SUPREME COURT OF CANADA

CITATION: Ontario (Attorney General) *v.* Working Families Coalition (Canada) Inc., 2025 SCC 5

APPEAL HEARD: May 21 and 22, 2024
JUDGMENT RENDERED: March 7, 2025
DOCKET: 40725

BETWEEN:

Attorney General of Ontario
Appellant

and

Working Families Coalition (Canada) Inc.,
Patrick Dillon, Peter MacDonald,
Ontario English Catholic Teachers' Association,
Elementary Teachers' Federation of Ontario,
Felipe Pareja, Ontario Secondary School
Teachers' Federation and Leslie Wolfe
Respondents

- and -

Attorney General of Canada, Attorney General of Quebec,
Attorney General of Alberta, Centre for Free Expression,
Chief Electoral Officer of Ontario,
International Commission of Jurists Canada,
Canadian Lawyers for International Human Rights,
British Columbia Civil Liberties Association,
Advocates for the Rule of Law, Democracy Watch,
Canadian Taxpayers Federation,
Canadian Civil Liberties Association and
David Asper Centre for Constitutional Rights
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 67)	Karakatsanis J. (Martin, Kasirer, Jamal and O'Bonsawin JJ. concurring)
JOINT DISSENTING REASONS: (paras. 68 to 178)	Wagner C.J. and Moreau J.
JOINT DISSENTING REASONS: (paras. 179 to 272)	Côté and Rowe JJ.

Attorney General of Ontario *Appellant*

v.

Working Families Coalition (Canada) Inc.,
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2025 SCC 5

File No.: 40725.

2024: May 21, 22; 2025: March 7.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to vote — Provincial elections — Third party political advertising — Spending limits — Provincial legislation imposing spending limit on third party political advertising in year before election period — Whether spending limit infringes right to vote — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 3 — Election Finances Act, R.S.O. 1990, c. E.7, s. 37.10.1(2).

Section 37.10.1(2) of Ontario's *Election Finances Act* ("*EFA*") restricts the amount that third parties can spend on political advertising in the year before a provincial election period. It limits spending on third party advertising to $24,000 in any one electoral district and to $600,000 in total during the 12-month period before the election period. The *EFA* also regulates political advertising by political parties: s. 38.1 provides that, in the six-month period right before the election period, political parties may spend up to $1,000,000. Political parties are not subject to any spending limits before that six-month period.

An application for a declaration that the third party spending limit in s. 37.10.1(2) infringes the right to vote guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms* was brought in the Superior Court by a civil society organization, several unions and individual citizens. The application judge concluded that the challenged provision did not violate s. 3 as the law respected the right of voters to meaningfully participate in the electoral process through an informed vote. A majority of the Court of Appeal allowed the appeal and concluded that the spending limit violated the right to vote under s. 3, as the spending limit was not carefully tailored and the application judge had made no findings supporting his conclusion that the spending restrictions were enough to support a modest informational campaign. The challenged spending limit was declared to be invalid.

Held (Wagner C.J. and Côté, Rowe and Moreau JJ. dissenting): The appeal should be dismissed.

Per **Karakatsanis**, Martin, Kasirer, Jamal and O'Bonsawin JJ.: The third party spending limit in s. 37.10.1(2) of the *EFA* infringes the right to vote in s. 3 of the *Charter* and is of no force or effect under s. 52(1) of the *Constitution Act, 1982*. By design, it creates absolute disproportionality, or a disproportionality that is so marked on its face that it allows political parties to drown out the voices of third parties on political issues from reaching citizens during an entire year of legislative activity. The spending limit cannot be saved under s. 1 of the *Charter* as it is not justified in a free and democratic society because the law is not minimally impairing.

Section 3 of the *Charter* constitutionally entrenches the right of all citizens to participate in elections and its purpose is for voters to be effectively represented in government and to play a meaningful role in the electoral process. The right to vote in free and fair elections is a primary means for citizens to participate in their governance and is the basis of the legitimacy of laws enacted by lawmakers. The participatory component of the right to vote includes a citizen's right to vote in an informed way, which requires that citizens be able to hear viewpoints and other information from third parties, candidates, and political parties. Third party advertising assists citizens in casting an informed vote as third parties encompass a diverse range of citizens and groups who aim to provide information to other citizens and draw attention to issues of importance to them. Limits that restrict rather than promote citizens' access to diverse information and views may violate their right to meaningfully participate in the political process

An egalitarian model of elections — endorsed by the Court in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, and *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827 — aims to achieve a balance in the political discourse. Section 3 does not require that all participants in the electoral system be treated equally and the legitimate goal of ensuring a level playing field for those who wish to engage in the political discourse may permit different limits on different electoral participants. The focus of the Court in *Libman* and *Harper* was the threat of those with greater resources exerting a disproportionate influence on the vote, given their role in the electoral process. Public debate dominated by any one actor,

including political parties, threatens balance in the political discourse. If differential treatment of participants has an adverse impact on citizens' right to meaningfully participate in the electoral process, it will offend s. 3. Therefore, a spending limit will infringe s. 3 of the *Charter* if it allows political actors or third parties a disproportionate voice in the political discourse given their roles in the electoral process, thus depriving voters of a broad range of views and perspectives on social and political issues.

Assessing whether spending limits may lead to a disequilibrium in that discourse is necessarily a comparative analysis. Although the importance of political parties and candidates in our present democracy is an accepted rationale for allowing them greater latitude in political advertising spending, it does not answer the question of whether a particular spending limit goes too far and interferes with the right of citizens to cast an informed vote under s. 3. It is an error in law to fail to compare the third party spending limit with the rules applying to political parties to assess the overall effects of the measure on voters and their right to meaningful participation. The rules applying to different actors will have an impact on the balance in the political discourse, and, in turn, the information voters receive.

In the instant case, the challenged spending limit has the clear potential to severely curtail voters' exposure to different views on the political issues that define their community in the year before the election period. Third parties are strictly limited in their ability to inform citizens while political parties face no restrictions in the first six months of the pre-writ year. This differential treatment creates a disproportionality

in the political discourse. The information available to voters in Ontario in the year before an election must include the interests, voices, and views of different citizens and parties. When political parties face no limitations, curtailing the ability of third parties to use platforms that may be effective in reaching certain voters has the potential to overwhelm the political discourse and drown out third parties, thus interfering with citizens' access to information letting them weigh and establish their views during an important time in the democratic cycle. Therefore, on its face, the *EFA* creates an absolute disproportionality in the broader political discourse that deprives voters of a broad range of views and perspectives on issues during a critical period in the democratic cycle, and impedes their ability to form meaningful preferences. This undermines the voter's right to an informed vote and to meaningful participation in the electoral process, violating s. 3 of the *Charter*.

Courts must exercise great care when determining whether a breach of s. 3 is justified under s. 1 of the *Charter*. In the instant case, while the objective of the spending limit to promote an egalitarian model of elections is pressing and substantial, and a spending cap on third parties is rationally connected to that objective, the province has not shown that the challenged spending limit minimally impairs s. 3. The length of the limit far surpasses what is reasonably necessary to protect the integrity of the election process, or the primary role of political parties in the electoral process.

Per **Wagner** C.J. and **Moreau** J. (dissenting): The appeal should be allowed and the judgment of the application judge restored. The spending limit on third

party political advertising does not infringe the right to meaningful participation under s. 3 of the *Charter*. It has not been established that the limit will have the effect of depriving each citizen of a reasonable opportunity to introduce their ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. While certain features of the spending limit scheme merit careful scrutiny, it has not been established on a balance of probabilities that these features undermine citizens' right to meaningfully participate in the electoral process.

It is critical to interpret s. 3 in a broad and purposive manner, as it strengthens the quality and legitimacy of our democracy and public institutions. Section 3 implicitly protects a number of rights beyond merely the rights to vote and run for office, including the right to effective representation and the right of citizens to meaningfully participate in the electoral process. The right to meaningful participation has two components. The first component is expressive and ensures that each citizen has a reasonable opportunity to introduce their own ideas and opinions into the political discourse. The second component is informational and ensures that each citizen has a reasonable opportunity to hear others' perspectives and access information in order to exercise their right to vote in an informed manner.

Challenges to laws governing democratic processes often implicate both the guarantee of free expression in s. 2(b) as well as s. 3 of the *Charter*. The fact that the right to meaningful participation includes expressive and informational components does not collapse the distinction between ss. 2(b) and 3. There will necessarily be

overlap between the electoral activity protected by both. But in order to respect the basic structure of the *Charter*, the content of one right should not be imported into another, nor be used to modify the scope of another right. The scope of activity protected by s. 3's right to meaningful participation is narrower than the scope of activity protected under s. 2(b). A claimant can make out a s. 2(b) infringement by proving that the purpose or effect of the government action in question restricts any protected expressive activity. In contrast, s. 3 protects the introduction and exchange of ideas and opinions to the extent necessary to facilitate meaningful participation in the electoral process. These two rights can operate inversely: an electoral spending restriction can limit freedom of expression under s. 2(b) yet facilitate meaningful participation in the electoral process under s. 3.

The right to meaningful participation is engaged by third party spending limits because third parties can be individual citizens or entities that act as a voice for multiple citizens during the electoral process. The s. 3 right to meaningful participation is engaged when legislation regulates political actors that serve as both a vehicle and outlet for individual citizens to participate in the electoral process. Third parties often use political advertisements to comment on the merits and faults of a particular candidate or party, bring new issues to the political discourse, and add new perspectives on issues associated with candidates and political parties. Regulation of third party advertising may thus restrict citizens' opportunity to become informed of political issues, parties, and candidates.

However, the right to meaningful participation under s. 3 does not guarantee a right to unlimited participation. When expression is unlimited, well-resourced third parties can dominate political discourse, drown out the voices of their opponents, and prevent other citizens from having the opportunity to speak and be heard. Thus, the enactment of a spending limit on third parties is not in itself a violation of s. 3. The right to meaningfully participate requires that citizens not be able to drown out the voices of others in the electoral process. Third party spending limits therefore can be consistent with and facilitate the expressive component of the right to meaningful participation. Electoral spending limits may also help to facilitate the informational component of the right to meaningful participation as they ensure that citizens are adequately informed of all their political choices by preventing the wealthy from controlling the electoral process to the detriment of others with less economic power. In doing so, spending limits can ensure that citizens are reasonably informed of all the possible choices and better able to consider opposing aspects of electoral issues. While spending limits can play an important role in facilitating the right to meaningful participation, an overly restrictive spending limit can infringe s. 3 by depriving citizens of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. Thus, spending limits must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters.

The standard for determining whether the right to meaningful participation has been infringed is whether the impugned law had the effect of depriving a citizen of

a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. This standard applies to assessing any alleged infringement of the right to meaningful participation; it is not specific to electoral spending limits and it applies to legislation impacting conduct outside of the writ period. The right to meaningfully participate in the electoral process is not limited to the writ period; it operates at all times. Ensuring citizens have a reasonable opportunity to convey ideas and receive information outside the writ period is necessary to fulfill s. 3's purpose of facilitating the healthy functioning of Canadian parliamentary democracy.

There are a variety of considerations that a court may weigh when determining whether a law has the effect of depriving a citizen of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. In the context of spending limits, a court may consider the quantum and temporal reach of the limit, the scope of conduct captured by the limit, and the limit's impact on different forms of expression. A court may also consider whether an impugned measure treats political actors differently and, if so, whether such differential treatment deprives some citizens of a reasonable opportunity to speak or be heard. However, asymmetrical treatment is itself insufficient to establish a violation of the right to meaningful participation.

In the instant case, it has not been shown that the $600,000 pre-writ political advertising limit deprives citizens of a reasonable opportunity to introduce

their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. Based on the evidentiary record, the third party spending limit is consistent with the right to meaningful participation, taking into account the scope of the definition of political advertising under the scheme, the extent of advertising that is possible within the limits, and the comparative spending limits for political parties and candidates.

While the definition of political advertising is broad, this definition, in itself, does not prevent citizens, acting as third parties, from having a reasonable opportunity to convey political information to citizens. In addition to the communications that do not count against the spending limit, third parties can engage in a range of political advertising activities within the spending limit. The right to meaningful participation under s. 3 is not synonymous with the ability of third parties to engage in an effective persuasive campaign or the ability to mount a media campaign capable of determining the outcome.

Furthermore, while the quantum and duration of the spending limit will have the effect of limiting the extent to which third parties can engage in television advertising, the evidence supports the finding that the limit does not deprive citizens of a reasonable opportunity to convey political information to other citizens through various forms of inexpensive and effective advertising within the spending limit. Numerous forms of low-cost political advertising methods remain available to third

parties. This is in addition to the forms of political communication that are expressly exempted from the spending limit, such as editorials, columns, or books.

Lastly, it cannot be inferred from the face of the law itself that the asymmetry between political parties and third parties will cause the impugned spending limit to deprive some citizens of a reasonable opportunity to meaningfully participate in the electoral process. The question is not whether this asymmetry exists, but whether it drowns out the voices of some citizens. In the instant case, the evidentiary record before the application judge did not demonstrate that the *EFA* would allow political parties' voices to drown out those of third parties during the 12 to 6 months prior to the writ period.

Per **Côté** and **Rowe** JJ. (dissenting): The appeal should be allowed and the judgment of the application judge restored. The spending limit set out in the *EFA* does not infringe s. 3 of the *Charter*.

Section 3 is fundamental to Canadian democracy. The importance and primacy of the right to vote housed within the *Charter* is demonstrated by the fact that it is exempt from the exercise of the notwithstanding clause. As such, s. 3, must be kept separate and distinct from the scope of s. 2(b), which seeks to protect freedom of expression. It would be contrary to the structure of the *Charter* to allow s. 3 to function as a backdoor to insulate expression which would otherwise be subject to legislative override. This point is especially salient in the instant case given that Ontario's

legislature has invoked s. 33 of the *Charter* to ensure the legislation operates notwithstanding the freedom of expression contained within s. 2(b) of the *Charter*.

There is disagreement with the approach taken by the majority which, at its core, erroneously presupposes that s. 3 protects political discourse and extends expressive rights to political actors including third parties. This is also a point of disagreement with Wagner C.J. and Moreau J. as to whether an expressive component exists within s. 3. There is agreement however, with Wagner C.J. and Moreau J. in their result that the impugned legislation does not violate s. 3. There is also substantial agreement with them that the freedom of expression rights housed under s. 2(b) of the *Charter* should be analytically separate from s. 3, that s. 3's right to meaningful participation is engaged in the appeal, and that the asymmetry between third parties and political parties is important, but not dispositive in the instant case.

Section 3 has two main purposes: it guarantees the right to effective representation and it safeguards the right of citizens to meaningfully participate in the electoral process. The jurisprudence which has led to the formulation of these purposes focuses on the existence of an informational component. At a minimum, the informational component requires a citizen to be able to weigh the strengths and weaknesses of political candidates, political parties, and policy positions impacting the citizen's electoral choice.

At the core of the majority's inquiry is the question of whether the limit imposed creates disproportionality in the political discourse. This comparative analysis

should be rejected. In the context of s. 3, the question is not whether the spending limit creates a disequilibrium in the political discourse, but rather whether the limit infringes a voter's ability to meaningfully participate in the electoral process. The analysis must be, first and foremost, voter-centric. The majority's analysis further conflates the relationship between ss. 2(b) and 3 by implicitly elevating third parties to the status of rights-holders. This is incorrect. Third parties ought to be properly conceptualized as interest groups who seek to contribute to, and influence, the political discourse. Section 3 does not protect the parties seeking to be heard. Rather, it is a participatory right which extends to individual citizens and their right to make an informed vote. Citizens are the exclusive rights holders in s. 3.

There is also no support in the case law to find an expressive component within s. 3. Section 3 does not preserve the right of third parties to disseminate information or express themselves. These activities are forms of expression, which properly belong within the purview of s. 2(b). Recognizing such a component would blur the lines between ss. 2(b) and 3. It would also effectively provide a workaround of s. 33 of the *Charter*, as parties would be able to mount a s. 3 challenge against legislative provisions which would otherwise be subject to the override. Not only does this fly in the face of the legislature's clear choice to invoke s. 33, it would also undercut the basic structure of the *Charter*.

The majority's conclusion is untethered from the application judge's findings as it relies on the text of the legislation itself to find an absolute

disproportionality. There is also no clear articulation of the level of differential treatment required to trigger an infringement of s. 3. The failure to elucidate a consistent standard is concerning and increases the risk of *ad hoc* outcomes. Moreover, s. 3 does not require equilibrium in the political discourse. Asymmetrical treatment of political actors is permissible because it ensures a level playing field and prevents any one voice from using affluence to drown out others. It is a necessary, and even healthy, part of Canadian democracy. The asymmetrical treatment between political actors is also consistent with the jurisprudence, which recognizes that third-party spending should be more strictly regulated than primary actors in the political process. Thus, mere existence of asymmetrical treatment is insufficient to violate s. 3. Rather, the treatment must have an adverse impact upon the voter's right to play a meaningful role in the electoral process.

There is agreement with the framework proposed by Wagner C.J. and Moreau J. for identifying an infringement of the right to meaningful participation under s. 3. However, the scope of consideration must be qualified so that it is properly focused on the informational component. In addition to the four relevant considerations identified by Wagner C.J. and Moreau J., an additional consideration rounds out the analysis — the totality of the information available for citizens.

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By Karakatsanis J.

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By Wagner C.J. and Moreau J. (dissenting)

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Electoral Officer), 2002 SCC 68, [2002] 3 S.C.R. 519; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

By Côté and Rowe JJ. (dissenting)

Toronto (City) v. Ontario (Attorney General), 2021 SCC 34, [2021] 2 S.C.R. 845; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Figueroa v. Canada (Attorney General*), 2003 SCC 37, [2003] 1 S.C.R. 912; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

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APPEAL from a judgment of the Ontario Court of Appeal (Benotto, Zarnett and Sossin JJ.A.), 2023 ONCA 139, 165 O.R. (3d) 241, 478 D.L.R. (4th) 710, 525 C.R.R. (2d) 141, [2023] O.J. No. 1010 (Lexis), 2023 CarswellOnt 2794 (WL), setting aside a decision of Morgan J., 2021 ONSC 7697, 158 O.R. (3d) 161, 500 C.R.R. (2d) 198, [2021] O.J. No. 6885 (Lexis), 2021 CarswellOnt 18447 (WL). Appeal dismissed, Wagner C.J. and Côté, Rowe and Moreau JJ. dissenting.

Peter H. Griffin, *K.C.*, *Nina Bombier*, *Samantha Hale*, *Josh Hunter* and *Yashoda Ranganathan*, for the appellant.

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Howard Goldblatt, *Christine Davies*, *Anna Goldfinch* and *Erin Sobat*, for the respondents the Elementary Teachers’ Federation of Ontario and Felipe Pareja.

Susan Ursel, *Kristen Allen* and *Emily Home*, for the respondents the Ontario Secondary School Teachers’ Federation and Leslie Wolfe.

Michelle Kellam and *François Joyal*, for the intervener the Attorney General of Canada.

François Hénault and *Caroline Renaud*, for the intervener the Attorney General of Quebec.

Ryan L. Martin and *Leah M. McDaniel*, for the intervener the Attorney General of Alberta.

