

## **Court of Appeal for Ontario Declares Bill 307 Unconstitutional**

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On March 6, 2023, the Court of Appeal for Ontario (“ONCA”) released its decision striking down Bill 307 as unconstitutional. The Bill, introduced by the Province of Ontario, placed spending limits on third-party political advertising for a full year prior to an election taking place. ONCA held the Bill infringed the right to vote as protected under section 3 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).<sup>2</sup> ONCA gave the province 12 months to prepare *Charter* compliant legislation.

This briefing note provides an overview of this important ONCA decision.

### **Background**

In 2017, the Government of Ontario amended the *Election Finances Act*, (“*EFA*”) to impose third-party spending limits on political advertising. The amendment capped spending at \$600,000 within the six months preceding an election writ and restricted that to \$24,000 in each provincial riding. According to the province, the purpose of the amendment was to fortify democratic governance and ensure equality in the electoral process.

On May 4, 2021, Bill 254 - *Protecting Ontario Elections Act, 2021* - was proclaimed into force, extending the pre-election spending period to 12 months, but keeping the monetary limits the same. At the time, an Ontario general election was scheduled for the following year (June 2022).

Almost immediately, Bill 254 was challenged as being overly broad and unfair to Ontario voters because it allegedly prevented individuals and civil society organizations from effectively communicating views about the government’s policies, including health care and education, for a full year prior to the election.

In June 2021, the Working Families Coalition (“Coalition”), a group primarily comprised of three large public sector unions, successfully argued Bill 254 infringed the protected right to freedom of expression under section 2(b) of the *Charter*. The Ontario Superior Court of Justice struck down Bill 254 as unconstitutional and of no force or effect.<sup>3</sup>

Within one week of the Superior Court’s ruling, the province introduced Bill 307 - *Protecting Elections and Defending Democracy Act, 2021* - which passed into law five days later. Bill 307 was identical to

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<sup>2</sup> *Working Families Coalition (Canada) Inc v Ontario*, 2023 ONCA 139 [*Working Families 3*].

<sup>3</sup> *Working Families Ontario v Ontario*, 2021 ONSC 4076 (CanLII) [*Working Families 1*].

Bill 254. However, it invoked the notwithstanding clause under section 33 of the *Charter* to prevent another *Charter* challenge under section 2(b). The notwithstanding clause, sometimes referred to as the override power, allows Parliament or a provincial legislature to temporarily override sections 2 and 7-15 of the *Charter*. This was the first time in Ontario's history the province had invoked the notwithstanding clause.

In November 2021, the Coalition challenged Bill 307 as unconstitutional. This time, the Coalition argued Bill 307 infringed the *Charter* right to vote (section 3), a right expressly exempt from the operation of the notwithstanding clause. The Superior Court found Bill 307 did not infringe the right to vote and upheld Bill 307 as constitutional.<sup>4</sup> The Coalition appealed and ONCA heard the challenge in June 2022.

### **The Court of Appeal Decision**

On March 6, 2023, ONCA released its decision striking down Bill 307 as a violation of the right to vote.<sup>5</sup> ONCA gave the province 12 months to prepare new legislation compliant with the *Charter*.

Two key issues were before the court:

- 1) Did the Government of Ontario properly invoke the notwithstanding clause?
- 2) Did Bill 307 infringe the *Charter* right to vote and, if it did, could it be saved under section 1 of the *Charter* on the grounds the infringement was a *reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society*?

#### *Section 33 – Notwithstanding Clause*

The Court of Appeal found the government properly invoked the notwithstanding clause. A government need only formally invoke the clause to use it; there is no substantive requirement.

#### *Section 3 – Right to Vote*

The Court of Appeal found Bill 307 infringed the right to vote. The court followed a line of caselaw from the Supreme Court of Canada (“SCC”) in which that court held the principal question is whether impacted persons could meaningfully participate in a vote:

The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party... in short the voter has a right to be reasonably informed of all the possible choices.<sup>6</sup>

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<sup>4</sup> *Working Families Coalition (Canada) Inc v Ontario*, 2021 ONSC 7697 [*Working Families 2*].

<sup>5</sup> *Working Families Coalition (Canada) Inc v Ontario*, 2023 ONCA 139 [*Working Families 3*].

<sup>6</sup> *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 71.

ONCA held the Bill unreasonably restricted the ability of third parties to convey information to voters and undermined the right of citizens to meaningfully participate in the electoral process:

The significance of the additional 6 months of restricted spending should have been the focus of the (lower court's) enquiry. Given the re-enactments were designed to restrict the ability of third parties to convey information to voters about whom they should vote for, and about the issues those vying to be their representatives were associated with, the operative question concerned the effect of the increased restrictions, in light of what preceded them.

...

.. we conclude that because the challenged spending restrictions were not carefully tailored, and there is no finding that they would permit a modest informational campaign, **they overly restrict the informational component of the right to vote.** They therefore **undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.** Consequently, in our view, they infringe s. 3 of the *Charter*. [emphasis added]

Regarding section 1 of the *Charter*, the Court of Appeal ruled that Bill 307 could not be justified. While the legislation had a pressing and substantial objective - to “fortify democratic governance” and ensure equality in the electoral process - and the spending restrictions were rationally connected to the objective, the legislation did not minimally impair the right to vote because “a 12-month impairment was already double the original 6-month impairment, and therefore not minimal” and the benefit of extending the time period to 12 months did not outweigh its detrimental effect.

### What happens next?

The Court of Appeal struck down Bill 307 as unconstitutional. However, it gave the province 12 months time to prepare new legislation compliant with section 3 of the *Charter*. As of today's date, the province has not yet indicated whether it will appeal this decision to the SCC. As the next provincial election is not scheduled until 2026, time is on the Government's side.

We will continue to follow these developments and keep our readers apprised.

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