SCC 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 AND 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 AND DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

AMENDED
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DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW

1. In 2017, the Ontario government amended the *Election Finances Act*, R.S.O. 1990, c. E.7 to impose, for the first time, spending limits on third party political advertising. It expanded the definition of political advertising to include issue-based ads, and restricted third party political advertising in the 6-month period leading up to the issuance of the writ of election. While a constitutional challenge to these restrictions was underway, the government further amended the legislation to extend the restriction to 12 months before the writ of election without increasing the $600,000 spending limit.

2. The David Asper Centre for Constitutional Rights (the "Asper Centre") argues that the enactment of greater restrictions on the informational component of the section 3 right to vote under the *Charter* is a relevant and important factor in assessing whether the right is infringed and whether the infringement is justified.

3. This Court's jurisprudence establishes that a change in legislation is not enough, on its own, to amount to a violation of *Charter* rights. However, as in this case, a change in legislation can provide helpful evidence and context to demonstrate that the effects of the amended legislation amount to a *Charter* violation.

4. The change in legislation here is also relevant to the justification analysis.

5. In order to define the government's objective with the necessary precision and specificity required for the section 1 analysis, the rationale for amending the existing legislation must be considered.

6. Finally, a change in legislation is highly relevant at the minimal impairment stage of the section 1 analysis. When legislation is modified to impose greater restrictions on *Charter* rights, the previous version of the legislation provides another alternative that was more minimally impairing of the right at issue. There is a serious question of whether Ontario has met its burden under section 1 and demonstrated that the previous version of the legislation did not achieve the government's purpose in a real and substantial manner.

PART II: QUESTION AT ISSUE

7. The Asper Centre intervenes on the interpretation and interrelationship between sections 3 and 1 of the *Charter* where, as here, the legislature has modified an existing law to impose greater restrictions on *Charter* rights.

8. The Asper Centre takes no position on the merits of the appeal.

PART III: STATEMENT OF ARGUMENT

9. The enactment of greater restrictions on a *Charter* right is a relevant and important factor in assessing whether the right has been infringed and whether the infringement is justified. It is particularly important to consider the impact of a change when ascertaining the government's purpose in enacting the legislation and determining whether the legislative choice made by the government is minimally impairing of the right at issue.

A. A Change in Legislation is Relevant to the Rights-Infringement Analysis

10. This Court has rejected the argument that a legislature's particular policy choices as codified in legislation can be elevated to a constitutional status.[1] All legislation, including ameliorative legislation, is open to modification and repeal by the legislature.

11. Based on this principle, Ontario argues that it was an error for the majority at the Court of Appeal to focus on the change in legislation in the sections 3 and 1 analysis. Ontario relies on two cases – *Sharma*[2] and *Toronto (City)*[3] – in support of its argument.

12. Properly interpreted, neither case stands for the proposition that a change in legislation is an irrelevant consideration in determining whether a right was infringed.

13. In *Sharma*, this Court considered whether a modification to the conditional sentencing regime amounted to a violation of section 15. The Court, relying on its previous decision in *Alliance*, held that it was not a violation of section 15 for the government to modify and narrow an ameliorative policy. Parliament was under no obligation to create the conditional sentencing regime and once adopted, could modify the regime without triggering an automatic constitutional violation.[4]

14. In *Toronto (City)*, the key issue was whether the City was advancing a positive or negative freedom of expression claim under section 2(b). As the test for determining whether

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[1] *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 33 [*Alliance*].
[2] *R. v. Sharma*, 2022 SCC 39, 486 D.L.R. (4th) 579 [*Sharma*].
[3] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1 [*Toronto (City)*].
[4] *Sharma*, at paras. 63, 82.

section 2(b) was infringed depends on whether the claim advanced is a positive or negative right, this question was critical. While the City framed its claim as non-interference and therefore, a negative rights claim, this Court held that the actual claim was for a particular platform (namely, the existing council structure) around which to structure the expression and was therefore a positive claim.[5]

15. In each case, the focus of this Court's analysis was whether there was a rights infringement *because* of the modification to existing legislation. In other words, did the mere fact of amendment, on its own, violate a *Charter* right and thus require justification under section 1? The Court rejected this approach as improperly constitutionalizing a particular piece of legislation.

