SCC File No. 40725

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

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant (Respondent)

- and -

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

Respondents (Appellants)

- and -

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ALBERTA, THE ATTORNEY GENERAL OF QUEBEC, 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

FACTUM OF THE INTERVENER,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
(Rule 42 of the *Rules of the Supreme Court of Canada*)

Allen / McMillan Litigation Counsel
1625 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

Greg J. Allen
Alex Mok
Mia Stewart (articled student)

Tel: (604) 569-2652
Fax: (604) 628-3832
Email: greg@amlc.ca / alex@amlc.ca / mia@amlc.ca

Counsel for the Intervener,
British Columbia Civil Liberties Association

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

Lenczner Slaght LLP
130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

Peter H. Griffin, K.C.
Nina Bombier
Samantha Hale
Tel : (416) 865-2921 / (416) 865-3052 / (416) 865-6764
Email : pgriffin@litigate.com
nbombier@litigate.com
shale@litigate.com

Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Josh Hunter
Yashoda Ranganathan
Tel : (416) 908-7465 / (647) 637-0883
Email : joshua.hunter@ontario.ca
yashoda.ranganathan@ontario.ca

Power Law
50 O'Connor Street, Suite 1313
Ottawa, ON K1P 6L2

Maxine Vincelette
Tel : (613) 702-5573
Email : mvincelette@powerlaw.ca

Ottawa Agent for Counsel for Applicant, The Attorney General of Ontario

Counsel for the Appellant, the Attorney General for Ontario

Goldblatt Partners LLP
1039 – 20 Dundas St W
Toronto, ON 5G 2C2

Howard Goldblatt
Christine Davies
Daniel Sheppard
Anna Goldfinch
Erin Sobat
Tel : (416) 977-6070
Email : hgoldblatt@goldblattpartners.com
cdavies@goldblattpartners.com
dsheppard@goldblattpartners.com
agoldfinch@goldblattpartners.com
esobat@goldblattpartners.com

Counsel for the Respondents, Elementary Teachers' Federation of Ontario and Felipe Parjea

Cavalluzzo LLP
Barristers and Solicitors
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

Paul Cavaluzzo
Adrienne Telford
Michelle Thomarat
Kylie Sier
Tel : (416) 964-1115
Email : pcavalluzzo@cavalluzzo.com
atelford@cavalluzzo.com
mthomarat@cavalluzzo.com
ksier@cavalluzzo.com

Counsel for the Respondents, Working Families Coalition (Canada) Inc. And Ontario English Catholic Teachers' Association, Patrick Dillon and Peter McDonald

Goldblatt Partners LLP
1400 – 270 Albert Street
Ottawa, ON K1P 5G8

Colleen Bauman
Tel : (613) 482-2463
Email : cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Respondents, Elementary Teachers' Federation of Ontario and Felipe Pareja

Goldblatt Partners LLP
1400 – 270 Albert Street
Ottawa, ON K1P 5G8

Colleen Bauman
Tel : (613) 482-2463
Email : cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Respondents, Working Families Coalition (Canada) Inc. And Ontario English Catholic Teachers' Association, Patrick Dillon and Peter MacDonald

Ursel Phillips Fellows Hopkinson LLP
555 Richmond Street West, Suite 1200
Toronto, ON M5V 3B1

Susan Ursel
Kristen Allen
Emily Home
Tel : (416) 968-3333
Email : sursel@upfhlaw.ca
kallen@upfhlaw.ca
ehome@upfhlaw.ca

Counsel for the Respondents, Ontario Secondary School Teachers' Federation and Leslie Wolfe

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel : (613) 695-8855 Ext. 102
Email : mfmajor@supremeadvocacy.ca

Agent for the Respondents, Ontario Secondary School Teachers' Federation and Leslie Wolfe

Lax O'Sullivan Lisus Gottlieb LLP
Barristers and Solicitors
Suite 2750, 145 King Street W.
Toronto, ON M5H 1J8

Crawford G. Smith
William C.S. Maidment
Tel : (416) 598-8648 / (416) 596-5099
Email : csmith@lolg.ca
wmaidment@lolg.ca

