File Number: 40725

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

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant

-and-

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

Respondents

-and-

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I - CONCISE OVERVIEW OF POSITION AND CONCISE STATEMENT OF FACTS

OVERVIEW

1. The justifiability of spending limits on political advertising depends on whether they effectively restrain the distortionary and undemocratic effect of wealth in electoral politics. Carefully crafted limits can do so by ensuring that each voter is afforded an equal voice in the political process, regardless of their material circumstances. But spending limits that overlook the inegalitarian backdrop of electoral politics can undermine democratic principles – and efface the right to vote – by consolidating the expressive power of voters with greater financial resources.

2. The spending limits introduced in subsection 37.10.1(2) of Ontario's *Election Finances Act* (the "Impugned Provisions" of the "*EFA*") fall into the latter category. They introduce a universal, indiscriminate ceiling on advertising expenditure that is insensitive to material differences between third parties, including the number of citizens for whom a given organization speaks. The *EFA* permits a wealthy individual to speak at the same volume as an organization that represents 10,000 Ontarians. Rather than ameliorating the inegalitarian effect of money in politics, the *EFA* entrenches it.

3. The result is an impoverished conception of the right to meaningful and equal political participation, an electoral process shaped by the inegalitarian distribution of wealth, and a substantively weakened democracy. Democracy Watch submits:

a) Third-party advertising spending limits are *Charter* compliant only if they limit the distortionary, undemocratic impact of wealth in politics and are consistent with the three principles of the Supreme Court of Canada's egalitarian model, namely:

   (i) ensuring close to equal opportunity for close to equal, meaningful participation in political processes;

   (ii) ensuring the appearance of integrity, and actual integrity, of political processes, so the public can have confidence in the processes, and;

   (iii) ensuring that voters have sufficient information for informed participation in political processes, including voting.

b) The ONCA misapprehended the constitutional defect of the spending limits at issue in this appeal in a manner that fails to vindicate the principles underlying s. 3 of the *Charter*. The limits are not unconstitutional because they are unreasonably low, as the ONCA found, but instead because they are identical for very different types of third parties (from one voter to a citizen group with thousands of members) which violates the principles of equality of opportunity for equal participation and the principle of ensuring integrity to ensure public confidence principle of the Supreme Court's egalitarian model, as the Court established in its ruling in *Libman*.

c) As the ONCA found, the *EFA* limits are not based on any reasonable assessment of the spending needed to undertake a "modest informational campaign" and, therefore, violate the principle of the egalitarian model concerning adequate information for voters.

STATEMENT OF FACTS

4. Democracy Watch relies upon the facts set out by the parties.

PART II - STATEMENT OF ARGUMENT

5. The core issue in this appeal is whether the *EFA*'s limit on third-party election advertising expenditure infringes the right to vote under s. 3 of the *Charter*. This inquiry turns on the proper analytical approach for determining whether such limits are designed in a manner that respects and preserves the rights of citizens to participate meaningfully and equally in the electoral process.

6. The proper test is whether the proposed limits comply with the three principles of this Court's egalitarian model. The *EFA* is unconstitutional because it contravenes all three principles.

A. SECTION 3 APPLIES DURING THE PRE-ELECTION PERIOD

7. Jurisprudence from this Court suggests that the protections afforded to voters by s. 3 of the *Charter* extend to the pre-election period. The purpose of s. 3 is to grant voters "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".[1] The exercise of these rights is premised on informational and participatory rights that cover not only the act of casting a ballot, but also the period during which ideas are expressed and political forces are marshalled.

