

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

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

Appellants

- and -

**THE ATTORNEY GENERAL OF ONTARIO**

Respondent

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**FACTUM OF THE INTERVENER,  
CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY**

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March 11, 2022

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## **PART I – OVERVIEW**

1. The fundamental principles of democracy and democratic accountability are firmly established in the constitutional jurisprudence. Specifically, s.3's democratic rights and s.33's legislative override are based on and informed by an underlying principle and condition of democratic accountability. The five-year timeline for democratic elections and the duration of override legislation establish a direct link between the text of ss.3 and 33, and the principle of democratic accountability. These principles mandate a broad and generous interpretation of s.3 in this appeal.

2. Section 3's concept of meaningful participation includes a right of access to information that might influence a voter's decision on whether and how to vote. Bill 307's restrictions on third party political advertising for an extended period of 12 months prior to a fixed-date election violate this core s.3 entitlement. Especially where a legislative override is in effect against s.2(b)'s guarantee of open democratic discourse, s.3 must be given a robust interpretation, and governments must bear a heavy onus under s.1 to justify any limits on the *Charter's* democratic rights.

## **PART II – THE ISSUES**

3. The CFE's submissions are:
- A. The fundamental principles of democracy and democratic accountability inform the interpretation of s.3's democratic rights;
  - B. Section 3 guarantees the right of voters to cast an informed vote; and
  - C. Limits on s.3, including the right to cast an informed vote, must be justified under s.1 of the *Charter*.

### PART III – LAW AND ARGUMENT

#### A. The fundamental principles of democracy and democratic accountability inform the interpretation of s.3's democratic rights

a. *The unwritten constitutional principle of democracy is vital to the interpretation of s.3*

4. The principle of democracy is embedded in the architecture of the *Charter's* democratic rights and acts as an “essential interpretive consideration” in determining the scope of s.3.<sup>1</sup> In particular, the Supreme Court has held that open discussion and access to information are the *sine qua non* of a functioning democracy.<sup>2</sup> As Chief Justice Duff stated in *Reference re: Alberta Legislation*, democratic institutions derive their “efficacy” from the free public discussion of affairs and demand “*the freest and fullest analysis and examination from every point of view of political proposals*”.<sup>3</sup>

5. In *Reference re: the Secession of Quebec*, the Supreme Court recognized four cornerstone unwritten constitutional principles, describing the democracy principle as the “baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated”.<sup>4</sup> The Court linked this principle to the promotion of self-government, and expressly noted that s.4's exemption from s.33's legislative override confirms the democracy principle “with particular clarity”.<sup>5</sup>

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<sup>1</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at para 62.

<sup>2</sup> Prior to the *Charter*, the vital role of democratic participation was recognized in a constitutional jurisprudence that affirmed free and open public discussion as a core element of a functioning democracy. See *Reference re: Alberta Legislation*, [1938] SCR 100, [1938] 2 DLR 81 (SCC); *Boucher v The King*, [1949] SCR 265, 1949 CanLII 334 (SCC); *Saumur v Québec (City)*, [1953] 2 SCR 299, 1953 CanLII 3 (SCC); and *Switzman v Elbling*, [1957] SCR 285, 1957 CanLII 2 (SCC).

<sup>3</sup> *Reference re: Alberta Legislation*, [1938] SCR 100, [1938] 2 DLR 81 (SCC) at para 106 (emphasis added).

<sup>4</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at para 62.

<sup>5</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at para 65.

