S.C.C. File No. 40725

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

B E T W E E N:

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 SCHOOL TEACHERS' FEDERATION AND LESLIE WOLFE

Respondents
(Appellants)

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ALBERTA, 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, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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PART I — OVERVIEW

1. Advocates for the Rule of Law ("**ARL**") intervenes on a single issue: the differences between s. 2(b) and s. 3 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"), and in particular the distinct analytical frameworks for assessing alleged limits of these protections. ARL submits that the majority's approach in the court below wrongly conflates s. 2(b) and s. 3.

2. The protections afforded by s. 2(b) and s. 3 of the *Charter* are not coextensive. Rather, they are distinct protections with different texts, purposes, and structures. One protects the "freedom" to express oneself without state interference, while the other protects the "right" to participate in the democratic process by voting and imposes corresponding duties on the state. One falls under the heading of "fundamental freedoms", while the other falls under the heading of "democratic rights". One is subject to legislative override, while the other is not. While there may be some overlap between the two distinct protections, such overlap is purely incidental—not by design.

3. In keeping with the distinct texts, purposes, and structures of these protections, the Court's jurisprudence calls for distinct analytical frameworks to assess alleged limits of s. 2(b) and s. 3. But the majority's approach in the court below fails to heed this guidance and erroneously conflates the distinct s. 2(b) and s. 3 analytical frameworks. In particular, the majority wrongly assumes that an unjustified limit on s. 2(b) in the context of political speech necessarily entails an unjustified limit on s. 3.

4. This assumption is incorrect. The nature and degree of a limit on s. 2(b) does not determine, or even necessarily predict, the nature and degree of a limit on s. 3, or *vice versa*. To the contrary, the same state action may have a very different impact on s. 2(b) and s. 3 protections depending on the circumstances. In some instances, a limit of one protection may have a proportionate limiting effect on the other. In other instances, the relationship may be inverse. In still other instances, the relationship may be imperfect or even non-existent. For example, a limit on s. 2(b) may in some cases have no effect at all on s. 3.

5. To ensure that Canadians receive the full benefit of both s. 2(b) and s. 3, each protection must be interpreted in accordance with its own unique purpose, as reflected and constrained by its text and place within the structure of the *Charter.* While each protection plays a vital role in our constitutional democracy, those roles are not the same.

PART II — STATEMENT OF POSITION

6. ARL makes two main submissions. First, s. 2(b) and s. 3 of the *Charter* are different rights that serve different purposes. Second, the approach taken by the majority in the court below wrongly conflates s. 2(b) and s. 3 of the *Charter.*

PART III — ARGUMENT

A. SECTIONS 2(B) AND 3 ARE DIFFERENT RIGHTS WITH DIFFERENT PURPOSES

(1) THE DIFFERENT PURPOSES OF FREEDOM OF EXPRESSION AND THE RIGHT TO VOTE

7. The *Charter* is a "purposive document" whose interpretation requires a "purposive analysis".[1] The central precept of this purposive approach is that each *Charter* protection must be interpreted in light of "the interests it was meant to protect"—*i.e.*, its own unique purpose.[2] But the Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time"; rather, purpose is revealed—and constrained—by the text of the Constitution.[3] Although the *Charter*'s protection is broad, it is not boundless.

8. Freedom of expression under s. 2(b) and the right to vote under s. 3 serve different purposes.[4] One protects the freedom to express oneself without state interference, while the other protects the right to vote in elections and thereby participate in the democratic process.[5] Whereas s. 2(b) protects a "freedom" from state interference, s. 3 protects a "right" that imposes corresponding duties on the state (*e.g.*, the duty to create an electoral process and hold elections).[6]

(i) Section 2(b): Freedom of Expression

9. Section 2(b) guarantees everyone in Canada "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". This section guarantees a freedom *from* state interference, in the sense that it "prohibits gags, but does not compel the distribution of megaphones".[7]

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[1] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156.
[2] *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 344 [emphasis added].
[3] *Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 32 [***Québec inc.***] at para. 9.
[4] *Harper v. Canada (Attorney General)*, 2004 SCC 33 [***Harper***] at para. 67.
[5] *Harper, supra* note 4 at paras. 66, 67, 72.
[6] *Haig v. Canada*, [1993] 2 S.C.R. 995 [***Haig***] at 1032, 1035.
[7] *Haig, supra* note 6 at 1035.