16. This does not mean that a change in legislation is irrelevant to determining if the right has been infringed. The effect of a change in legislation may be relevant to determining whether the evidentiary threshold for establishing a rights infringement is met. In this way, the focus properly remains on the *effects* of the law, rather than its *form*.[6]

17. *Alliance* helpfully clarifies this distinction. In *Alliance*, this Court found a constitutional violation when the Quebec legislature modified existing pay equity legislation after widespread non-compliance. Quebec reduced employers' obligation to maintain pay equity in the hope that doing so would lead to greater compliance.[7] Justice Abella for the majority concluded that Quebec had violated equality rights. The reason for the violation was not simply that Quebec modified the extent of protection afforded under the previous pay equity legislation.[8] Rather, the modification caused a discriminatory impact because the new provisions had the effect of perpetuating the pre-existing disadvantage of women.[9]

18. The previous iteration of legislation can be highly relevant when considering the effects of the amended version. For instance, where the older version of the legislation only barely passed constitutional muster, a court may properly consider the previously established effects and the impact of the amendment.

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[5] *Toronto (City)*, at paras. 31-32.
[6] *Alliance*, at para. 33.
[7] *Alliance*, at para. 16.
[8] *Alliance*, at para. 33.
[9] *Alliance*, at para. 33.

19. In the context of the informational component of the right to vote, a rights infringement is established where spending limits interfere with the right of each citizen to play a meaningful role in the electoral process.[10]

20. A change in legislation can be relevant when determining whether section 3 has been infringed. For instance, if a court previously found that there was no violation of section 3 because third parties could – just barely – mount a modest informational campaign, a significant reduction in spending limits will be relevant to determining whether the new restrictions violate section 3. This would, of course, be a question based on the particular evidence before the application judge.

21. Similarly, this Court has held that spending limits "must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters."[11]

22. As explained by the respondents, Elementary Teachers' Federation of Ontario and Felipe Pareja, the careful tailoring analysis is distinct from the section 1 justification analysis as it focuses on a purpose internal to the right itself.[12] Modest spending limits may enhance the informational component of the right to vote by preventing the wealthy from dominating political discourse.[13] However, spending limits can also go too far and prevent candidates, political parties and third parties from being able to convey their information to voters.[14] A middle ground – articulated through the concept of careful tailoring – must be struck to ensure that spending limits enhance, without undermining, the informational component of the right to vote.

23. The concept of careful tailoring does not reflect the importation of justification considerations into the scope of the right. As explained by Justice Iacobucci in *Figueroa*, while the content of the section 3 right uses qualified phrases like the right of a voter to be "reasonably informed" of all possible choices, this does not mean that there should be a balancing between

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[10] *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 74 [*Harper*].
[11] *Harper*, at para. 73.
[12] Factum of the Respondents, Elementary Teachers' Federation of Ontario and Felipe Pareja, at paras. 73-74.
[13] *Harper*, at para. 72.
[14] *Harper*, at para. 73.

individual and collective interests.[15] Rather, the use of such phrases reflects the scope of the right – a citizen does not have the right to play an *unlimited* role in the electoral process; a citizen only has the right to play a *meaningful* role.[16]

24. As in this case, the previous spending limits can be relevant to determining whether the modified spending limits are carefully tailored. Where a previous version of legislation was found to be carefully tailored to ensure that the informational component of the right to vote was enhanced, a significant change in legislation – without explanation, study, or analysis – can provide useful context and evidence when determining how carefully tailored the modification was.

25. Considering a previous iteration of legislation does not require a finding that the modification itself to the legislation resulted in an infringement of the *Charter* right. Rather, a careful analysis of the *effects* of the legislation, in comparison with the previous legislation, is relevant to determine whether the evidentiary threshold for establishing a rights infringement has been met.

B. A Change in Legislation is Relevant to the Justification Analysis

26. The right to vote as protected by section 3 is a fundamental political right that "lies at the heart of Canadian democracy."[17] The importance of section 3 is reinforced by the structure of the *Charter*. Section 3 is worded broadly, with untrammeled language. Furthermore, unlike other rights guaranteed by the *Charter*, section 3 cannot be legislatively overridden under section 33.[18] Thus, any infringements of section 3 must be justified under section 1.