6. In *City of Toronto v. Ontario* (“*City of Toronto*”), the Supreme Court recently stated that unwritten principles assist in the purposive interpretation of *Charter* rights by informing “the character and larger objects of the *Charter* itself, ... the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined”.<sup>6</sup> Moreover, the Court confirmed that democracy is one of the principles by which the Constitution is to be understood and interpreted, adding that the principle embraces the *process* of representative and responsible government and *the right of citizens to participate in that process*, but also substantive goals, including the promotion of self-government.<sup>7</sup>

7. Just as the democratic principle was relevant as a guide to the interpretation of s.2(b) in *City of Toronto*, it is relevant to and informs the interpretation of s.3, including the right to cast an informed vote, in this appeal.<sup>8</sup>

*b. The principle of democratic accountability informs the interpretation of sections 3 and 33 of the Charter*

8. Section 3’s democratic rights are excluded from s.33 and not subject to legislative override.<sup>9</sup> The principle of democratic accountability is at the core of s.33, and compels a robust interpretation of s.3’s democratic rights to ensure that governments are held accountable for invoking the override. Section 3’s entitlements must be vigilantly protected at all times, but especially when s.2(b)’s rights of democratic participation and their vital role in the process of

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<sup>6</sup> *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 55, citing *R v Big M Drug Mart* [1985] 1 SCR 295, 1985 CanLII 69 (SCC). Unwritten constitutional principles did not apply in *City of Toronto* because s.3 of the *Charter* does not address or protect municipal electoral processes.

<sup>7</sup> *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 76, 77 (emphasis added).

<sup>8</sup> *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 78.

<sup>9</sup> These provisions are ss.3-5 (democratic rights), s.6 (mobility rights), and ss.16-23 (minority language rights). See *Conseil scolaire francophone de la Colombie-Britannique v BC* 2020 SCC 13 (holding that s.23’s exclusion from s.33 reflects the importance of the right and the framers’ intention that intrusions be strictly circumscribed, citing *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, and *Frank v. Canada (Attorney General)*, 2019 SCC 1; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (holding an expansive interpretation is consistent with s.6(1)’s exemption from the override (citing *Sauvé*)).

self-government are eliminated through a government's reliance on the override. Both in intent and design, this is the objective and result of Bill 307.

9. The text of s. 33 directly addresses the principle of democratic accountability in two ways. First, a government must provide a "sufficiently express declaration of override" to satisfy s.33(1)'s requirement of form, which draws attention to any use of the override and promotes the public debate that will test and decide its democratic legitimacy.<sup>10</sup> Second, the five-year limit in s.33(3) entrenches the principle of democratic accountability because it makes any renewal of the override contingent on an intervening election process under s.4. Any government that relies on the override must face the electorate under a robust interpretation of s.3's right to vote. In this way, the text of s.33's "sunset clause" and the *Charter*'s democratic rights work symbiotically to protect the principle of democratic accountability.<sup>11</sup>

10. It is accepted that democratic accountability is part of the design and architecture of s.33. According to Roy McMurtry, one of the political leaders in the negotiation of the *Constitution Act 1982*, "political accountability is the best safeguard against any improper use of the 'override clause' by any parliament in the future".<sup>12</sup> That view is broadly reflected in the academic commentary. Professor Weiler stated that "the practice of representative democracy implies a structural core consisting of periodic elections between parties competing for the vote of a broad-based electorate" that has been educated about the issues "through vigorous public commentary, especially by an uninhibited press".<sup>13</sup> Professor Russell also supported s.33, arguing that the

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<sup>10</sup> *Ford v Quebec*, [1988] 2 SCR 712, 1988 CanLII 19 (SCC) at para 33. Also see: Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, (1990) 35 McGill LJ 541 at p. 549, BOA, Tab 1.

<sup>11</sup> Section 4 of the *Charter* mandates that neither the House of Commons nor any legislative assembly can continue for longer than five years.

<sup>12</sup> R. McMurtry, "The Search for a Constitutional Accord – A Personal Memoir", (1982) 8 Queen's LJ 28 at p. 65, BOA Tab 2.

<sup>13</sup> P. Weiler, "Rights and Judges in a Democracy: A New Canadian Version", 18 U of Mich J of Law Reform 51 at p. 67 (1984), BOA Tab 3.

override was intended to provoke a process of “wide public discussion so that the politically active citizenry participate in and share responsibility for the outcome”.<sup>14</sup> Though s.33 provides an opportunity for “responsible and accountable public discussion of rights issues”, Professor Russell cautioned that this purpose can be “seriously undermined” if legislatures are free to use the override without discussion and deliberation.<sup>15</sup>

11. Sections 3 and 33 are grounded in an underlying theory of democratic accountability: the government is prohibited from using the legislative override against s.3’s democratic rights, and any government that invokes s.33 must face the electorate, pursuant to s.4, before an override provision can be renewed. The symbiotic relationship of these provisions informs the interpretation of the *Charter*’s democratic rights in this appeal. It is imperative for s.3 to be given a broad and robust interpretation that reinforces and protects s.33’s core principle of democratic accountability.

