Supreme Court strikes down Ontario's third-party advertising spending limits as unconstitutional

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On March 7, 2025, the Supreme Court of Canada (SCC) issued its decision in *Ontario (Attorney General) v. Working Families Coalition (Canada) Inc,* 2025 SCC 5.

At issue was the constitutionality of Ontario's legislation that limits third party spending on political advertising in the 12 months leading up to a provincial election writ period. The SCC's decision was released just over a week following Ontario's provincial election on Feb. 28, 2025.

A narrow 5-4 majority of the SCC struck down the legislation as unconstitutional, finding that it violated Ontarians' right to cast an informed vote pursuant to s. 3 of the *Canadian Charter of Rights and Freedoms* (the Charter). The decision also included two dissents, collectively setting out three competing frameworks for the appropriate s. 3 analysis.

Background

Legislative background

The challenged spending limits were first enacted in 2017 as part of broader election financing reform. At that time, the spending limit was set at $600,000 for third parties and $1,000,000 for political parties for the 6-month period before the election writ was drawn up.

In 2021, the Ontario legislature amended the *Election Finances Act* (EFA) to extend the pre-writ period for third-party advertising from 6 months to 12 months. However, the $600,000 spending cap for third-party advertising remained unchanged for the extended pre-writ period.

These changes prompted several groups to challenge the third-party spending limits as a breach of freedom of expression guaranteed by s. 2(b) of the Charter. In *Working Families I*, 2021 ONSC 4076, the application judge, Justice Morgan, declared that the spending limits violated s. 2(b) and could not be saved by s. 1. In particular, he found that the limits failed the minimal impairment branch of the *Oakes* test based on evidence

from the government's own expert witnesses that both the 6-month and 12-month pre-writ periods were reasonable. He wrote, "it is hard to see how 12 months is minimal if 6 months will do the trick".

In response, the Ontario legislature quickly re-enacted the exact same spending limit in new legislation by invoking the notwithstanding clause (s. 33 of the Charter) to override any breach of ss. 2 and 7-15 of the Charter. A new constitutional challenge was launched, this time relying solely on s. 3 of the Charter to challenge the third-party spending limits in s. 37.10.1(2) of the EFA, since the notwithstanding clause does not apply to s. 3.

Judicial history

At first instance, Justice Morgan, hearing the new application, held that Ontario's third-party spending limit did not violate s. 3 as the law maintained the right of voters to participate in the electoral process through an informed vote. The application judge acknowledged that television advertising was significantly constrained by the spending limit but emphasized that third parties could still access low-cost media options and that the restrictions applied equally across the political spectrum. Additionally, the application judge was of the view that the restrictions served to prevent well-resourced parties from dominating the political discourse while not overly restricting the dissemination of relevant information to voters. He found that expert evidence supported the conclusion that either a 6-month or a 12-month restriction would foster egalitarian elections and held that the "tailoring of the law" was "careful enough to be appropriate".

On appeal, a majority of the Ontario Court of Appeal overturned the decision below. Justices Zarnett and Sossin, writing for the majority, held that the third-party spending limits were not carefully tailored and restricted access to political information. The majority held that the application judge applied the wrong legal framework to assess whether there had been a breach of s. 3.

In particular, Justices Zarnett and Sossin drew from language in an earlier SCC decision about spending limits, *Harper v. Canada (Attorney General)*, 2004 SCC 33, to identify what they referred to as two "proxies" for determining when a voter's right to meaningfully engage in the electoral process has been infringed: (1) whether the restrictions are "carefully tailored"; and (2) whether they allow for a "modest informational campaign". The majority concluded that the application judge had erred in finding the restrictions to be "carefully tailored" and made no findings as to whether a modest informational campaign would be possible.

Accordingly, the majority held that s. 37.10.1(2) of the EFA unjustifiably infringes s. 3 of the Charter and declared it to be of no force or effect. However, they ordered the declaration be suspended for 12 months to allow the Government of Ontario adequate time to enact Charter-compliant legislation.