27. A change in legislation is a crucial consideration when determining whether a rights infringement is justified under section 1. It is directly relevant when ascertaining the government's pressing and substantial objective for infringing the right and in determining whether the government's choice is minimally impairing of the right at issue.

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[15] *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 35-36 [*Figueroa*]. See also *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at paras. 29-30.
[16] *Figueroa*, at para. 36 (emphasis in original).
[17] *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 25 [*Frank*].
[18] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11 [*Sauvé*].

I. Pressing and Substantial Objective

28. Much of the analytical work under section 1 depends on how the government's objective has been defined.[19] The integrity of the justification analysis depends on properly stating the government's objective.[20] The legislative purpose must be stated "as precisely and specifically as possible so as to provide a clear framework for evaluating its importance."[21] For instance, in the criminal law context, a broad and general purpose like "protection from harm" is insufficient.[22]

29. The characterization of a legislative objective must be at the appropriate level of generality.[23] Vague, abstract, and symbolic objectives are looked upon with skepticism, as they are subject to distortion and manipulation.[24]

30. The statement of legislative objective must be tied to the particular infringement of the *Charter* at issue, rather than other goals.[25] This is because it is the infringing measure and nothing else that the government seeks to justify.[26]

31. A broad statement of purpose that does not take into account the impact of an amendment is insufficient to meet these requirements. It lacks the necessary precision and specificity to allow the Court to determine the purpose behind the infringing measure and why, in particular, the government determined that additional or greater infringements were necessary.

32. The analysis under section 1, including the identification of the law's objective, is undertaken with a close attention to context.[27] "In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the

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[19] See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), at § 38:12 [*Hogg*].
[20] *Frank*, at para. 46.
[21] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 98 [*Thomson Newspapers*]; *Harper*, at para. 92.
[22] *R. v. Zundel*, [1992] 2 S.C.R. 731, at 762 [*Zundel*].
[23] *Sharma*, at para. 87.
[24] *Sauvé*, at para. 22.
[25] Hogg, at § 38:12.
[26] *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, at para. 144 (*per* McLachlin J. as she then was) [*RJR-MacDonald*].
[27] *Thomson Newspapers*, at para. 87; *RJR-MacDonald*, at para. 134.

actual objective of the law" (emphasis added).[28]

33. An analysis of the government's actual objective would be incomplete without considering the rationale for amending the law.

34. Similarly, just as the description of the government's purpose is focused exclusively on the rights-infringing measures, the purpose inquiry should consider why additional restrictions were necessary. It is the full extent of the additional infringements that the government must justify.

35. This Court has recognized that legislative history and evolution play an important role in determining purpose.[29] Courts may look to legislative history and evolution, along with other considerations like the text, context, and scheme of the legislation, when ascertaining the government's purpose.[30] A change in legislation is a key part of the legislative history and evolution that sheds light on the government's purpose.

36. This Court has drawn inferences about a government's purpose from modifications to legislation.[31] For instance, in *Zundel*, this Court addressed the constitutionality of the criminal offence of spreading false news. The Court had significant difficulty determining the purpose behind the offence and ultimately concluded that Parliament failed to identify a social problem justifying the offence.[32] In attempting to define the offence's purpose, Justice McLachlin (as she then was) noted that the move of the offence from the "Sedition" section of the *Criminal Code* to the "Nuisance" section suggested that the offence no longer had a political purpose.[33]

37. Considering a government's purpose as it relates to an amendment is also consistent with the rule against shifting purposes.

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[28] *RJR-MacDonald*, at para. 133.
[29] *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 31; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 31; *Sharma*, at para. 88; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 64.
[30] *Sharma*, at para. 88.
[31] See, e.g., *Zundel*, at 763.
[32] *Zundel*, at 764.
[33] *Zundel*, at 763.

38. Except for a permissible shift in emphasis, the purpose of a piece of legislation cannot change merely by the passage of time.[34] In other words, the purpose is determined based on the intention of the legislature when the law was enacted or amended.[35]

39. The corollary of the shifting purpose doctrine is that legislation can only have a new purpose when it has been amended by a legislature motivated by a new purpose. Time alone cannot change the legislation's purpose. Thus, if the legislature wants to rely on a new purpose for a piece of legislation, it must amend the existing law in accordance with its new purpose.

40. Accordingly, the focus of the analysis must properly be on the intention of the legislature that amended the law and its purpose at that time for making the amendment.

