whether a reasonable choice was made among alternatives that infringe the *Charter* right. Instead, the analysis must focus on whether an infringement has occurred at all. Therefore, the question is whether the challenged spending restrictions draw the line at the point of preventing the well-resourced from dominating political discussion without being overly restrictive so as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. A conclusion that a choice was in some other sense "reasonable" does not answer this question.

[90] The Attorney General contends that Bastarache J.'s reference to careful tailoring represented a "pragmatic caution" but not a controlling legal test. According to the Attorney General, the controlling legal test is whether the challenged spending restrictions limit information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.

[91] We agree with the Attorney General about the constitutional standard, but disagree that the reference to "carefully tailored" spending restrictions can be so easily distinguished from the ultimate question of whether the rights of citizens to meaningfully participate in the political process and to be effectively represented have been undermined. The two are inextricably linked. In our view, this is demonstrated by Bastarache J.'s use of the term "must" in relation to careful tailoring, as opposed to some other modifier consistent with a mere caution. The

use of the term "must", in our view, indicates that careful tailoring is a consideration that the court is to use in determining whether the constitutional standard – the voter's right to meaningfully participate in the electoral process – has been violated.

[92] The application judge accepted that the challenged spending restrictions had to be carefully tailored within the meaning of *Harper* in order to be found consistent with s. 3. However, as we discuss below, he erred in the way he conceptualized and applied that standard.

Modest informational campaign

[93] The second proxy in assessing whether the constitutional standard is met is the level of information campaign that the restrictions will permit a third party to conduct. *Harper* recognizes that nothing more need be permitted than a "modest informational campaign", as opposed to a campaign that would be capable of determining the outcome. This is a fact-based, evidentiary analysis: *Harper*, at para. 115. As we discuss below, the application judge erred in the manner in which he approached this consideration. He did not make a finding that a modest informational campaign could be conducted.

Conclusion on proxies

[94] In summary, the presence or absence of careful tailoring, and the view the court takes of the level of information campaign that can be mounted in compliance

with the restrictions, are not additional tests. They are considerations that must be used to inform whether the constitutional standard has been violated by spending restrictions because they "restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented": *Harper*, at para. 73.

(b) The application judge erred in applying s. 3 to this case

(i) The required focus was the extension compared to the previous restrictions

[95] The appellants contend that the application judge erred in the conclusions he reached on each of the proxies. They stress that the application judge did not properly explain or justify how the challenged spending restrictions could be carefully tailored when he had previously (in *Working Families 1*) found them to be unnecessary to achieve electoral fairness, given that the previous restrictions accomplished the desired objective.

[96] We agree that the failure of the application judge to focus on the significance of the extended restrictions brought about by the *PEDDA* re-enactments tainted his analysis.

[97] In our view, to properly consider the proxies, the application judge was required to focus on the effect of the challenged spending restrictions re-enacted by *PEDDA*, given what had preceded them. Under the 2017 *EFA* provisions, a

third party could spend unlimited amounts with a view to providing information to voters in the seventh to twelfth month before the election period, and a further $600,000 in the 6 months preceding it. That changed with Bill 254 and then *PEDDA*, which extended the restricted period to 12 months without increasing the spending limit.

[98] The object of the *PEDDA* re-enactments was to more severely restrict what could be spent on political advertising in the 12-month pre-writ period than was the case under legislation in effect since 2017 (leaving aside the constitutionally invalid 2021 amendments struck down in *Working Families 1*). Since the definition of political advertising embraces advertising to voters to promote or oppose party leaders, parties, or the election of a candidate, and includes taking a position on issues with which any of them are closely associated, the goal of *PEDDA* was clearly to more severely restrict information being provided to voters than had previously been the case.

[99] The significance of the additional 6 months of restricted spending should have been the focus of the enquiry. Given that the *PEDDA* 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 had preceded them. Do they undermine the informational component of the right to vote – because they restrict

information in a more severe way than had previously been the case – such that they undermine the right of citizens to meaningfully participate in the political process and be effectively represented?

(ii) The application judge's error with respect to "careful tailoring"

[100] Against that backdrop, it is our respectful view that the application judge made three related errors in his analysis of careful tailoring. First, he failed to apply his findings from *Working Families 1* that bore on the question of careful tailoring that was raised with respect to the challenged spending restrictions. Second, he divorced the length of the spending restrictions from their quantum – matters that had to be considered together. Third, he conflated the approach to careful tailoring required in a s. 3 analysis with a different and inapplicable analysis by his reference to the impugned legislation being "one of a number of reasonable alternatives".

