# Ontario's Restrictions on Third Party Election Advertising are Law, "Notwithstanding" the Finding of Unconstitutionality

Creating a balance between protecting both democracy and free expression is a difficult task. In 2017, the Ontario legislature amended the *Election Finances Act*[1] to insert a provision that places spending limits on third party political advertising six months prior to an election. In 2018, this spending limit was extended such that the limit applied over a 12-month period prior to an election instead of a 6-month period. Arguably, these spending limits were imposed to promote a fair and democratic election process by limiting the extent to which more affluent individuals and groups can influence the electoral process.[2] However, a constitutional challenge was launched against the Government of Ontario on the ground that the law infringed section 2(b) of the *Charter of Rights and Freedoms*, which guarantees the freedom of expression. The Ontario Superior Court of Justice found in *Working Families Ontario v Ontario*[3] ("*Working Families*") that the impugned provisions of the *Election Finances Act* did in fact unjustifiably infringe section 2(b) of the *Charter*. As a result, the Court declared these provisions of no force or effect.

The Government of Ontario then had a choice: appeal the Court's decision, amend the law to align with *Charter* values, or disregard the finding of unconstitutionality and invoke the notwithstanding clause to reenact the invalidated law. Of these options, the last was chosen. On July 14, 2021, the lifeless law was revived, despite its *Charter* infringements, using the notwithstanding clause.

This article first reviews the amendments to the *Election Finances Act*. It then explains the Court's decision in *Working Families*. Finally, it explores the Government of Ontario's decision to invoke the notwithstanding clause in response to the Court's ruling.

**Legislative History: Third Party Spending is Limited by the *Election Finances Act***

Bill 254 amended the laws governing Ontario's provincial elections to "protect Ontarians' essential voice in elections" and "promote fairness in the electoral process for everyone."[4] One of these amendments, section 37.10.1(2) of the *Election Finances Act*, found itself at the centre of a constitutional challenge for infringing free expression. Section 37.10.1(2) provides that no third party can spend "more than $600,000 in total for the purposes of third-party political advertising during the 12-month period immediately before the issue of a writ of election."[5] This limit was criticized as "severely and aggressively target[ing] third parties,"[6] such as trade unions. Political advertising is broadly defined in section 1.1(1) of the *Election Finances Act* as "advertising in any broadcast, print, electronic or other

medium with the purpose of promoting or opposing any registered party or its leader or the election of a registered candidate."[7] As such, the law limits many forms of political expression.

Before Bill 254's amendments, Ontario had a spending limit that was capped at 6 months prior to the writ of election. Like the 12-month limit, the 6-month limit was also scrutinized. *Charter* challenges were launched against the Government of Ontario, which responded that "pre-election spending limit[s] on third-party political advertising … [are] necessary and reasonable to ensure a fair and proper election process."[8] Before the courts could adjudicate the claims regarding the 6-month limit, the Government of Ontario amended the *Election Finances Act* in 2021 with Bill 254.

### ***Charter*** **Challenge Launched: Bill 254 Unjustifiably Limits Free Expression**

To determine whether the 12-month spending limit violates the freedom of expression, a *Charter* analysis must be conducted. First, the Court must determine whether political advertising is protected speech under section 2(b) of the *Charter*. If it is not protected speech, it will not receive *Charter* protection and the analysis ends. However, if it is protected speech and an infringement is found, the Court will proceed to the next step of the analysis, when it will ask whether the law constitutes a reasonable limit on the infringed right under section 1 of the *Charter*.

Is Third Party Political Advertising Protected Speech Under the *Charter*?

Not all expression receives the same degree of protection under section 2(b) of the *Charter*.[9] Instead, courts assess each form of expression in context to determine the extent to which it must be protected.[10] In *R v Keegstra*, Justice McLachlin (as she then was) explained the importance of the freedom of expression for political speech: "[Free expression] is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions. This is sometimes referred to as the political process rationale."[11] For these reasons, among others, political expression has been granted a high level of protection under section 2(b).[12] However, as the analysis is contextual, this is not always the case. Sometimes political expression merits a lower level of protection "depending on the nature of the controversy at hand."[13]

In *Working Families,* free expression was not the only constitutional value at stake. Other constitutional values, like equal speaking opportunities, must also be protected during elections.[14] The concern with not limiting third-party advertising is that heavily-funded third party political advertisers can disproportionately dominate the airwaves and drown out voices that have less funding.[15] The Court concluded that the "financing of political expression" is "certainly an aspect of expression deserving protection under section 2(b) … but its level of protection is a matter of context, to be weighed with and against other values underlying democracy itself."[16] The right of third-party political advertisers to engage in free expression is therefore "counterbalanced by a need to ensure that all citizens have an equal opportunity to participate in the electoral process."[17]