### **B. Section 3 guarantees the right of voters to cast an informed vote**

12. Section 3 guarantees the rights of voters, and includes the right of each citizen to play a meaningful role in the political life of the country.<sup>16</sup> The Supreme Court has rejected “an overly narrow interpretation of the right to vote” because it would diminish the quality of democracy in our system of government, and undermine s.3’s central purpose of ensuring that every citizen can participate meaningfully in the electoral process.<sup>17</sup> Beyond the “bare right to vote”, s.3’s

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<sup>14</sup> P. Russell, “Standing Up for Notwithstanding”, (1991) 29 Alta L Rev 293 at p. 299, BOA Tab 4.

<sup>15</sup> P. Russell, “Standing Up for Notwithstanding”, (1991) 29 Alta L Rev 293 at p. 299, BOA Tab 4.

<sup>16</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 30.

<sup>17</sup> *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 27.

democratic rights include the right to meaningful participation,<sup>18</sup> the right to effective representation,<sup>19</sup> and the right to cast an informed vote.<sup>20</sup>

13. Section 3's rights of participation are interconnected and symbiotic in nature. In *Figueroa v. Canada (Attorney General)* ("*Figueroa*"), the Supreme Court found that restrictions on statutory benefits for smaller political parties breached the s.3 rights of voters. As Justice Iacobucci explained, "[t]he right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences."<sup>21</sup> By limiting the capacity of marginal or regional parties to present their ideas and opinions to the general public, the restrictions "undermine[d] the right of each citizen to information that might influence the manner in which she or he exercises the right to vote."<sup>22</sup>

14. In *Harper v. Canada (Attorney General)* ("*Harper*"), the Supreme Court affirmed that s.3's right of meaningful participation includes a citizen's right to vote in an informed manner. As the Court explained, a "well informed" voter is reasonably informed of "all the possible choices", and must be able to weigh and assess the relative strengths and weaknesses of each candidate and political party.<sup>23</sup> In addition, voters must be able to consider opposing aspects of issues associated with candidates and their parties.<sup>24</sup>

15. In addressing the issue of breach under s.3, "the essential question to be determined is whether [the legislation] interferes with the capacity of individual citizens to play a meaningful

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<sup>18</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 70.

<sup>19</sup> *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158, 1991 CanLII 61 (SCC); Also see *Haig v Canada*, [1993] 2 SCR 995, 1993 CanLII 58 (SCC); *Harvey v. New Brunswick (Attorney General)*, [1996] 2 SCR 876, 1996 CanLII 163 (SCC); *Figueroa v Canada (Attorney General)*, 2003 SCC 37; *Harper v Canada (Attorney General)*, 2004 SCC 33 at paras 68-69.

<sup>20</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at paras 71, 87.

<sup>21</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 54.

<sup>22</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 54.

<sup>23</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 71.

<sup>24</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 71.

role in the electoral process.”<sup>25</sup> More specifically, the issue in this appeal is whether Bill 307 undermines the voter’s right of access to information that might influence the manner in which they exercise their right to vote.<sup>26</sup>

16. In *Thomson Newspapers v. Canada (Attorney General)* (“*Thompson Newspapers*”), the Supreme Court invalidated a blackout on opinion polls in the final 72 hours of a federal election.<sup>27</sup> In particular, Bastarache J. stated that the ban interfered with the rights of voters and flow of information on “the most important democratic duty Canadians undertake in their lives”: their choice as to who will govern them.<sup>28</sup> The ban, which was 72 hours in length and limited to opinion poll information, denied access to electoral information. As such, the opinion poll blackout interfered with voters’ freedom of expression and their “perception of the freeness and validity of their vote”.<sup>29</sup> As the Court stated, the ban undermined “their very faith in the electoral process”.<sup>30</sup> The same conclusion applies, *a fortiori*, to Bill 307’s restrictions on third party political advertising for a full year prior to a fixed-date election.