Failure to properly apply findings from *Working Families 1*

[101] As noted above, the "careful tailoring" aspect of the s. 3 analysis may be traced to the Supreme Court's decision in *Harper,* where Bastarache J. sought to capture the balancing of interests that lies at the heart of the egalitarian democratic model. Careful tailoring describes the line drawing between voting right-enhancing spending limits and those that are overly restrictive.

[102] The application judge quite rightly rejected the argument advanced by the appellants that the haste with which *PEDDA* was enacted following *Working*

Families 1, in and of itself, demonstrated that it was not carefully tailored to ensure that third parties are able to convey their information to voters. He also rejected the appellants' contention that s. 3 was violated because *PEDDA* constitutes partisan self-dealing by the incumbent government. The application judge found that the legislation is neutral in its language and effect, and did not constitute partisan self-dealing. We agree with these conclusions as far as they go. But they do not end the enquiry as to whether extending the restricted period from 6 to 12 months was the result of careful tailoring.

[103] The appellants bore the burden of demonstrating that the challenged spending restrictions were not carefully tailored to ensure third party advertisers are able to convey their information to voters. In doing so, the appellants were entitled to rely on the application judge's findings in *Working Families 1* that the previous restricted period of 6 months with a $600,000 spending limit was appropriate to ensure electoral equality, and that the extension of the restricted period, together with no corresponding increase in the quantum of the spending limit, was not justified or explained.

[104] The application judge considered the effect of the extension from 6 months to 12 in *Working Families 1*. He noted, at paras. 65-66, that:

> [The] government's own expert witnesses in the present case have all testified that a 6-month pre-election period was the appropriate and effective period in which spending restrictions for political advertisements should

> operate. In the predecessor litigation, the experts produced by counsel for the Attorney General – Professor Harold Jansen and former CEO Jean-Pierre Kingsley – both opined that a 6-month period of pre-writ regulation was reasonable. Those same experts have now opined that the new 12-month period introduced by Bill 254 is "also reasonable".
>
> Without meaning to stress the obvious, it is hard to see how 12 months is minimal if 6 months will do the trick.

[105] The application judge distinguished what he had decided in *Working Families 1* – whether the extended 12-month period was minimally impairing for purposes of s. 1 – and the question he had to decide in this case: "the Applicants must demonstrate here that the spending limits in the *EFA* – and, in particular, the 12-month restricted spending period – impact detrimentally on citizens' meaningful participation in elections." The application judge was right that the ultimate questions were different. But, with respect, this framing elided the question before him.

[106] *PEDDA* did not establish a restricted period of 12 months and a spending limit of $600,000 in that period out of whole cloth. Rather, *PEDDA* re-enacted Bill 254's amendments to the prior *EFA* provisions by extending the restricted period for third party advertisers from 6 months to 12 months before the election period, while leaving the spending limit the same at $600,000. The change to the third party pre-election restrictions is impugned by the appellants on these appeals. And the change was to extend restrictions beyond an already existing restriction

that the application judge accepted, in *Working Families 1*, was an "appropriate and effective period in which spending restrictions for political advertisements should operate" – one that would "do the trick".

[107] In other words, *PEDDA* drew the line in a different place than it had previously been drawn. The previous line, drawn at a spending limit of $600,000 over 6 months, was redrawn at 12 months with no increase in monetary amount. The careful tailoring question involved an examination of the move.

[108] In *Working Families 1*, at paras. 73-75, the application judge had noted in his s. 1 analysis that there was no explanation for why the extension of the restricted period to 12 months, 6 months longer than one that already accomplished the desired objective, was necessary:

> There is no justification or explanation anywhere in the Attorney General's record as to why the doubling of the pre-election regulated period was implemented. This lack of explanation has to be taken seriously ...
>
> It is self-evident that if a six-month impairment on free expression accomplishes the desired objective, a twelve-month impairment cannot be the least drastic means. It does not matter that both a 12-month and a 6-month restricted period are "reasonable" in the view of the experts. A 12-month impairment is twice as long, and twice as restrictive, as a 6-month impairment, and so by definition is not minimal.