The question, then, was whether Bill 254 violates freedom of expression by infringing on political speech. The Court quickly concluded that limiting third party political advertising does restrict freedom of expression.[18] In the Court's words, free expression is a broad right that is infringed whenever a government "limits an activity that conveys or attempts to convey meaning," and political advertising is one of those activities.[19] The Attorney General of Ontario also conceded this point.[20]

*Charter* Rights Are Not Absolute: Can the Section 2(b) Infringement Be Justified?

*Charter* rights are not absolute. Governments can justifiably limit a protected right under section 1 of the *Charter* if that limit "can be demonstrably justified in a free and democratic society."[21] To determine whether the law is justified, courts apply the *Oakes* test, which assesses the importance of the law's objective and whether there is proportionality "between the objective and the means used to achieve it."[22] If the *Oakes* test is satisfied, the violation of the *Charter* right is regarded as legally justified and the law is constitutional.

The *Working Families* decision hinged on the question of proportionality. Among other things, an infringement is proportional only if it minimally impairs the violated *Charter* right. The Court found that at the *Oakes* test's minimal impairment stage "the rubber of Bill 254 hits the slippery road of justification, causing the … vehicle to skid off course."[23] The Court found that Bill 254 was not minimally impairing because the Government failed to consider other measures that would achieve its objective but have less of an impact on *Charter* rights. The Court cited two key facts in support of this conclusion. Firstly, the Chief Electoral Officer recommended against imposing restrictions on "issue-based advertising" prior to the election, concluding that such restrictions do "not augment the fairness and equality that such regulations are meant to address."[24] Secondly, and more significantly, the Government of Ontario's own expert witness testified that a 6-month spending limit was an "appropriate and effective" length of time for restricting political advertisements.[25] As such, it was difficult for the Government of Ontario to argue that a 12-month period minimally impairs free expression when a 6-month period would, according to its own expert witness, ensure a fair and democratic election period. On this point, the Attorney General failed to provide evidence that justified or explained why the restricted spending period was doubled.[26] The 12-month spending restrictions in section 37.10.1(2) were accordingly not found to be minimally impairing, and the law was not saved under section 1 of the *Charter*.

Having ruled the 12-month spending restrictions unconstitutional, the remedy declared by the Court was the invalidation of the impugned sections of the *Election Finances Act*, rendering them of no force or effect. Often, when this type of declaration is made, courts will suspend the declaration of invalidity for a period of time, so that governments may amend the law and bring it into compliance with the *Charter*. In this case, no suspension was granted as an Ontario provincial election was scheduled to occur within 12 months of the Court ruling. This meant that third party advertisers, under the impugned law, were already within the 12-month restricted spending period. As such, the law was invalidated

immediately, so that these parties would not be subject to unconstitutional laws during this pre-election period.

**The Notwithstanding Clause Stifles Judicial Dialogue**

Section 37.10.1(2) was lifeless for just a few days before it was revived by the Government of Ontario on June 14, 2021. What made this revised legislation different than the original law was the inclusion of the notwithstanding clause. The notwithstanding clause is a constitutional provision set out in section 33 of the *Charter* that gives the provinces and Parliament power to declare that a law may operate "notwithstanding" the fact that it infringes upon certain *Charter* rights. It functions to "prevent a person from bringing an action in court claiming that a law violates fundamental freedoms, legal rights, or equality rights and is therefore invalid."[27] Therefore, as Ontario enters the next election cycle, no party will be able bring a claim to court arguing that the spending restrictions in the *Election Finances Act* violate their freedom of expression.

Since its inception in 1982, the notwithstanding clause has had limited use. Of the 14 governments that can use the clause, only Saskatchewan, the Yukon, Ontario, Alberta, and Quebec have made declarations under section 33.[28] However, this is the first time that a court has declared a law unconstitutional and the government has *immediately* responded by invoking the notwithstanding clause and reenacting *exactly the same law*. Normally, where the courts find a law unconstitutional, the offending government will attempt to bring it into compliance with the Constitution through amendment — a process that is often referred to as a dialogue between courts and legislatures. Ontario's use of the notwithstanding clause effectively ends this dialogue; the Government of Ontario has simply re-enacted the same law, ignoring the Court's judgment that it is unconstitutional.