Counsel for the Intervener, Democracy Watch

Conway Baxter Wilson LLP/S.R.L
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Abdalla Barqawi
Tel : (613) 780-2026
Email : abarqawi@conwaylitigation.ca

Agent for the Intervener, Democracy Watch

McCarthy Tétrault LLP
Suite 2400 – 745 Thurlow Street
Vancouver, BC V6E 0C5

Connor Bildfell
Lindsay Frame
Tel : (604) 643-5877
Email : cbildfell@mccarthy.ca
lframe@mccarthy.ca

Counsel for the Intervener, Advocates for the Rule of Law

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel : (613) 786-8695
Email : lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Advocates for the Rule of Law

Benson Buffett PLC Inc.
Suite 900 Atlantic Place
215 Water St.
St. John's NFLD A1C 6C9

Devin Drover
Tel : (709) 570-7259
Email : ddrover@bensonbuffett.com

Counsel for the Intervener, Canadian Taxpayers Federation

Lerners LLP
85 Dufferin Avenue
London, ON N6A 1K3

Debbie Boswell
Earl A. Cherniak, K.C.
Tel : (516) 640-6353
Email : dboswell@lerners.ca
echerniak@lerners.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

Conway Baxter Wilson LLP/S.R.L.
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Marion Sandilands
Tel : (613) 780-2021
Email : msandilands@conwaylitigation.ca

Co-Counsel for the Intervener, International Commission of Jurists Canada

Dentons Canada LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott
Corey Villeneuve (Law Clerk)
Tel : (613) 783-9699
Email : corey.villeneuve@dentons.com

Ottawa Agent to Counsel for the Intervener, Canadian Taxpayers Federation

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Catherine Ouellet
Tel : (613) 786-0189
Email :
catherine.ouellet@gowlingwlg.com

Agent for Counsel for the Intervener, David Asper Centre for Constitutional Rights

University of Ottawa
125 – 57 Louis Pasteur St.
Ottawa, ON K1N 6N5

Errol P. Mendes
Tel : (613) 562-5124
Email : emendes@uottawa.ca

Co-Counsel for the Intervener, International Commission of Jurists Canada

Ryder Wright Holmes Bryden Nam
333 Adelaide Street West, 3rd Floor
Toronto, ON M5V 1R5

Mae J. Nam
Laura R. L. Johnson
Tel : (416) 340-9070
Email : mjnam@ryderwright.ca

Counsel for the Intervener, Canadian Lawyers for International Human Rights

Stockwoods LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Brian Grover
Stephen Aylward
Olivia Eng
Tel : (416) 593-2489 / (416) 593-2496 / (416) 593-2495
Email : BrianG@stockwoods.ca
StephenA@stockwoods.ca
OliviaE@stockwoods.ca

Counsel for the Intervener, Chief Electoral Officer of Ontario

Champ & Associates
Equity Chambers
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Tel : (613) 237-4740
Email : broy@champlaw.ca

Agent for the Intervener, Canadian Lawyers for International Human Rights

Conway Baxter Wilson LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Christopher Trivisonno
Tel : (613) 780-2008
Email :
CTrivisonno@conwaylitigation.ca

Agent for the Intervener, Chief Electoral Officer of Ontario

Borden Ladner Gervais LLP
3400 – 22 Adelaide Street West
Toronto, ON M5H 4E3

Laura M. Wagner
Alicia Krausewitz
Tel : (416) 367-6572 / (416) 367-6749
Email : lwagner@blg.com
akrausewitz@blg.com

Osgoode Hall Law School

Jamie Cameron, Professor Emerita
Tel : (416) 294-1512
Email : jcameron@osgoode.yorku.ca

ADR Chambers

Christopher D. Bredt
Tel : (16) 526-7878
Email : cbredt@adr.ca

Counsel for the Intervener, Centre for Free Expression

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel : (613) 787-3562
Email : neffendi@blg.com

Agent for Counsel for the Intervener, Centre for Free Expression

Department of Justice Canada
Complexe Guy-Favreau
200 boulevard René-Lévesque West, Tour Est, 9th Floor
Montreal, QC H2Z 1X4

