasized that the government cannot interfere with s. 3 democratic rights to advance other values without justifying the infringement under s. 1. When the government seeks to justify a limit on s. 3, a reviewing court must examine the government's explanation "carefully and rigorously" and must not adopt a deferential attitude: *Frank*, at para. 43; *Figueroa*, at para. 60.

[138] We note that in this case the Attorney General did not argue, in his factum or orally, that if a s. 3 violation were found, it was justified under s. 1. Nevertheless, we briefly consider that issue.

[139] Having found an infringement of the right to vote, the burden is on the Attorney General, under the first two prongs of the *Oakes* test, to establish that this extension of the duration of the restricted period, together with the unchanged

spending limits, furthered a pressing and substantial objective by means rationally connected to achieving that purpose. He has provided no evidence or argument in this regard. However, the application judge noted, at paras. 54-56 of *Working Families 1*, that the legislation was aimed at fortifying "democratic governance itself" and related to the objective of ensuring equality in the electoral process, and that the challenged spending restrictions were rationally connected to that pressing and substantial objective.

[140] Even so, since there is no evidence that the challenged spending restrictions were necessary to accomplish anything toward securing the egalitarian model of elections that was not already accomplished by the restrictions in effect prior to 2021, we conclude that they are not minimally impairing of the s. 3 rights in issue. In this regard, we endorse the statement by the application judge from *Working Families 1*, at para. 75, that "[a] 12-month impairment is twice as long, and twice as restrictive, as a 6-month impairment, and so by definition is not minimal."

[141] Nor are we satisfied that, on the final prong of the *Oakes* test, namely proportionality, that the benefits of the challenged spending restrictions are worth the cost of the rights limitations: *Hutterian Brethren*, at para. 77. Simply put, no benefits were identified as flowing from extending the duration of the spending limits while freezing their quantum.

DISPOSITION

[142] Accordingly, we would allow the appeals and declare that s. 37.10.1(2) of the *EFA* unjustifiably infringes s. 3 of the *Charter* and is, therefore, of no force or effect. Counsel are invited to make submissions on whether any further provisions of the *EFA* should be declared invalid as a result of the reasoning in this judgment. Each appellant and the Attorney General may make written submissions not exceeding 10 pages each. The submissions of each appellant shall be delivered within 15 days of the release of these reasons; those of the Attorney General within 10 days thereafter.

[143] Unlike the application judge's decision in *Working Families 1*, where he concluded that a suspension of the declaration of invalidity was inappropriate given the timeline before the 2022 election, there is no such concern in this context, with the next fixed-date election to take place in 2026. Therefore, we order that the declaration in this case be suspended for 12 months to allow Ontario to fashion new legislation that is compliant with s. 3 of the *Charter*.

[144] If the appellants and the Attorney General are unable to agree on costs as between them, including with respect to costs below, they may make written submissions not exceeding 3 pages each. The submissions of each appellant shall be delivered within 15 days of the release of these reasons; those of the Attorney

General within 10 days thereafter. There shall be no costs for or against any of the interveners.

"B. Zarnett J.A."
"L. Sossin J.A."

Benotto J.A. (dissenting):

OVERVIEW

[145] I agree with my colleagues that s. 33 was properly invoked. With respect, I disagree that the application judge erred by finding no s. 3 infringement.

[146] Section 3 protects the right of every citizen to participate meaningfully in the electoral process. The right to meaningful participation includes the right to be "reasonably informed of all the possible [electoral] choices": *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47. At issue are the spending limits that may be placed on third-party political advertising, which plays an important role in informing citizens.

[147] It is agreed that the leading s. 3 case on limits for third-party spending is *Harper*, which articulates the nature of the s. 3 right, and explains the reasons for imposing such limits, which are rooted in the egalitarian model of electoral democracy: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827. However, I do not agree with the inferences that my colleagues draw from *Harper.*

[148] My colleagues say that *Harper* created two "proxies" that must be satisfied for spending restrictions not to breach s. 3: (i) the legislation must be carefully tailored; and (ii) the legislation must permit a modest informational campaign.

I respectfully disagree with the meaning ascribed to the first proxy and do not agree that the second was not followed.

[149] The majority says that the reference to careful tailoring "invites the court to examine the rationale, express or implicit, for the amount and duration of the spending limit – the express or implicit reasons why the lines were drawn where they were." In my view, this approach conflates the analysis under s. 3 and s. 1 of the *Charter*, requiring Ontario to provide a justification for the legislation at the stage of determining whether a breach has occurred.

[150] The majority also says that the application judge made a number of errors in his analysis of careful tailoring. As I will explain, I disagree.