[109] Although these findings were made in connection with their implications for a s. 1 analysis in *Working Families 1*, where a violation of the *Charter* right to free

expression was conceded, the underlying factual findings are important in the careful tailoring analysis required here. The absence of any explanation for the extended restriction, given that the existing restriction was appropriate to accomplish the electoral fairness objective, tells heavily against a finding of careful tailoring. So is the finding that the extended restriction is twice as long and twice as restrictive as one that was appropriate, given that Bastarache J. used the term "careful tailoring" to describe the punctilious drawing of a line between what would enhance the right to vote and what was overly restrictive. On the findings from *Working Families 1* that the application judge made, the 6-month restriction was voting right-enhancing. It "[accomplished] the desired objective" and "[did] the trick". We agree with the appellants that doubling the restricted period without increasing the quantum, a result that was twice as restrictive as what had been found appropriate, without explanation, does not denote careful tailoring.

[110] The Attorney General submits that whether or not the challenged spending restrictions could be said to be carefully tailored, the extension of the restricted period in this case (from 6 to 12 months) does not undermine the voter's right to meaningful participation, as election-related advertising more than a few months from the date of an election is unlikely to have an impact.

[111] We do not accept this argument.

[112] The legislation itself is premised on third party advertising mattering, at least to some voters, between 6-12 months prior to the election period. Even if most voters may not be paying attention, s. 3 does not protect aggregate rights but rather individual ones. If at least some voters are prevented from exposure to political information of value from third parties in the 6 to 12-month period, their right to meaningful participation under s. 3 may be undermined.

Failure to consider the length and quantum of the challenged spending restrictions together

[113] While the focus of the application judge's analysis was the 12-month restricted period, as stated above, this issue cannot be viewed in isolation from the actual spending limits over that period as well. In our view, the duration of spending restrictions and the monetary amount of those restrictions must be considered together. By doubling the length of the restricted period and leaving in place the quantum of permitted spending, the *PEDDA* re-enactments did change the spending limits for third party advertisers. This change forced third parties to make a choice. They could spend nothing in the 6 to 12 months before the election period. Or, if they wished to spend anything during that period, they would have to spend that much less in the 6 months before the writs were issued.

[114] The application judge did not squarely address the quantum of the spending restriction in his analysis of careful tailoring. Rather, he addressed the question of

careful tailoring by reference to the length of the restricted period alone. Because, in his view, the record in *Working Families 1* disclosed that some experts believed both a 6-month and a 12-month restricted period were reasonable, the application judge concluded that the appellants had not established that the legislation was not carefully tailored for purposes of the s. 3 analysis. He stated "[t]he tailoring of the law, to use the Supreme Court of Canada's phrase, is neither perfectly skintight nor to everyone's taste; but it is careful enough to be appropriate to the suit this time around" (emphasis added).

[115] In our view, it is no answer to the question of whether the legislation was carefully tailored to point to evidence that the length of the extended restriction could be seen as reasonable. The question is whether the extension of this restricted period from a 6-month period that "did the trick" to 12 months, without increasing the spending limits, and without explanation, was carefully tailored. The application judge erred by not addressing this question.

[116] The Attorney General addresses the rationale for enacting the challenged spending restrictions in his factum. He points to the testimony of the Chief Electoral Officer of Ontario, Greg Essensa, who appeared before a legislative committee in March 2021. Mr. Essensa voiced support for extending the restricted period from 6 months to 12 months, on the basis that there were indications in 2018 that third parties engaged in advertising prior to the 6-month restricted period then in place.

Mr. Essensa, however, also called for the spending limits to be increased if the restricted period was extended:

> As I indicated in my commentary in 2016, Ontario is an outlier in Canadian jurisdictions. Our third-party advertisers spend much more money than any third-party advertising in the country, including federally. At one point, we had third-party advertisers who were spending more money than political parties. As I have always indicated, a fair and level playing field is the most important consideration or principle that guides me in this regard. I have been a big proponent of greater transparency around third-party advertising—who is funding those, and over a greater period of time. I have seen, over time, third parties begin advertising well in advance of the six-month period that is currently in place, as much as up to nine or 10 months before an election. I am in support of extending the period to 12 months. However, I do believe the bill would be enhanced by increasing the amount that the third parties could spend. They are currently allowed to spend $600,000 over six months, and I am recommending that that number should be increased. If they're going to be having to file financial statements in regard to the 12-month period, then there should be consideration given to increasing that amount. [Emphasis added.]