10. Section 2(b)'s free expression guarantee serves three broad purposes: (1) encouraging the search for the truth through the open exchange of ideas; (2) promoting individual autonomy and self-actualization; and (3) facilitating participation in political and social decision-making.[8]

11. Freedom of expression plays a vital role in our constitutional democracy, and political expression lies at "the very heart of the values sought to be protected" by the s. 2(b) guarantee.[9] Free expression is instrumental to democratic governance, and the "connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee".[10]

12. A broad range of political expression falls within s. 2(b)'s protection. For example, s. 2(b) protects expression through voting,[11] political advertising,[12] political spending,[13] broadcasting election results,[14] and publishing polling information and opinion surveys.[15] In the context of political advertising, freedom of expression protects not only the freedom of the persons doing the advertising to express ideas or convey meaning,[16] but also the freedom of voters to receive the information required to cast an informed vote.[17]

13. However, as this case demonstrates, s. 2(b) is subject to legislative override under s. 33 of the *Charter*. Thus, where "a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions".[18]

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[8] *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 764-5.

[9] *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 [***Libman***] at para. 29.

[10] *R. v. Keegstra,* [1990] 3 S.C.R. 697 at 763.

[11] *Haig, supra* note 6 at 1041.

[12] *Harper, supra* note 4 at para. 66.

[13] *Libman, supra* note 9 at para. 35.

[14] *R. v. Bryan*, 2007 SCC 12 at para. 26.

[15] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 [***Thomson Newspapers***] at para. 85.

[16] *Working Families Ontario v. Ontario*, 2021 ONSC 4076 [***Working Families 1***] at para. 34.

[17] *R. v. National Post*, 2010 SCC 16 at para. 28; see also *Harper, supra* note 4 at para. 17, *per* McLachlin C.J. and Major J. (dissenting in part but not on this point).

[18] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 [***Toronto v. Ontario***] at para. 60 [emphasis in original].

(ii) Section 3: The Right to Vote

14. Section 3 of the *Charter* guarantees "[e]very citizen of Canada … the right to vote in an election of members of the House of Commons or of a legislative assembly…". This section guarantees a "positive" right that imposes corresponding duties on the state to take certain actions to facilitate the electoral process (*e.g.*, the duty to create an electoral process and hold elections).[19]

15. The purpose of the right to vote under s. 3 is "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".[20] The primacy of this right, which lies "at the heart of our constitutional democracy",[21] is signalled by its immunity from legislative override under s. 33 of the *Charter*.

16. At the core of this guarantee, and implicit within it, is the right to "effective representation".[22] Effective representation entails the right to have "a voice in the deliberations of government".[23] It aims to ensure relative parity in voting power, with the qualification that our legislative assemblies must remain representative of Canada's diverse social mosaic.[24] It also requires meaningful participation: "[c]itizens' political choices cannot be effectively represented unless they have the opportunity to participate in the process in a meaningful way".[25]

17. The Court has held that the right to effective representation, and the related right of meaningful participation, entail an informational component: the right to cast an *informed* vote.[26] This requires that voters be informed of *all* views, not just *some*.[27] However, the right to vote remains first and foremost a *participatory* right, not an *informational* right: it guarantees "the right to vote in an election" and thereby participate in the democratic process.

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[19] *Haig, supra* note 6 at 1032.
[20] *Haig, supra* note 6 at 1031.
[21] *Thomson Newspapers*, *supra* note 15 at para. 79.
[22] *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 [***Sask. Reference***] at 183.
[23] *Sask. Reference, supra* note 22 at 183.
[24] *Sask. Reference, supra* note 22 at 183-4.
[25] *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 [***Figueroa***] at para. 100 (*per* LeBel J., dissenting, not on this point); *Harper, supra* note 4 at para. 71.
[26] *Harper, supra* note 4 at paras. 69-70.
[27] *Harper, supra* note 4 at para. 72.