François Joyal
Michelle Kellam
Tel : (514) 283-4934
Email : francois.joyal@justice.gc.ca
michelle.kellam@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

Attorney General of Canada
Department of Justice Canada
50 O'Connor Street, Suite 500, Room 557
Ottawa, ON K2P 6L2

Christopher Rupar
Tel : (613) 941-2351
Email : christpher.rupar@justice.gc.ca

Agent for Counsel for the Intervener, Attorney General of Canada

Alberta Justice Contitutional and Aboriginal Law
10th Floor, Oxford Tower
10025 – 102A Avenue, NW
Edmonton, AB T5J 2Z2

Leah M. McDaniel
Ryan L. Martin
Tel : (780) 422-7145
Email : leah.mcdaniel@gov.ab.ca
ryan.martin@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel : (613) 786-8695
Email : lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener, Attorney General of Alberta

Procureur Général du Québec
1200 route de l'Église, 2e étage
Québec, QC G1V 4M1

Caroline Renaud
François Hénault
Tel : (418) 643-1477 ext. 20780
Email : caroline.renaud@justice.gouv.gc.ca
francois.henault@justice.gouv.gc.ca

Counsel for the Intervener, Attorney General of Quebec

Noël et Associés, s.e.n.c.r.l.
225, montée Paiement, 2e étage
Gatineau, QC J8P 6M7

Pierre Landry
Tel : (819) 771-7393
Email : p.landry@noelassocies.com

Agent for Counsel for the Intervener, Attorney General of Quebec

Osler, Hoskin & Harcourt LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

W. David Rankin
Lindsay Rauccio
Graham Buitenhuis
Tel : (416) 862-4895 / (416) 862-5910 / (416) 862-4274
Email : drankin@osler.com
lrauccio@osler.com
gbuitenhuis@osler.com

Lawyers for the Intervener, The Canadian Civil Liberties Association

TABLE OF CONTENTS

Page

PART I: OVERVIEW

1. In this appeal, the Court is asked to assess whether the Ontario *Election Finances Act*, RSO 1990, c E.7 (the "*Act*") infringes the right to vote guaranteed under section 3 of the *Charter*.

2. One of the issues raised by the appellant is whether the majority of the Ontario Court of Appeal has erroneously imported a justificatory component into the section 3 analysis by assessing the government's rationale for imposing the impugned spending limit. The appellant's submission in this regard echoes the dissenting reasons of Justice Benotto, who suggested that the majority's focus on the rationale for the legislation in question conflates the section 3 analysis with that of section 1, and accordingly reverses the burden of proof at the infringement stage.[1]

3. The intervention of the British Columbia Civil Liberties Association ("BCCLA") in this appeal is focused on this particular issue. BCCLA submits that the infringement analysis under section 3, properly applied, does not include a justificatory component, and does not result in a shifting of the burden from the rights holder to government. In this factum, BCCLA will explain the focus of the section 3 inquiry, anchor the importance of contextual factors to this analysis, and differentiate the analysis from the justificatory analysis applied under section 1. BCCLA will also address the question of whether an assessment of the government's rationale at the section 3 infringement stage has the effect of shifting the burden of proof to the government. BCCLA submits that it does not.

4. BCCLA will not make any submissions on the merits of the appeal.

PART II: STATEMENT OF POINTS IN ISSUE

5. Does the analysis applied to section 3 of the *Charter* by the majority of the Ontario Court of Appeal in this case introduce a justificatory analysis within section 3, or otherwise shift the burden of proof at the infringement stage from the claimant to the government.

---

[1] *Working Families Coalition (Canada) Inc v Ontario (Attorney General)*, 2023 ONCA 139 at para 149 [ONCA Reasons].