Accordingly, this evidence underscores the error in not considering both the length of the restriction and its quantum.

[117] In these appeals, the Attorney General has referred to no evidence in support of the need for the actual changes re-enacted by *PEDDA* – that is, doubling of the restricted period, together with leaving in place the same spending limits – that would provide a basis for challenging the application judge's findings from *Working Families 1* made as part of his s. 1 analysis.

Conflating careful tailoring with reasonable alternatives

[118] In his discussion of careful tailoring, the application judge noted that the Supreme Court had observed that carefully tailored does not mean perfectly designed. With respect, this is not a statement that the Supreme Court made in *Harper.* In addition, when expressing his conclusion that the legislation was "careful enough", the application judge stated that it was one of the reasonable alternatives.

[119] These comments reflect a conflation between s. 1 and s. 3. The Supreme Court's distinction between carefully tailored and perfectly designed, and its reference to reasonable alternatives, are s. 1 concepts, not s. 3 concepts. As we have explained above, although selecting from one of a number of reasonable alternatives may be relevant to whether a *Charter* breach is minimally impairing, it is not the test for whether an infringement has occurred.

[120] In a s. 3 analysis, carefully tailored may not mean perfectly designed, but it does in the end require assiduous attention to whether the restriction falls on the right side of the line. Since the application judge approached this issue from the wrong perspective, we are unable to conclude that he properly found careful tailoring. It cannot be said, based on his conclusion that the government had chosen a reasonable alternative, that he found the challenged spending restrictions to be "carefully tailored to ensure that candidates, political parties and

third parties are able to convey their information to voters" without being "overly restrictive": *Harper*, at para. 73.

Conclusion on careful tailoring

[121] In the face of the application judge's findings in *Working Families 1* as to the lack of justification for the changes to third party advertising restrictions, on which the appellants now rely for a different purpose, and no new intervening evidence produced by the Attorney General in *Working Families 2* to counter this finding, we conclude that the challenged spending restrictions cannot be said to have been carefully tailored.

[122] As we have noted above, careful tailoring is only one of two proxies that a court should consider in deciding whether a violation of the constitutional standard has occurred. We therefore turn to the second proxy – whether the challenged spending restrictions permit third parties to mount a modest informational campaign.

(iii) The application judge made no finding that a modest informational campaign could be mounted

[123] While the application judge found that the 12-month restricted period was "reasonable", he did not specifically make a finding that third party advertisers could mount modest informational campaigns notwithstanding the doubling of the

length of the restricted period without any corresponding increase to the spending limit.

[124] The application judge noted that s. 3 did not entitle the appellants to mount an influential media campaign. He stated, at para. 104:

> [T]he threshold for finding a prima facie infringement of section 3 is not as low as it is for section 2(b). The Supreme Court has been at pains to explain that "carefully tailored" does not mean perfectly designed. It has also clarified that restrictions on spending are not to be evaluated or measured by the impact of the advertisements: "Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome." [Footnote omitted.]

[125] The application judge's analysis focused on what he considered to be the main informational tool the spending limits would restrict – television advertisements. He concluded that television advertisements do not tend to relate to "policy discourse" and added, at para. 83:

> In fact, anyone who has ever watched a 30-second television commercial will know that while the medium is effective, an ability to review policy matters or convey any detailed information is not what makes it so. To expect policy options to be canvassed in a commercial would be akin to expecting serious information about the chemical properties of cleansing agents to be conveyed in a laundry detergent commercial, or a biologically sound anatomical analysis of the digestive process to be contained in an ad for antacid tablets.

[126] The application judge contrasted television advertisements with other media the appellants could use to convey their message, stating, at para. 77:

> Blogs, advertisements in print media, op-eds, press releases, interviews, radio spots, mass mailings (via email or traditional post), tweets, Facebook posts and other social media disseminations, can all be engaged in without great expense and readily within the *EFA*'s spending limits. It is not realistic to say that the statute works to "silence" any viewpoint or any electoral discourse in today's multi-media environment. These various media choices are all "highly effective", to use the Supreme Court's description, in engaging with and informing the public of election issues. [Emphasis added; footnote omitted.]

[127] It does not follow that everything less than an influential media campaign is a modest informational campaign. It also does not follow from a finding that television is not the only way to mount a modest informational campaign that the challenged spending restrictions allow for such a campaign. The application judge referred to no evidence in relation to the cost of the other forms of media he mentioned, either individually or in combination. Nor did he make any finding about the appellants' evidence that the limits are too low to mount a campaign consisting of other forms of media, such as mailings, radio, digital media, and newspaper advertisements.