[151] Additionally, the application judge is said to have erred in failing to make a specific finding that the restrictions permit third parties to conduct a modest informational campaign. I read the application judge's reasons as clearly making that finding.

[152] I conclude that the application judge applied the correct legal test and made factual findings that are entitled to deference.

BACKGROUND

[153] Before turning to my legal analysis, I pause briefly to examine the scope of the spending restrictions imposed on third-party advertising.

[154] At issue here is the spending limit of $600,000 (now indexed to $702,600) on third-party political advertising applicable to the 12-month pre-writ period. Of the total, $24,000 (indexed to $28,104) may be spent in any particular electoral district.

[155] In addition, third parties may spend $100,000 (now indexed to $117,100) on political advertising between the dropping of the writ and election day. Of the total, $4,000 (now indexed to $4,684) may be spent in any particular electoral district. These spending restrictions are not challenged.

[156] The restrictions in question relate to “political advertising” that is election oriented. Given the definition of “political advertising”, they do not capture issue-based advertising that cannot reasonably be regarded as closely associated with a registered party or its leader or a registered candidate. They also exclude several means of communicating with the public – for example, the transmission of debates, editorials, columns, letters, speeches and interviews.

[157] There are no spending restrictions that apply to the time prior to the 12-month pre-writ period.

[158] Thus, in advance of a fixed-date general election, each third party, whether big or small, may spend a total of $700,000 (now indexed to $819,700) on election-related advertising caught by the definition of “political advertising”, plus an unlimited amount on communications that are not caught by the definition.

ANALYSIS

(1) The principles from *Harper*

[159] *Harper* begins with the basic proposition that spending limits are necessary and enhance the right to be an informed voter. Without spending limits, it is possible for the affluent or a number of persons or groups to dominate the electoral discourse.

[160] The decision describes how to determine if there is a s. 3 breach, at paras. 73-74:

> Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.
>
> The question, then, is whether the spending limits set out in s. 350 interfere with the right of each citizen to play a meaningful role in the electoral process.[Emphasis added.]

[161] The controlling test is not whether the spending limits are carefully tailored but whether they restrict information in such a way to undermine the right of citizens to meaningfully participate in the electoral process, which includes the right to vote in an informed manner.

[162] *Harper* specifically holds, at para. 74, that meaningful participation is not synonymous with effective persuasion:

> Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote.

[163] In the end, *Harper* concluded that the federal legislation imposing spending limits did not breach s. 3. Notably, in applying the law to the facts of that case, the court did not discuss justification or the reasons why the limits were drawn where they were. Rather, the court focused on whether the limits interfered with the right of each citizen to play a meaningful role in the electoral process. In answering that question, the court took into account the findings of the trial judge, who found that even though the limits did not permit third parties to mount effective persuasive campaigns, they did permit them to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns": at para. 74. The court also considered the potential number of third parties and their ability to act in concert.

[164] Given that there was no breach of s. 3, it was unnecessary for the court to go on to consider whether any breach was justified under s. 1.

(2) The majority reasons and the two proxies

[165] Against these directives, I turn to my colleagues' interpretation of *Harper* and their critiques of the application judge's application of the two "proxies".

(a) Proxy #1 – Careful tailoring

(i) Justification is not part of the s. 3 analysis

[166] As noted, the majority says that the careful tailoring requirement "invites the court to examine the rationale, express or implicit, for the amount and duration of the spending limit – the express or implicit reasons why the lines were drawn where they were."

[167] If one infers that "carefully tailored" invites the court to consider justification at the s. 3 stage of analysis, the s. 3 and s. 1 analysis are conflated. This is inconsistent with *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, which warns against such conflation, at paras. 30-31:

> The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country.
>
> …
>
> … If the government is to interfere with the right of each citizen to play a meaningful role in the electoral process in order to advance other values, it must justify that infringement under s.1. [Emphasis added]

[168] Nor does *Harper* import justification into the s. 3 analysis. On the contrary. As discussed, the test is not focused on the tailoring but on whether the restrictions undermine the purposes of s. 3. Paragraph 73 of *Harper* states:

> To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. [Emphasis added.]

[169] In other words, the s. 3 analysis does not require an inquiry into why the government enacted the spending restrictions. Rather, the question is whether the spending limits – as set out in the impugned legislation − restrict information such that they undermine the right to meaningfully participate in the electoral process. In this regard the court is to consider the legislation as it stands, not previous iterations. If the court, on the basis of the evidence, determines that there is no infringement of this right, justification for the legislation is not engaged.