For some observers, though, the notwithstanding clause offers a way for elected officials to challenge unelected judges' interpretations of constitutional rights and principles. Hansard from the debates on June 14, 2021, when the new notwithstanding legislation was passed, states that reviving the spending limit law "will restore … critical guardrails to protect the essential role of individuals at the heart of Ontario's democracy."[29] This suggests that the Government of Ontario is re-enacting this law to ensure a fair and democratic election process by limiting the role of private money in the electoral process. Conversely, critics of the Government of Ontario argue that this law "limits comment on essentially any public policy issue when these comments matter the most."[30] Whatever position one takes, critics of the *Election Finances Act* are no longer able to challenge it under section 2 of the *Charter* (or under other sections of the *Charter* to which the notwithstanding clause applies).

**Conclusion: Back Where We Started**

Despite the unjustifiable infringement on free expression, the 12-month restriction on spending for third-party political advertisements is law in Ontario. Those who fall under the impugned restrictions set out by the *Election Finances Act* are left with few to no remedies. Because the notwithstanding clause was used to revive the law, *Charter* challenges cannot

be brought on the basis that the law violates fundamental freedoms, legal rights, or equality rights. However, this issue is not free of constitutional challenges just yet. A new challenge was launched against the law under section 3 of the *Charter*.[31] Section 3 guarantees democratic rights and is exempt from the purview of the notwithstanding clause. Whether or not this claim will succeed is uncertain, but in the meantime third-party political advertising must abide by the spending limits under the revived *Election Finances Act*.

[1] *Election Finances Act*, RSO 1900, c E7.

[2] *Working Families Ontario v Ontario*, 2021 ONSC 4076 at para 6 .

[3] *Ibid*.

[4] *Bill 254, An Act to amend various Acts with respect to elections and members of the Assembly*, 1st reading, *Legislative Assembly of Ontario*, 42-1, No 227 (25 February 2021) at 11578 (Hon Doug Downey).

[5] *Election Finances Act*, *supra* note 1, s 37.10.1(2).

[6] "Conservatives double-down with amendments to Bill 254, the 'Squashing Ontario Democracy Act'" (13 April 2021), online: *Cision* <www.newswire.ca/news-releases/conservatives-double-down-with-amendments-to-bill-254-the-squashing-ontario-democracy-act--823313298.html>.

[7] *Election Finances Act*, *supra* note 1, s 1.1(1).

[8] *Working Families*, *supra* note 2 at para 6.

[9] *Ibid* at para 24.

[10] *Ibid*.

[11] *Ibid* at para 24, citing *R v Keegstra*, [1990] 3 SCR 697 at 802, 1990 CanLII 24.

[12] *Working Families*, *supra* note 2 at para 25.

[13] *Ibid* at para 26. See *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 1988 CanLII 19.

[14] *Working Families*, *supra* note 2 at para 27.

[15] *Ibid* at para 32.

[16] *Ibid* at para 28.

[17] *Ibid* at para 31.

[18] *Ibid* at para 34.

[19] *Ibid*.

[20] *Ibid*.

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

[22] "Section 1 — Reasonable Limits" (last modified 2 July 2021), online: *Government of Canada Department of Justice* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html>.

[23] *Working Families*, *supra* note 2 at para 63.

[24] *Ibid* at para 64.

[25] *Ibid* at para 65.

[26] *Ibid* at para 73.

[27] "Notwithstanding Clause" (last visited 21 July 2021), online: *Centre for Constitutional Studies* <https://www.constitutionalstudies.ca/2019/07/notwithstanding-clause/> .

[28] "Section 33 – Notwithstanding clause" (last modified 2 July 2021), online: *Government of Canada Department of Justice* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art33.html>.

[29] *Bill 307, An Act to amend the Election Finances Act*, 3rd reading, *Legislative Assembly of Ontario*, 42-1, No 275 (14 June 2021) at 14208 (Hon Doug Downey).

[30] Christine Van Geyn, "Doug Ford's gag law will limit comment on essentially any public policy issue" (17 June 2021), online: *Canadian Constitution Foundation* <https://theccf.ca/doug-fords-gag-law-will-limit-comment-on-essentially-any-public-policy-issue/>.

[31] Robert Benzie, "Unions again challenging Premier Doug Ford's campaign finance law as unconstitutional" (12 July 2021), online: *Toronto Star* <www.thestar.com/politics/provincial/2021/07/12/unions-again-challenging-premier-doug-fords-campaign-finance-law-as-unconstitutional.html>.