[128] The appellant Working Families argues that the Attorney General produced no evidence on the sufficiency of the quantum of the spending restriction generally. In his factum, the Attorney General refers to no such evidence, but rather argues

that if a $100,000 limit during the writ period is sufficient (which is not impugned on these appeals), then $600,000 during the pre-writ period "cannot possibly violate s. 3". We do not interpret the application judge as having drawn that conclusion.

[129] Of the Attorney General's experts referred to by the application judge, Professor Jansen does not appear to have expressly opined about why the quantum of the spending limit was sufficient, and Mr. Kingsley did so only to the extent of refering to the $600,000 amount as not being "small change". Neither addressed the costs of the components of the media campaign (without television) the application judge referred to. Neither specifically addressed what modest informational campaign could be run in light of the newly-restricted period of 6-12 months before the writs.[4]

[130] The application judge's brief references to the availability of several media platforms that he viewed as less expensive than television, and which he considered could be used to convey information and messages within the $600,000 monetary limit, did not amount to a finding that the appellants could mount a modest informational campaign. Nor did they entail a broader conclusion

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[4] Expert evidence for the respondent was also given by Tamara Small. The application judge did not refer to her evidence and the Attorney General did not cite or rely upon her evidence in this court with respect to this point.

that the challenged spending restrictions enabled the meaningful participation of voters for purposes of s. 3 of the *Charter.*

[131] The application judge's approach may be contrasted with the findings made by the trial judge in *Harper v. Canada (Attorney General)*, 2001 ABQB 558, 295 A.R. 1. In that decision, the trial judge reviewed the extensive record on the actual costs of various media (local and national print, radio, and television costs) and concluded, at para. 88: "With respect to the spending limits themselves, I find that third parties can engage in modest, national, informational campaigns and reasonable electoral district informational campaigns, within the spending limits set out in the Act." Subsequently, in the Supreme Court's decision in *Harper*, Bastarache J. relied on those findings in setting out his conclusion on the application of s. 3: at para. 74 (quoted above).

[132] In this case, the application judge focused on the appellants' position that the challenged spending restrictions would impair their ability to conduct a multimedia persuasive campaign. He referred to the appellants' expert Stephen Freeman, who testified that a "minimally effective", two-week advertising campaign would cost at least $1.2 million, but where effective was measured by the ability to change voter behaviour. The application judge concluded that s. 3 did not entitle third party advertisers to mount campaigns that would persuade or influence voters. However, after *Harper*, the question was whether the challenged

spending restrictions permitted a modest informational campaign. He did not go on to consider whether any evidence allowed him to conclude that they did.

[133] The application judge did not refer to evidence in the record before him in this regard. Rather, he referred to the Supreme Court's decision in *Harper*, where Bastarache J. commented, at para. 115, that "third parties [can] engage in a significant amount of low-cost forms of advertising". That comment from *Harper*, however, was grounded in the evidentiary findings made at trial in that case.

[134] For these reasons, we do not see the application judge's observations about low-cost methods of advertising as addressing the ultimate question of whether a modest informational campaign could be mounted.

[135] The burden of showing a constitutional violation is on the appellants. But here, the question of whether the challenged spending restrictions permit a modest informational campaign had to be addressed from the standpoint of the restrictions extending beyond the 6-month period previously found to achieve the desired goals. The modest informational campaign had to be one that could be mounted given the 12-month restricted period. The fact that the Attorney General points to no evidence that a modest informational campaign could be mounted within the challenged spending restrictions is telling on the ultimate question.

(c) Conclusion on s. 3

[136] Adopting the reasoning from *Harper*, 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*.

(3) The infringement of s. 3 is not saved by s. 1 of the *Charter*

[137] In *Figueroa*, at para. 31, the Supreme Court emphasized that the government cannot interfere with s. 3 democratic rights to advance other values without justifying the infringement under s. 1. When the government seeks to justify a limit on s. 3, a reviewing court must examine the government's explanation "carefully and rigorously" and must not adopt a deferential attitude: *Frank*, at para. 43; *Figueroa*, at para. 60.

[138] We note that in this case the Attorney General did not argue, in his factum or orally, that if a s. 3 violation were found, it was justified under s. 1. Nevertheless, we briefly consider that issue.