8. This is consistent with the Court's ruling in *Harper* that s. 3 upholds equality in political discourse and protects the right to meaningful participation in the "political process" and to be "effectively represented."[2] These rights are hollow if they have no application during the pre-election period. This Court should affirm the finding of the Application Judge that s. 3 must apply to the pre-election period "if the egalitarian model of elections is to be preserved."[3]

B. BETWEEN-ELECTION SPENDING LIMITS CONSTITUTIONAL IF THEY COMPLY WITH EGALITARIAN MODEL

9. The distortionary effect of wealth in politics extends to the pre-election period in which political ideas circulate and the contours of debate are formed. There are legitimate concerns about balancing the suppression of political speech against the preservation of fair elections in which every citizen can participate meaningfully. Those concerns are best assuaged by a clear requirement that pre-election spending limits must efface, rather than amplify, the deleterious effects that wealth plays in the political process. Consistency with the egalitarian model is the surest means of doing so.

C. TO BE CONSTITUTIONAL, SPENDING LIMITS MUST REFLECT DIFFERENCES BETWEEN THIRD PARTIES

(i) The ONCA's limited ruling vs. the Supreme Court's broader egalitarian framework

10. The decision below held that the *EFA* violate s. 3 the *Charter* because it set spending limits that are not "carefully tailored" to the objective of the legislation.

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[1] *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 SCR 158, p. 183 (subsection III.C).
[2] *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 SCR 827, paras. 72-73 ("*Harper*") [emphasis added].
[3] *Working Families Coalition (Canada) Inc. v. Ontario*, 2021 ONSC 7697 (CanLII), para. 68 ("*Working Families 2*").

11. This conclusion about the *EFA*'s tension with s. 3 is sound – but it was reached for reasons which do not cohere with this Court's treatment of s. 3. The analysis of the ONCA was focused only on whether the spending limit was too low, given that the Impugned Provisions extended the period during which they applied from six months before the issuance of a writ of election to 12 months before the writ.

12. Respectfully, the ONCA improperly focussed its analysis on the level at which an indiscriminate limit should be set, rather than whether an indiscriminate limit, applied alike to all parties, is consistent with the egalitarian model. The ONCA offered only a cursory treatment of the fact that the $600,000 limit, and $24,000 limit are the same for every third party, whether the third party is one individual voter, an organization comprised of a handful of voters, or an organization made up of thousands of voters.

13. The Supreme Court has yet to address directly whether s.3 imposes a constitutional requirement that spending limits must be designed with sensitivity to the character, size, and wealth of the entities to which they apply. While the Court in *Harper* upheld limits that, like the Impugned Provisions, were the same for every third party, it did not consider whether such a limit is in tension with the egalitarian model.

14. However, as discussed below, the contours of a constitutional requirement to draw spending limits with reference to the distinctive features of various third parties are visible in the Court's jurisprudence. In *Libman*, in the context of a referendum, the Court considered spending limits that were calibrated to the unique features of different third parties, and stated clearly that the limit for a single voter should be lower than the limit for an organization that represents many voters. The principle animating the decision in *Libman* is clear: limits that give a single wealthy voter the same "voice" as an organization representing 10,000 Ontarians unfairly constrains political participation by entrenching the disproportionate effects of wealth in politics.

15. This cogent principle applies with equal force to the context of election spending. This appeal provides the Court with an opportunity to draw upon its earlier decision in *Libman* to develop a comprehensive test that fixes the constitutional compliance of election spending limits to the principles of the egalitarian model. Failure to comply with the egalitarian model vitiates the protections afforded by s. 3.

(ii) Spending limits must ensure equality of opportunity for equal participation

16. The Supreme Court's egalitarian model addresses the concern that "wealth is the main obstacle to equal participation" and has as its objective "an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power."[4]

17. As the Supreme Court held in *Libman*, "[i]f the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate…".[5] Similarly, it held in *Harper* that the primary limitation on citizens having an equal opportunity for equal participation in election debates is "a lack of means, not legislative restrictions" because "the vast majority of Canadian citizens simply cannot spend" amounts allowed by the limits as they do not have the money.[6]

18. The first principle of the egalitarian model is that each voter must be given a close to equal opportunity for close to equal participation in political processes.[7] Meaningfully equal participation cannot occur where one individual is permitted to spend as much as a citizen organization that represents thousands or tens of thousands of voters.