[170] That is exactly how the application judge approached the matter. At para. 20 of the application judge's reasons he writes:

> It is therefore worth summarizing the challenged provisions again for the purpose of assessing the need to "ensure the primacy of the principle of fairness in democratic elections… [and that] all citizens are reasonably informed". In other words, the impugned statute must now be reviewed with a view to analyzing its impact on the consumers of political information – i.e. voters – rather than, as in the previous litigation, on the purveyors of political information – i.e. advertisers.

[171] And, at para. 110 he writes:

> Unlike under section 2(b), the analysis does not go right to section 1 where the government must meet a test of minimal intrusion. Under section 3, if the government intervenes in the political advertising market it must do so in a way that is attuned to [the] right of voters to meaningful participation via an informed vote. Only if it were found not to be attuned to that objective would the section 1 analysis become relevant and the question of minimal impairment be raised. [Emphasis added.]

[172] In my respectful view, my colleagues focus on the words "carefully tailored" without adequate recognition of the words that explain the purpose of the careful tailoring, which is "to ensure that candidates, political parties and third parties are able to convey their information to voters": *Harper*, at para. 73. These explanatory words are consistent with *Harper*'s clear direction that, to constitute an infringement of s. 3, the spending limits would have to undermine the right to meaningful participation, which includes the right to vote "in an informed manner".

[173] Furthermore, the onus of establishing the breach of s. 3 rests with the appellants. In my view, inviting consideration of the rationale for the spending limits would require the government to lead evidence that would effectively shift the burden of proof.

(ii) The application judge did not err by not focussing on extended restrictions

[174] The majority says that their interpretation of careful tailoring required the application judge to conduct an analysis focusing on the change in the legislation from a 6-month to a 12-month restricted spending period without an increase in the spending limit. They say that because the application judge did not focus on the change, he erred. I disagree for three reasons.

[175] First, the application judge explicitly recognized the importance of the extension, noting that "the most important change … was the elongation of the restricted period from 6 months in the previous iteration of the Bill to 12 months": at para. 46. He also recognized that the spending limits stayed the same: at para. 21. He did not, as suggested, fail to consider the length and quantum of the restrictions as part of his analysis.

[176] Second, while the application judge was alive to the legislative history and the fact the $600,000 limit now applied for 12 months instead of 6 months, he correctly considered the legislation that was before him. The legislation had to stand or fall on its own. It was not the change that was determinative, but whether the legislation before him was *Charter* compliant.

[177] Third, the application judge was entitled to accept the respondent's expert evidence. The evidence supported the application judge's conclusion that the 12-

month period did not prevent meaningful participation. Jean-Pierre Kingsley, Canada's Chief Electoral Officer from 1990 to 2007, opined that third parties are able to meaningfully participate in elections under the current legislation. He acknowledged that he previously opined that the 6-month regulated pre-writ period was reasonable. In his view, the 12-month pre-writ regulated period was also reasonable. In other words, he said that both periods fell within "a range of reasonable alternatives." As for the spending limits, he noted that the total amounts third parties can spend during and before the election are not "small change" and that the majority of third parties spend well below the limits. Thus, Mr. Kinsley was alive to the change but nonetheless opined that meaningful participation was possible.

[178] In conclusion, it cannot be said that the application judge erred in ignoring the change to an extended restricted period.

(iii) The application judge did not erroneously focus on "reasonable choice"

[179] The majority suggests that the application judge erroneously focused on whether the government made a "reasonable choice", rather than by analyzing whether there was an infringement of s. 3. They say:

> …in considering whether a s. 3 infringement has taken place, the careful tailoring analysis must not focus on whether a reasonable choice was made among alternatives that infringe the *Charter* right. Instead, the

> analysis must focus on whether an infringement has occurred at all. Therefore, the question is whether the challenged spending restrictions draw the line at the point of preventing the well-resourced from dominating political discussion without being overly restrictive so as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. A conclusion that a choice was in some other sense "reasonable" does not answer this question. [Emphasis added.]

[180] I do not agree that the application judge concluded that the spending restrictions were "in some other sense 'reasonable'", as my colleagues suggest. Rather, he determined that the restrictions were aimed at promoting the egalitarian model and citizens could still cast an informed vote.

[181] Furthermore, the application judge's reference to "reasonable" was made in the context of discussing the expert evidence. A number of the experts spoke about reasonableness in the sense of preventing domination of political discourse without undermining the right of citizens to meaningful participation. But they also recognized that there is not just one option for achieving that goal. At the end of the day, the application judge was entitled to rely on the evidence he did and determine that the legislation did not infringe the right to vote.