[139] Having found an infringement of the right to vote, the burden is on the Attorney General, under the first two prongs of the *Oakes* test, to establish that this extension of the duration of the restricted period, together with the unchanged

spending limits, furthered a pressing and substantial objective by means rationally connected to achieving that purpose. He has provided no evidence or argument in this regard. However, the application judge noted, at paras. 54-56 of *Working Families 1*, that the legislation was aimed at fortifying "democratic governance itself" and related to the objective of ensuring equality in the electoral process, and that the challenged spending restrictions were rationally connected to that pressing and substantial objective.

[140] Even so, since there is no evidence that the challenged spending restrictions were necessary to accomplish anything toward securing the egalitarian model of elections that was not already accomplished by the restrictions in effect prior to 2021, we conclude that they are not minimally impairing of the s. 3 rights in issue. In this regard, we endorse the statement by the application judge from *Working Families 1*, at para. 75, that "[a] 12-month impairment is twice as long, and twice as restrictive, as a 6-month impairment, and so by definition is not minimal."

[141] Nor are we satisfied that, on the final prong of the *Oakes* test, namely proportionality, that the benefits of the challenged spending restrictions are worth the cost of the rights limitations: *Hutterian Brethren*, at para. 77. Simply put, no benefits were identified as flowing from extending the duration of the spending limits while freezing their quantum.

DISPOSITION

[142] Accordingly, we would allow the appeals and declare that s. 37.10.1(2) of the *EFA* unjustifiably infringes s. 3 of the *Charter* and is, therefore, of no force or effect. Counsel are invited to make submissions on whether any further provisions of the *EFA* should be declared invalid as a result of the reasoning in this judgment. Each appellant and the Attorney General may make written submissions not exceeding 10 pages each. The submissions of each appellant shall be delivered within 15 days of the release of these reasons; those of the Attorney General within 10 days thereafter.

[143] Unlike the application judge's decision in *Working Families 1*, where he concluded that a suspension of the declaration of invalidity was inappropriate given the timeline before the 2022 election, there is no such concern in this context, with the next fixed-date election to take place in 2026. Therefore, we order that the declaration in this case be suspended for 12 months to allow Ontario to fashion new legislation that is compliant with s. 3 of the *Charter*.

[144] If the appellants and the Attorney General are unable to agree on costs as between them, including with respect to costs below, they may make written submissions not exceeding 3 pages each. The submissions of each appellant shall be delivered within 15 days of the release of these reasons; those of the Attorney

General within 10 days thereafter. There shall be no costs for or against any of the interveners.

B. Burnett J.A.

L. Sossin J.A.

Benotto J.A. (dissenting):

OVERVIEW

[145] I agree with my colleagues that s. 33 was properly invoked. With respect, I disagree that the application judge erred by finding no s. 3 infringement.

[146] Section 3 protects the right of every citizen to participate meaningfully in the electoral process. The right to meaningful participation includes the right to be "reasonably informed of all the possible [electoral] choices": *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47. At issue are the spending limits that may be placed on third-party political advertising, which plays an important role in informing citizens.

[147] It is agreed that the leading s. 3 case on limits for third-party spending is *Harper*, which articulates the nature of the s. 3 right, and explains the reasons for imposing such limits, which are rooted in the egalitarian model of electoral democracy: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827. However, I do not agree with the inferences that my colleagues draw from *Harper.*

[148] My colleagues say that *Harper* created two "proxies" that must be satisfied for spending restrictions not to breach s. 3: (i) the legislation must be carefully tailored; and (ii) the legislation must permit a modest informational campaign.

I respectfully disagree with the meaning ascribed to the first proxy and do not agree that the second was not followed.

[149] The majority says that the reference to careful tailoring "invites the court to examine the rationale, express or implicit, for the amount and duration of the spending limit – the express or implicit reasons why the lines were drawn where they were." In my view, this approach conflates the analysis under s. 3 and s. 1 of the *Charter*, requiring Ontario to provide a justification for the legislation at the stage of determining whether a breach has occurred.

[150] The majority also says that the application judge made a number of errors in his analysis of careful tailoring. As I will explain, I disagree.

[151] Additionally, the application judge is said to have erred in failing to make a specific finding that the restrictions permit third parties to conduct a modest informational campaign. I read the application judge's reasons as clearly making that finding.