Jamie Cameron, *Laura M. Wagner*, *Alicia Krausewitz* and *Christopher D. Bredt*, for the intervener the Centre for Free Expression.

Stephen Aylward and *Olivia Eng*, for the intervener the Chief Electoral Officer of Ontario.

Marion Sandilands and *Mohammed Elshafie*, for the intervener the International Commission of Jurists Canada.

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Crawford Smith and *William Maidment*, for the intervener Democracy Watch.

Devin Drover, for the intervener the Canadian Taxpayers Federation.

W. David Rankin and *Graham Buitenhuis*, for the intervener the Canadian Civil Liberties Association.

Debbie Boswell, for the intervener the David Asper Centre for Constitutional Rights.

The judgment of Karakatsanis, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

KARAKATSANIS J. —

I. Overview

[1] This appeal concerns the right to vote, which lies at the heart of our constitutional democracy. Canada was founded as a democracy (*Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 145-46, per Cannon J.), and the *Canadian Charter*

of Rights and Freedoms constitutionally entrenched the right of all citizens to participate in elections. Section 3 of the *Charter* guarantees each citizen the right to vote in elections of members of the House of Commons and the provincial legislative assemblies, and the right to be qualified for membership therein.

[2] This Court has long recognized that s. 3's protection must be interpreted broadly and extend to the conditions under which the right to vote is formally exercised (*Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at paras. 25 and 27). The right to vote is more than "the bare right to place a ballot in a box" (*Dixon v. B.C. (A.G.)*, [1989] 4 W.W.R. 393 (B.C.S.C.), per McLachlin C.J., at p. 403). It is exercised within a framework of institutions and actors, including regular elections and sittings of the legislatures guaranteed by ss. 4 and 5 of the *Charter*, political parties, candidates, campaigns, electoral districts, laws regulating conditions for voting, and more (Y. Dawood, "Electoral fairness and the law of democracy: A structural rights approach to judicial review" (2012), 62 *U.T.L.J.* 499, at p. 519; P. Thibault, "Les droits démocratiques (articles 3 à 5)", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 563, at pp. 564 et seq.).

[3] This appeal requires the Court to consider whether the limit on third party spending on political advertising in the year before an election period, set out in s. 37.10.1(2) of the *Election Finances Act*, R.S.O. 1990, c. E.7 (*EFA*), infringes s. 3 of the *Charter*.

[4] Third parties are defined broadly in s. 1 of the *EFA* as any person or entity that is not a registered candidate, constituency association, or political party. They encompass a diverse range of citizens and groups who aim to provide information to other citizens and draw attention to issues of importance to them. Third party political advertising is a medium through which voters receive different views on political candidates, parties, and important public issues. This information helps voters identify the views of others in their community and informs the key issues on the election agenda. As this Court has recognized, third party advertising adds fresh perspectives to the political discourse (*Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 55). It may give voice to vulnerable or underrepresented groups. It may help voters to assess their options or identify important issues absent from the election agenda, and to push political parties and candidates to address them. Third party advertising thus assists citizens in casting an informed vote (*Harper*, at para. 55).

[5] The challenged spending limit restricts the amount that third parties can spend on political advertising in the year before a provincial election period (the pre-writ year). The election period begins when the writ is drawn up, one month before election day (also called the writ period). Third parties are capped at $600,000 in advertising spending for the entire pre-writ year (*EFA*, s. 37.10.1(2)(b)). By contrast, registered political parties may spend up to $1,000,000 in advertising; this limit applies for only six months before the election period (s. 38.1). In the first six months of the pre-writ year, political parties face *no* limits on political advertising.

[6] The application judge relied on expert evidence suggesting that both a 6- and 12-month spending limit for third parties would promote electoral fairness, and concluded that the challenged provision did not violate s. 3 of the *Charter*. He determined that third parties could still advertise within the spending limit, and that expensive television advertisements did not contribute to policy debates. The application judge thus concluded that the law respected the right of voters to meaningfully participate in the electoral process through an informed vote.

[7] With respect, I disagree. An examination of the extent of low-cost advertising that third parties can still engage in does not capture the broader impacts of the spending limit that, by design, creates absolute disproportionality, or a disproportionality that is so marked on its face that it allows political parties to drown out the voices of third parties on political issues from reaching citizens during an entire year of legislative activity.

[8] This Court's interpretation of s. 3 has been "guided by the ideal of a 'free and democratic society' upon which the *Charter* is founded" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (*Saskatchewan Reference*), at p. 181; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 26-27). To interpret the scope of s. 3's protection, this Court has emphasized free and open participation, respect for the diverse interests of a broad range of citizens, fairness in political discourse, and the importance of citizen participation in political

life for public faith in our laws and institutions (*Saskatchewan Reference*, at pp. 181-82 and 188; *Figueroa*, at paras. 27-30; *Harper*, at paras. 70 and 72).

[9] In this way, this Court has held that the purpose of s. 3 is for voters to be effectively represented in government, and to play a meaningful role in the electoral process. A legislative measure that undermines or interferes with citizens' ability to meaningfully participate in the electoral process will infringe the right to vote. And meaningful participation requires that citizens be able to vote in an informed way (*Harper*, at paras. 71 and 73). An informed vote is foundational to the health of the electoral system and a properly functioning democracy.

[10] An egalitarian model of elections — endorsed by this Court in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, and *Harper* — aims to achieve a balance in the political discourse, such that no one participant in the electoral system can exert undue influence. These participants include candidates, political parties and third parties (*Harper*, at para. 87). Assessing whether spending limits may lead to a disequilibrium in that discourse is necessarily a comparative analysis. Given the competitive nature of elections, the capacities of different actors to participate fairly in the electoral process are interconnected and will be affected by how all actors are regulated (*Figueroa*, at para. 49). In principle, spending limits may level the playing field and ensure wealth cannot be mobilized to drown out other voices (*Harper*, at para. 72). However, limits that restrict rather than promote citizens' access to diverse

information and views may violate their right to meaningfully participate in the political process (*Harper*, at para. 74).

[11] This Court's jurisprudence is clear that s. 3 does not require that all participants in the electoral system be treated equally. However, s. 3 will be infringed if spending limits allow any political actor or third party a disproportionate voice in the political discourse given their role in the electoral process, thus depriving voters of a broad range of views and perspectives on social and political issues.

[12] The issue in this case is not whether the evidence establishes that third parties can still provide some information to the public. It is about whether legislation that on its face limits third parties during a critical time in the democratic cycle, while imposing no limits at all on political parties for half that period, undermines voters' right to an informed vote that reflects their views. The application judge erred in law by failing to engage with the qualitative differences that permit political parties to drown out the voices of third parties.

[13] In my view, the spending limit infringes s. 3 of the *Charter*. The spending limit applies to issue-based political advertising during a full quarter of the standard life of a legislative assembly, during which citizens' s. 3 rights are engaged and the government is engaged in policy development and lawmaking. It has the clear potential to severely curtail voters' exposure to different views on the political issues that define their community in the year before the election period. During this period, the legislature will sit, as it must do under s. 5 of the *Charter*, debating policies and

influencing the election agenda. Third parties are strictly limited in their ability to inform citizens while political parties face *no* restrictions in the first six months of the pre-writ year. This differential treatment creates a disproportionality in the political discourse. Further, this disproportionality in political discourse persists over the second six months: if third parties do provide their perspective during the first six months of the pre-writ year, they may be unable to contribute meaningful information closer to the election. As a result, on their face, the statutory provisions create an absolute disproportionality in the broader political discourse that deprives voters of a broad range of views and perspectives on issues during a critical period in the democratic cycle. This undermines the voter's right to an informed vote and to meaningful participation in the electoral process.

[14] I would dismiss the appeal.

II. Background

[15] This is an appeal by the Attorney General of Ontario (AGO).

[16] The respondents are a civil society organization and several unions which aim to further the interests of thousands of citizens across Ontario. The respondents regularly engage in political advertising designed to inform and mobilize the public on certain issues. They seek to encourage citizens to vote by drawing attention to certain issues of law and policy. The Working Families Coalition is a non-profit civil society organization that draws voter attention to laws and policies that affect the lives of

working people. The Ontario English Catholic Teachers' Association, Elementary Teachers' Federation of Ontario, and Ontario Secondary School Teachers' Federation are unions representing teachers across Ontario and aim to inform the public on issues important to students, teachers, and the education system. The named respondents are individual voters who work with the respondent organizations.

[17] The challenged spending limit on political advertising was first enacted in 2017 as part of broader electoral financing reforms. The spending limit was set at $600,000 for third parties, for six months before the writ was drawn up. The legislature amended the *EFA* in 2021 (*Protecting Ontario Elections Act, 2021*, S.O. 2021, c. 5). Among other amendments, the pre-writ period was extended to 12 months, while the $600,000 cap remained the same. Section 37.10.1(2) limits spending on third party advertising to $24,000 in any one electoral district and to $600,000 in total (indexed to inflation) during the 12-month period before the election period.

[18] The definition of "political advertising" has not been changed since 2017. It is a defined term under s. 1(1) of the *EFA*:

> "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 . . . .

The definition also lists examples of communications that are not included, such as editorials and speeches, or the transmission of personal political views on the Internet. In addition, s. 37.0.1 sets out a non-exhaustive list of factors that the Chief Electoral Officer of Ontario must consider in determining whether an advertisement is a political advertisement.

[19] The *EFA* also regulates political advertising by political parties. In the six-month period right before the election period, political parties may spend up to $1,000,000 (s. 38.1). Before that period, political parties are not subject to any spending limits.

[20] Alongside spending limits, the *EFA* includes anti-collusion provisions, which prevent third parties from circumventing the limits by colluding with others (see s. 37.10.1(3) and (4)). The regime also has attribution provisions, which deem contributions of one third party to another as part of the political advertising expenses of the contributing third party (s. 37.10.1(3.1)). The *EFA* requires extensive compliance reporting (ss. 37.10.2, 37.12 and 37.13). For example, a third party must file an interim report each time its political advertising spending increases by $1,000 or more, and another report after reaching the total spending limit (s. 37.10.2(1)). The Chief Electoral Officer may order persons or organizations to pay administrative penalties for contravening these provisions of the *EFA* (ss. 45.1, 46.0.2, 47 and 48).

[21] In a previous proceeding, the application judge declared that the spending limit in s. 37.10.1(2) violated 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) 546). The legislature re-enacted the spending limit in a new law that invoked the s. 33 override clause (*Protecting Elections and Defending Democracy Act, 2021*, S.O. 2021, c. 31). Neither ss. 2(b) nor 33 are before this Court. This application challenges the spending limit solely under s. 3 of the *Charter*.

III. Judicial History

A. *Ontario Superior Court of Justice, 2021 ONSC 7697, 158 O.R. (3d) 161 (Morgan J.)*

[22] The application judge concluded that Ontario's third party spending limit did not violate s. 3 of the *Charter*. He found that various forms of media such as blogs, advertisements in print media, and social media provided third parties with effective and inexpensive ways to inform voters. He acknowledged that television advertising was significantly restrained by the limit, but considered examples of this medium "hyberbolic" caricature, not "policy discourse" (para. 87). The application judge determined that a spending limit policy would "entail a choice among a range of options that are aimed at the same objective" and found that the expert evidence suggested that both 6- and 12-month periods of restriction would foster egalitarian elections (para. 109). He concluded there was no infringement of s. 3, finding that the "tailoring of the law" was "careful enough to be appropriate" (para. 112).

B. *Court of Appeal for Ontario, 2023 ONCA 139, 165 O.R. (3d) 241 (Zarnett and Sossin JJ.A., Benotto J.A. Dissenting)*

[23] Zarnett and Sossin JJ.A., writing for the majority, allowed the appeal and concluded that the spending limit violated the right to vote under s. 3. They drew from *Harper* 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 allow a modest informational campaign (para. 86). In their view, the application judge erred in concluding that the spending limit was carefully tailored, and he made no findings supporting his conclusion that the spending restrictions were enough to support a modest informational campaign. They declared the challenged spending restriction invalid, and suspended the effect of the declaration for one year.

[24] Benotto J.A. dissented. She would have dismissed the appeal. She concluded that the application judge identified the correct legal test and did not err in applying it. She disagreed with the majority that there was any proxy for the right to meaningfully participate, and concluded that a requirement of careful tailoring improperly imported justification into the s. 3 analysis.

IV. Analysis

[25] The issues in this appeal are whether the *EFA*'s third party spending cap violates s. 3 of the *Charter*, and if so, whether that violation is a reasonable limit justifiable under s. 1.

[26] I begin by considering the scope of s. 3, before addressing whether the challenged spending limit violates the right to vote by creating a disproportionality in the political discourse, thereby interfering with the ability of citizens to meaningfully participate in the electoral process. Because I conclude that the legislation does so on its face, I turn to the AGO's argument that the spending limit is justified in a free and democratic society. I conclude the law is not minimally impairing and cannot be saved under s. 1 of the *Charter*.

A. *Legal Framework*

[27] Section 3 of the *Charter* is foundational to our democracy and the rule of law (*Sauvé*, at para. 9; *Frank*, at para. 44). It has been described by our Court as "synonymous" with democracy, a principle that underlies our Constitution and form of government (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1031, quoting *Saskatchewan Reference*, at p. 165, per Cory J., dissenting, but not on this point; see also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (*Secession Reference*), at paras. 61-69). A generous interpretation of the right to vote reflects its importance to the health and quality of Canadian democracy (*Frank*, at para. 27). *Figueroa* instructs that "an enriched understanding of s. 3 . . . advances the values and principles that embody a free and democratic state, including respect for a diversity of beliefs and opinions" (para. 27; see also *Haig*, at p. 1031).

[28] This Court has defined the scope of s. 3's protection to safeguard the free and open participation of citizens in the electoral process. Section 3 "has an intrinsic

value independent of its impact upon the actual outcome of elections" because the electoral process is the "primary means by which the average citizen participates in the open debate that animates the determination of social policy" (*Figueroa*, at para. 29). The right to vote in free and fair elections is a primary means for citizens to participate in their governance. It is the basis of the legitimacy of laws enacted by lawmakers as "the citizens' proxies" and a vital incident of Canadians' membership in a self-governing polity (*Sauvé*, at para. 31; see also para. 33; *Figueroa*, at para. 30; *Frank*, at para. 27; *Secession Reference*, at paras. 63-67).

[29] This Court has repeatedly confirmed that the purpose of s. 3 is to advance and ensure effective representation (*Saskatchewan Reference*; *Haig*; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Figueroa*; *Harper*). In the *Saskatchewan Reference*, McLachlin J. articulated a broad role of the individual in a representative democracy: "Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative . . ." (p. 183 (emphasis deleted)). The Court's jurisprudence has thus recognized that both the institutional and individual elements of democracy inform the meaning of s. 3 — that is, both "the process of representative and responsible government and the right of citizens to participate in the political process as voters" (*Secession Reference*, at para. 65, citing *Saskatchewan Reference*).

[30] In *Haig*, *Figueroa*, and *Harper*, the Court affirmed the participatory nature of the right to vote. L'Heureux-Dubé J., in *Haig*, elaborated that the purpose of s. 3 is to grant citizens "the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate" (p. 1031; see also *Figueroa*, at para. 25). The participatory component of s. 3 "ensure[s] that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions" (*Figueroa*, at para. 29). Thus, s. 3 protects the ability of citizens to participate in the political life of the country through exposure to and involvement in the political discourse about policies and issues that affect them (*Figueroa*, at paras. 28-30; *Harper*, at para. 70).

[31] The principle of meaningful participation also arose in *Harper*, where the Court confirmed that it includes a citizen's right to vote in an informed way — that is, "to be 'reasonably informed of all the possible choices'" (para. 71, quoting *Libman*, at para. 47). This requires that citizens be able to hear viewpoints and other information from third parties, candidates, and political parties (*Harper*, at paras. 71-72). Even before the *Charter*, this Court recognized that true democracy requires that citizens have access to information, including from "sources independent of the government", to participate in the governance of the country (*Reference re Alberta Statutes*, at p. 146).

[32] Section 3 protects the right of a citizen to vote "in a manner that accurately reflects his or her preferences" (*Figueroa*, at para. 54). To vote in this way, citizens must have access to information to "be able to assess the relative strengths and weaknesses of each party's platform" (*Figueroa*, at para. 54; see also *Harper*, at para. 71). For citizens to have a meaningful opportunity to participate in their governance through voting, there must be equilibrium in the political discourse to allow voters to develop an informed view (*Harper*, at paras. 72-73; *Libman*, at paras. 49-50). In *Libman* and *Harper*, the Court considered spending limits on political advertising and endorsed the goal of electoral fairness reflected in the egalitarian model of elections, noting the threat of affluent individuals and groups using wealth to monopolize or dominate the electoral discourse (*Libman*, at para. 47; *Harper*, at paras. 62-63). Equality and fairness in elections are essential to the meaningful exercise of the vote and encourage public confidence in the electoral system (*Figueroa*, at para. 51; *Harper*, at para. 63; *Libman*, at para. 47). The egalitarian model of elections thus aims to "balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters", so that voters may be better informed (*Harper*, at para. 87; see also paras. 62 and 72).

[33] As this Court recognized in *Figueroa*, electoral fairness is "not synonymous with formal equality" (para. 51). The legitimate goal of ensuring a level playing field for those who wish to engage in the political discourse may permit different limits on different electoral participants. Such limits "in turn, enabl[e] voters to be better informed; no one voice is overwhelmed by another" (*Harper*, at para. 62).

[34] The focus of the Court in *Libman* and *Harper* was the threat of those with greater resources exerting a disproportionate influence on the vote, given their role in the electoral process (*Harper*, at paras. 61 and 72-73; *Libman*, at paras. 41 and 49-50). The Court recognized that independent spending could be limited more strictly than spending by candidates or political parties (*Harper*, at para. 61; *Libman*, at para. 50). As *Harper* observed, this Court has recognized that "third parties . . . are important and influential participants in the electoral process" (para. 63). However, as this Court also noted in *Libman*, at para. 50:

> . . . 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.

While third parties may be focussed on particular issues, citizens expect political parties to take a stance on many of the significant issues that come up in the legislature and in public debate. Relatedly, the government may decide to subject individuals to a lower limit than broad-based organizations, given their different roles in the political process. Voters must be able to hear viewpoints and other information from third parties, candidates, and political parties (*Harper*, at paras. 71-72).

[35] Public debate dominated by any one actor, including political parties, threatens balance in the political discourse (*Libman*, at paras. 47-52; *Harper*, at para. 72). *Harper* held that overly severe spending limits may interfere with the ability of voters to hear a diversity of views and undermine the ability of citizens to vote in an

informed way (para. 73). To meaningfully participate, voters should be able "to hear and weigh many points of view" (para. 87). If the differential treatment of participants has an adverse impact on citizens' right to meaningfully participate in the electoral process, it will offend s. 3 (*Figueroa*, at para. 51).

[36] I conclude from this review of our jurisprudence that a spending limit will infringe s. 3 of the *Charter* if it allows political actors or third parties a disproportionate voice in the political discourse given their roles in the electoral process, thus depriving voters of a broad range of views and perspectives on social and political issues. Such disproportionality in the political discourse would violate voters' right to be "reasonably informed of all the possible choices" (*Harper*, at para. 71, quoting *Libman*, at para. 47). This analysis is necessarily comparative, considering *all* actors. No one actor should be able to exert undue influence on the political discourse, drowning out other voices.