17. Similarly, *Harper* accepted that third party spending limits will violate s.3 when overly restrictive spending limits undermine the informational component of the right to vote.<sup>31</sup> The spending restrictions in *Harper* did not violate s.3 of the *Charter*, but were of short duration and confined to the writ period in a federal election campaign.<sup>32</sup> On that evidence, the limits did not undermine the s.3 right to cast a vote that is well informed.

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<sup>25</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 38.

<sup>26</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 54.

<sup>27</sup> *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 131.

<sup>28</sup> *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 127.

<sup>29</sup> *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 129.

<sup>30</sup> *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 129.

<sup>31</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 73. Prior to *Figueroa*, Bastarache J. acknowledged that a restriction on information could infringe s.3 if it undermined the guarantee of effective representation: *Thomson Newspapers v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 82.

<sup>32</sup> Under the *Canada Election Act*, this period can be no longer than 50 days. *Canada Elections Act*, SC 2000, c 9, s 57(1.2)(c).

18. Bill 307's restrictions on all third party political advertising apply for 12 months and are substantially longer than pre-election restrictions anywhere else in Canada.<sup>33</sup> The imposition of these unprecedented restrictions undermines voter access to information that might influence the exercise of their votes. Like *Figueroa's* restrictions on smaller political parties, Bill 307's 12-month limits reduce the capacity of third party political advertisers to "introduce ideas and opinions into the open dialogue and debate that the electoral process engenders".<sup>34</sup> Bill 307 violates s.3 because it undermines *the right of each citizen to information that might influence the manner in which he or she exercises the right to vote.*<sup>35</sup>

19. In addition and as discussed above, Bill 307's restrictions on voter access to third party political advertising undermine the principle of democratic accountability that grounds ss.3 and 33 of the *Charter*, as well as the unwritten constitutional principle of democracy.

**C. Limits on the right to vote, including the right to cast an informed vote, must be justified under s.1 of the *Charter***

20. The vitality of s.3's democratic rights depends on a generous and purposive interpretation of s.3, and a stringent standard of justification under s.1, for "any intrusions on this core democratic right".<sup>36</sup> The right to cast an informed vote is not subject to any balancing of values, and countervailing values have no place in the definition of the right.<sup>37</sup> *Figueroa* explicitly addressed the issue, holding that the government cannot interfere with s.3's democratic rights to advance other values without justifying the infringement under s.1.<sup>38</sup> Any corresponding benefits related to

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<sup>33</sup> The federal regime only regulates third party political advertising for 2.5 months before the election writ and does not extend to issue based advertising during the pre-writ period. *Canada Elections Act*, SC 2000, c 9, ss 349.1(1), 350(1). Also see: *Working Families Ontario v Ontario*, 2021 ONSC 4076 at para 7.

<sup>34</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 53.

<sup>35</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 54 (emphasis added).

<sup>36</sup> *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 25.

<sup>37</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 36.

<sup>38</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 31.

democratic values, *other than the right of each citizen to play a meaningful role*, can only be considered under s.1.<sup>39</sup>

21. In the decision under appeal, the court considered the egalitarian model and the tailoring of the legislation in reaching the conclusion that Bill 307 does not violate s.3's democratic rights.<sup>40</sup> It is clear, under *Figueroa*, that these factors must be addressed under s.1, where the government bears a heavy onus to justify limits on the rights guaranteed by s.3 of the *Charter*.