[152] I conclude that the application judge applied the correct legal test and made factual findings that are entitled to deference.

BACKGROUND

[153] Before turning to my legal analysis, I pause briefly to examine the scope of the spending restrictions imposed on third-party advertising.

[154] At issue here is the spending limit of $600,000 (now indexed to $702,600) on third-party political advertising applicable to the 12-month pre-writ period. Of the total, $24,000 (indexed to $28,104) may be spent in any particular electoral district.

[155] In addition, third parties may spend $100,000 (now indexed to $117,100) on political advertising between the dropping of the writ and election day. Of the total, $4,000 (now indexed to $4,684) may be spent in any particular electoral district. These spending restrictions are not challenged.

[156] The restrictions in question relate to "political advertising" that is election oriented. Given the definition of "political advertising", they do not capture issue-based advertising that cannot reasonably be regarded as closely associated with a registered party or its leader or a registered candidate. They also exclude several means of communicating with the public – for example, the transmission of debates, editorials, columns, letters, speeches and interviews.

[157] There are no spending restrictions that apply to the time prior to the 12-month pre-writ period.

[158] Thus, in advance of a fixed-date general election, each third party, whether big or small, may spend a total of $700,000 (now indexed to $819,700) on election-related advertising caught by the definition of "political advertising", plus an unlimited amount on communications that are not caught by the definition.

ANALYSIS

(1) The principles from *Harper*

[159] *Harper* begins with the basic proposition that spending limits are necessary and enhance the right to be an informed voter. Without spending limits, it is possible for the affluent or a number of persons or groups to dominate the electoral discourse.

[160] The decision describes how to determine if there is a s. 3 breach, at paras. 73-74:

> Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.
>
> The question, then, is whether the spending limits set out in s. 350 interfere with the right of each citizen to play a meaningful role in the electoral process.[Emphasis added.]

[161] The controlling test is not whether the spending limits are carefully tailored but whether they restrict information in such a way to undermine the right of citizens to meaningfully participate in the electoral process, which includes the right to vote in an informed manner.

[162] *Harper* specifically holds, at para. 74, that meaningful participation is not synonymous with effective persuasion:

> Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote.

[163] In the end, *Harper* concluded that the federal legislation imposing spending limits did not breach s. 3. Notably, in applying the law to the facts of that case, the court did not discuss justification or the reasons why the limits were drawn where they were. Rather, the court focused on whether the limits interfered with the right of each citizen to play a meaningful role in the electoral process. In answering that question, the court took into account the findings of the trial judge, who found that even though the limits did not permit third parties to mount effective persuasive campaigns, they did permit them to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns": at para. 74. The court also considered the potential number of third parties and their ability to act in concert.

[164] Given that there was no breach of s. 3, it was unnecessary for the court to go on to consider whether any breach was justified under s. 1.

(2) The majority reasons and the two proxies

[165] Against these directives, I turn to my colleagues' interpretation of *Harper* and their critiques of the application judge's application of the two "proxies".

(a) Proxy #1 – Careful tailoring

(i) Justification is not part of the s. 3 analysis

[166] As noted, the majority says that the careful tailoring requirement "invites the court to examine the rationale, express or implicit, for the amount and duration of the spending limit – the express or implicit reasons why the lines were drawn where they were."

[167] If one infers that "carefully tailored" invites the court to consider justification at the s. 3 stage of analysis, the s. 3 and s. 1 analysis are conflated. This is inconsistent with *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, which warns against such conflation, at paras. 30-31:

> The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country.
>
> ...
>
> ... If the government is to interfere with the right of each citizen to play a meaningful role in the electoral process in order to advance other values, it must justify that infringement under s.1. [Emphasis added]

[168] Nor does *Harper* import justification into the s. 3 analysis. On the contrary. As discussed, the test is not focused on the tailoring but on whether the restrictions undermine the purposes of s. 3. Paragraph 73 of *Harper* states:

> To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. [Emphasis added.]

[169] In other words, the s. 3 analysis does not require an inquiry into why the government enacted the spending restrictions. Rather, the question is whether the spending limits – as set out in the impugned legislation – restrict information such that they undermine the right to meaningfully participate in the electoral process. In this regard the court is to consider the legislation as it stands, not previous iterations. If the court, on the basis of the evidence, determines that there is no infringement of this right, justification for the legislation is not engaged.