[37] To assess the potential impact of the limit, it must be considered in its statutory context, including any limits on other electoral participants. This appeal thus requires us to consider the right to vote in an informed way in the context of restrictions on information during a full year of the duration of a legislative assembly — the year before a fixed-date election.

[38] Section 3 protections are engaged in the pre-writ period. The timing and length of restrictions on information are important factors post-*Harper*, as fixed-date elections have made pre-writ spending restrictions more common. Different interests

may be relevant in the pre-writ period, during which citizens' s. 3 rights remain engaged, and the legislature sits and defines government policies. Political discourse on such issues is essential to democracy. Pre-writ spending limits thus raises different concerns, which were not at play in *Harper* or *Libman*.

[39] Moreover, whatever the content or perspective of the political advertising, our jurisprudence has stressed that voters must be able to "hear and weigh many points of view" and to consider the relative strengths and weaknesses of each candidate, political party, and the issues associated with them, to make an informed choice (*Harper*, at para. 87; see also para. 71; *Figueroa*, at para. 63).

[40] Third parties are varied, and may include civil society organizations, Indigenous groups, religious groups, unions, individuals passionate about causes, and entities representing business interests. They may bring different perspectives to an issue associated with a political party or push new issues on to the agenda. Organizations trusted by citizens or reflecting their preferences may help voters to identify issues of importance to them or disseminate their views into the political discourse, much as political parties do (*Figueroa*, at para. 40). Or they may challenge a citizen's worldview and introduce them to new perspectives they may otherwise not have considered. They may represent vulnerable, less resourced, and dissenting voices, which "[a] democratic system of government is committed to considering" (*Secession Reference*, at para. 68). Or they may represent powerful interest groups that are well-resourced.

[41] Ultimately, the challenged spending limit's broader impacts on political discourse and varied citizen participation in the context of the year leading to an election period are thus highly relevant to its constitutionality. Courts must guard against interference with the right of citizens of differing views and backgrounds to participate in fair elections by advancing the purpose of s. 3 in Canada's heterogeneous society.

B. *The Spending Limit Infringes Section 3 of the Charter*

[42] The application judge expressly refrained from comparing the spending limits on political parties and third parties, reasoning that political parties are the "primary vehicles for informing the public of their electoral choices" (para. 66). With respect, although the importance of political parties and candidates in our present democracy is an accepted rationale for allowing them greater latitude in political advertising spending, it does not answer the question of whether a particular spending limit goes too far and interferes with the right of citizens to cast an informed vote under s. 3 (*Harper*, at para. 73).

[43] The application judge erred in law by failing to compare the third party spending limit with the rules applying to political parties to assess the overall effects of the measure on voters and their right to meaningful participation. The inquiry must ask whether the limit creates disproportionality in the political discourse. While in some cases this question might turn on the evidence, the legislation challenged in this appeal creates an absolute disproportionality on its face.

[44] As this Court noted in *Figueroa*, because of the competitive nature of elections, limits on political actors in the electoral process are highly interdependent. The rules applying to different actors will have an impact on the balance in the political discourse, and, in turn, the information voters receive (para. 49; see also *Harper*, at para. 72). The application judge failed to consider that the nature of the limit imposed on third parties, in circumstances where there are no limits imposed on political parties, means that the *EFA* permits political parties, by design, to overwhelm or drown out the voices of third parties during a critical period in the democratic cycle. This legal error undermines his conclusion that the spending limit does not violate s. 3 of the *Charter*.

[45] The challenged law in this case caps third party political spending at $600,000 during the pre-writ year (s. 37.10.1(2)(b) of the *EFA*). Political parties have no limit on spending during the first six months of this period, and can spend substantially more (up to $1,000,000) during the second six (s. 38.1).

[46] By design, the *EFA* creates a significant, qualitative disparity between what political parties and third parties may do, leading to disproportionality in the political discourse. Third parties are strictly limited in their ability to inform citizens while political parties face *no* restrictions in the first six months of the pre-writ year, and may spend a substantially higher amount in the six months before the writ period. On its face, the provision permits political parties to overwhelm or drown out the voices of third parties during the first six months of the pre-election year.

[47] The impact of this disparity is heightened by the breadth of advertising captured by the restriction over a long period of legislative activity. Considered in this light, the *EFA* permits political parties, by design, to overwhelm the voices of third parties on issues during an important period in the democratic cycle. This is qualitatively different from comparing differing amounts of permitted spending during an election period. I shall explain.

[48] The *EFA*'s definition of "political advertising" casts a wide net. The AGO and the intervener the Chief Electoral Officer of Ontario share the view that the definition in the *EFA* only captures "election-oriented" advertising (A.F., at para. 102; I.F., at paras. 19-20). However, the scope of regulated political advertising under the *EFA* captures significant issue-based advertising. If the advertisement "can reasonably be regarded as closely associated with a registered party or its leader or a registered candidate", it is caught by the definition (s. 1(1)). Given the broad range of issues on which parties can and do campaign, this could include any advertising on education, justice, Indigenous, health, environmental, or economic issues. There is no requirement that the advertising include an explicit reference to the election, though that is a factor that the Chief Electoral Officer may consider (s. 37.0.1(c)). As the Chief Electoral Officer candidly explains, the definition captures indirect advertising or advertising that is impliedly related to an election (I.F., at paras. 18-19 and 22).

[49] The legislation defines what election-related advertising is restricted, and includes indirect advertisements that take a position on issues associated with the party,

party leader, or candidate. While the current Chief Electoral Officer may enforce the provision in a particular way, the constitutionality of the spending limit must be determined by looking at the provision itself. An official's discretion as to whether to enforce a statutory provision cannot render an otherwise unconstitutional provision constitutional (*R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 74).

[50] This restriction on issues-based advertising on third parties in the first half of the pre-writ year, while political parties face no limits, also has potential effects closer to an election. If an issue of public significance arises a year or many months away from an election, and which is (or may become) closely associated with a political party, third parties are required to decide whether to use part of their spending limit to convey their views to citizens, or refrain from advertising. They may choose to save it, in case other important issues arise during the year, or to ensure they are able to advertise in the period right before an election. Citizens are potentially deprived of information regarding matters of public concern, both when the legislature is sitting and in the period before an election. The legislation thus forces third parties into a Hobson's choice, while simultaneously allowing political parties to spend unlimited amounts in the first six months of the pre-writ year to advertise using whichever form of media they wish on a wide range of issues.

[51] Moreover, the differential treatment must be considered in light of the sheer length of the regulated period, being one-quarter of the usual duration of a legislative

assembly in Ontario. Spending limits during the pre-writ period have not yet been considered by this Court.

[52] In contrast with the writ period — when all political participants are focused on the imminent election — s. 5 of the *Charter* requires that the legislature sit at least once during the pre-writ year. The government thus continues to develop policy and enact laws. In the months before an election, the government's "election budget" highlights its policy priorities (Affidavit of Marc Mayrand, reproduced in Exhibit Book, vol. XIII, at p. 5277). Third parties also play an important role in informing citizens during this time, shaping the political discourse and raising the profile of issues while political parties prepare their electoral platforms in response to voters' concerns.

[53] The rationales from *Harper* and *Libman* for why a balanced political discourse is necessary for meaningful participation in the electoral process thus applies to the pre-writ period (see, e.g., P. Vallée, *Droit électoral québécois: repères et enjeux contemporains* (2023), at pp. 282-84). But the importance of citizen participation takes on a different complexion in a year-long period of public debate about policy-related issues leading to the election. Iacobucci J. noted in *Figueroa* that this debate ensures "not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens" (para. 28). This pre-writ context magnifies concerns about limiting the ability of third parties to comment on public policy issues and from a variety of viewpoints during an important part of the democratic cycle. As noted by Canada's former Chief

Electoral Officer Marc Mayrand, the spending limit could insulate the government from public criticism and debate (Affidavit of Marc Mayrand, at p. 5277).

[54] Accordingly, over the course of the pre-writ year, the *EFA*'s spending limit on third parties creates a disproportionality in the political discourse about important issues of public policy, while the legislature is sitting. By contrast, under the *Canada Elections Act*, S.C. 2000, c. 9, regulated third party advertising in the pre-writ period expressly excludes issue-based advertising; spending limits apply only to explicitly "partisan advertising", a defined term (ss. 2 and 349.1). During the month of the election period, spending limits apply to "election advertising", which includes advertisements that "tak[e] a position on an issue with which a registered party or candidate is associated" (ss. 2 and 350).

[55] To summarize, the information available to voters in Ontario in the year before an election must include the interests, voices, and views of different citizens and parties. Meaningful participation in the electoral process includes an informed vote, as it is only with access to information that citizens can vote in a way that accurately reflects their preferences (*Figueroa*, at para. 54). To assess the relative merits of each party and candidate and their positions on the issues of the day, there must be equilibrium or proportionality in the political discourse so citizens have information on diverse points of view (*Harper*, at paras. 71-72). Political advertising is an important part of the electoral process. When political parties face no limitations, curtailing the ability of third parties to use platforms that may be effective in reaching certain voters

has the potential to overwhelm the political discourse and drown out third parties, interfering with citizens' access to information letting them weigh and establish their views during an important time in the democratic cycle. The preferences of citizens casting votes is the basis of responsive government policy, and the legitimacy of laws made by the elected government. On its face, the *EFA* creates an absolute disproportionality in the availability of information to citizens over a key period, thus impeding their ability to form meaningful preferences, violating s. 3 of the *Charter*.

[56] Given this conclusion, it is unnecessary to address whether the anti-collusion and extensive reporting provisions, or the sheer length of the restrictions on their own, also violate the right to vote. Nor is it necessary to assess whether the limit complies with the expressive component of s. 3.

[57] I add this. It may be that in a different case, evidence could assist the court in determining whether spending limits permit an actor to exert undue influence on the political discourse. In this case, an examination of the extent of low-cost advertising that third parties can still produce, such as that conducted by the application judge and urged upon us by the AGO, is beside the point, given the absolute disproportionality created on the face of the *EFA*.

[58] The findings of fact here show that a third party wishing to engage in effective television advertising could not do so, or would need to exhaust most of the permitted amount for a short campaign (Affidavit of Stephen Freeman, reproduced in Appeal Book, vol. III, at pp. 2459-61). Under the comparative analysis required under

s. 3, the ability of political parties to run television advertisements while third parties cannot exacerbates the disequilibrium. Our Court has affirmed that third parties are important participants in the electoral process (*Harper*, at para. 63). Their viewpoints must be able to reach voters without being drowned out by political parties.

C. *The Legislation Is Not Saved Under Section 1*

[59] The AGO argues that any violation of s. 3 is justified under s. 1 of the *Charter*. The AGO starts from the proposition that the spending restrictions on third parties enhance s. 3's protection, and that deference is owed to the legislature's balancing of competing interests in designing an electoral system. The AGO says the law furthers electoral fairness and appropriately levels the playing field. The respondents argue that the law does not strike a reasonable balance in the promotion of the right to vote.

[60] The constitutionality of limitations on *Charter* rights is determined under *R. v. Oakes*, [1986] 1 S.C.R. 103: Is the limit rationally connected to a pressing and substantial objective? Does the limit impair the right as little as possible? And do the benefits of the limit outweigh its harmful effects? Courts must exercise "great care" when determining whether a breach of s. 3 is justified under s. 1 of the *Charter* (*Figueroa*, at para. 60). In my view, the AGO has not shown the challenged spending limit minimally impairs s. 3.

[61] The AGO submits that the objective of the spending limit is to promote an egalitarian model of elections. Such an objective is pressing and substantial. And a spending cap on third parties is rationally connected to that objective.

[62] However, even assuming that this stated objective is pressing and substantial, the AGO fails at the minimal impairment stage. The length of the limit far surpasses what is reasonably necessary to protect the integrity of the election process, or the primary role of political parties in the electoral process.

[63] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. explained the application of the minimal impairment test. She concluded the government must show that the measure impairs the right in question as little as reasonably possible to achieve the legislative objective (p. 342). Some deference to the legislator is warranted — if the law falls within a range of reasonable options, the court will not insist on the smallest infringement conceivable. This Court has accepted before that in the political sphere, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, courts must give deference to the legislature's choice (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 53). The AGO says that deference is owed to the legislature's policy choice, and that limiting third party advertising for 12 months in the pre-writ period is reasonable given the primacy of political parties. The AGO also points to evidence that third parties advertised before

the six-month pre-writ period in the 2018 election (before the expanded limit came into effect).

[64] At the same time, courts must examine the legislature's choice more closely in areas where those rights at the heart of our democracy are at stake. Section 3 is one of those rights (*Saskatchewan Reference*; *Sauvé*). I agree with the respondents that there are measures "clearly superior to the measures currently in use" (*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 296, per Wilson J.). The application judge accepted the expert opinions — including from the former Chief Electoral Officer of Canada — that a six-month period of pre-writ restrictions on third party political advertising would be effective at achieving the government's stated objective (para. 109). Across the country and at the federal level, spending limits are much less restrictive. No other jurisdiction in Canada regulates third-party issue advertising for longer than five months, and many do not regulate third-party spending during the pre-writ period. Issue-based advertising is only restricted during the writ period of federal elections. The challenged spending limit fails the minimal impairment test.

[65] Having concluded that the challenged spending limit is not minimally impairing, it is unnecessary to consider the final stage of *Oakes*, which looks at the overall proportionality between the deleterious and salutary effects of the law.

V. Conclusion and Disposition

[66] Section 37.10.1(2) of the *EFA* infringes the right to vote in s. 3 of the *Charter*, and cannot be justified in a free and democratic society. I would uphold the Court of Appeal's declaration that s. 37.10.1(2) is of no force or effect under s. 52(1) of the *Constitution Act, 1982*.

[67] The respondents seek their costs. The AGO suggests that this is not a case for costs. In my view, there are no grounds to depart from this Court's normal practice that costs follow the result. Accordingly, I would dismiss the appeal with costs.

The reasons of Wagner C.J. and Moreau J. were delivered by

THE CHIEF JUSTICE AND MOREAU J. —

I. Overview

[68] The right to vote lies at the heart of a free and democratic society. This right is protected under s. 3 of the *Canadian Charter of Rights and Freedoms*, which guarantees citizens not only the right to cast a vote, but also the right to meaningfully participate in the electoral process. Such a right ensures that each citizen has a reasonable opportunity to introduce their own ideas and opinions into the political discourse and become informed of facts, ideas, and others' perspectives.

[69] This appeal concerns whether the Ontario legislature's pre-writ spending limit on third party political advertising unjustifiably infringes the right to meaningful

participation in the electoral process. The impugned spending limit, which is set out in s. 37.10.1(2) of the *Election Finances Act*, R.S.O. 1990, c. E.7 ("*EFA*"), imposes a cap of $600,000 (indexed to inflation) on third party political advertising for 12 months before the writ is issued.

[70] The respondents are made up of a civil society organization, special interest associations, trade unions, and individual citizens. They submit that the spending limit infringes the right to meaningful participation by overly restricting the dissemination of political information to citizens through advertising. The appellant, the Attorney General of Ontario, submits that the limit is consistent with the right to meaningful participation because it promotes electoral fairness by preventing well-funded voices from drowning out others in the lead-up to an election.

[71] The application judge found that the third party spending limit does not infringe the right to meaningful participation. In his view, the limit prevents the well-resourced from dominating the political discourse without overly restricting the dissemination of relevant information to voters. The Court of Appeal overturned the application judge's decision. The majority held that the application judge erred in his understanding and application of the proper legal framework for assessing the right to meaningful participation. The dissenting judge would have upheld the application judge's decision, finding no reviewable error in his approach and findings.

[72] Based on the evidentiary record before us and the findings of the application judge, we conclude that the spending limit on third party advertising does

not infringe the right to meaningful participation under s. 3 of the *Charter*. Simply put, the respondents have not established that the limit will have the effect of depriving each citizen of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. We find no reversible error in the application judge's conclusions, which were based on his review of the extensive evidentiary record before him. While certain features of the spending limit scheme merit careful scrutiny, the respondents have not established on a balance of probabilities that these features undermine citizens' right to meaningfully participate in the electoral process. Accordingly, we would allow the appeal and restore the decision of the application judge.

II. Legislative Context

A. *Context of Enactment*

[73] Third parties play an increasingly important role in the electoral process. Elections Canada registered 105 third parties in the 2021 federal election and 154 third parties in the 2019 federal election, the highest number registered in any elections to date (*Third Party Database* (online); see also D. J. Bourgeois and J. Spindler, with S. B. Campbell, *Election Law in Canada* (2nd ed. 2021), ch. 5). Ontario's general elections have followed a similar trend. While Elections Ontario registered only 17 third parties in the 2007 general election, 63 third parties were registered in the 2022 provincial general election (*Third Party Advertisers: General Election 2007 — October*

10, 2007 (online), and *Third Party Advertisers: 2022 Provincial General Election* (online)).

[74] A third party is any person or entity, other than a registered candidate, registered constituency association or registered party, that engages in political advertising (see *EFA*, s. 1(1), discussed in greater detail below). Third parties may have indirect affiliations with political parties or no affiliations at all, and "may include corporations, unions, groups or individuals that represent the interests of particular groups in society or have a broad base and draw their membership from individuals or from other organizations" (Bourgeois and Spindler, at p. 105). Third parties may seek to influence the outcome of an election by highlighting the perceived strengths and weaknesses of candidates or political parties, introduce novel insights and perspectives to the discourse concerning one or more issues associated with a candidate or political party, and may bring a new issue to the political discourse that candidates and political parties may be compelled to address (*Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 55).

[75] For much of Canada's electoral history, third parties' political activities were not subject to financial regulation (Bourgeois and Spindler, at pp. 127-28). In 1974, Parliament passed the *Election Expenses Act*, S.C. 1973-74, c. 51, which first introduced substantive regulations on the spending activities of third parties in federal elections (see Elections Canada, *A History of the Vote in Canada* (3rd ed. 2021), at p. 167; A. Geddis, "Liberté, Égalité, Argent: Third Party Election Spending and the

Charter" (2004), 424 *Alta. L. Rev.* 429, at p. 439). Several provinces and the Northwest Territories have since introduced their own third party spending limits.

[76] The approach to electoral fairness under Canadian law lies in stark contrast to that taken in the United States, where the promotion of equal participation in the electoral process was considered under First Amendment jurisprudence not to be a compelling interest capable of justifying restrictions on third party election spending (see *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010)). As a result, few restrictions on third party election spending remain in the United States. Many experts are concerned that this model, which our Court has described as a "libertarian" approach to election spending, allows well-funded third parties to control the electoral process "to the detriment of others with less economic power" (*Harper*, at para. 62; see also Bourgeois and Spindler, at pp. 39-40; C. Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999), 44 *McGill L.J.* 5; F. Fletcher, *Free and fair elections: regulations that ensure a "fair go"*, June 20, 2007 (online)).