PART III: STATEMENT OF ARGUMENT

This Court's approach to section 3

6. The plain language of section 3 of the *Charter* enshrines two rights – the right of all Canadian citizens to vote in an election of members of the House of Commons or of a legislative assembly, and the right to be qualified for membership in such legislative bodies. Although the plain language of the section is drafted narrowly, section 3 has been interpreted broadly by this Court to encompass much more extensive democratic participatory rights. This is consistent with the "living tree" approach to constitutional interpretation, and the reality that practical considerations such as social and physical geography may impact the value of a citizen's right to vote.[2]

7. This Court's approach to section 3 was summarized as follows by Justice L'Heureux-Dubé, writing for the majority in *Haig v Canada*:

> Clearly, in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court [in the *Saskatchewan Reference*], McLachlin J. concluded at p. 183 that it is the Canadian system of effective representation that is at the centre of the guarantee:
>
> > . . . 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. 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.
>
> 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.[3] [emphasis in original]

8. Legislation breaches section 3 when it interferes with the right of a citizen to participate in a fair election.[4] This can take the form of decreasing the capacity of citizens to introduce

---

[2] *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 SCR 158 at 180-181 [*Saskatchewan Reference*].
[3] *Haig v Canada*, [1993] 2 SCR 995 at 1031.
[4] *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 51 [*Figueroa*].

ideas and opinions into the public forum during an election,[5] exacerbating a disparity in the capacity of political parties to communicate their positions to the general public,[6] and restricting the ability of citizens to cast their vote in a manner that is consistent with their political preferences.[7]

Section 3 and collective democratic values

9. In *Figueroa v Canada (Attorney General)*, this Court rejected the idea that the guarantee of effective representation is satisfied through the formation of majority government that has structured choice and aggregated preferences at the national level.[8] In his majority reasons in *Figueroa*, Justice Iacobucci reinforced the individual nature of the section 3 right, and made clear that the interpretation of section 3 must advance in a manner that is consistent with the importance of individual participation in the selection of elected representatives in a free and democratic state.[9]

10. Given the primacy of the participatory rights of the individual, there is no room in the section 3 analysis to balance those individual participatory rights against collective interests, such as the efficiency of aggregating political preferences.[10] Put another way, the Court has declined to read an internal balancing or limitation into the text of section 3, consistent with its well-accepted approach of reading *Charter* rights broadly and placing the burden of justifying breaches of those rights on the government under section 1.[11]

11. Justice Iacobucci in *Figueroa* acknowledged that legislation which departs from absolute voter equality and voter parity may serve a benefit for other democratic values beyond the rights of individuals to meaningfully participate in the electoral process, but confirmed that any such benefits are to be considered in the section 1 analysis.[12] In *Frank v Canada (Attorney General)*, this Court reiterated that any balancing against collective democratic interests must take place at the section 1 stage.[13]

---

[5] *Figueroa* at para 53.
[6] *Figueroa* at para 54.
[7] *Figueroa* at para 57.
[8] *Figueroa* at para 22.
[9] *Figueroa* at para 26.
[10] *Figueroa* at para 36.
[11] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at paras 29-30.
[12] *Figueroa* at para 36; see also *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11 [*Sauvé*].
[13] *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 42 [*Frank*].

The importance of contextual factors to the section 3 analysis

12. In order to breathe life into the guarantees of section 3, this Court looks to a broad range of factors to determine if a citizen's right to effective representation and meaningful participation in the democratic process has been breached. In the *Saskatchewan Reference*, Justice McLachlin (as she then was) considered the circumstances in which it may be necessary to depart from absolute voter parity, and concluded that "[f]actors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic."[14]

Harper and the "careful tailoring" requirement

13. In *Harper v Canada (Attorney General)*, Justice Bastarache held that there is an informational component to meaningful participation in the democratic process. To meaningfully participate in the democratic process, a citizen must cast an informed ballot. That, in turn, requires the citizen to have the opportunity to reasonably inform him or herself of the strengths and weaknesses of all available choices.[15] In the modern media environment, the ability of a voter to reasonably inform him or herself of the various available options is influenced greatly by the ability of political parties to spend campaign funds on advertising and messaging.