22. Limits on s.3 require careful examination, not deference, and great care must be taken, under s.1, to determine whether a violation is justified.<sup>41</sup> The role of justification is especially important when democratic rights are at stake and the legislative override prevents the application of other *Charter* guarantees, including s.2(b)'s freedom of expression. In such circumstances, s.3's entitlements assume critical importance. In *Thomson Newspapers* the Court stated that, "though the override is rarely invoked", s.3's immunity from s.33 clearly places this provision "at the heart of our constitutional democracy."<sup>42</sup> Stating that s.3 is of "seminal importance", *Sauvé v. Canada* declared that it is "precisely when legislative choices threaten to undermine the foundation of the participatory democracy" that courts must act with vigilance to protect the integrity of the system.<sup>43</sup>

23. Bill 307's use of s.33 to immunize unconstitutional legislation from s.2(b) and undermine access to the information voters require to play a meaningful role in the electoral process poses a threat to s.3's entitlements and the principles of democracy and democratic accountability that calls for a vigilant response from the judiciary.

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<sup>39</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 36 (emphasis added).

<sup>40</sup> *Working Families Coalition (Canada) Inc. v. Ontario*, 2021 ONSC 7697 at paras 102-112.

<sup>41</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 60.

<sup>42</sup> *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 79.

<sup>43</sup> *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 15, 36.

**D. Conclusion**

24. This appeal engages fundamental principles of democracy and democratic accountability that are deeply entrenched in the Constitution. In the circumstances of Bill 307, where the government has invoked s.33 to negate s.2(b)'s rights of democratic participation, it is essential for the Court to act with vigilance to protect s.3's right to cast an informed vote. It is also essential that the government bear the onus under s.1 to justify Bill 307's infringement of this core entitlement. Anything less undermines the principle of democratic accountability and the legitimacy of invoking the override in this instance.

**PART IV – RELIEF REQUESTED**

25. The CFE takes no position on the disposition of this appeal.

**PART V – COSTS**

26. The CFE seeks no costs and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: March 11, 2022



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**BORDEN LADNER GERVAIS LLP**

**SCHEDULE “A”  
List of Authorities**

Number	Case
1.	<u><i>Boucher v The King</i>, [1949] SCR 265, 1949 CanLII 334 (SCC).</u>
2.	<u><i>Conseil scolaire francophone de la Colombie-Britannique v BC</i>, 2020 SCC 13.</u>
3.	<u><i>Divito v Canada (Public Safety and Emergency Preparedness)</i>, 2013 SCC 47.</u>
4.	<u><i>Figueroa v Canada (Attorney General)</i>, 2003 SCC 37.</u>
5.	<u><i>Ford v Quebec</i>, [1988] 2 SCR 712, 1988 CanLII 19 (SCC).</u>
6.	<u><i>Frank v Canada (Attorney General)</i>, 2019 SCC 1.</u>
7.	<u><i>Haig v Canada</i>, [1993] 2 SCR 995, 1993 CanLII 58 (SCC).</u>
8.	<u><i>Harper v Canada (Attorney General)</i>, 2004 SCC 33.</u>
9.	<u><i>Harvey v New Brunswick (Attorney General)</i>, [1996] 2 SCR 876, 1996 CanLII 163 (SCC).</u>
10.	<u><i>R v Big M Drug Mart</i>, [1985] 1 SCR 295, 1985 CanLII 69 (SCC).</u>
11.	<u><i>Reference re Alberta Legislation</i>, [1938] SCR 100, [1938] 2 DLR 81 (SCC).</u>
12.	<u><i>Reference re Provincial Electoral Boundaries</i>, [1991] 2 SCR 158, 1991 CanLII 61 (SCC).</u>
13.	<u><i>Reference re Secession of Quebec</i>, [1998] 2 SCR 217, 1998 CanLII 793 (SCC).</u>
14.	<u><i>Saumur v Québec (City)</i>, [1953] 2 SCR 299, 1953 CanLII 3 (SCC).</u>
15.	<u><i>Sauvé v Canada (Attorney-General)</i> [1992] OJ No 565, 1992 CanLII 2786 (ONCA).</u>
16.	<u><i>Sauvé v Canada (Chief Electoral Officer)</i>, 2002 SCC 68.</u>
17.	<u><i>Switzman v Elbling</i>, [1957] SCR 285, 1957 CanLII 2 (SCC).</u>
18.	<u><i>Thomson Newspapers Co. v. Canada (Attorney General)</i>, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) 385.</u>
19.	<u><i>Toronto (City) v Ontario (Attorney General)</i>, 2021 SCC 34.</u>
20.	<u><i>Working Families Ontario v. Ontario</i>, 2021 ONSC 4076.</u>
21.	<u><i>Working Families Coalition (Canada) Inc. v. Ontario</i>, 2021 ONSC 7697.</u>