II. Minimal Impairment

41. A change in legislation is highly relevant to the question of whether the legislation at issue is minimally impairing.

42. The minimal impairment analysis requires the government to impair "as little as reasonably possible" the right or freedom at issue.[36] As Justice McLachlin held in *RJR-MacDonald*, "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[37]

43. The previous iteration of a piece of legislation is not an abstract hypothetical alternative dreamed up by a court. Rather, it is a viable alternative that actually existed and had measurable effects. The effects of a previous piece of legislation can be studied to determine whether it was meeting the government's objective in a "real and substantial manner."[38]

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[34] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 91; *R. v. Butler*, [1992] 1 S.C.R. 452, at para 496.
[35] *Zundel*, at para 761.
[36] *RJR-MacDonald*, at para. 160; *R. v. Oakes*, [1986] 1 S.C.R. 103, at para 139.
[37] *RJR-MacDonald*, at para. 160 (citations omitted).
[38] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55.

44. Where the government seeks to justify additional restrictions on rights, it should be held to the burden of demonstrating why the previous legislative alternative did not satisfy its objective in a real and substantial manner.

45. Meeting this burden will require evidence, likely in the form of studies as to the impact of the previous piece of legislation and its failure to achieve the government's objective.

46. The lack of this kind of evidence was an important factor in concluding that the government had not justified a total restriction on advertising in *RJR-MacDonald*.[39] There, the government sought to justify a total ban on the advertising of tobacco products for sale in Canada. The government presented no evidence comparing the effects of a total ban to the effects of a partial ban. The government had, in fact, carried out a study on the effects of a partial ban, but refused to disclose the results of that study. Justice McLachlin criticized the government for failing to disclose the results and found it had not met its burden under section 1.

47. The timing of the amendment here afforded Ontario the opportunity to study the previous limit in the context of an election and present evidence demonstrating why the amendment was necessary. Ontario imposed a $600,000 spending limit on political advertising by third parties in the 6-month pre-writ period in 2017.[40] The 2018 provincial election was conducted with this limit in place. In the lead-up to the 2022 provincial election, Ontario made the amendment at issue in this appeal (extending the time period from the 6-month pre-writ period to the 12-month pre-writ period).[41]

48. Given that the 2018 provincial election was conducted with the $600,000/6-month restriction in place, it was possible for Ontario to study the previous restriction's impact and present evidence explaining why this restriction was insufficient to meet the government's pressing and substantial objective.

49. The importance of ensuring that the government is held to its burden of justifying additional restrictions on rights is heightened in the context of amendments to electoral laws.

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[39] *RJR-MacDonald*, at paras. 165-168.
[40] *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, at para. 5 [*Working Families Court of Appeal*].
[41] *Working Families Court of Appeal*, at para. 6.

50. As Professor Yasmin Dawood argues, there is a risk of partisan self-dealing when elected representatives develop or modify electoral laws, including spending limits, in order to entrench themselves in power and protect themselves from potential challengers.[42]

51. The concerns about partisan self-dealing have foundations in the record of this case. The respondents Working Families' Coalition (Canada) Inc., Patrick Dillon, Peter Macdonald and Ontario English Catholic Teachers' Association have pointed to evidence in the record that the respondents in this appeal are all considered "foes" of the current Ontario government given their vocal criticism of its policies.[43] Further, Ontario's own evidence is that it is primarily the respondents on this appeal who engage in third party political advertising and were thus impacted by the amended legislation.[44]

52. Given these risks of self-dealing, governments who amend electoral legislation should be held to their full burden under section 1 of demonstrating why the change in legislation was necessary.

PART IV: SUBMISSIONS ON COSTS

53. The Asper Centre is a non-profit organization represented on this appeal by counsel acting *pro bono*. It does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

54. The Asper Centre takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14th day of May, 2024

Debbie Boswell

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[42] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 500, 547.
[43] Factum of the Respondents, Working Families' Coalition (Canada) Inc., Patrick Dillon, Peter MacDonald and Ontario English Catholic Teachers' Association, at para. 31.
[44] Factum of the Appellant, at para. 25, Appendix A.

PART VI: TABLE OF AUTHORITIES

AUTHORITIES: **PARAS.**

SECONDARY SOURCES:

STATUTES AND LEGISLATION:

None.