14. Facilitating a constructive exchange of information and opinion is important not only to an election, but also to the policy and direction of the government eventually formed. As Justice Iacobucci observed in *Figueroa*, even if a party does not win a single seat in Parliament, the greater the number of votes that it receives the more likely it is that other citizens and the elected government will take seriously the ideas and opinions that it endorses.[16]

15. Thus, election spending can enhance the ability of citizens to meaningfully participate in an election. But, unlimited spending can have the opposite effect. Writing for the majority in *Harper*, Justice Bastarache canvassed the harm caused by unlimited spending on elections, and noted that section 3 does not guarantee a right to unlimited information or unlimited

---

[14] *Saskatchewan Reference* at 184; see also *Figueroa* at para 24.
[15] *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 71 [*Harper*].
[16] *Figueroa* at para 55.

participation.[17] Legislation which limits spending will not constitute a breach of section 3 so long as it is "carefully tailored":

> [73] Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.[18]

16. BCCLA submits that the "careful tailoring" requirement is a tool for performing a contextual analysis within section 3 to ascertain the effect of any restraint placed on individuals to receive information and be adequately apprised of the available choices in an election. The focus is on whether any individual would be hampered from meaningfully participating in the electoral process, or even in the long-term democratic policy-making process, by such spending limits.

The appellant's position in the case at bar

17. As noted above, the appellant argues that the majority of the Ontario Court of Appeal imported a justificatory analysis into section 3. In particular, the appellant submits that the majority improperly engaged in a justificatory analysis when, in assessing whether the legislation had been "carefully tailored", it looked to "the rationale, explicit or implicit, for the amount and duration of the spending limit – the express or implicit reasons why the lines were drawn where they were."[19] The appellant also submits that this focus on the rationale of the legislation in question shifts the burden of proof at the infringement stage from the claimant to the government.

18. In order to understand the appellant's position, it is important to briefly summarize the majority's approach in the Ontario Court of Appeal. The majority looked to the rationale (or lack thereof) for the impugned legislative provisions in its assessment of whether the provisions were "carefully tailored", per *Harper*. The majority held that the lack of any explanation from government for the extension of the restricted period from six months to 12

---

[17] *Harper* at para 72.
[18] *Harper* at para 73.
[19] ONCA Reasons at para 87.

months, when the existing six-month restriction had been previously found sufficient to accomplish the objective of electoral fairness in *Working Families 1*, "tells heavily against a finding of careful tailoring".[20]

There is no justificatory component to the section 3 analysis

19. In advancing these positions, the appellant's factum relies heavily on paragraph 33 of this Court's decision in *Figueroa*, wherein Justice Iacobucci wrote as follows:

> [33] With respect, I do not agree with LeBel J. that the proper analytical approach varies with the nature of the alleged breach. The only difference, in my view, is one of proof. As discussed throughout, the purpose of s. 3 is to protect the right of each citizen to play a meaningful role in the electoral process. Where the impugned legislation is inconsistent with the express language of s. 3, it is unnecessary to consider the broader social or political context in order to determine whether the legislation interferes with the right of each citizen to play a meaningful role in the electoral process. It is plain and obvious that the legislation has this effect. But where the legislation affects the conditions in which citizens exercise those rights it may not be so obvious whether the legislation has this effect. Consequently, it may be necessary to consider a broad range of factors, such as social or physical geography, in order to determine whether the legislation infringes the right of each citizen to play a meaningful role in the electoral process. In neither instance, however, is the right of each citizen to play a meaningful role in the electoral process subject to countervailing collective interests. These interests fall to be considered under s. 1.[21]

20. The appellant submits that in the above passage, Justice Iacobucci warned against "bringing a justificatory analysis into...s. 3 of the *Charter*".[22] BCCLA submits that this passage from *Figueroa* in fact sets out the proper role of "broader social or political context" in the section 3 analysis as established in the *Saskatchewan Reference*. Justice Iacobucci makes clear that it may be necessary to consider the "broader social or political context" of impugned legislative provisions in order to determine if a breach of section 3 has taken place.