18. Although the text of s. 3 is unqualified, the implicit rights to "effective" representation and "meaningful" participation are not. Section 3's purpose "is not to protect the right of each citizen to play an unlimited role in the electoral process, but to protect the right of each citizen to play a meaningful role in the electoral process".[28] Therefore, "the mere fact that the legislation departs from absolute voter equality or restricts the capacity of a citizen to participate in the electoral process" does not itself establish a limit on s. 3.[29] Rather, the claimant must show that the impugned state action impairs voter parity to such a degree that it precludes *effective* representation,[30] or limits *meaningful* participation in the electoral process.[31]

19. It follows that the threshold for establishing a limit on the implied rights to effective representation or meaningful participation under s. 3 is higher than the threshold for establishing a limit on freedom of expression under s. 2(b). Whereas s. 3 offers *qualified* protection of certain implicit rights that are essential to fulfilling the purpose of the right to vote (*meaningful* participation and *effective* representation), s. 2(b) has no such qualifications ("freedom of expression", not freedom of *effective* or *meaningful* expression).

(2) THE STRUCTURE OF THE *CHARTER* REFLECTS AND CONSTRAINS THESE PURPOSES

20. The structure of the *Charter* reflects and constrains the different purposes of s. 2(b) and s. 3. The framers placed these two protections not only in different sections, but under separate headings: the *Charter* groups freedom of expression with other "Fundamental Freedoms" under s. 2, while it places the right to vote with other "Democratic Rights" under ss. 3-5. The text and structure of these protections within the *Charter* reflects their distinct purposes.

21. While there may be incidental overlap between s. 2(b) and s. 3, such overlap is not by design: the structure of the *Charter* reveals no inherent relationship between s. 2(b) and s. 3.

22. Rather, the *Charter* establishes three types of relationships: (1) protections in the same section or subsection, which the framers must have envisaged as having strong affinity or overlap; (2) protections under the same heading, which the framers must have envisaged as having some

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[28] *Figueroa, supra* note 25 at para. 36 [emphasis in original]; see also *Harper, supra* note 4 at para. 67.
[29] *Figueroa, supra* note 25 at para. 36; see also *Harper, supra* note 4 at para. 67.
[30] *Sask. Reference, supra* note 22 at 187.
[31] *Harper, supra* note 4 at paras. 67, 70-1.

affinity or overlap; and (3) protections under different headings, which the framers must have envisaged as having no direct overlap, such that any overlap is purely incidental. Sections 2(b) and 3 fall into the third category.

23. The strongest relationship exists between different *Charter* protections contained within the same section or subsection of the *Charter*. For example, s. 2(b) protects not only freedom of expression, but also freedom of thought, belief, and opinion, and these freedoms "include" freedom of the press—each highly related to freedom of expression. The decision to include all these protections within the same subsection suggests that the framers envisaged such a strong relationship between freedom of thought, belief, opinion, and expression that to separate them would lead to substantial redundancy. Similarly, s. 3 includes not only the right to vote, but also the related right to be qualified for membership in elected government roles.

24. The framers must have also envisaged overlap between different rights protected under a single section, or separately enumerated protections housed under a single heading in the *Charter*. For example, s. 2 protects free expression alongside three other fundamental freedoms: conscience and religion, peaceful assembly, and association. Based on this structural choice, the framers must have envisioned some conceptual overlap between these enumerated freedoms, which are all freedoms *from* state interference in aspects of private life, even if the overlap is not so significant that the protections could be reduced to a single right. Similarly, the framers placed ss. 3-5 under the heading of "Democratic Rights", signalling a relationship between each enumerated protection, although not one strong enough to justify reducing the ss. 3-5 rights to a single section, or to subsections of the same protection.