In dissent, Justice Benotto would have dismissed the appeal. She concluded that the application judge applied the correct legal test, rejecting the majority's "proxies" and noting that the "careful tailoring" proxy impermissibly imported the s. 1 justification analysis into s. 3. She also concluded that on a fair reading, the application judge had found a "modest informational campaign" to be possible.

The Ontario government subsequently appealed the decision to the SCC. The Attorneys General of Canada, British Columbia, and Québec intervened as of right. The Chief Electoral Officer of Ontario and nine organizations, including the Centre for Free Expression, were granted leave to intervene. The appeal was argued over two days, on May 21 and 22, 2024.

The SCC

Majority (Karakatsanis, Martin, Kasirer, Jamal and O ’Bonsawin JJ.)

Writing for the five-judge majority, Justice Karakatsanis held that the third-party spending limit infringes s. 3 of the Charter because, by design, the impugned legislation creates “absolute disproportionality” between third parties and political parties. The majority held that the infringement could not be justified under s. 1, as the spending restrictions were not minimally impairing.

The majority endorsed the principle that a spending limit will infringe s. 3 where it allows a political actor or third party to have a disproportionate voice in the political discourse, thus depriving voters of a broad range of views and perspectives on social and political issues. To assess this, the majority adopted a comparative framework, requiring courts to consider whether the impugned provision allows certain actors to exert undue influence over political discourse, thereby suppressing other voices. This must be considered in the statutory context, including any limits imposed on other electoral participants. The majority held that the application judge erred by failing to compare the third-party spending limits to the rules governing political parties in order to assess the overall impact on voters’ right to meaningful participation.

Applying this approach, the majority described the spending limits as creating 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.” Notably, the majority held that, in this case, given the marked disparity on the face of the legislation, it was not necessary to consider the evidence to reach this conclusion.

The majority conducted a comparative analysis of spending limits imposed on political parties during the same period. It noted that while political parties face no spending limit during the first six months and a much higher $1,000,000 cap for the remaining six months, third parties are subject to a strict $600,000 limit for the entire 12-month period. This, the majority held, results in a significant qualitative disparity between political parties and third parties, leading to disproportionality in the political discourse. Political parties, by design, would be able to overwhelm the voices of third parties for a full year of the election cycle.

The majority concluded that the infringement could not be justified as it fails at the minimal impairment stage of the s. 1 analysis. The length of the spending limit far exceeds what would be reasonably necessary to achieve the objective of protecting electoral integrity. The majority cited the application judge’s acceptance in *Working Families I* of expert evidence that a 6-month period of pre-writ restrictions would be reasonable, as well as federal and other provincial legislation with less restrictive third-party spending limits.

Accordingly, albeit relying on a different framework for analysis than the Court of Appeal, the majority upheld the Court of Appeal's declaration that s. 37.10.1(2) of the EFA is of no force or effect.

Dissent (Wagner CJ. and Moreau J.)

Chief Justice Wagner and Justice Moreau, writing in dissent, would have allowed the appeal. They concluded that the provision did not violate s. 3 of the Charter, as voters still had sufficient access to political information. They emphasized that s. 3 is focused on ensuring that voters have a reasonable opportunity to participate, rather than balancing political discourse in the manner suggested by the majority. Further, unlike the majority, they focused on the evidence that was before the application judge and his findings based on that evidence. They found that there was no evidence that voters were deprived of any essential political information.

In their reasons, Chief Justice Wagner and Justice Moreau developed a different analytical framework for determining whether a measure violates s. 3 that is oriented towards the participatory and informational components of the right to meaningful participation in the electoral process. They held that the question of infringement is informed by an analysis of whether the impugned law had the effect of depriving a citizen of: (1) a reasonable opportunity to introduce their own ideas and opinions into the political discourse or (2) a reasonable opportunity to become informed of facts, ideas, and others' perspectives. To assess these two parts in the context of spending limits, they outlined a variety of factors that courts could consider, including the quantum and temporal reach of the limit, the scope of conduct it captures, and its impact on different forms of expression. The court may also consider whether the limit treats political actors differently, and if so, whether that differential treatment deprives some citizens of the right to speak or be heard, though they were clear to note that differential treatment alone is insufficient to find a breach of s. 3.