(iv) The application judge did not err in failing to apply findings made in a different context

[182] The majority says that the application judge erred in "failing to apply his previous findings". In their view, the appellants were entitled to rely on the

application judge's findings in *Working Families 1* that the previous $600,000 restriction over six months was appropriate to ensure electoral equality, and that the extension of the restricted period, with no corresponding increase, was not justified.

[183] Again, I disagree. Although the records in both cases contained similar studies, *Working Families 1* engaged a different constitutional framework. In *Working Families 1*, it was conceded that there was a breach of s. 2(b) and so the case turned on whether the breach was justified under s. 1. The findings in question were made in the context of the application judge's analysis of whether the s. 2(b) breach was justified under s. 1, and more particularly, at the minimal impairment stage of his analysis.

[184] The Supreme Court has repeatedly emphasized the difference between s. 2(b) and s. 3 analyses. And, as discussed, the s. 3 analysis is not to be conflated with a s. 1 analysis.

[185] The application judge recognized that this case involved a different analytic framework. For instance, at para. 61, he stated:

> …[U]nlike under section 2(b) of the *Charter*, where any restriction on political advertisement spending amounts to a *prima facie* infringement of the right of expression, under section 3 restrictions on spending for political advertisements can enhance citizens' exercise of the right to vote. As the Court explained it in *Libman*:

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others… Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources. [Footnotes omitted.]

[186] Just because it happened to be the same judge who decided the s. 2(b) and the s. 3 applications does not mean that he was somehow bound by findings he made in determining that the s. 2(b) breach was not justified under s. 1 in determining whether there was a s. 3 breach. The application judge properly recognized that he was required to make findings in this case through a different legal lens than in *Working Families 1*.

[187] Accordingly, I disagree that the appellants were entitled to rely on findings made in a different case with a different analytic structure.

(v) Conclusion: the application judge did not err in how he approached the analysis

[188] A review of the application judge's reasons confirms that he did not err in how he approached the analysis:

- He correctly recognized that the legislation must be "carefully calibrated in order to respect rather than impede voting rights": at para 5.
- He understood that any restrictions must be "carefully tailored to ensure that…third parties are able to convey their information to voters" and that overly restrictive provisions may undermine the informational component of the right to vote: at para. 80.
- He found that the legislation is tailored to the principle of electoral equality: at paras. 97, 105-106 and 109.
- He did not conflate s. 3 and s. 1, recognizing that the analysis is not to make the spending restrictions as minimal as possible: at para. 106.

[189] In short, the application judge applied the correct legal analysis and made no palpable and overriding errors.

(b) Proxy #2 – Modest Informational Campaign

[190] The majority says there is another "proxy" from *Harper* that was ignored by the application judge ─ that he failed to "specifically make a finding" that a modest informational campaign could be mounted.

[191] Read as a whole, the application judge's reasons make it clear that he was satisfied that a $600,000 spending limit on political advertising in the 12-month pre-writ period did not preclude third parties from mounting a modest informational campaign. He considered the scope of "political advertising" and what would and would not be caught by the $600,000 spending limit. He recognized that television advertising is particularly impactful but that in today's multi-media environment there are less expensive means of getting a message out. Finally, at paras. 106 and 109 he found:

> The goal of the voting rights analysis in the first instance is not to restrain government or to make its legislative interventions as minimal as possible. Rather, it is to allow government to do what it takes to foster the kind of "equality in the political discourse [that] is necessary for meaningful participation". This means that the spending restrictions must at least leave room for the conduct by third parties of "modest, national, informational campaigns", but need not ensure that any third party can mount an expensive media campaign with the potential for determining election results.
>
> …
>
> … But having done multiple studies which indicate that a 12-month pre-writ restricted period is also aimed at fostering an egalitarian electoral playing field, one cannot say that the EFA is not tailored to its appropriate goal. [Footnotes omitted; emphasis added.]

[192] This is a clear finding that the legislation permits a modest informational campaign. There is no error when the basis for the application judge's conclusion

is apparent in the reasons read as a whole: see *Marcoux v. Bouchard*, 2001 SCC 50, [2001] 2 S.C.R. 726, at para. 33.

[193] Appeal courts have been instructed to conduct a functional review of lower court reasons. In *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para. 79, the court said:

> To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review…. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error…. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated…. An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity. [Citations omitted.]

[194] I do not agree that the application judge's reasons were ambiguous, but even if they were, *G.F.* instructs that the interpretation consistent with the presumption of correct application must be preferred over those that suggest error.

CONCLUSION

[195] I am satisfied that the application judge followed the directives in *Harper* and made findings open to him on the evidence.

[196] Accordingly, I would dismiss the appeals.

Released: March 6, 2023 “M.L.B.”

“M.L. Benotto J.A.”