<b>Number</b>	<b>Publication</b>
1.	L. Weinrib, "Learning to Live with the Override", (1990) 35 McGill LJ 541.
2.	R. McMurtry, "The Search for a Constitutional Accord – A Personal Memoir", (1982) 8 Queen's L J 28.
3.	P. Weiler, "Rights and Judges in a Democracy: A New Canadian Version", 18 U of Mich J of Law Reform 51.
4.	P. Russell, "Standing Up for Notwithstanding", (1991) 29 Alta L Rev 293.

**SCHEDULE “B”**  
**Text of Statutes, Regulations & By-Laws**

***Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.***

**Rights and freedoms in Canada**

**1** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**Democratic rights of citizens**

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

**Exception where express declaration**

**33 (1)** Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

**Operation of exception**

**(2)** An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

**Five year limitation**

**(3)** A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

**Re-enactment**

**(4)** Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

**Five year limitation**

**(5)** Subsection (3) applies in respect of a re-enactment made under subsection (4).

***The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11***

**Primacy of Constitution of Canada**

**52.(1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

**Bill 307, *An Act to amend the Election Finances Act***

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**1 Section 37.0.1 of the *Election Finances Act* is repealed and the following substituted:**

**Considerations re political advertising**

**37.0.1** In determining whether an advertisement is a political advertisement, the Chief Electoral Officer shall consider, in addition to any other relevant factors,

- (a) whether it is reasonable to conclude that the advertising was specifically planned to coincide with the period referred to in section 37.10.1;
- (b) whether the formatting or branding of the advertisement is similar to a registered political party's or registered candidate's formatting or branding or election material;
- (c) whether the advertising makes reference to the election, election day, voting day, or similar terms;
- (d) whether the advertisement makes reference to a registered political party or registered candidate either directly or indirectly;
- (e) whether there is a material increase in the normal volume of advertising conducted by the person, organization, or entity;
- (f) whether the advertising has historically occurred during the relevant time of the year;
- (g) whether the advertising is consistent with previous advertising conducted by the person, organization, or entity;
- (h) whether the advertising is within the normal parameters of promotion of a specific program or activity; and
- (i) whether the content of the advertisement is similar to the political advertising of a party, constituency association, nomination contestant, candidate or leadership contestant registered under this Act.

**2 Subsections 37.10.1 (2), (3) and (3.1) of the Act are repealed and the following substituted:**

**Same, non-election period**

- (a) (2) No third party shall spend, more than \$24,000 in any electoral district for the purpose of third party political advertising in that district during the 12-month period immediately before the issue of a writ of election for a general election held in accordance with subsection 9 (2) of the *Election Act*, multiplied by the indexation factor determined under section 40.1 for the calendar year in which the election period begins and rounded to the nearest dollar; or
- (b) more than \$600,000 in total for the purposes of third party political advertising during the 12-month period immediately before the issue of a writ of election for a general election held in accordance with subsection 9 (2) of the *Election Act*, multiplied by the indexation factor determined under section 40.1 for the calendar year in which the election period begins and rounded to the nearest dollar.

**No combination to exceed limit**

(3) No third party shall circumvent, or attempt to circumvent, a limit set out in this section in any manner, including by,

- (a) acting in collusion with another third party so that their combined political advertising expenses exceed the applicable limit;
- (b) splitting itself into two or more third parties;
- (c) colluding with, including sharing information with, a registered party, registered constituency association, registered candidate, registered leadership contestant, or registered nomination contestant or any of their agents or employees for the purpose of circumventing the limit;

- (d) sharing a common vendor with one or more third parties that share a common advocacy, cause or goal;
- (e) sharing a common set of political contributors or donors with one or more third parties that share a common advocacy, cause or goal;
- (f) sharing information with one or more third parties that share a common advocacy, cause or goal; or
- (g) using funds obtained from a foreign source prior to the issue of a writ for an election.