[77] Until fairly recently, most third party spending limits under both federal and provincial legislation applied only to the "election period" between the issue of the writ and the election date. However, since the establishment of fixed election dates at the federal and provincial levels, third parties can begin election-oriented advertising in advance of the writ period (i.e., the "pre-writ period"). Parliament and the legislatures of Alberta, Manitoba, and the Northwest Territories have consequently

imposed third party spending limits to regulate this expansion of election-oriented advertising during the pre-writ period (see *Canada Elections Act*, S.C. 2000, c. 9, s. 349.1(1); *Election Finances and Contributions Disclosure Act*, R.S.A. 2000, c. E-2, s. 44.11(1)(a)(i); *The Election Financing Act*, C.C.S.M., c. E27, s. 83(2); *Elections and Plebiscites Act*, S.N.W.T. 2006, c. 15, s. 264.3).

[78] The Ontario legislation challenged in the present case was introduced against this historical backdrop. Elections in Ontario take place every four years on the first Thursday in June, with the election writ issued one month before then (*Election Act*, R.S.O. 1990, c. E.6, ss. 9 and 9.1). Although fixed date elections were implemented in Ontario in 2005, third party election spending limits were not introduced until early 2017. This legislation and subsequent amendments to the *EFA* gave rise to two sequential constitutional challenges, which were heard by the same application judge. While this appeal concerns only the second challenge flowing from the most recent June 2021 amendments, an overview of the preceding enactments and the first challenge is necessary context for understanding the issues that arise in this appeal.

B. *Legislative History*

(1) January 2017 Amendment to the *EFA* Under Bill 2

[79] In January 2017, the Ontario government amended the *EFA* by implementing Bill 2, the *Election Finances Statute Law Amendment Act, 2016*, S.O. 2016, c. 22. The legislation imposed, among other election-related provisions, a

spending limit on third party political advertising of $600,000 in the six months before the writ is issued for a fixed-date election. Some of the respondents challenged the constitutionality of the restrictions on third party political advertising as infringing freedom of expression and freedom of association under s. 2(b) and (d) of the *Charter*.

(2) April 2021 Amendment to the *EFA* Under Bill 254

[80] In April 2021, before that challenge was heard, Ontario passed Bill 254, the *Protecting Ontario Elections Act*, 2021, S.O. 2021, c. 5. This legislation extended the period during which the third-party political advertising spending limit applied from 6 months to 12 months before the fixed-date election writ is issued.

(3) *Working Families Ontario v. Ontario*, 2021 ONSC 4076, 155 O.R. (3d) 546 ("*Working Families 1*")

[81] The respondents challenged the extended third-party spending limit as infringing s. 2(b) and (d) of the *Charter*.

[82] On June 8, 2021, the application judge ruled on these challenges in *Working Families 1*. The Attorney General of Ontario conceded that the third-party pre-writ spending limit infringed s. 2(b). The application judge held that the infringement could not be saved under s. 1 of the *Charter*, having found that Ontario could not justify the extension of the six-month limit to 12 months. The government's own evidence suggested that a six-month limit could achieve its objective of enhancing

electoral fairness. Accordingly, the application judge found that the limit did not minimally impair third party advertisers' freedom of expression and that the deleterious effects of the limit was not proportionate to its salutary effects. He declared the third party spending limit constitutionally invalid and inoperative.

(4) June 2021 Amendment to the *EFA* Under Bill 307

[83] Less than one week after the application judge's ruling, on June 14, 2021, Ontario passed Bill 307, the *Protecting Elections and Defending Democracy Act, 2021*, S.O. 2021, c. 31 ("*PEDDA*"). In this bill, Ontario invoked s. 33 of the *Charter* to have the *EFA*'s third-party spending limit operate notwithstanding ss. 2 and 7 to 15 of the *Charter*. The amended provisions of the *EFA* were identical to those invalidated in *Working Families 1* except for the invocation of the notwithstanding clause.

(5) *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2021 ONSC 7697, 158 O.R. (3d) 161, and 2023 ONCA 139, 165 O.R. (3d) 241 ("*Working Families 2*")

[84] In July 2021, the respondents challenged the spending limit as infringing the right to vote under s. 3 of the *Charter*, which is not subject to the notwithstanding clause. They also challenged the Ontario legislature's use of the notwithstanding clause. The application judge and the Court of Appeal held that the legislature's use of the notwithstanding clause was constitutionally valid. The respondents did not raise this issue before our Court.

C. *The Impugned Third Party Spending Limit Scheme Under the EFA*

[85] The *PEDDA* amendments form part of an extensive third party political advertising spending limit scheme under the *EFA*. The scheme includes provisions concerning the writ period and pre-writ period spending limit, the definition of third parties and political advertising, prohibitions on strategies to circumvent the spending limit, spending reporting requirements, and administrative offences and penalties.

(1) The Spending Limit Under Section 37.10.1

[86] Under the amended *EFA* scheme, third parties are subject to a spending limit of $600,000 (indexed to inflation) on political advertising during the 12-month period preceding the issue of the election writ (s. 37.10.1(2)(b)). Third parties are further limited to spending no more than $24,000 in any particular electoral district during the 12-month pre-writ period (s. 37.10.1(2)(a)).

[87] During the election period (between the issue of the writ and election day), third parties face a spending limit of $100,000 (also indexed to inflation) on political advertising and $4,000 in any given riding (s. 37.10.1(1)).

[88] As the courts below noted, the crux of the respondents' challenge is the 12-month pre-writ spending limit. As mentioned, while the previous limit under the *EFA* was for the same amount ($600,000), it applied only for six months prior to the issue of the election writ. By contrast, registered political parties are subject to a $1,000,000

political advertising spending limit for the six-month period before the issue of the election writ (s. 38.1).

(2) Definition of Third Party and Political Advertising Under Sections 1(1) and 37.0.1

[89] "Third parties" and "political advertising" are defined terms in s. 1(1) of the *EFA*. A "third party" is defined as "a person or entity, other than a registered candidate, registered constituency association or registered party".

[90] "Political advertising" is defined to include advertising in any medium with "the purpose of promoting or opposing any registered party or its leader or the election of a registered candidate" (s. 1(1) *EFA*). It 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". However, it does not include:

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

[91] This definition is supplemented by s. 37.0.1, a non-exhaustive list of factors the Chief Electoral Officer must consider when determining whether an advertisement is a "political advertisement":

> (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.

[92] The Chief Electoral Officer is an independent officer of the Legislative Assembly of Ontario who administers provincial elections in accordance with the *Election Act* and the *EFA*. This includes monitoring participants in the electoral

process, including political parties and third parties, and enforcing compliance with Ontario's election finance scheme.

(3) Prohibitions on Circumventing the Limit or Colluding Under Sections 37.10.1(3) and (3.1)

[93] Section 37.10.1(3) of the *EFA* prohibits third parties from circumventing or attempting to circumvent the spending limit, including by:

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

[94] The *EFA* also prohibits third parties from colluding to circumvent the limit by providing that "[a]ny contribution from one third party to another third party for the

purposes of political advertising shall be deemed as part of the expenses of the contributing third party" (s. 37.10.1(3.1)).

(4) Interim Reporting Requirements Under Section 37.10.2

[95] Under s. 37.10.2 of the *EFA*, third parties are required to file interim reports with the Chief Electoral Officer whenever their political advertising spending increases by $1,000 and when their spending reaches the total limit. The Chief Electoral Officer is required to publish these reports online.

(5) Administrative Penalties and Offences Under Sections 45.1, 46.0.1-46.0.2 and 47-48

[96] Third parties are liable to pay penalties and to be convicted of offences for contravening the spending limit or other provisions under ss. 45.1, 46.0.1-46.0.2 and 47-48 of the *EFA*. For example, the Chief Electoral Officer may order a third party to pay an administrative penalty for contravening certain provisions of the *EFA*, including the spending limit and the interim reporting requirement. If third parties exceed the spending limit, they are also liable to pay a fine of no more than five times the amount by which they exceeded the limit. A third party that knowingly contravenes any of the provisions of the *EFA* is guilty of an offence and, if convicted, is liable to a fine of up to $5,000. A corporation or trade union that does so is liable for a fine of up to $50,000 if convicted.

III. Judicial History — *Working Families 2*

A. *Ontario Superior Court of Justice, 2021 ONSC 7697, 158 O.R. (3d) 161*

[97] The application judge held that the *EFA*'s pre-writ third party spending limit for political advertising does not infringe s. 3 of the *Charter*. After reviewing the impugned provision, he explained that spending limits on third parties may promote the equality of information among citizens that is necessary for meaningful participation in the electoral process. Such limits can serve to prevent those with greater resources from dominating the political discourse leading up to an election. The application judge noted, however, that spending limits may infringe the informational component of the right to meaningful participation if they are overly restrictive.

[98] Before turning to his analysis of whether the impugned provision infringes s. 3, the application judge emphasized that his decision in *Working Families 1* did not address this question. In that decision, he concluded that the provision unjustifiably infringes freedom of expression under s. 2(b) of the *Charter*. As part of his s. 1 analysis in *Working Families 1*, he had accepted evidence that both a 6-month and a 12-month spending limit period would have been a reasonable means of achieving the provision's objective. Thus, he concluded that the 12-month limit was not minimally impairing. In the instant case, the application judge explained that, while he was drawing and building on some of his findings from *Working Families 1*, ss. 2(b) and 3 are distinct rights which require distinct analyses.

[99] In his s. 3 analysis, the application judge considered the voluminous evidence submitted by the parties, which included thousands of pages of affidavits from experts on elections, political advertising and communications, and the availability of information to citizens. Based on this evidence, he found that the spending limit allows third parties to engage in many forms of low-cost advertising, including in print, online and social media. The application judge found that the provision primarily affects the respondents' ability to engage in television advertising, the most expensive form of advertisement. He found, however, that the television advertisements in evidence did not carry much informational value. He also found that the provision was content neutral and imposed equal limits on third parties across the political spectrum.

[100] Considering the evidence as a whole, the application judge concluded that the applicants had not demonstrated that the spending limit prevents citizens from meaningfully participating in the electoral process. While accepting that expensive television advertisements are one of the most persuasive forms of political advertisement, he noted that meaningful participation does not require that third parties be able to engage in advertising campaigns that are capable of influencing the outcome of an election. Furthermore, the evidence suggested that both the previous 6-month limit and the amended 12-month limit are consistent with the promotion of equal participation amongst citizens. He noted, in this regard, that there are no "mathematical standards" for determining how to foster equal and fair elections (para. 111). Thus, while the 12-month limit might not have been "perfectly skintight nor to everyone's taste", it is nevertheless "careful enough to be appropriate to the suit this time around"

(para. 112). He concluded that the impugned provision does not infringe the right to meaningful participation.

B. *Court of Appeal for Ontario, 2023 ONCA 139, 165 O.R. (3d) 241*

[101] The Ontario Court of Appeal overturned the application judge's decision in a split decision. A majority (Zarnett and Sossin JJ.A.) found that he did not apply the proper test to determine whether spending limits infringe the right to meaningful participation under s. 3. Based on a proper application of the test, they concluded that the impugned limit unjustifiably infringes s. 3. The dissenting judge (Benotto J.A.) disagreed with the majority's framing of the test and would have upheld the application judge's decision.

[102] The majority determined that, in *Harper*, this Court established a constitutional standard and two proxies for assessing whether legislation infringes the informational component of the right to meaningful participation. The constitutional standard requires that the spending restrictions do not limit information in a way that undermines citizens' right to meaningfully participate in the political process and to be effectively represented. According to the majority, the two proxies for determining whether this standard is violated are: (1) whether the limits are "carefully tailored" and (2) whether they permit a third party to carry out a "modest informational campaign" (paras. 15, 87 and 93).

[103] According to the majority, the application judge erred because his analysis did not show how either of the proxies are satisfied. These errors were tied to his failure to focus on the extension of the restrictions from 6 months to 12 months. The expert evidence suggested, and the application judge's factual conclusions from *Working Families 1* established, that a six-month limit was sufficient to achieve electoral fairness and prevent the well-resourced from dominating political discourse. Consequently, a limit that is twice as long cannot be said to be carefully tailored. Moreover, in the majority's view, the application judge's findings did not show how a modest informational campaign was possible within the 12-month limit.

[104] The majority held that the spending limit infringed s. 3 and could not be saved under s. 1. The government did not advance any arguments to demonstrate that the infringement was justified under the s. 1 test developed in *R. v. Oakes*, [1986] 1 S.C.R. 103. In any case, the infringement would have failed the minimal impairment and proportionality stages of the *Oakes* test. Consequently, the majority declared the spending limit invalid. They suspended the effect of the declaration of invalidity for 12 months, to allow the government to fashion *Charter*-compliant legislation.

[105] The dissenting judge would have upheld the application judge's decision. In her view, *Harper* did not establish "careful tailoring" as a proxy. Treating "careful tailoring" as a proxy improperly conflates the analysis required for a s. 3 infringement with the analysis required for a s. 1 justification. A "careful tailoring" proxy examines the government's rationale for the spending limit and, in effect, shifts the burden to the

government to justify the spending limit at the infringement stage. Furthermore, the majority erred in finding that the application judge had not concluded that the spending limit allows for a "modest informational campaign". His reasons, when read as a whole, make it clear that he was satisfied that third parties could carry out a modest informational campaign under the *EFA*'s limit. Thus, in her view, the application judge properly followed *Harper* and made factual findings that were available to him on the evidence. As a result, she would have upheld his conclusion that s. 3 was not infringed.

IV. Issue

[106] This appeal raises the issue of whether the third party spending limit for political advertising under s. 37.10.1(2) of the *EFA* unjustifiably infringes s. 3 of the *Charter*.

[107] The resolution of this issue requires clarification of the proper analytical framework for assessing the right to meaningful participation under s. 3 and whether the application judge or the Court of Appeal erred in their understanding or application of this analytical framework.

V. Principles of Law

A. *Standard of Review*

[108] The constitutional questions of whether the impugned provision infringes s. 3 of the *Charter* and, if so, whether such an infringement is justified under s. 1, are reviewable on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

[109] As we will explain, assessing whether third party spending limits infringe the right to meaningful participation under s. 3 is necessarily a contextual and fact-specific analysis. The application judge's findings of fact and mixed fact and law are reviewable for palpable and overriding error (*Housen*, at paras. 10 and 26-37). This deferential standard applies equally to the application judge's findings on social science and legislative facts (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 48; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 109).

B. *The Scope of Section 3*

[110] The right to vote is a fundamental political right and an essential feature of Canadian democracy (*Sauvé v. Canada (Chief Electoral Officer*), 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 1; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 1). It is enshrined in s. 3 of the *Charter*, which states that "[e]very 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."

[111] The special importance of the right to vote is made apparent by the "broad, untrammeled language" of s. 3 and by its exclusion from the legislative override under the *Charter*'s notwithstanding clause (*Sauvé*, at para. 11; *Frank*, at para. 25). For these reasons, this Court has emphasized that it is particularly critical to interpret s. 3 in a broad and purposive manner and to carefully scrutinize any alleged infringement (*Sauvé*, at para. 11; *Frank*, at para. 25; see also P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 45). A broad interpretation of s. 3 strengthens the quality and legitimacy of our democracy and public institutions (*Frank*, at para. 27).

[112] The purpose of s. 3, along with other democratic rights guaranteed by ss. 4 and 5, is "to ensure the healthy functioning of Canadian parliamentary democracy" (R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at p. 231). To give effect to this purpose, this Court has, over time, recognized that s. 3 implicitly protects a number of rights beyond merely the rights to vote and run for office. For example, when assessing the constitutionality of electoral boundaries, this Court has held that s. 3 protects the right to "effective representation" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 ("*Saskatchewan Reference*"), at p. 183). Recognizing that civic participation is the cornerstone of a healthy democracy, this Court has also held that s. 3 protects the right of citizens to meaningfully participate in the electoral process (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1031; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 25-28; *Harper*, at para. 70).

C. *The Right to Meaningful Participation*

(1) The Substantive Content of the Right to Meaningful Participation

[113] The right to meaningfully participate in the electoral process seeks to preserve full political debate, giving citizens the benefit of a broad range of ideas and opinions (*Figueroa*, at para. 28). Accordingly, the right guarantees more than simply the right to select elected representatives (*Harper*, at para. 70). Meaningful participation in the electoral process has intrinsic value independent of its impact on the outcome of elections (*Figueroa*, at para. 29).

[114] This Court has previously recognized that the right to meaningful participation has two components. The first component is expressive. As McLachlin J. (as she then was) wrote in *Saskatchewan Reference*, s. 3 contemplates the "right to bring one's grievances and concerns to the attention of one's government representative" (p. 183). In *Figueroa*, Iacobucci J. held that s. 3 ensures that "each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions" (para. 29). In *Harper*, Bastarache J. noted that the meaningful participation of citizens contributes to a "wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy" (para. 70). In short, the expressive component of the right to meaningful participation ensures that each citizen has a reasonable opportunity to introduce their own ideas and opinions into the political discourse.

[115] The second component is informational. The right to meaningful participation under s. 3 ensures that each citizen has a reasonable opportunity to hear others' perspectives and access information in order to exercise their right to vote in an informed manner (*Harper*, at para. 71). Each citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party, and also be able to consider opposing aspects of issues associated with certain candidates and political parties (*ibid.*).

[116] The expressive and informational components of the right to meaningful participation are interconnected. Where a citizen is deprived of a reasonable opportunity "to present their ideas and opinions to the general public", other citizens' right to cast an informed vote is also undermined (*Figueroa*, at para. 54). This is because access to information and to other citizens' opinions is necessary to ensure each citizen can exercise their right to vote "in a manner that accurately reflects [their] actual preferences" (para. 57).

(2) The Link Between the Right to Meaningful Participation and Freedom of Expression

[117] The fact that the right to meaningful participation includes expressive and informational components does not collapse the distinction between ss. 2(b) and 3 of the *Charter*. Challenges to laws governing democratic processes often implicate both ss. 2(b) and 3. As mentioned, the provision under review in the present appeal was first challenged and deemed invalid on the basis of s. 2(b). In previous cases, such as *Harper*

and *Haig*, the Court considered whether the legislation violates both ss. 2(b) and 3. In other cases, such as *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, and *Figueroa*, this Court has viewed one of these rights as relevant to the analysis of the other (see *Libman*, at para. 54; *Figueroa*, at para. 28). Justice Gonthier, dissenting, but not on this point, in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, noted that "one of the objectives underlying freedom of expression is the ability of voters to make informed choices" (*Thomson Newspapers Co.*, at para. 26 (emphasis in original)).

[118] There will necessarily be overlap between the electoral activity protected by both ss. 2(b) and 3 of the *Charter*. Political expression "lies at the core of the guarantee of free expression" (*Harper*, at para. 66). This Court has also recognized that s. 2(b) protects the recipients of expression (see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 767). By extension, s. 2(b) safeguards the right to "information pertaining to public institutions" (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40). Despite this overlap, this Court has emphasized that "ss. 2(b) and 3 record distinct rights which must be given independent meaning" (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, at para. 45; see also *Thomson Newspapers Co.*, at paras. 79-80; *Harper*, at para. 67).