Applying this framework, Chief Justice Wagner and Justice Moreau concluded that there was insufficient evidence to establish that the impugned measure deprives citizens of a reasonable opportunity to introduce their own ideas and opinions into the political discourse or to become informed of facts, ideas, and others' perspectives.

Dissent (Côté J. and Rowe J.)

Justices Côté and Rowe, in a separate dissent, also concluded that the provision did not violate s. 3 and would have allowed the appeal.

Justices Côté and Rowe criticized the majority's comparative approach for focusing on whether the limit "creates disproportionality in the political discourse," which presupposes that s. 3 protects political discourse and extends to expressive rights. They emphasized that s. 3 is a voter-centric right and should not be conflated with the freedom of expression values protected by s. 2(b). In their view, s. 3 is a distinct right that does not overlap with s. 2(b) and therefore does not protect political expression.

Justices Côté and Rowe similarly disagreed with the dissent by Chief Justice Wagner and Justice Moreau on the issue of whether s. 3 includes an expressive component. In their view, s. 3 requires the court to determine only whether the *informational component* of the right to vote has been infringed, specifically, whether the legislation

deprives voters of the ability to obtain enough information to make an informed electoral choice. Otherwise, Justices Côté and Rowe agreed with much of the analysis by Chief Justice Wagner and Justice Moreau, including the relevant considerations to determine whether s. 3 has been infringed, provided the focus remains on the informational component in s. 3. They would add one additional factor: the totality of information available.

Justices Côté and Rowe applied the factors identified by Chief Justice Wagner and Justice Moreau, as well as the totality of the information available, and concluded that the spending limit does not deprive voters of the information needed to cast an informed vote, thereby not violating s. 3.

Key takeaways

The SCC majority's decision strengthens protections for third-party political advocacy by recognizing where limits on third parties' political expression will violate s. 3 of the Charter. Because the right to vote–including the right to meaningfully participate in the electoral process–lies at the very heart of our constitutional democracy, it is excluded from the application of s. 33 of the Charter. In other words, it is a right that cannot be overridden by the government of the day.

The Government of Ontario will have an opportunity to introduce new spending limit legislation to replace that which was struck down by the courts as unconstitutional. To be constitutionally compliant, any new limit cannot allow any political actor or third party a disproportionate voice in the political discourse. Limits that are markedly disparate for third parties versus political parties will therefore not meet constitutional muster.

The majority's decision, however, provides little guidance on the degree of parity between third-party and political party spending limits needed to pass constitutional scrutiny. The majority recognized that the limits do not need to be identical. However, given that the majority found the disparity was so clear here and did not engage in any evidentiary analysis, it is difficult to determine in practical terms what will qualify as "absolute disproportionality" and what will pass Charter scrutiny going forward. It remains to be seen whether any re-enacted third-party spending limits will find themselves subject to further court challenge.

Finally, one issue that is not addressed by the decision in *Working Families II* is the role of advertising on behalf of the sitting government. Such advertising, too, may be arguably political in nature–designed to influence voters by touting the accomplishments of the sitting government and therefore meant to be associated with the governing political party of the day. If such advertising is not subject to legislative limits like the spending of third parties and political parties, it raises the query of whether it has the potential to overwhelm the political discourse where those parties' spending is limited.

BLG served as co-counsel to the intervener the Centre for Free Expression (CFE) at each stage of the application, before the Superior Court of Justice, the Court of Appeal for Ontario, and the SCC. Authors Laura M. Wagner and Alicia Krausewitz served as co-counsel to the CFE in its intervention before the SCC, along with Jamie Cameron, Professor Emerita, Osgoode Hall Law School, and Christopher D. Bredt, ADR Chambers.

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