19. Limits on spending should be calibrated to the size of the entity whose expenditure they restrict. An organization that represents many voters should be allowed to spend more than an individual voter or a few voters. Such an organization represents an aggregation of political preferences that amplifies the voices of many voters, which the Supreme Court has recognized as a democratic value.[8] One voter, no matter how wealthy, only ever represents the voice of one voter. That voter cannot be allowed to speak at the same volume as the voices of several – or several thousand– voters of lesser means.

20. This is precisely the effect of the Impugned Provisions. By setting the same limit for wealthy individuals and organizations representing many voters, the *EFA* permits wealthy

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[4] *Harper*, paras. 61-62.
[5] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 596 (CanLII), para. 47 ("*Libman*").
[6] *Harper*, para. 113.
[7] *Harper*, paras. 23-24, 63, 79, 82-83, 91-92, 97, 99, 101-104, 108-109, 120, 122, 142 and 146. *Libman*, paras. 41, 52 and 84.
[8] *Figueroa v Canada (Attorney General)*, 2003 SCC 37 (CanLII), [2003] 1 SCR 912, para. 31.

individuals to dominate electoral discourse. One wealthy voter could spend $600,000 – 6,000 times more than a low-income voter who can only afford to spend $100, and six times more than an organization that can only afford to spend $100,000 even though it represents 1,000 low-income voters. This violates the first principle of the egalitarian model.

21. The means of ameliorating this constitutional defect has already been identified by the Court. In *Libman*, the Court held that it would be consistent with the egalitarian model, in the context of a referendum, to limit the spending of one voter to a relatively low amount while allowing yes and no "national committees" and their affiliated groups to spend a much larger amount because they represent many voters (with affiliated groups being allowed to spend amounts based on the number of voters they represent).[9] The *EFA* should be similarly structured.

(iii) The EFA will undermine public confidence in the integrity of the political process

22. The second principle of the egalitarian model is that close to equal opportunity for close to equal influence is required for public confidence in the appearance of integrity, and actual integrity, of political processes.[10]

23. By allowing a single wealthy voter or a few wealthy voters to spend as much as an organization that represents thousands or tens of thousands of voters, the Impugned Provisions offer wealthy voters a greater opportunity to influence political processes. The visible nature of this unequal treatment sends a corrosive signal about the diminished importance of political participation of less wealthy voters and the organizations through which the express their views. This erodes public confidence in the integrity of the political processes protected by s. 3.

(iv) Democracy Watch's position is neutral as to the value of political speech

24. The ONCA majority dismissed Democracy Watch's position by imputing to it and rejecting the principle that "certain third party advertisers convey information of higher value" than others. To the extent this statement reflects concern about inviting the Court to evaluate the

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[9] *Libman*, paras. 10-12, 53-54, 56 and 70 especially, and 76-81.
[10] *Harper*, paras. 23-24, 63, 79, 82-83, 91-92, 97, 99, 101-104, 108-109, 120, 122, 142 and 146. *Libman*, paras. 41, 52 and 84.

relative merit of different political positions, it is a misapprehension of Democracy Watch's argument. No concern arises.

25. Democracy Watch is agnostic as to the *substantive* value of the political speech of different third parties. Instead, its position is that an egalitarian distribution of the *power* to affect electoral politics through speech is itself valuable, and this value is unattainable where indiscriminate spending limits give one wealthy voter a louder voice than less wealthy voters.

26. For the purposes of crafting rules for a fair political process that ameliorates unequal wealth distribution, there is no basis to distinguish between the value of the information conveyed by different voters. But there is significant value in an aggregation of voters who have combined their resources in order to amplify their voice above what each individual could achieve on their own. From the perspective of a vibrant democracy, where wealth is *not* a correlate to political influence, the speech of an organization constituted of multiple voices is more valuable than the speech of a single wealthy voter who advocates for themselves.

27. Indiscriminate spending limits like those at issue in this appeal imperil this value. By permitting a single voter to speak at the same volume as potentially thousands of less wealthy voters, the *EFA* draws an unjustifiable equivalence between their respective speech. But the voice of one voter is not as important or as valuable to the electoral process as the common voice of thousands of voters. The *EFA* offends s. 3 because it contravenes this principle.