[119] In order to respect the basic structure of the *Charter*, the content of one right should not be imported into another, nor be used to modify the scope of another

right. Two important differences exist between s. 2(b) and the right to meaningful participation under s. 3. First, s. 3 only applies to Canadian citizens, whereas s. 2(b) applies to "everyone". Second, the scope of activity protected by s. 3's right to meaningful participation is narrower than the scope of activity protected under s. 2(b). For example, a claimant can make out a s. 2(b) infringement by proving that the purpose or effect of the government action in question restricts *any* protected expressive activity (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 969-72). In contrast, s. 3 protects the introduction and exchange of ideas and opinions to the extent necessary to facilitate meaningful participation in the electoral process. As discussed below, these two rights can operate inversely: an electoral spending restriction can limit freedom of expression under s. 2(b) yet facilitate meaningful participation in the electoral process under s. 3 (see *Harper*, at para. 72).

(3) The Link Between the Right to Meaningful Participation and Third Party Spending Limits

[120] The right to meaningful participation is engaged by third party spending limits because third parties can be individual citizens or entities that act as a voice for multiple citizens during the electoral process. This Court has previously held that the s. 3 right to meaningful participation is engaged when legislation regulates political actors that serve as both a "vehicle and outlet" for individual citizens to participate in the electoral process (*Figueroa*, at para. 39). For example, in *Figueroa*, this Court confirmed that legislation that disadvantaged small political parties engaged the right to meaningful participation because political parties serve a participatory function for

citizens in the electoral process (see paras. 39-46). Likewise, in *Harper*, this Court recognized that the right is engaged by the regulation of third parties because they are "important and influential participants in the electoral process" (para. 63).

[121] Both the expressive and informational components of the right to meaningful participation are engaged by third party spending limits. Third parties often use political advertisements to comment on the merits and faults of a particular candidate or party, bring new issues to the political discourse, and add new perspectives on issues associated with candidates and political parties (see *Harper*, at para. 55; see also *Libman*, at para. 49). Regulation of third party advertising may thus restrict citizens' opportunity to become informed of political issues, parties, and candidates.

[122] However, the right to meaningful participation under s. 3 does not guarantee a right to "unlimited participation" (*Harper*, at para. 72). When expression is unlimited, well-resourced third parties can dominate political discourse, drown out the voices of their opponents, and prevent other citizens from having the opportunity to speak and be heard (para. 72; *Libman*, at para. 47; *Figueroa*, at para. 49). Thus, the enactment of spending limits on third parties is not in itself a violation of s. 3.

[123] In fact, this Court has recognized that the right to meaningfully participate requires that citizens not be able to drown out the voices of others in the electoral process (*Figueroa*, at para. 49; *Harper*, at para. 72). Third party spending limits therefore can be consistent with and facilitate the expressive component of the right to meaningful participation. Such limits often indicate the legislature's commitment to an

egalitarian model of election finance which is "premised on the notion that individuals should have an equal opportunity to participate in the electoral process" (*Harper*, at para 62; see also Sharpe and Roach, at p. 245). Without spending limits or measures to "provide a voice to those who might otherwise not be heard", it would be "possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse" (*Harper*, at paras. 62 and 72; see also *Libman*, at para. 47, citing the Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (1991), vol. 1, at pp. 323-24 ("Lortie Commission")). In this way, third party spending limits can promote "deliberative" or "discursive" equality in the electoral process (C. Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003), 48 *McGill L.J.* 11, at pp. 17-18; Y. Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the *Charter*" (2013), 51 *Osgoode Hall L.J.* 251, at p. 288).

[124] Electoral spending limits may also help to facilitate the informational component of the right to meaningful participation as they ensure that citizens are adequately informed of all their political choices by preventing the wealthy from controlling the electoral process to the detriment of others with less economic power (*Harper*, at para. 62; see also Y. Dawood, "Equal Participation and Campaign Finance: Comparative Perspectives", in E. D. Mazo and T. K. Kuhner, eds., *Democracy by the People: Reforming Campaign Finance in America* (2018), 426, at pp. 434-37). In doing so, spending limits can ensure that citizens are reasonably informed of all the possible choices and better able to consider opposing aspects of electoral issues (see Dawood

(2018), at pp. 434-37). This Court has upheld the constitutionality of spending limits that foster equal participation in the electoral process without unduly limiting the availability of information to citizens (see *Harper*, at paras. 73-74).

[125] With that said, while spending limits can play an important role in facilitating the right to meaningful participation, an overly restrictive spending limit can infringe s. 3 by depriving citizens of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. Thus, spending limits "must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters" (*Harper*, at para. 73).

D. *The Analytical Framework for Identifying an Infringement of the Right to Meaningful Participation*

(1) Overview

[126] The parties present competing understandings of the analytical framework for identifying an infringement of the right to meaningful participation. These arguments stem, in part, from the different analytical frameworks utilized by the application judge and the Court of Appeal. The appellant rejects the Court of Appeal's "careful tailoring" and "modest informational campaign" proxies and argues that the essential question should be whether citizens have been denied meaningful participation in an election. In contrast, the respondents argue that the Court of

Appeal's proxies, while not standalone requirements, are helpful tools for determining whether the right to meaningful participation has been infringed. This appeal provides the Court with an opportunity to clarify the proper analytical framework for identifying an infringement of the right to meaningful participation under s. 3.

[127] In *Figueroa* and *Harper*, this Court considered whether legislation infringes the s. 3 right to meaningful participation in the electoral process. In these cases, the Court assessed whether the impugned law had the effect of depriving a citizen of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives (see *Figueroa*, at para. 52; *Harper*, at para. 72; see also *Libman*, at para. 47). This is the standard for determining whether the right to meaningful participation has been infringed.

[128] In *Figueroa*, this Court assessed the constitutionality of federal legislation that required political parties to nominate candidates in at least 50 electoral districts in order to obtain, and then to retain, registered party status. Among other benefits, this status granted a political party the ability to issue tax receipts for donations received outside the election period, the ability for its candidates to transfer unspent election funds to the party, and the right of its candidates to list their party affiliation on ballots. The question was whether the withholding of these benefits from small political parties violated the right to meaningful participation. The Court held that both the expressive and informational components of the right to meaningful participation had been violated.

[129] The expressive component was infringed because the 50-candidate threshold undermined the capacity of citizens who support small parties to "influence policy by introducing ideas and opinions into the public discourse and debate" (*Figueroa*, at para. 58). In a political context where larger, affluent parties are more likely to dominate public discourse, legislation that augmented this advantage increased the likelihood that smaller parties would be "drowned out" and deprived of "a reasonable opportunity to speak and to be heard" (para. 52; see also para. 51). By extension, the informational component was infringed because the 50-candidate threshold undermined the opportunity for other citizens to receive "information that might influence the manner in which she or he exercises the right to vote" (para. 54).

[130] In *Harper*, this Court assessed the constitutionality of federal legislation imposing third party spending limits during the writ period. When determining whether the limits complied with the s. 3 right to meaningful participation, the Court considered whether the informational component had been violated (para. 71). In concluding that there was no s. 3 violation, Bastarache J. deferred to the trial judge's finding that the limits permitted "modest, national, informational campaigns" and "reasonable electoral district informational campaigns" (para. 74). Accordingly, the legislation did not deprive third parties of a reasonable opportunity to speak and be heard (para. 72). The ability for citizens to "weigh the relative strengths and weaknesses" of candidates and political parties, in addition to considering "opposing aspects of issues" associated with candidates and parties, was preserved (para. 71).

[131] In our view, the standard used in *Figueroa* and *Harper* applies to assessing any alleged infringement of the right to meaningful participation. As *Figueroa* makes clear, this standard is not specific to electoral spending limits and applies to legislation impacting conduct outside of the writ period.

[132] The right to meaningfully participate in the electoral process is not limited to the writ period; it operates at all times (see, e.g., J. Cameron, "The Text and the Ballot Box: Section 3, Section 33, and the Right to Cast an Informed Vote", in P. L. Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (2024), 381, at pp. 389 and 393). Ensuring citizens have a reasonable opportunity to convey ideas and receive information outside the writ period is necessary to fulfill s. 3's purpose of facilitating the healthy functioning of Canadian parliamentary democracy. Outside of a writ period, citizens must be able to assess parties' and candidates' performance and become informed of various perspectives on political issues. Ongoing public participation ensures that elected officials and prospective candidates can remain sensitive to the changing needs and interests of citizens. In addition, such participation allows citizens to gain over time an informed view of which electoral option best aligns with their concerns and beliefs, and later use their vote to hold political actors accountable (see Cameron, at p. 393). In short, the right to meaningful participation has no inherent temporal limits.

(2) Relevant Considerations

[133] There are a variety of considerations that a court may weigh when determining whether a law has the effect of depriving a citizen of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. In the context of spending limits, a court may consider the quantum and temporal reach of the limit, the scope of conduct captured by the limit, and the limit's impact on different forms of expression. A court may also consider whether an impugned measure treats political actors differently and, if so, whether such differential treatment deprives some citizens of a reasonable opportunity to speak or be heard. However, asymmetrical treatment is itself insufficient to establish a violation of the right to meaningful participation (*Figueroa*, at para. 51).

[134] Where the impugned measure is a spending limit, its quantum and temporal reach will generally be an important consideration in the analysis. An overly permissive analytical framework can allow those with greater resources to dominate the discourse and drown out the voices of others, preventing citizens from having a reasonable opportunity to communicate their views and become fully informed about the electoral landscape (see *Harper*, at para. 62). At the same time, an overly restrictive limit can deprive citizens of a reasonable opportunity to contribute to political discourse and receive adequate information (see para. 73).

[135] The scope of conduct captured by the impugned measure is another consideration that will often be relevant to the analysis. For example, if a measure

targets political advertising, the breadth of the definition of "political advertising" will be relevant to assessing whether citizens have a reasonable opportunity to contribute to political discourse. A measure which encompasses a considerable amount of political expression may have a significant impact on citizens' ability to communicate ideas and cast an informed vote. As well, it is possible that a definition of "political advertising" is so ambiguous that, while not unconstitutionally vague, it has a chilling effect on a citizen's ability to meaningfully participate in the electoral process. Other mechanisms that limit or affect third parties' ability to disseminate information under the scheme may also be relevant, such as anti-circumvention or reporting requirements.

[136] The impugned measure's impact on different forms of media and advertisement may also be relevant to the analysis of an alleged infringement of s. 3. Certain types of advertisement may have a broader reach (see, e.g., Elections Ontario, *A balanced approach to election administration: 2014-2015 Annual Report* (online)), at p. 35)). Others may be less likely to reach certain demographics. For instance, a spending limit that makes it such that third parties could only run social media campaigns might have a disproportionate impact on the information that is accessible to citizens who tend to rely on more traditional media (see, e.g., Reply Affidavit of Patrick Dillon, reproduced in Exhibit Book, vol. I, at p. 243; Affidavit of Stephen Freeman, reproduced in Exhibit Book, vol. V, at pp. 1660-63; Cross-examination of Tamara Small, reproduced in Exhibit Book, vol. XXXII, at p. 14457; Reply Affidavit of Stephen Freeman, reproduced in Exhibit Book, vol. VI, particularly at pp. 2130 and 2138; see also Affidavit of Marshall Jarvis, reproduced in Exhibit Book, vol. IV, at

p. 1395; Affidavit of Kerri Ferguson, reproduced in Exhibit Book, vol. XIV, at p. 5791).

[137] An asymmetrical treatment of different political actors can also be a relevant consideration. The right to meaningful participation ensures that *every* citizen has a reasonable opportunity to introduce their own ideas and opinions into the political discourse and become informed of facts, ideas, and others' perspectives. A measure that restricts some political actors more than others may infringe this guarantee by giving certain citizens an opportunity to dominate the discourse. Such an imbalance could manifest in a number of ways, including with legislation that establishes different spending limits for different actors or, as seen in *Figueroa*, grants only some political parties access to certain benefits.

[138] To be clear, the question is not whether the legislature has adopted an asymmetrical treatment of different actors, nor whether the measure has a disproportionate impact on certain actors (see *Figueroa*, at para. 51). Rather, the question is whether the imbalance results in depriving citizens of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. This analysis is contextual, and must account for the fact that different actors play different roles in the electoral process.

[139] For example, our Court has noted that "[i]t is . . . important to limit independent spending more strictly than spending by candidates or political parties"

(*Libman*, at para. 50). Third party spending poses a particularly high risk of depriving other citizens of a reasonable opportunity to communicate their views and become informed of facts, ideas, and others' perspectives. This is because "[i]t 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" (*ibid.*). Without stricter limits for third parties, "owing to their numbers, the impact of [independent] spending on one of the candidates or political parties to the detriment of the others could be disproportionate" (*ibid.*). Moreover, unlike political parties, third parties are not directly accountable to citizens through the electoral process. Ultimately, "[a]lthough what [third parties] have to say is important, it is the candidates and political parties that are running for election" (*ibid.*).

[140] In short, the standard developed in *Figueroa* and *Harper* determines whether a measure infringes the right to meaningful participation. The question is whether the impugned measure has the effect of depriving a citizen of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives. This flexible standard is applicable to measures that impact activity outside of the writ period and is not limited to spending limits. When applying this standard to spending limits, however, a court may consider the quantum and temporal reach of a spending limit, the scope of conduct captured by the limit, the limit's impact on different forms of expression, and the asymmetrical treatment of different actors.

(3) Errors Made by the Court of Appeal

[141] We are of the view that the Court of Appeal erred in interpreting *Harper* as establishing two proxies for identifying violations of the informational component of the right to meaningful participation. As we will now explain, *Harper* did not introduce "careful tailoring" and a third party's ability to mount a "modest informational campaign" as proxies. We agree with the dissenting judge that the majority's conception of "careful tailoring" improperly conflates the ss. 3 and 1 analyses. While elements of both proxies, properly understood, may be relevant to assessing an alleged breach of the right to meaningful participation, the focus must remain on whether the applicant has demonstrated on a balance of probabilities that the impugned measure had the effect of depriving a citizen of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives.

[142] "Careful tailoring" does not emerge as a proxy from *Harper*. Justice Bastarache used this phrase to explain that, while spending limits may be necessary to achieve equality in the political discourse, they "must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters" (para. 73). In this context, the reference to "careful tailoring" simply indicates that spending limits will breach the informational component of s. 3 if they restrict information past a certain point. Naturally, if the government fails to tailor the legislation to avoid this outcome, there is a risk that the limits will restrict information

in a way that undermines citizens' ability to cast an informed vote. This reference to "tailoring", however, should not shift the focus away from whether the limits *in fact* undermine this ability. The phrase does not dictate a particular form of analysis and should not be read as an invitation to assess the government's rationale behind the impugned legislation. Justice Bastarache's analysis of the alleged breach in *Harper* confirms this approach: he focused on the scope of advertising campaigns that could actually take place under the spending limits, rather than on the "tailoring" behind them (see para. 74).

[143] Furthermore, the Court of Appeal majority's understanding of "careful tailoring", by focusing on the government's "rationale" or "reasons" behind the amount and duration of the limits, inappropriately brings s. 1 justificatory concerns into the infringement analysis (para. 87). Maintaining the distinction between the infringement and justification analyses "is necessary, in part, because the burden of proof is attributed differently: the rights claimant has the burden of establishing an infringement of his or her *Charter* right, but it is the state that must justify the infringement" (*Frank,* at para. 42). The two are, in other words, "distinct processes with different burdens" (*Sauvé*, at para. 10).

[144] This Court has emphasized that s. 3's right to "meaningful" participation is not subject to the consideration of countervailing collective interests (*Figueroa,* at para. 33). This remains true even though we have identified the implicit content of the right with reference to qualified phrases such as the right to "meaningful" participation,

which grants each citizen a "reasonable" opportunity to express views and become informed (para. 35). Rather than importing a consideration of collective interests, such language simply reflects the recognition that the scope of the s. 3 right is not unlimited (para. 36).

[145] The Court of Appeal majority's "careful tailoring" analysis illustrates how this proxy can give rise to a conflation between the infringement and justification analyses. The majority faulted the application judge for failing to give sufficient attention to his conclusions from *Working Families 1*. In his s. 1 analysis in *Working Families 1*, the application judge concluded that a six-month restriction of $600,000 was appropriate to ensure electoral equality. In the majority's view, the applicants were entitled to rely on this finding and on the absence of justification or explanation for the extension of the restriction to 12 months.

[146] This approach treats the absence of justification or explanation behind the amendments to the legislation as a factor that tends to show a breach of s. 3. It effectively places the burden on the government to justify the amendments in order to disprove the infringement. Moreover, unlike the minimal impairment step of *Oakes*, the informational component of s. 3 does not lend itself to an analysis of whether less restrictive options are available. The analysis must instead remain focused on whether the impugned measure deprives citizens of a reasonable opportunity to express their viewpoints and access information they need in order to meaningfully participate in the political process.

[147] As to the ability to mount a "modest informational campaign", *Harper* did not introduce this factor as a legal standard. Rather, Justice Bastarache used this phrase to refer to a specific factual finding from the trial decision, which he invoked in support of his conclusion that the spending limits did not infringe s. 3 (para. 74). The question of whether third parties can mount a modest informational campaign may be an important consideration in the s. 3 analysis insofar as it sheds light on the degree to which citizens can express themselves and receive information from others. However, it cannot serve as a proxy for determining whether an impugned measure breaches the right to meaningful participation in all circumstances.

VI. Application

[148] With this analytical framework in mind, we turn now to assessing whether the third party spending limit under s. 37.10.1(2) of the *EFA* violates the right to meaningful participation in the electoral process. The burden is on the respondents to show that the $600,000 pre-writ political advertising limit deprives citizens of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives.

[149] For the reasons that follow, we find that the respondents have not met this burden. Taking into account the scope of the definition of political advertising under the scheme, the extent of advertising that is possible within the limit, and the comparative spending limits for political parties and candidates, we conclude, based on

the evidentiary record, that the third party spending limit is consistent with the right to meaningful participation.

A. *The Definition of Political Advertising*

[150] The appellant submits that the definition of political advertising under the election spending limit scheme is appropriately restricted to election-oriented activities and capable of consistent application. In this respect, the appellant agrees with the Chief Electoral Officer of Ontario's intervener submissions regarding the scope of political advertising under the *EFA*. The respondents submit that part of the problem with the third party spending limit is that the definition of political advertising under the scheme is vague. Specifically, because of the uncertainty involved in determining whether an issue will likely be "closely associated" with a party, its leader, or a candidate during the pre-writ period, they argue that the limit will have a chilling effect on third parties' ability to convey important electoral information to citizens.

[151] The definition of political advertising limits the scope of communications caught by the third party spending limit in two significant ways: by form and by content. First, the definition of political advertising under the *EFA* does not include all forms of third party communication to citizens. Under s. 1(1), numerous forms of communication are explicitly excluded from the spending limit, such as editorials, columns, letters, speeches, debates, news, commentary, direct communications by a person, group, corporation, or trade union to their members, employees, or shareholders, and personal views expressed online on a non-commercial basis. These

exceptions allow third parties to transmit information to citizens through many forms of communication, including in an attempt to influence the outcome of the election, that are not caught by the spending limit.