21. BCCLA agrees with the appellant that there is no place for a justificatory analysis in section 3. As noted above, this Court has repeatedly cautioned against engaging in a balancing of countervailing collective rights in the section 3 analysis. This Court has also cautioned

---

[20] ONCA Reasons at para 109.
[21] *Figueroa* at para 33.
[22] Appellant's factum at para 74.

against reading in an internal limitation to the language of section 3. This does not, however, preclude a court from assessing the rationale for the amount and duration of a legislated spending limit to ultimately decide whether the extension has a limiting effect on meaningful participation, as the majority of the Ontario Court of Appeal did in this case.

Considering the government's rationale for impugned legislation does not import a justificatory analysis into section 3, and does not conflate section 3 with section 1

22. The appellant's argument, at core, appears to be that an assessment of a government's rationale for enacting legislation that restricts electoral spending is akin to a justificatory analysis, and should therefore only take place under section 1. BCCLA submits that discerning the rationale of the restriction is one way to assess whether a legislative scheme is "carefully tailored", and operates as a precursor to the "broader social or political context" assessment required by the *Saskatchewan Reference* and *Figueroa*.

23. Identifying the rationale behind a restriction is particularly useful to determine a potential section 3 breach when the legislation involves a change of policy. In the *Saskatchewan Reference*, this Court was asked to consider whether proposed changes to electoral boundaries infringed section 3. In doing so, Justice McLachlin (as she then was) considered factors such as geographic boundaries, growth projections, and the comparative difficulty of representing urban and rural ridings.[23] Her analysis in this regard included an assessment of why the government had proposed the boundary changes in question.

24. This position is best explained through a hypothetical. In this hypothetical, a provincial government has introduced legislation which limits electoral spending on television advertisements in Area A but not Area B. On its face, this legislation undermines voter parity and voter equality, and could amount to a breach of section 3. If the government had no reason to unequally regulate electoral spending on television advertisements between Area A and Area B, there would be no basis to find that the legislation was "carefully tailored", and no broader social or political context to the legislation which could establish that the asymmetrical restrictions do not operate as a limitation on a citizen's right to meaningfully participate in the electoral process.

[23] *Saskatchewan Reference* at 194-195.

25. If, however, the evidence established that the government's rationale for the legislation was that voters in Area B traditionally had less access to other forms of media (print, radio and online) than voters in Area A, there is a *prima facie* basis to conclude that the legislation was designed to advance rather than inhibit the participatory democratic rights of citizens in the province. At that point, the Court may engage in an assessment of the legislation to determine if it is "carefully tailored", per *Harper*, and assess whether the aforementioned social geographic context is such that section 3 has not been breached.

26. This is not a justificatory analysis. The assessment does not focus on whether the breach of section 3 resulting from asymmetric election spending restrictions within the province is justified in a free and democratic society, and does not resort to a balancing of collective interests against individual rights. Rather, the assessment focuses on whether section 3 has been breached at all, given the government's rationale for enacting the asymmetric restrictions and the broader context which informs how the asymmetric restrictions will impact the ability of citizens to meaningfully participate in the democratic process.

27. The gravamen of the appellant's submission in this regard is that the majority erred by conflating the section 3 analysis with the section 1 analysis. BCCLA submits that the majority did not overlook the potential overlap between the section 3 analysis and the minimal impairment analysis in section 1. Rather, the majority addressed the potential overlap head on, and made clear that the section 3 analysis was different from the minimal impairment assessment within *Oakes*. The majority gave two reasons why the analysis was different: (a) the burden was on the rightsholder, and (b) the analysis did not focus on whether the impugned legislation constituted a reasonable choice among various *Charter*-infringing options, but whether the *Charter* right had been infringed at all.[24]

Consideration of a government's rationale does not shift the burden of proof

28. Justice Benotto, in dissent at the Ontario Court of Appeal, suggested that inviting consideration of the government's rationale "would require the government to lead evidence

[24] ONCA Reasons at para 89.

that would effectively shift the burden of proof".[25] The appellant echoes this concern in his factum.[26]

29. BCCLA submits, with respect, that the appellant's concern regarding the shifting of burden of proof at the infringement stage is misplaced. It is likely, but not invariably true, that evidence of a government's rationale in enacting certain legislation will be in the possession of the government. Individual rightsholders may access some of this evidence through freedom of information requests, or by obtaining public domain documents, but the remainder of relevant evidence will be within the possession and control of the government in question.