28. The Supreme Court should establish that the egalitarian model requires that spending limits must be calibrated to the material differences between the entities whose expenditure they restrain. The imposition of a representation-based criterion for setting spending limits would enhance democratic institutions and foster the participatory culture to which s. 3 is oriented. The specific limits themselves fall to be determined through the normal legislative process.

D. REALISTIC COST FOUNDATION IS A CONSTITUTIONAL CONDITION OF SPENDING LIMITS

29. As the ONCA found, the *EFA*'s limits set spending limits that were not based on any reasonable assessment of the spending needed to undertake a "modest informational campaign." As a result, they violate the third principle of the egalitarian model – namely that the rules must

ensure voters have adequate information to make informed choices in political processes (paras. 123-136).

30. The ONCA minority would have upheld the conclusion of the Application Judge that the spending limits allowed for a "modest informational campaign" (para. 191). This conclusion rested on the Applicant Judge's ruling that "multiple studies" were done showing that applying the same limits to the 12-month period as was previously applied to a 6-month period is reasonable and, therefore, the limits are carefully tailored.

31. With respect, no such studies of the actual cost of a modest campaign to inform voters in Ontario are part of the record of this proceeding, nor were any such studies completed before the Ontario government limited advertising spending by third parties to $600,000 province-wide and $24,000 in an electoral district during the six-month period before the issue of a writ of election. Before those limits were enacted in Ontario, the previous government did not complete any studies before it enacted an arbitrary limit on third-party spending during the election period of $100,000 province-wide and $4,000 in an electoral district. And all the previous government did was multiply those arbitrary amounts by six to set $600,000 and $24,000 as the six-month limits.

32. In other words, as the ONCA found, the 12-month pre-election limits were set arbitrarily based on arbitrary six-month pre-election limits which were based on arbitrary election limits.

33. As the majority of the ONCA points out, the Application Judge "referred to no evidence" and the Attorney General "refers to no evidence" and neither of the Attorney General's experts, Professor Jansen and Mr. Kingsley, "addressed the costs" of an actual modest informational campaign (paras. 127-130 and 133-134).

34. The affidavits of another of the Attorney General's experts, Tamara Small, contain summary evidence of the spending pattern of third parties in recent Ontario and federal elections, but that is only evidence of what third parties spent, not evidence of what the actual costs are for a modest informational campaign at the province-wide level or district level.[11]

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[11] Affidavit of Tamara Small, sworn September 16, 2021, Attorney General's AR, Vol 9, Tab 3, paras. 52-63, pp. 3709-3714. Affidavit of Tamara Small, sworn May 18, 2021, Attorney General's AR, Vol 9, Tab 3, Exhibit B, paras. 11-20 and 49-51, pp. 3723-3727 and 3740-3741.

35. The records of the Respondents in this appeal contain extensive evidence of the costs of a campaign aimed at persuading voters but, as the ONCA majority found (para. 132) as established by the Supreme Court in *Harper*, third parties only have a right under s. 3 to a "modest informational campaign" not to a persuasive informational campaign.

36. This Court should state clearly that, in order to comply with the third principle of the Court's egalitarian model, governments must complete comprehensive, evidence-based studies of the actual cost of a "modest informational campaign" at the province-wide level and district level, and then base third-party advertising spending limits on the results of those studies.

PART III - CONCLUSION

37. It is vitally important that this Court articulate the precise constitutional defects of the *EFA*. The Impugned Provisions cannot stand because they do not accord due weight to the constitutional rights of less wealthy voters, who reasonably seek to express themselves, against a tide of wealthy voices, through third-party organizations.

38. Democracy Watch urges the Court to provide clear direction that different spending limits must be set based not only on realistic assessments of the costs of informing voters, but also the number of voters each third party represents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 1ST DAY OF MAY, 2024

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PART IV - TABLE OF AUTHORITIES

CASES	Cited in paras.
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