[152] Second, the scope of political advertising under the *EFA* is also limited in terms of the content of third party communications it captures. Under s. 1(1), only advertising that has "the purpose of promoting or opposing any registered party or its leader or the election of a registered candidate" is caught by the limit. This 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". Third parties may therefore spend an unlimited amount on advertising on issues that are not closely associated with a candidate, party, or party leader. We note that this definition is similar to that found in other third party election financing schemes, such as the definition of "election advertising" in the *Canada Elections Act*, s. 2(1), or in Alberta's *Election Finances and Contributions Disclosure Act*, s. 44.1(1)(d). In *Harper*, this Court held that a prior version of the *Canada Election Act*'s definition of election advertising formulated similarly to that of the *EFA*, "although broad in scope, is not unconstitutionally vague" (para. 89). Indeed, a broad definition of political advertising may be viewed as a feature of a well-designed election spending limit scheme because it mitigates "sham issue advocacy", that is, thinly veiled election advertising (see Feasby (2003), at pp. 13-14).

[153] Having carefully reviewed the evidentiary record, we see no basis to interfere with the application judge's rejection of the respondents' position that the definition of political advertising would have a chilling effect on citizens' opportunity to speak and be heard in the lead-up to an election. While we accept that whether an issue is closely associated with a candidate or party may in some cases only crystallize closer to the election period, this is a consideration that the Chief Electoral Officer would take into account in assessing whether a given communication, at the time of its broadcast, falls within the scope of the definition (I.F., at para. 22, citing Elections Ontario, *CFO Handbook for Third Parties 2021* (2021), at pp. 30-31). Moreover, as one expert noted, the late crystallization of candidates' and parties' positions works to the advantage of third parties in the sense that it allows third parties to advertise with regard to these issues until close to the election period without running against the spending limit (Affidavit of Jean-Pierre Kingsley, reproduced in Exhibit Book, vol. XXIX, at p. 8209). Accordingly, we agree that this definition "is not so broad as to be incapable of predictable interpretation or so uncertain that even the Chief Electoral Officer will not be able to properly enforce it" (application judge's reasons, at para. 74).

[154] Likewise, it was open to the application judge to find that third parties may still engage in a range of meaningful electoral activities that do not count against the spending limit for political advertising. This finding was supported by the evidence of Jean-Pierre Kingsley, a former Chief Electoral Officer of Canada, who enumerated a list of such issue-based activities (Affidavit of Jean-Pierre Kingsley, at pp. 8205-6). While we recognize that other witnesses expressed doubts as to whether they could

predict how the definition would be applied, the application judge was entitled to accept other evidence that the definition leaves multiple pathways for third parties to effectively bring relevant issues and information to the electorate without engaging the application of the spending limit (see, e.g., pp. 8207 and 8209).

[155] In sum, while we will keep this broad definition of political advertising in mind as we consider other aspects of the spending limit scheme, we reject the respondents' submission that this definition, in itself, prevents citizens, acting as third parties, from having a reasonable opportunity to convey political information to citizens.

B. *The Extent of Permissible Political Advertising*

[156] The respondents submit that the 12-month $600,000 spending limit does not provide a reasonable opportunity for third parties to communicate their views and for citizens to become informed of them. The appellant submits that this Court should accept the application judge's conclusion that, although there is no perfect quantum or length for third party political advertising spending limits, the limit under the *EFA* does not prevent third parties from sufficiently communicating information to citizens.

[157] In our view, in addition to the communications that do not count against the spending limit, third parties can engage in a range of political advertising activities within the spending limit. The application judge's findings of fact supported his conclusion that the *EFA* does not deny some citizens a reasonable opportunity to

disseminate political information throughout the pre-writ period without surpassing the $600,000 limit.

[158] The application judge found that television advertisements, the most expensive advertising medium, are the main form of advertising affected by the spending limit. He recognized that the spending limit curtails a third party's ability to engage in television advertising, noting that according to Stephen Freeman, a communications expert, a "'minimally effective', two-week advertising campaign" across multiple platforms that included television would cost at least $1.2 million (paras. 44-46 and 78; see Affidavit of Stephen Freeman, at p. 1672).

[159] The application judge correctly noted, however, that the right to meaningful participation under s. 3 is not synonymous with the ability of third parties to engage in an "effective persuasive campaign" or "the ability to mount a media campaign capable of determining the outcome" (*Harper*, at para. 74). As was the case in *Harper*, the $600,000 pre-writ spending limit here appears on the evidence to be "high enough to allow third parties to engage in a significant amount of low cost forms of advertising" (para. 115). While television advertising may be among the more persuasive tools for influencing citizens, a s. 3 analysis must remain focused on whether citizens have a reasonable opportunity to express viewpoints and become informed of facts, ideas, and others' perspectives.

[160] The application judge found that the evidence suggested television advertising had an attenuated impact on voters' ability to understand their political

options and make an informed choice among them. The application judge carefully examined the television advertisements introduced as evidence by the respondents and found that they had low informational content (paras. 82 and 85-86). He found that these advertisements do not amount to "policy discourse" nor do they "convey any detailed information" (paras. 83 and 87). He concluded that while this kind of polemical advertisement "certainly constitutes legitimate free speech", it does not meaningfully inform voters (para. 87). Analogizing such advertisements to political cartoons in a newspaper's editorial page, he said that eliminating them "would be a serious interference with freedom of expression, but it could not be said to deprive readers of information needed to inform themselves since all of the print information would remain intact" (*ibid.*).

[161] The evidentiary record further supports the application judge's findings. As noted by Professor Tamara Small, "very few" third parties engaged in television-dominant advertising in Ontario prior to the imposition of spending limits (Affidavit of Tamara Small, reproduced in Exhibit Book, vol. XXIV, at pp. 10476-77). This evidence indicates that the impugned limit's effect on television advertising only impacts a small number of third parties in Ontario. Likewise, it bolsters the appellant's argument that the spending limit is working to ensure that well-funded third parties do not drown out the voices of third parties with fewer resources.

[162] The extent to which the application judge found that the spending limit curtails television advertising does not, in our view, rise to the level of an infringement

of s. 3. Putting aside the application judge's commentary on the informational value of the television advertisements in the record, the thrust of his findings indicate that citizens have not been deprived of a reasonable opportunity to speak or be heard due to the availability of other media platforms for citizens to exchange ideas and opinions. Therefore, neither the expressive nor the informational component of s. 3 were infringed by the inability to run television advertisements.

[163] The application judge found that numerous forms of low-cost political advertising methods remain available to third parties. This is in addition to the forms of political communication enumerated in s. 1(1) that are expressly exempted from the spending limit, such as editorials, columns, or books. After reviewing the evidence from advertising and communications experts, he found that today's multimedia environment allows for a variety of forms of advertising that are inexpensive enough to remain within the spending limit. He specifically noted that:

> Blogs, advertisements in print media, op-eds, press releases, interviews, radio spots, mass mailings (via e-mail 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" . . . in engaging with and informing the public of election issues. [para. 77]

[164] Several of the respondents' witnesses gave evidence that demonstrated how political advertising could be conducted and disseminated within the spending limit (see, e.g., Affidavit of Peter Macdonald, reproduced in Exhibit Book, vol. III, at

pp. 945-46; Reply Affidavit of Patrick Dillon, at pp. 240-42). The application judge was only required to find that there was a reasonable opportunity for citizens to express their ideas and inform voters. On the evidence presented by the respondents, the application judge did not commit a reversible error in finding that the *EFA* does not prevent the "modest informational campaigns" that this Court held in *Harper* was a constitutionally-compliant degree of opportunity (para. 74).

[165] Justice Bastarache noted in *Harper* that "third parties tend to focus on one issue and may therefore achieve their objective less expensively" (para. 116). This is consistent with the application judge's finding that the limit under the *EFA* allows third parties to make efficient use of the alternative means of advertising listed above, at para. 82, to focus on the particular issues that matter to them. Moreover, the spending limit allows for advertising in diverse mediums, both traditional and online. In this context, on the evidentiary record before us, the respondents have not demonstrated that third parties will be unable to reach particular demographics.

[166] In sum, while the quantum and duration of the spending limit will have the effect of limiting the extent to which third parties can engage in television advertising, the evidence supports the finding that the limit does not deprive citizens of a reasonable opportunity to convey political information to other citizens through various forms of inexpensive and effective advertising within the spending limit.

[167] In light of this conclusion, we would further reject the respondents' position that the anti-coordination restrictions or the registration and reporting

requirements contribute to a denial of a reasonable opportunity to speak and be heard. In our view, s. 37.10.1(3), which prevents third parties from circumventing the spending limit by acting in collusion, splitting themselves into multiple coordinated entities, or otherwise colluding or sharing information with political parties or each other, ensures that the most well-funded third parties and political parties cannot cover the field to the detriment of smaller participants. These restrictions do not curtail the right of meaningful participation, but rather give effect to it. Likewise, there is insufficient evidence to suggest that the interim reporting requirements for third parties under s. 37.10.2 burdens third parties to a degree that effectively denies them a reasonable opportunity to contribute to the political discourse.

[168] We also recognize that many third parties have not spent up to the limit in past election cycles. It was for this reason that, as Benotto J.A. highlighted in dissent at the Court of Appeal (at para. 177), Jean-Pierre Kingsley opined third parties are still able to meaningfully participate while subject to a 12-month regulated period. We reject the respondents' position that evidence of underspending is necessarily demonstrative of the *EFA*'s *Charter*-infringing effects. Rather, we are of the view that placing this limit on third party spending ensures that the most well-funded third parties do not drown out the voices of smaller third parties. It prevents some of the asymmetry as between third parties as election finance laws are intended to do.

C. *The Asymmetry Between Third Parties and Political Parties*

[169] The application judge did not consider the impact of the impugned spending limit with reference to the *EFA*'s asymmetrical treatment of third parties and political parties. For the reasons that follow, we are of the view that this omission did not undermine his conclusion that s. 37.10.1(2) of the *EFA* does not infringe s. 3 of the *Charter*. Unlike our colleagues, we would not infer from the face of the provision itself that this asymmetry will cause the impugned spending limit to deprive some citizens of a reasonable opportunity to meaningfully participate in the electoral process.

[170] The central difference between the pre-writ treatment of third parties and political parties under the *EFA* is that the former are subject to a spending limit of $600,000 for the 12 months leading up to the issue of the writ (s. 37.10.1(2)(b)), whereas the latter are subject to a limit of $1,000,000 for only 6 months leading up to the issue of the writ (s. 38.1). This asymmetry plays out in two related ways. First, between 12 and 6 months prior to the issue of the writ, political parties can spend an unlimited amount while third parties must remain within the $600,000 limit. Second, in the six months leading up to the issue of the writ, third parties will be operating under a more restrictive limit than political parties. Moreover, if third parties use part of the allocated $600,000 between the 12 to 6 months prior to the issue of the writ, they will have even less left to spend in the 6 months leading up to the writ period. Consequently, in practice, the difference between the amount that third parties and political parties can spend during the six months leading up to the writ period may be greater than $400,000.

[171] The question is not whether this asymmetry exists, but whether it undermines a citizen's opportunity to meaningfully participate in the political process. As this Court explained in *Figueroa,* asymmetrical treatment is itself insufficient to establish a violation of the right to meaningful participation (para. 51). In other words, the respondents must demonstrate that the asymmetry between third parties and political parties drowns out the voices of some citizens, such that they do not have a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives (*Harper*, at para. 71).

[172] The respondents have failed to meet their burden. Again, this Court has noted that "[i]t is . . . important to limit independent spending more strictly than spending by candidates or political parties" (*Libman*, at para. 50). As the "primary political organizations" in the electoral process, the voices of political parties and candidates must have the opportunity to be heard clearly (Lortie Commission, at pp. 11-13, 209 and 228). Without stricter limits for third parties, "owing to their numbers, the impact of [independent] spending on one of the candidates or political parties to the detriment of the others could be disproportionate" (*Libman*, at para. 50). In other words, stricter limits for third parties may be necessary to ensure the citizens who wish to communicate their views via political parties and become informed of such views are not deprived of a reasonable opportunity to do so.

[173] The Court continued in *Libman* to explain that "[l]imits on independent spending are essential to maintain an equilibrium in the financial resources available to candidates and political parties and thus ensure the fairness of elections" (para. 52). By extension, asymmetry in the length of time in which third parties and political parties are subject to spending restrictions may assist in promoting electoral fairness and "balance [. . .] the promotion of the [electoral] options" (para. 54). An infringement of the right to meaningful participation is only made out if a citizen can demonstrate that the asymmetry at issue has deprived them of a reasonable opportunity to speak and be heard.

[174] Although some third parties engage in political advertising more than six months prior to the issue of the writ, the application judge's factual findings confirm that most election-specific advertising is concentrated around the issue of the writ and during the election period (para. 53). For example, the application judge invoked expert evidence by Professor Andrea Lawlor to the effect that "although third parties do attempt to engage in election-oriented advertising more than six months prior to the dropping of the writ [period], election-related advertising by third parties is generally concentrated around the election period" (para. 49). In addition, the application judge accepted evidence from two of the respondents' expert witnesses, who confirmed that the bulk of their election-related activity is concentrated around the issue of the writ and during the election period (para. 51).

[175] Furthermore, even in cases where third parties are advertising in the 12 to 6 month period, the extent to which the application judge found that third parties are still able to mount modest informational campaigns informs our conclusion that the respondents have failed to demonstrate that the asymmetry in the *EFA* causes some voices to be drowned out. The evidentiary record before the application judge in this case did not demonstrate that the degree to which citizens can express themselves and receive information from others was sufficiently attenuated by the fact that political parties may spend an unrestricted amount of the funds available to them on advertising up to 6 months before the writ is issued.

[176] In light of these findings, the respondents have not demonstrated that the *EFA* would allow political parties' voices to drown out those of third parties during the 12 to 6 months prior to the writ period. For the same reason, they have not demonstrated that third parties will have to use so much of their allotted $600,000 during the 12 to 6 months prior to the writ period that, during the 6 months leading up to the writ, they will lack a reasonable opportunity to make their voices heard against the advertisement campaigns of political parties.

D. *Summary*

[177] In summary, based on the application judge's factual findings, the respondents have not demonstrated on a balance of probabilities that the *EFA* infringes the right to meaningful participation. An analysis of the scope of advertisements captured by the *EFA*, the amount of information that third parties can disseminate

without surpassing the $600,000 limit, and the asymmetry between third parties and political parties demonstrates that the impugned measure does not deprive citizens of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or become informed of facts, ideas, and others' perspectives.

VII. Conclusion

[178] In our view, the third party spending limit for political advertising under s. 37.10.1(2) of the *EFA* does not infringe s. 3 of the *Charter*. Accordingly, we would allow the appeal, set aside the judgment of the Court of Appeal, and restore the judgment of the application judge.

The reasons of Côté and Rowe JJ. were delivered by

CÔTÉ AND ROWE JJ. —

I. Introduction

[179] Freedom of expression is protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The right to vote is affirmed by s. 3. The majority treats these two rights as being not distinct, that s. 3 encompasses s. 2(b). We disagree.

[180] Sections 2(b) and 3 are distinct rights with independent meaning (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, at para. 45;

see also *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 67). The significance of this distinction between the two *Charter* rights cannot be overstated. While s. 2(b) is subject to override under s. 33 of the *Charter* (the notwithstanding clause), s. 3 is not; this distinction clearly places s. 3 "at the heart of our constitutional democracy" (*Thomson Newspapers Co.*, at para. 79; see also R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at p. 231).

[181] It would be contrary to the structure of the *Charter* to allow s. 3 to function as a backdoor to insulate expression which would otherwise be subject to legislative override. This point is especially salient in the instant case given that Ontario's legislature has invoked s. 33 of the *Charter* to ensure the legislation operates notwithstanding the freedom of expression contained within s. 2(b) of the *Charter* (*Protecting Elections and Defending Democracy Act, 2021*, S.O. 2021, c. 31). To import an expressive component into s. 3 is not only unsupported by our Court's jurisprudence, it would fly in the face of the legislature's clear legislative choice.

[182] The central question in this appeal is whether Ontario's legislation imposing a pre-writ spending limit on third parties unjustifiably infringes the right of citizens to vote, as guaranteed by s. 3 of the *Charter*. The majority finds that it does. The Chief Justice and Moreau J. find that it does not. We find that it does not.

[183] Respectfully, we disagree with the approach taken by the majority. At its core, the majority's "comparative analysis" (para. 58) between the spending limits applying to third parties, as opposed to those applying to political parties, rests on an erroneous characterization of the purpose of s. 3. By focusing the inquiry on "whether the limit creates disproportionality in the political discourse" (para. 43), the majority presupposes that s. 3 protects political discourse and extends expressive rights to political actors in our society. This, in our respectful view, is incorrect. As we will explain below, s. 3 is a voter-centric *Charter* right. It protects the ability of individual citizens to be informed in order to make an electoral choice. It does not — contrary to what the majority states — require "equilibrium in the political discourse" (para. 32), nor does it contain an "expressive component" (para. 56). Rather, protection of the political discourse falls within the freedom of expression housed under s. 2(b) of the *Charter* — a provision not at issue in this appeal, in light of Ontario legislature's clear choice to invoke s. 33.

[184] Moreover, the majority's comparative analysis suggests that asymmetrical treatment in the imposition of spending limits between third parties and political parties is sufficient, in and of itself, to breach s. 3. In our view, this reasoning cannot stand. The mere fact that third parties are treated differently than political parties cannot be dispositive of the s. 3 analysis. The focus must be on whether the limits adversely impact the ability of voters to cast an informed vote. The majority falls short of demonstrating this.

[185] Finally, the majority's reasons do not engage with the factual findings made by the application judge. Despite concluding that the impugned legislation creates "absolute disproportionality" between third parties and political parties, the majority does not explain *how* such disproportionality arises (para. 55). Instead, this conclusion is simply drawn by looking at the face of the legislation. This is problematic. In the words of LeBel J. in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 73, legal tests and frameworks must not be created "on the fly".

[186] Rather, we are in agreement with our colleagues, the Chief Justice and Moreau J., in their result: the impugned legislation does not violate s. 3. We are also in substantial agreement with the Chief Justice and Moreau J. on the following: that the freedom of expression rights housed under s. 2(b) of the *Charter* should be analytically separate from s. 3; that s. 3's right to meaningful participation is engaged in this appeal; that the Court of Appeal erred; and that the asymmetry between third parties and political parties is important, but not dispositive, to the analysis in this case. We would also adopt the relevant considerations that the Chief Justice and Moreau J. advance to assess whether there is a breach of s. 3, subject to some additional comments.

[187] Where we respectfully part ways with the Chief Justice and Moreau J. is on the issue of whether an expressive component exists within s. 3. Like the majority, they suggest that such a component does exist; we say that it does not. In our view, this appeal requires our Court to determine whether or not the *informational component* of the right to vote has been infringed. In other words, does the legislation prevent a voter

from ascertaining enough information to cast an informed electoral choice? We find that it does not. This appeal should be allowed.

II. The Conception of Third Parties

[188] Given the centrality of the role of third parties to this appeal, we preface our analysis with a brief discussion about the proper conception of "third parties".

[189] The majority describes third parties in the following way, at para. 40:

> Third parties are varied, and may include civil society organizations, Indigenous groups, religious groups, unions, individuals passionate about causes, and entities representing business interests. They may bring different perspectives to an issue associated with a political party or push new issues on to the agenda. Organizations trusted by citizens or reflecting their preferences may help voters to identify issues of importance to them or disseminate their views into the political discourse, much as political parties do (*Figueroa* [*v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912], at para. 40). Or they may challenge a citizen's worldview and introduce them to new perspectives they may otherwise not have considered. They may represent vulnerable, less resourced, and dissenting voices, which "[a] democratic system of government is committed to considering" ([*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217], at para. 68). Or they may represent powerful interest groups that are well-resourced.