30. However, the fact that the evidence is in the possession and control of the government does not mean that the government is required to lead evidence of its rationale. The burden remains on the individual claiming a *Charter* infringement to prove the infringement. As with any claimant in the civil justice system, a *Charter* claimant may discharge this burden with evidence that was initially within their own possession and control, as well as with evidence that they obtained through the discovery process from the defendant. A citizen may establish a government's rationale in enacting certain legislation through document discovery, evidence given on examination for discovery and a number of other means available under the applicable court rules. Moreover, if a government decides to adduce evidence in anticipation of a section 1 analysis, a claimant may use this evidence to establish an infringement of section 3.

31. Contrary to the statement of Justice Benotto, considering a government's rationale within the section 3 analysis neither requires the government to lead evidence nor shifts the burden of proof for the alleged infringement. The government may choose not to lead any evidence of its own rationale, but such a decision is at its peril.

32. BCCLA submits that where there is a sudden change of previous constitutionally valid policy which has a *prima facie* effect of further limiting or restricting an individual's section 3 rights, it is open to the claimant to ask the Court to infer that the new policy is not "carefully tailored". In such a case, the claimant will have satisfied their burden of proof to establish an infringement of section 3. This was the result in the present case, where the majority held that the respondents were entitled to rely on the application judge's findings in *Working Families*

[25] ONCA Reasons at para 173.
[26] Appellant's factum at para 79.

1, in which the application judge held that a six-month restriction period with a $600,000 spending limit was reasonable to protect meaningful participation in the electoral process.[27]

33. Given that the restrictions in *Working Families 1* were found to be reasonable by the application judge in that case, the government's failure in the present case to provide any explanation for the doubling of the restriction period strongly suggested that there was a lack of "careful tailoring". Even in these unique circumstances, the burden of proof has not shifted to the government. The government had an opportunity to lead evidence to rebut the respondents' position that the legislation was not carefully tailored, and declined to do so. The court was left with the newly doubled restriction period and no explanation as to the rationale for the increase.

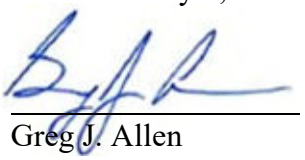
PART IV: COSTS

34. BCCLA seeks no order for costs and asks that no order for costs be made against it.

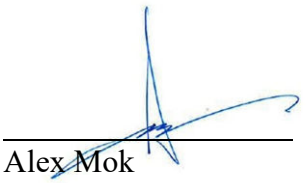
PART V: NATURE OF ORDER SOUGHT

35. Pursuant to the Order of the Chief Justice dated April 11, 2024, BCCLA has been granted leave to present oral argument at the hearing of this appeal for five minutes. As noted above, BCCLA takes no position on the outcome of the appeal.

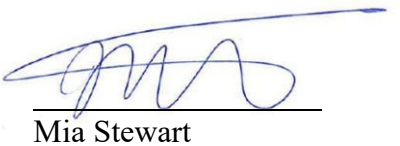
DATED: May 1, 2024



Greg J. Allen



Alex Mok



Mia Stewart

Counsel for the Intervener, British Columbia Civil Liberties Association

[27] ONCA Reasons at para 103.

PART VI – TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
Figueroa v Canada (Attorney General), 2003 SCC 37	8, 9, 10, 11, 12, 14, 19
Frank v Canada (Attorney General), 2019 SCC 1	11
Haig v. Canada, [1993] 2 SCR 995	7
Harper v Canada (Attorney General), 2004 SCC 33	13, 15
Harvey v New Brunswick (Attorney General), [1996] 2 SCR 876	10
Reference re Provincial Electoral Boundaries (Saskatchewan), [1991] 2 SCR 158	6, 12
Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68	11
Working Families Coalition (Canada) Inc v Ontario (Attorney General), 2023 ONCA 139	2, 17, 20, 23, 27, 28, 32