### **Contributions**

(3.1) Any contribution from one third party to another third party for the purposes of political advertising shall be deemed as part of the expenses of the contributing third party.

### **2022 election**

(3.2) With respect to the general election to be held in 2022 in accordance with subsection 9 (2) of the Election Act, the relevant period for the purposes of subsection (2) of this section commences on the day the Protecting Elections and Defending Democracy Act, 2021 receives Royal Assent.

### **3 Section 37.10.2 of the Act is repealed and the following substituted:**

#### **Interim reporting requirements**

37.10.2 (1) Every third party shall promptly file the following interim reports with the Chief Electoral Officer, in the prescribed form:

1. When it has paid or committed to any person or entity to spend any funds on paid political advertising, it shall report the amount spent or committed, with a separate report being required each time its aggregate spending increases by an amount of at least \$1,000.
2. When it has reached the applicable spending limit under section 37.10.1, it shall report that fact.

#### **Posting**

(2) The Chief Electoral Officer shall publish every report filed under subsection (1) on the website of the Chief Electoral Officer within two days of receiving it.

#### **Percentage**

(3) Based on the interim reports, the Chief Electoral Officer shall determine the amounts spent or committed to be spent by each third party as a percentage of the maximum spending that is permitted for a third party under section 37.10.1, and publish the percentages on the website of the Chief Electoral Officer.

#### **Purpose**

(4) The purpose of the percentages determined under subsection (3) is to permit persons or entities that sell advertising to be aware that the third party is at risk of exceeding its spending limit, and to make informed decisions about selling advertising to the third party.

#### **No selling over limit**

(5) No person or entity shall sell advertising to a third party when the person should reasonably be aware, based on the reporting under this section, that the sale would cause the third party to exceed a limit imposed by section 37.10.1.

**4 The Act is amended by adding the following section:**

**Application of Charter and *Human Rights Code***

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

***Human Rights Code***

(2) This Act applies despite the *Human Rights Code*.

**Commencement**

5 This Act comes into force on the day it receives Royal Assent.

**Short title**

6 The short title of this Act is the Protecting Elections and Defending Democracy Act, 2021

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

**General election — proclamation**

**57 (1)** The Governor in Council shall issue a proclamation in order for a general election to be held.

**By-election — order**

**(1.1)** The Governor in Council shall make an order in order for a by-election to be held.

**Contents**

**(1.2)** The proclamation or order shall

- (a) direct the Chief Electoral Officer to issue a writ to the returning officer for each electoral district to which the proclamation or order applies;
- (b) fix the date of issue of the writ; and
- (c) fix the date for voting at the election, which date must be no earlier than the 36th day and no later than the 50th day after the day on which the writ was issued.

**Maximum pre-election period expenses**

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

- (a) partisan activity expenses in relation to partisan activities that are carried out during a pre-election period;
- (b) partisan advertising expenses in relation to partisan advertising messages that are transmitted during that period; and
- (c) election survey expenses in relation to election surveys that are conducted during that period.

**Maximum election period expenses**

**350 (1)** Subject to section 351.1, a third party shall not incur the following expenses in an aggregate amount of more than \$350,000:

- (a) partisan activity expenses in relation to partisan activities that are carried out during the election period of a general election;
- (b) election advertising expenses in relation to election advertising messages that are transmitted during that period; and
- (c) election survey expenses in relation to election surveys that are conducted during that period.

**WORKING FAMILIES COALITION (CANADA) INC. et al.**  
Appellants

-and-

**THE ATTORNEY GENERAL OF ONTARIO**  
Respondent

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**COURT OF APPEAL FOR ONTARIO**

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**FACTUM**

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