[190] This is in stark contrast to our Court's description in *Harper*, where Bastarache J., writing for the majority, stated at para. 55:

> Numerous groups and organizations participate in the electoral process as third parties. They do so to achieve three purposes. First, third parties may seek to influence the outcome of an election by commenting on the merits and faults of a particular candidate or political party. In this respect,

> the influence of third parties is most pronounced in electoral districts with "marginal seats", in other words, in electoral districts where the incumbent does not have a significant advantage. Second, third parties may add a fresh perspective or new dimension to the discourse surrounding one or more issues associated with a candidate or political party. While third parties are true electoral participants, their role and the extent of their participation, like candidates and political parties, cannot be unlimited. Third, they may add an issue to the political debate and in some cases force candidates and political parties to address it.

[191] When seen in this light, it is fair to describe third parties as akin to "interest groups" which seek to influence elections and impact the political discourse in favour of the issue for which they advocate. While we recognize that third parties are "important and influential participants" in the electoral process (*Harper*, at para. 63), we agree with the Chief Justice and Moreau J. when they hold political parties and candidates as the "primary political organizations" in the electoral process, and as such "the voices of political parties and candidates must have the opportunity to be heard clearly" (para. 172). This accords with our view of third parties as interest groups, more detached from the political process than political parties and candidates, and therefore subject to greater limits (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 50). This results in ensuring a level playing field to keep the most affluent and well-resourced interest groups from drowning out the voices of smaller, less affluent ones. In that respect, limits serve to protect vulnerable, less resourced, and dissenting voices. We have more to say on that below.

III. The Purpose of Section 3

[192] The majority is of the view that the s. 3 inquiry "must ask whether the limit creates disproportionality in the political discourse" (para. 43). In order to explain why we disagree with this approach, we must first look to the purpose underlying s. 3 of the *Charter*.

[193] Section 3 of the *Charter* reads as follows:

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

[194] As the Chief Justice and Moreau J. correctly explain in their reasons, this Court has recognized that s. 3 extends beyond the right to vote and run for office, which are apparent from the written text of the provision itself (para. 112). Over time, s. 3 has come to be interpreted as having two main purposes: it guarantees the right to effective representation *and* it safeguards the right of citizens to meaningfully participate in the electoral process (see *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 ("*Saskatchewan Reference*"), at pp. 183 and 188; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1031; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at paras. 23-24; *Thomson Newspapers Co.*, at para. 82; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 25 and 29; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 26; *Harper*, at paras. 70-71).

[195] In the following sections, we review the jurisprudence which has led to the formulation of these purposes to demonstrate that the focus is on the existence of an informational component — and that there is no expressive component within s. 3.

A. *Right to Effective Representation and Right to Meaningful Participation*

[196] Beginning with *Saskatchewan Reference*, this Court recognized that s. 3 protected a right to "effective representation" (p. 183). The appeal in that case concerned a challenge to provincial electoral boundaries that assigned more seats to rural ridings, on a per capita basis, than urban ridings. Writing for the majority, McLachlin J. (as she then was) adopted a "broad and purposive" understanding of what is covered by s. 3 (pp. 179-80, referring to *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). The main question under appeal was "to what extent, if at all, does the right to vote enshrined in the *Charter* permit deviation from the 'one person - one vote' rule?" (p. 182). McLachlin J. answered this question, in part, by holding the s. 3 right not to be solely about the equality of voting power, but rather the right to "effective representation" (p. 183):

> It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. [Emphasis in original.]

[197] On numerous occasions, this Court has reaffirmed that effective representation is a purpose of s. 3 (see *Haig*; *Harvey*; *Thomson Newspapers Co.*; *Figueroa*, at para. 21; *Harper*, at para. 68).

[198] However, the right to effective representation is not limited to "a right to be effectively represented in Parliament" (*Harper*, at para. 69; see also *Figueroa*, at para. 25). Indeed, in *Haig*, our Court acknowledged the right to effective representation but also found a purpose of s. 3 to be "the right to play a meaningful role in the selection of elected representatives":

> The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate. [Emphasis added; p. 1031.]

[199] Following *Haig*, our Court continued to provide further guidance on the purpose of s. 3. In particular, there was a growing emphasis on a citizen's ability to be informed during the electoral process. In *Libman*, spending restrictions in the context of a referendum were found to be in violation of s. 2(b) of the *Charter*. In assessing whether there was a rational connection between the spending restrictions and the impugned legislation's objective, our Court explained that "[e]lections are fair and equitable only if all citizens are reasonably informed of all the possible choices" (para. 47 (emphasis added)). Furthermore, spending limits were deemed "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" (para. 47 (emphasis added)).

[200] In *Thomson Newspapers Co.*, which concerned a s. 2(b) and s. 3 challenge against a provision in the *Canada Elections Act*, R.S.C. 1985, c. E-2, this Court held that "to constitute an infringement of the right to vote, a restriction on information would have to undermine the guarantee of effective representation" (para. 82 (emphasis added)). However, the question of what constituted the "informational content" of s. 3 was left for another day (para. 82), as the Court found that the impugned provisions violated s. 2(b) (para. 84).

[201] *Figueroa* concerned a challenge to a provision of the *Canada Elections Act* requiring political parties to nominate candidates in at least 50 electoral districts in order to gain access to benefits, which included the ability to issue tax receipts and transfer unspent election funds to the party. In concluding that the provisions infringed s. 3, our Court engaged in a purposive interpretation of the *Charter* right. Iacobucci J., writing for the majority, confirmed that the purpose of s. 3 included both the right of each citizen to vote for an elected representative and to play a meaningful role in the electoral process (para. 25). Moreover, Iacobucci J. explained that the rights protected by s. 3 "are participatory in nature" — that is, s. 3 does not "advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process" (para. 26). He reasoned that framing the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in

the election process better ensures that the right is "not construed too narrowly" (para. 26).

[202] In sum, in *Figueroa*, our Court reaffirmed the importance of s. 3 to Canadian democracy (para. 30). As Iacobucci J. wrote, at para. 30, "[i]n our system of democracy . . . each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives." Absent s. 3, which promotes and protects "the right of each citizen to play a meaningful role in the political life of the country", there would "not be a true democracy" (para. 30). In our view, while *Figueroa* provided significant guidance on the purposes and meaning of s. 3, it did not recognize the existence of an expressive component within s. 3. Had Iacobucci J. desired to do so, he would have. We return to this point later in these reasons.

B. *The Informational Component of Section 3*

[203] In *Harper*, Bastarache J., writing for the majority, applied much of the jurisprudence summarized above in the context of third party electoral spending restrictions. The appeal concerned a ss. 2(b), (d) and 3 challenge to provisions of the *Canada Elections Act* which limited third party election advertising expenses during the writ period to $3,000 in a given electoral district, and $150,000 nationally.

[204] Bastarache J. sought to "reconcile the right to meaningfully participate in elections under s. 3 with the right to freedom of expression under s. 2(*b*)" (*Harper*, at

para. 50). He reaffirmed the right to "effective representation" as being firmly established in this Court's s. 3 jurisprudence, which he noted includes "the right to play a meaningful role in the selection of elected representatives" (para. 69 (emphasis deleted)). This right, in turn, further implicates a right to "meaningful participation" in the electoral process (para. 70).

[205] Having ascertained the purpose of s. 3, Bastarache J. explained that the appeal engaged "the informational component of an individual's right to meaningfully participate in the electoral process" (*Harper*, at para. 71 (emphasis added)). The existence of the informational component stemmed from the fact that the right to meaningful participation also includes a citizen's right "to be 'reasonably informed of all the possible choices'" of candidates and political parties that they could vote for (para. 71 (emphasis added), quoting *Libman*, at para. 47). As well, the citizen must be able to consider opposing views on political issues (para. 71).

[206] In light of this Court's reasons in *Harper*, it is clear that s. 3 contains an informational component, and that s. 3 is assessed from the perspective of the citizen as a recipient of information in order to carry out their right to meaningfully participate. At minimum, the informational component requires a citizen to be able to weigh the strengths and weaknesses of political candidates, political parties, and policy positions impacting the citizen's electoral choice (para. 71). This component serves a critical role in the manner in which we approach the facts on this appeal.

C. *The Egalitarian Model of Election Finance*

[207] Having set out the purpose of s. 3, we outline the proper relationship between ss. 2(b) and 3. But first, we pause to take stock of the contextual backdrop in which a review of electoral spending limits takes place: the egalitarian model of election finance.

[208] The majority, in its reasons, states that "[i]n *Libman* and *Harper*, the Court considered spending limits on political advertising and endorsed the goal of electoral fairness reflected in the egalitarian model of elections, noting the threat of affluent individuals and groups using wealth to monopolize or dominate the electoral discourse" (para. 32). The majority also explains that the egalitarian model of elections "aims to 'balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters', so that voters may be better informed" (para. 32; see also *Harper*, at paras. 62, 72 and 87).

[209] While we take no issue with the majority's description of the model's goals of desiring a level playing field, in our view, the Chief Justice and Moreau J. more precisely, and rightly, label the model as the "egalitarian model of election finance" (para. 123). This model of regulating election finance stems from recommendations in the 1991 report delivered by the Lortie Commission (Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (1991)) that were subsequently adopted by Parliament and some provincial legislatures. This Court has noted that the egalitarian model of election finance is consistent with our "conception of electoral fairness" (*Harper*, at para. 62, see also para. 63).

[210] It is important to note that the adoption of an egalitarian model of election finance is a legislative choice. Ontario's legislature has made that choice, in choosing to impose limits on third party and political party advertising in the pre-writ period. In this realm, courts owe a "natural attitude of deference" to Parliament and the legislatures, when it comes to the "nuanced choices" implicated in "selecting and implementing [the] electoral model" (*Frank*, at para. 44, quoting *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at para. 9). The *Charter* is "entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised" (*Figueroa*, at para. 37). Thus, the purpose of s. 3 does not enable courts to direct Parliament or the legislatures as to the overall design of the electoral system, or facets thereof such as election spending limits. Rather, the proper role of this Court is to ensure that the right of each citizen to play a meaningful role in the electoral process — whatever that electoral process might be — is upheld.

IV. Section 3 Is Not a "Comparative Analysis"

[211] Having established the purpose of s. 3, we now proceed to set out why we disagree with the majority's approach in this appeal.

[212] At the core of the majority's inquiry is the question of "whether the limit creates disproportionality in the political discourse" (para. 43). The majority explains that the analysis is "necessarily comparative, considering *all* actors", including third parties and political parties (para. 36 (emphasis in original)). The majority proceeds to find that that the impugned legislation is unconstitutional because "on its face" it

creates "absolute disproportionality" in the political discourse (para. 43). More specifically, the nature of the spending limit imposed on third parties in the 12-month pre-writ period, as compared to a spending limit imposed on political parties for only half of that time, means that the legislation "permits political parties, by design, to overwhelm or drown out the voices of third parties during a critical period in the democratic cycle" (para. 44).

[213] Respectfully, we reject the majority's comparative analysis. As we explain below, the basis of our disagreement with the majority is rooted in the opposing ways in which we conceptualize the relationship between ss. 2(b) and 3 of the *Charter*.

A. *Section 2(b) Cannot Be Imported Into Section 3*

[214] Our Court has repeatedly emphasized that ss. 2(b) and 3 are distinct rights with independent meaning (*Toronto (City)*, at para. 45; see also *Thomson Newspapers Co.*, at paras. 79-80; *Harper*, at para. 67). Yet, the majority's inquiry imports the s. 2(b) protections into the realm of s. 3. Their comparative analysis focuses on the ability of "all actors" to participate in the political discourse (para. 36 (emphasis deleted)). In their view, no actor can be allowed to drown out other voices. Nor can any actor "exert undue influence" in the discourse (para. 36). As such, should an actor have a "disproportionate voice" in the discourse, this would constitute an infringement of s. 3 (para. 36).

[215] Respectfully, in our view, the majority's concerns regarding the nature of political discourse, and its actors, properly fall within s. 2(b). They do not belong to s. 3.

(1) Section 2(b) Protects Political Expression, Section 3 Does Not

[216] Undoubtedly, had the present challenge been brought under s. 2(b) of the *Charter* — as it originally was in the courts below prior to the invocation of the notwithstanding clause — the impugned legislation's impact on the political discourse in the 12-months pre-writ period would have been relevant. Indeed, the freedom of expression guarantee housed within s. 2(b) is broad. This Court has held that "[u]nless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(*b*) of the Canadian *Charter*" (*Thomson Newspapers Co.*, at para. 81, quoting *Libman*, at para. 31). Notably, political expression is central to the rights protected by s. 2(b) (see *Thomson Newspapers Co.*, at para. 92; *Bryan*, at para. 26; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 763-64). Since most third party election advertising "constitutes political expression", they are therefore "at the core of the guarantee of free expression" (*Harper*, at para. 66).

[217] However, it bears repeating: s. 2(b) is not at issue in the present case, due to the Ontario legislature's clear invocation of the notwithstanding clause. Instead, this current challenge is being brought under s. 3 — which is not, contrary to the views of

the majority, focused on the impugned legislation's impact on the nature of political discourse. Rather, as we read the jurisprudence, s. 3 focuses on whether there is "a restriction on information" that undermines "the guarantee of effective representation" (*Thomson Newspapers Co.*, at para. 82). As such, limits on third party spending must be assessed with reference to the ultimate impact on the individual citizen's ability to "meaningfully participate in the electoral process", which includes a right to "exercise his or her vote in an informed manner" (*Harper*, at para. 71; see also *Figueroa*, at para. 30; *Haig*, at p. 1031; *Libman*, at para. 47). The citizen must be able to "consider opposing aspects of issues associated with certain candidates and political parties where they exist" (*Harper*, at para. 71).

[218] Put differently, unlike s. 2(b), s. 3 does not view political discourse in a vacuum. Rather, viewed through the perspective of s. 3, political discourse functions as a means to *inform* voters of their electoral choices. Thus, in the context of s. 3 analysis, the question is not whether the spending limit *creates a disequilibrium in the political discourse*, but rather whether the limit *infringes a voter's ability to meaningfully participate in the electoral process*.

[219] This is the way we view the proper framing of the s. 3 analysis. Interestingly, it is phrased similarly by the majority at para. 35 of their reasons:

> To meaningfully participate, voters should be able "to hear and weigh many points of view" ([*Harper*, at] para. 87). If the differential treatment of participants has an adverse impact on citizens' right to meaningfully participate in the electoral process, it will offend s. 3 (*Figueroa*, at para. 51). [Emphasis added.]

[220] Despite this acknowledgement, however, the majority fails to give effect to it as an animating rationale underlying their reasons. Rather, their analysis is fixated on whether the impugned legislation allows political parties or third parties "a disproportionate voice in the political discourse" (para. 36). The impact of the impugned legislation on the voter — which should be the central focus of s. 3 — is reduced to an afterthought. For this reason, the majority's analysis, in our view, improperly imports protections offered by s. 2(b) into s. 3.

(2) Third Parties Are Not Section 3 Rights-Holders

[221] The majority further conflate the relationship between ss. 2(b) and 3 by implicitly elevating third parties to the status of rights-holders under s. 3. Notably, at para. 40, the majority offers a description of third parties, describing the types of groups that comprise third parties, the activities in which they engage, and the beneficial role third parties occupy within the political process. Furthermore, at para. 34, the majority references this Court's statement in *Harper*, wherein Bastarache J. recognized that "third parties . . . are important and influential participants in the electoral process" (para. 63). The majority seems to see this as supportive of its own statement that third parties "viewpoints must be able to reach voters without being drowned out by political parties" (para. 58). And, at another point in their analysis, the majority appears to suggest that third parties can be equated with citizens in the context of s. 3 (para. 41):

> Ultimately, the challenged spending limit's broader impacts on political discourse and varied citizen participation in the context of the year leading to an election period are thus highly relevant to its constitutionality. Courts

> must guard against interference with the right of citizens of differing views and backgrounds to participate in fair elections by advancing the purpose of s. 3 in Canada's heterogeneous society. [Emphasis added.]

[222] Respectfully, these suggestions are incorrect. As we explained at the outset of these reasons, third parties ought to be properly conceptualized as "interest groups" who seek to contribute to, and influence, the political discourse. With this conception in mind, it becomes clear that third parties are not rights-holders in s. 3. Unlike s. 2(b), s. 3 does not protect the parties *seeking to be heard*. Rather, s. 3 is a participatory right which extends to *individual citizens* and their right to *make an informed vote*. Thus, citizens are the exclusive rights holders in s. 3.

[223] On this point, we look to this Court's statements in *Harper*. At paragraph 71, Bastarache J. expressly stated that the informational component attaches to an "individual", "citizen", or "voter":

> 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.]

[224] In conducting this voter-centric analysis, Bastarache J. framed the voter as the recipient of information. He framed third parties, candidates, and political parties as purveyors, or conveyors, of information to voters (*Harper*, at paras. 72-73):

> For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. . . .
>
> Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. [Emphasis added.]

[225] In our view, the Court's framing in *Harper* properly accords with the purpose of the right to vote, which is an individual right. Section 3 protects the right of voters as *recipients of information*. Section 3 does not protect the right of third parties *to disseminate information*. Despite the beneficial contribution made by third parties to Canada's political process, they cannot be elevated to the status of rights-holders under s. 3. Doing so would improperly shift the focus of s. 3 onto the disparity between third parties and political parties, as opposed to focus on the voter. Rather, as this Court found in *Harper*, third parties' ability to engage in expression is properly protected by s. 2(b) (para. 66).

[226] In their reasons, the Chief Justice and Moreau J. appear to hold a similar conception of third parties as the majority. They propose that citizens can be equated with third parties in the s. 3 analysis "because third parties can be individual citizens or entities that act as a voice for multiple citizens during the electoral process" (para. 120).

[227] Respectfully, we would reject this broad definition. To be clear, we do not dispute that third parties are made up of citizens. However, when acting as a third party, those citizens are not acting as recipients of information for the purposes of s. 3. Rather, they are acting as, or in concert with, an entity that takes steps to be a purveyor of information. As stated by this Court in *Harper*, third parties are generally aimed at three purposes: seeking to influence the outcome of an election by commenting on the merits and faults of a particular candidate or political party; adding a fresh perspective to the electoral discourse; or infusing an issue into the political debate (para. 55). All of these are forms of expression — which is properly protected by s. 2(b), not s. 3.

[228] Weighing whether third parties — in the name of "citizens" — have a "reasonable opportunity to introduce their own ideas and opinions into the political discourse" (Wagner C.J. and Moreau J.'s reasons, at paras. 68, 72, 114, 125, 127, 133, 137-38, 140-41, 148, 171 and 177) erroneously equates third-parties to "citizens", and distorts the question underlying this appeal: Should well-resourced third party entities be able to dominate the marketplace of ideas at the expense of less resourced political actors, to the ultimate detriment of the citizen voter? In other words, will wealthy third parties have the effect of impeding an ordinary citizen's right to vote in an informed manner? In our view, the delineation between a citizen as a *recipient* of information and a third party as a *purveyor* of information is critical when assessing whether or not the informational component of s. 3 has been breached. The analysis must be, first and foremost, voter-centric.