25. Where protections are not only enumerated separately, but also organized under separate headings—as is the case with s. 2(b) and s. 3—this suggests that any overlap is purely incidental.

26. The *Charter* "could have been different but is not".[32] Although the framers *could have* chosen to create omnibus protection for "the rights and freedoms of a free and democratic society", they instead chose to enumerate specific rights and freedoms grouped under different headings, using different language. This choice must be given effect: the *Charter* must be interpreted in a manner that is faithful to its structure and text. To ignore these carefully delineated boundaries

[32] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 S.C.R. 749, at 840, *per* Beetz J.

would risk rendering s. 2(b) and s. 3 redundant in the context of political speech.[33]

B. THE MAJORITY'S APPROACH WRONGLY CONFLATES SECTIONS 2(B) AND 3

27. The majority's approach in the court below fails to heed these basic differences in text, purpose, and structure, erroneously conflating the distinct s. 2(b) and s. 3 analytical frameworks. Although the majority's approach acknowledges distinctions between s. 2(b) and s. 3 at a superficial level,[34] its effect is to treat the two protections as if they were coextensive, wrongly conflating s. 2(b) and s. 3 by assuming that an unjustified limit on s. 2(b) in the context of political speech necessarily entails an unjustified limit on s. 3. Among other things, it wrongly faults the application judge for not applying his s. 2(b) findings to his s. 3 analysis.

28. This approach lacks rigour and fidelity to the text and structure of the *Charter* and to this Court's guidance. It risks overshooting—and indeed confusing—the unique purposes of these distinct protections.[35]

29. In *Working Families 1*, Morgan J. found that the same $600,000 third-party spending limit, when spread over a 12-month period rather than a 6-month period, was "twice as restrictive" of freedom of expression under s. 2(b).[36] However, in applying the s. 3 framework in *Working Families 2*, Morgan J. found that this spending limit did not limit the right to vote under s. 3.[37]

30. On appeal, the majority criticized Morgan J.'s analysis in *Working Families 2* for "[f]ailing to properly apply findings" from his earlier s. 2(b) decision in *Working Families 1*, and reasoned that a measure restricting expression of "political information of value from third parties" under s. 2(b) will necessarily entail a directly proportionate restriction of s. 3.[38]

31. This approach wrongly conflates s. 2(b) and s. 3.

32. To be sure, s. 2(b) and s. 3 share some overlap in their scope of protection. For example, s. 2(b) and s. 3 both protect the act of voting, which is both an expression of a political ideal and a

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[33] See *e.g.*, *Toronto v. Ontario, supra* note 18 at para. 82.

[34] See *e.g.*, *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139 [***Working Families ONCA***] at para. 81.

[35] *Québec inc.*, *supra* note 3 at para. 10.

[36] *Working Families 1*, *supra* note 16 at para. 75.

[37] *Working Families Coalition (Canada) Inc. v. Ontario*, 2021 ONSC 7697 at para. 113.

[38] *Working Families ONCA*, *supra* note 34 at paras. 101 (heading), 109, 112, 140.

form of participation in the democratic process. But this overlap is purely incidental—it is a reflection of the role free expression plays in our constitutional democracy, not of a coextensive relationship between freedom of expression and the right to vote. The text and structure of the *Charter* make this clear.

33. By virtue of the incidental overlap between these two protections, state action that limits freedom of expression may in some cases limit the right to vote. For example, a law prohibiting Manitobans from voting in federal elections would not only limit their freedom of expression under s. 2(b), but also limit their right to vote under s. 3. But as a doctrinal matter, the fact that a law limits freedom of political expression does not necessarily (or even likely) mean that it also limits the right to vote, or that the nature and degree of the limit on these two protections are the same or even similar.

34. Indeed, in some instances, the two protections may actually have an *inverse* relationship. As in *Harper v. Canada (Attorney General)*, limiting political expression under s. 2(b) may actually "*enhance*… the right to vote" where it brings "greater balance to the political discourse" and therefore facilitates "meaningful participation in the electoral process".[39]

35. In other instances, the two protections may have an imperfect relationship, or no relationship at all. For example, contrary to the majority's approach, the fact that a law is twice as restrictive of *freedom of expression* does not necessarily mean that it is twice as restrictive of *the right to vote*. To illustrate, a law that prohibits profanity in political advertising may limit freedom of expression, but may have no impact whatsoever on the right to vote—it may not interfere with a citizen's ability to participate meaningfully in the democratic process by voting for their preferred political representatives.

36. Thus, the nature and degree of impact on s. 2(b) does not necessarily predict the nature and degree of impact on s. 3, or *vice versa*. Because the right to vote is first and foremost a *participatory* right, limits on political expression will limit the right to vote only if they interfere with meaningful participation in the democratic process by voting. Such instances should be rare.

37. A limit on freedom of expression under s. 2(b) thus does not necessarily entail a limit on the right to vote under s. 3, and findings made in the s. 2(b) context do not necessarily have

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[39] *Harper, supra* note 4 at para. 86 [emphasis added]; see also *Working Families ONCA*, *supra* note 34 at para. 81.

purchase in the s. 3 context. As the dissent in the court below observed, s. 2(b) and s. 3 findings are made "through a different legal lens",[40] even if there is incidental overlap between the two.

38. In some ways, s. 2(b)'s protection extends more broadly than s. 3's protection. Section 2(b) protects political expression of all kinds, while s. 3 protects only the right to vote in federal and provincial elections.[41] Even when the state imposes limits on expression in an election context, the protection afforded by each section stands on its own footing. The majority ignored this conceptual and textual independence when it analyzed the application judge's s. 3 analysis in *Working Families 2* by reference to his s. 2(b) analysis in *Working Families 1*.

39. The doctrinal differences between these two protections also have practical consequences. Whereas s. 2(b) is subject to legislative override under s. 33 of the *Charter*, s. 3 is not. If the right to vote under s. 3 is interpreted as being coterminous with freedom of political expression under s. 2(b), this would effectively circumvent s. 33, immunizing restrictions of political expression under s. 2(b) from legislative override despite the clear contrary intent reflected in s. 33.[42]

40. For clarity, this appeal does not engage an analysis of s. 33 at all. By design, a case about the interpretation of s. 3 never *could* engage a s. 33 analysis, as the right to vote is not subject to legislative override. The Court therefore should not accept any invitation to interpret s. 3 differently in circumstances where s. 33 has been invoked in respect of democratic expression, as such an invitation wrongly blurs the lines between s. 2(b) and s. 3 and subverts the deliberate choice to make one—but *not* the other—subject to legislative override. Nor should the Court try to discourage—or encourage—the invocation of s. 33. As stated in the Appellant's Factum, "Section 3 is the sole *Charter* right before this Court".[43] This is so for good reason.

41. To preserve the integrity of the *Charter*, and to ensure Canadians benefit from the full scope of protection afforded by each of its separate provisions, the Court should provide guidance on the relationship and differences between s. 2(b) and s. 3. While each protection plays a vital role in our constitutional democracy, those roles are not the same.

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[40] *Working Families ONCA*, *supra* note 34 at para. 186 (*per* Benetto J.A., dissenting).
[41] *Haig, supra* note 6 at 1033.
[42] *Toronto v. Ontario, supra* note 18 at paras. 60-1.
[43] Appellant's Factum at para. 53.

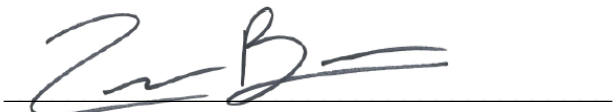
PART IV — SUBMISSIONS CONCERNING COSTS

42. As an intervener, ARL asks that no costs be awarded to or against it.

PART V — ORDER SOUGHT

43. ARL takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of May, 2024.



Connor Bildfell | Lindsay Frame

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Case Law	**Paragraph(s)**
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