(3) Section 3 Does Not Contain an "Expressive Component"

[229] The majority, in their reasons, recognizes the existence of an expressive component within s. 3, but concludes that it is unnecessary to assess whether it has been infringed in this case (para. 56). We find this problematic in two ways. First, there is no clear nor adequate support in the case law to find an expressive component within s. 3. Second, despite saying it is unnecessary to address, it is clear that the majority's underlying rationale focusses on political discourse and the ability of third parties to be heard.

[230] The Chief Justice and Moreau J., in their reasons, also suggest an expressive component exists within s. 3, and that this is an active consideration in this appeal (para. 114):

> This Court has previously recognized that the right to meaningful participation has two components. The first component is expressive. As McLachlin J. (as she then was) wrote in *Saskatchewan Reference*, s. 3 contemplates the "right to bring one's grievances and concerns to the attention of one's government representative" (p. 183). In *Figueroa*, Iacobucci J. held that s. 3 ensures that "each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions" (para. 29). In *Harper*, Bastarache J. noted that the meaningful participation of citizens contributes to a "wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy" (para. 70). In short, the expressive component of the right to meaningful participation ensures that each citizen has a reasonable opportunity to introduce their own ideas and opinions into the political discourse. [Emphasis added.]

[231] Neither the purpose of s. 3 nor the jurisprudence from this Court supports the conclusion that s. 3 includes an expressive component. This Court's pronouncement in *Harper* is instructive. There, the respondent advanced a position that the impugned third party spending limit infringed the right to vote on the basis that s. 3 guaranteed a right to unimpeded and unlimited electoral debate or expression. In response, Bastarache J. concluded the following, at para. 67:

> The respondent effectively equates the right to meaningful participation with the exercise of freedom of expression. Respectfully, this cannot be. The right to free expression and the right to vote are distinct rights; see *Thomson Newspapers*, *supra*, at para. 80. [Emphasis added.]

[232] Furthermore, the references to *Saskatchewan Reference*, *Figueroa*, and *Harper* relied on by the Chief Justice and Moreau J. to establish the existence of an expressive component are, in our respectful view, misplaced.

[233] To begin, our colleagues, the Chief Justice and Moreau J., refer to a passage in *Saskatchewan Reference* where they say McLachlin J. declared an expressive component to s. 3. We suggest McLachlin J. was not referring to the right of citizens — or third parties, for that matter — to express themselves through the contribution of ideas or advertising during or related to an election. Rather, she was judging to what extent voter parity affects the ability of the citizen voter to have an equal voice in selecting, and then in holding to account, elected representatives. In doing so, she was discussing the nature of our representative democracy, holding that:

> Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative . . . . [Emphasis in original; p. 183.]

[234] This serves as a recognition that voters can, or will, engage with those seeking public office and the eventual successful candidate who assumes office. In our view, this is a recognition based on common sense, not the development of an expressive component of s. 3 in the way that our colleagues describe.

[235] Likewise, *Figueroa* does not provide for an expressive component. The Chief Justice and Moreau J., at para. 114, quote Iacobucci J. as saying "each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions" (para. 29). But, when the statement is read in context of the decision, it is clear that Iacobucci J. was referring to the preceding sentence:

> The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. [Emphasis added; para. 29.]

[236] In our view, Iacobucci J. makes no comment on an expressive right, implicitly or explicitly. Rather, he is suggesting those running for office have the ability to present ideas to the electorate, and the citizen voter can engage with the candidate(s) and ultimately express themselves by voting for the candidate that most aligns with their views.

[237] With respect to *Harper*, we have already outlined above Bastarache J.'s explicit statement that no expressive component exists. Additionally, in reference to para. 70, we acknowledge that Bastarache J. referred to greater participation in the political discourse leading to an enhancement of Canada's democracy. We take no issue with his statement, as it reinforces s. 3 as a participatory right. However, we do take issue with characterizing this statement as an implicit finding that Bastarache J. found an expressive component within s. 3. The paragraph following that comment at para. 70 focusses on the informational component only, and expressly states "[t]he right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner" (para. 71). Had Bastarache J. desired to include reference to an expressive component, he would have.

[238] In sum, s. 3 does not preserve the right of third parties *to disseminate* information or *express* themselves. These activities are forms of expression, which properly belong within the purview of s. 2(b).

B. *Asymmetrical Treatment of Political Actors Is Permissible; A Finding of "Disproportionality" in Political Discourse Is Insufficient To Violate Section 3*

[239] In addition to our doctrinal concerns with the majority's comparative analysis, we also take issue with the manner in which they have applied it in the present case.

(1) Methodological Inconsistency

[240] To begin, we disagree with the methodology in the majority's comparative analysis. Importantly, the majority does not offer a clear articulation of the level of "differential treatment" required to trigger an infringement of s. 3 (para. 35). Instead, they advance different thresholds at different points in their reasons.

[241] For example, at para. 11, our colleagues in the majority state that our Court's "jurisprudence is clear that s. 3 does not require that all participants in the electoral system be treated equally". Later, at para. 33, they similarly recognize that "formal equality" is unnecessary in s. 3, and that the goal of ensuring a level playing field "may permit different limits on different electoral participants". Later, they acknowledge that political parties have primacy in electoral advertising (para. 42):

> . . . the importance of political parties and candidates in our present democracy is an accepted rationale for allowing them greater latitude in political advertising spending . . . . [Emphasis added.]

[242] These statements by the majority suggest that a degree of asymmetrical treatment between third parties and political parties is appropriate within s. 3. However, at para. 32 of their reasons, the majority suggest that nothing less than "[e]quality and fairness in elections" will be sufficient to ensure "the meaningful exercise of the vote". In addition, "there must be equilibrium or proportionality in the political discourse so citizens have information on diverse points of view" (para. 55). Respectfully, we are unable to reconcile these statements which reflect absolutism as opposed to the earlier statements which, rightly, demonstrated a degree of tolerance for differential treatment of electoral actors.

[243] The majority's failure to elucidate a consistent standard as to what constitutes a s. 3 breach on the basis of disproportionality is concerning. For one, it invites uncertainty in the jurisprudence. As we mentioned earlier in these reasons, LeBel J., writing in another case, cautioned against the creation of tests or thresholds by the courts "on the fly" (*Van Breda*, at para. 73), or else this increases the risk of *ad hoc* outcomes.

[244] In addition, the majority's use of the "disproportionality" threshold also suggests that *any* level of disproportionality could give rise to an infringement. In other words, according to the majority, differential — or asymmetrical — treatment of different actors in the electoral process can, in certain cases, be sufficient *in and of itself* to ground a s. 3 breach. Indeed, this is precisely what the majority finds in the present appeal; the impugned legislation is unconstitutional because "on its face" it creates "absolute disproportionality" in the political discourse (para. 43). As we will explain below, proceeding on this basis is not supported in law (*Figueroa*, at para. 51).

(2) A Degree of Asymmetrical Treatment of Political Actors Is Necessary in Section 3

[245] As courts review electoral spending limits, it is relevant to consider how that limit impacts that particular actor, but also to compare it against limits *which other political actors* are subject to. But, not all political actors will be, or must be, treated equally. This gives way to an "asymmetrical treatment" of political actors, which is

part and parcel of the egalitarian model of election finance. It is a necessary, and even healthy, part of Canadian democracy.

[246] Due to the competitive nature of elections, "spending limits are necessary to prevent the most affluent from monopolizing election discourse" (*Libman*, at para. 47). The asymmetrical treatment between political actors is also consistent with this Court's jurisprudence, which recognizes that third-party spending should be more strictly regulated than political candidates and parties who occupy the terrain as the primary actors in the political process (*Harper*, at para. 61; *Libman*, at para. 50).

[247] Political parties and candidates have primacy as the primary actors in the political process. Third parties, as noted, can provide impactful and helpful information to assist voters in realizing their right to meaningful participation, but it should not come at the expense of information conveyed to the citizen voter by those actually seeking office. The fact that the legislation differentiates, or treats, certain political actors in the electoral process differently is not enough, in and of itself, to offend s. 3. Rather, the treatment must have an "adverse impact" upon the voter's "right to play a meaningful role in the electoral process" (*Figueroa*, at para. 51).

[248] We note that the majority, in their reasons, appear to acknowledge the primacy of political parties. At paragraph 42, the majority observes "the importance of political parties and candidates in our present democracy is an accepted rationale for allowing them greater latitude in political advertising spending". However, despite this tacit acknowledgement, the majority fails to demonstrate why that primacy, or

asymmetry, is not appropriate in the present case. By offering a conclusion rather than reasoning, we are left wondering what the basis for that conclusion is beyond the written text. We turn to this issue next.

(3) The Majority's Conclusion Does Not Engage With the Factual Findings

[249] The majority's conclusion regarding how the impugned legislation creates "absolute disproportionality" is untethered from the application judge's findings. We agree with the application judge when he said that a spending limit challenge should ask whether the legislation "is carefully calibrated with the need for broad and egalitarian participation", not "to ensure that the political advertisements can pack a strong punch" (2021 ONSC 7697, 158 O.R. (3d) 161, at para. 105). This is an acknowledgement that a reviewing court should pay close attention to the evidence before it to weigh how the spending limit affects the right of a voter to be informed, rather than how the spending limit affects the political actor, in this case a third party.

[250] Our colleagues in the majority have not done so in this case; they are instead relying on the text of the legislation itself and declaring it as creating "absolute disproportionality". Beyond the methodological confusion this approach causes, we respectfully suggest the lack of engagement with the findings and evidence below is problematic.

[251] If the evidence on the record was properly engaged, the majority reasons could have grappled with salient evidence and factual findings of the application judge.

This includes the evidence tendered that only a small number of third parties actually engage in expensive television advertising, which attenuates the impact of the limit (Affidavit of Tamara Small, reproduced in Exhibit Book, vol. XXIV, at p. 10461), and the finding that the television advertisements themselves did not add great value to the right of voters to be informed because they were expressive but not overly informational (application judge's decision, at para. 87).

[252] By contrast, the Chief Justice and Moreau J. considered the asymmetry in light of the factual findings and evidence and reached a reasoned conclusion. They note the primacy of political parties undergirds asymmetrical treatment as they are the "primary political organizations" in the electoral process (para. 172). They further note that "spending restrictions may assist in promoting electoral fairness" (para. 173). They also engage the evidence and factual findings, such as the finding that most third parties engage in advertising within six months of the election, not twelve months (para. 174; see also application judge's decision, at paras. 49-51), and the fact that despite the spending limits third parties are still able to mount modest informational campaigns (Wagner C.J. and Moreau J.'s reasons, at para. 175). Taken together, rather than simply reading the face of the legislation, it is clear the asymmetrical treatment of third parties and political parties is justified in this case.

C. *Conclusion: The Proposed "Comparative Analysis" Is Incompatible With Section 3*

[253] Overall, the majority's comparative analysis distorts the scope of s. 3 and is fundamentally incompatible with its purposes. The right for third parties to express themselves and contribute to political discourse is properly housed under s. 2(b). The right to effective representation and the right to meaningfully participate in the electoral process belong to citizens and resides within s. 3. While claims of infringement may very well overlap, the rights themselves do not — and cannot — overlap. Yet, the majority's comparative analysis for s. 3 does exactly that, shifting the focus away from the impact of the spending limit on voters to cast an informed vote, and towards the ability of third parties to be heard in the political discourse leading up to an election.

[254] In our view, s. 3 is a participatory right that focuses on voters. It does not extend to third parties, nor should third parties be equated with voters. For the purposes of s. 3, third parties are *purveyors* of information, while voters are *recipients* of information. As such, the s. 3 analysis must be voter-centric. In the context of spending limits, the analysis must focus on whether the restriction on information undermines the capacity of individual citizens to meaningfully participate in the electoral process. Asymmetrical treatment of political actors is permissible because it ensures a level playing field and prevents any one voice from using affluence to drown out others. Thus, mere existence of asymmetrical treatment is insufficient to violate s. 3. The majority's comparative analysis fails to recognize this, or to grapple with the facts found by the application judge.

[255] Finally, we emphasize that there is no expressive component in s. 3. Recognizing such a component would blur the lines between ss. 2(b) and 3. It would also effectively provide a workaround of s. 33 of the *Charter*, as parties would be able to mount a s. 3 challenge against legislative provisions which would otherwise be subject to the override. Not only does this fly in the face of the legislature's clear choice to invoke s. 33, it would also undercut the basic structure of the *Charter*. Since s. 33 is not a live issue in the present case, we refrain from offering any substantive comments on its actual scope.

V. Determining Whether the Informational Component Has Been Infringed

[256] In contrast to the majority's comparative analysis, the Chief Justice and Moreau J. propose a framework for identifying an infringement of the right to meaningful participation which accords with the purpose of s. 3. We are in agreement with our two colleagues with respect to the factors they consider to be relevant to dispose of this appeal. Specifically, in the context of spending limits, our colleagues list the following relevant factors: ". . . the quantum and temporal reach of the limit, the scope of conduct captured by the limit, and the limit's impact on different forms of expression" (para. 133). Later in their reasons, the Chief Justice and Moreau J. identify "asymmetrical treatment of different political actors" as another relevant consideration (para. 137).

[257] While we agree with these factors, in light of our foregoing analysis, we would qualify the scope of each consideration so that it is properly focused on the

informational component in s. 3. We would also consider one additional factor as relevant to the analysis: the totality of the information available.

A. *The Quantum and Temporal Reach of the Spending Limit*

[258] First, in regard to the "quantum and temporal reach of the [spending] limit" (Wagner C.J. and Moreau J.'s reasons, at para. 133; see also para. 134), this Court has recognized that spending limits which are "overly restrictive may undermine the informational component of the right to vote" (*Harper*, at para. 73). Therefore, in order to constitute an infringement of the right to vote, the quantum or temporal reach "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" (para. 73; see also *Figueroa*, at para. 36).

[259] We do not agree with the proposition that courts should consider the impact of the quantum and temporal reach of the spending limit on the ability of citizens to have a reasonable opportunity to communicate their views and become fully informed about the electoral landscape (Wagner C.J. and Moreau J.'s reasons, at para. 134). This is because, as we explained, the focus of the analysis should remain on the informational component of s. 3, rather than transforming it into an inquiry based on third parties' or citizens' abilities to express themselves.

B. *The Scope of Conduct Captured by the Spending Limit*

[260] We agree that "the scope of conduct captured by the limit" (Wagner C.J. and Moreau J.'s reasons, at para. 133; see also para. 140) is relevant to determining whether s. 3 has been infringed. However, the emphasis of this consideration should not be on the "citizens' ability to communicate ideas" or "contribute to political discourse" (para. 135). Rather, courts should consider how the spending limit impacts the type of informational campaign that third parties can mount and how it impacts the range of information available to voters. This properly shifts the focus from citizens' ability to express themselves, to citizens' ability to be sufficiently informed of the electoral landscape.

[261] Take, for example, the case in *Harper*, where this Court relied on the trial judge's conclusion that third parties were able to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns" to conclude that there was no s. 3 breach (para. 74). In the absence of other factors that shape the amount and type of information that voters receive, a conclusion that third parties are able to mount a modest informational campaign will tend to show that the spending limits do not deprive voters of adequate access to third party perspectives. Such a conclusion suggests that each third party has the ability to share enough information for voters to be sufficiently informed of the landscape as a whole. Of course, the informational component does not require third parties to have "the ability to mount a media campaign capable of determining the outcome" (para. 74). Indeed, such an entitlement "would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote" (para. 74).

C. *The Spending Limit's Impact on Different Forms of Media and Advertisement*

[262] The Chief Justice and Moreau J., in their reasons, identify the spending limit's "impact on different forms of media and advertisement" as a relevant consideration (para. 136; see also para. 133). We take no issue with this consideration.

D. *The Asymmetrical Treatment of Different Actors*

[263] The Chief Justice and Moreau J. rightly point to the asymmetrical treatment of different actors as one of several factors relevant to examine if there has been a breach of the informational component of s. 3. By contrast, the majority relies on asymmetry — or what they call "disproportionality" — exclusively.

[264] As we discussed above, the mere existence of asymmetrical treatment between third parties and political parties is insufficient to make out a s. 3 infringement (*Figueroa*, at para. 51). Limits to election spending allow for a level playing field, so that the citizen's right to be informed is not compromised by political actors with more money or greater resources. It allows for a contextual weighing of the different roles of various political actors and can assess what fair limits are, even in light of asymmetry.

E. *The Totality of Information Available*

[265] In addition to the four relevant considerations identified above by the Chief Justice and Moreau J., we would add an additional consideration which, in our view, rounds out the analysis — the totality of the information available for citizens.

[266] Third parties are but one source of information for voters during, and in the lead up to, an election. Since the informational component of s. 3 focuses on the ability of voters to cast an informed vote, the analysis necessarily requires consideration of the full range of information to voters. This includes information that voters receive from *all* third parties combined (rather than from any single third party (see, e.g., *Harper*, at para. 74)), and from the media.

[267] The totality of information also includes information available to voters by political parties, whom this Court has recognized "ensure that the ideas and opinions of their members and supporters are effectively represented in the open debate occasioned by the electoral process and presented to the electorate as a viable option" (*Figueroa*, at para. 40). Of course, given that political parties and third parties play different roles in the electoral process, the type of information they disseminate to voters will often differ. But, where overlap in certain subjects exists, voters will continue to receive information of this nature from political parties, despite the restrictions that apply to third party advertising.

VI. Conclusion

[268] Section 3 is fundamental to Canadian democracy. The importance and primacy of the right to vote housed within the *Charter* is demonstrated by the fact it is exempt from the exercise of the notwithstanding clause (Sharpe and Roach, at p. 231). As such, s. 3 must be kept separate and distinct from the scope of s. 2(b), which seeks to protect freedom of expression.

[269] The majority improperly conflates the scope of both *Charter* rights in their analysis in the present appeal. They expand the scope of s. 3 to require an equilibrium in the political discourse. However, protection of political discourse, and its actors, properly falls under the purview of s. 2(b). Furthermore, s. 3 is a voter-centric *Charter* right; voters must be conceived of as *recipients* of information, and third parties must be conceived of as *purveyors* of that information. Thus, the focus of the infringement analysis must be on how the limits impact a voter's ability to meaningfully participate in the electoral process by casting an informed vote. A bare finding of asymmetrical treatment between third parties and political parties is insufficient to ground an infringement.

[270] The import of an expressive component into s. 3 lacks adequate and clear jurisprudential support. It is also at odds with the Ontario legislature's edict in invoking s. 33 of the *Charter* to ensure the impugned legislation operated notwithstanding the freedom of expression protections contained in s. 2(b).

[271] In our view, having regard to the purpose of s. 3 and the relevant factors identified by the Chief Justice and Moreau J., the impugned legislation does not infringe s. 3.

[272] The appeal should be allowed. We would set aside the judgment of the Court of Appeal and restore the judgment of the application judge.

Appeal dismissed with costs, WAGNER C.J. *and* CÔTÉ, ROWE *and* MOREAU JJ. *dissenting*.

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