[170] That is exactly how the application judge approached the matter. At para. 20 of the application judge's reasons he writes:

> It is therefore worth summarizing the challenged provisions again for the purpose of assessing the need to "ensure the primacy of the principle of fairness in democratic elections... [and that] all citizens are reasonably informed". In other words, the impugned statute must now be reviewed with a view to analyzing its impact on the consumers of political information – i.e. voters – rather than, as in the previous litigation, on the purveyors of political information – i.e. advertisers.

[171] And, at para. 110 he writes:

> Unlike under section 2(b), the analysis does not go right to section 1 where the government must meet a test of minimal intrusion. Under section 3, if the government intervenes in the political advertising market it must do so in a way that is attuned to [the] right of voters to meaningful participation via an informed vote. Only if it were found not to be attuned to that objective would the section 1 analysis become relevant and the question of minimal impairment be raised. [Emphasis added.]

[172] In my respectful view, my colleagues focus on the words "carefully tailored" without adequate recognition of the words that explain the purpose of the careful tailoring, which is "to ensure that candidates, political parties and third parties are able to convey their information to voters": *Harper*, at para. 73. These explanatory words are consistent with *Harper*'s clear direction that, to constitute an infringement of s. 3, the spending limits would have to undermine the right to meaningful participation, which includes the right to vote "in an informed manner".

[173] Furthermore, the onus of establishing the breach of s. 3 rests with the appellants. In my view, inviting consideration of the rationale for the spending limits would require the government to lead evidence that would effectively shift the burden of proof.

(ii) The application judge did not err by not focussing on extended restrictions

[174] The majority says that their interpretation of careful tailoring required the application judge to conduct an analysis focusing on the change in the legislation from a 6-month to a 12-month restricted spending period without an increase in the spending limit. They say that because the application judge did not focus on the change, he erred. I disagree for three reasons.

[175] First, the application judge explicitly recognized the importance of the extension, noting that "the most important change ... was the elongation of the restricted period from 6 months in the previous iteration of the Bill to 12 months": at para. 46. He also recognized that the spending limits stayed the same: at para. 21. He did not, as suggested, fail to consider the length and quantum of the restrictions as part of his analysis.

[176] Second, while the application judge was alive to the legislative history and the fact the $600,000 limit now applied for 12 months instead of 6 months, he correctly considered the legislation that was before him. The legislation had to stand or fall on its own. It was not the change that was determinative, but whether the legislation before him was *Charter* compliant.

[177] Third, the application judge was entitled to accept the respondent's expert evidence. The evidence supported the application judge's conclusion that the 12-

month period did not prevent meaningful participation. Jean-Pierre Kingsley, Canada's Chief Electoral Officer from 1990 to 2007, opined that third parties are able to meaningfully participate in elections under the current legislation. He acknowledged that he previously opined that the 6-month regulated pre-writ period was reasonable. In his view, the 12-month pre-writ regulated period was also reasonable. In other words, he said that both periods fell within "a range of reasonable alternatives." As for the spending limits, he noted that the total amounts third parties can spend during and before the election are not "small change" and that the majority of third parties spend well below the limits. Thus, Mr. Kinsley was alive to the change but nonetheless opined that meaningful participation was possible.

[178] In conclusion, it cannot be said that the application judge erred in ignoring the change to an extended restricted period.

(iii) The application judge did not erroneously focus on "reasonable choice"

[179] The majority suggests that the application judge erroneously focused on whether the government made a "reasonable choice", rather than by analyzing whether there was an infringement of s. 3. They say:

> ...in considering whether a s. 3 infringement has taken place, the careful tailoring analysis must not focus on whether a reasonable choice was made among alternatives that infringe the *Charter* right. Instead, the

> analysis must focus on whether an infringement has occurred at all. Therefore, the question is whether the challenged spending restrictions draw the line at the point of preventing the well-resourced from dominating political discussion without being overly restrictive so as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented. A conclusion that a choice was in some other sense "reasonable" does not answer this question. [Emphasis added.]

[180] I do not agree that the application judge concluded that the spending restrictions were "in some other sense 'reasonable'", as my colleagues suggest. Rather, he determined that the restrictions were aimed at promoting the egalitarian model and citizens could still cast an informed vote.

[181] Furthermore, the application judge's reference to "reasonable" was made in the context of discussing the expert evidence. A number of the experts spoke about reasonableness in the sense of preventing domination of political discourse without undermining the right of citizens to meaningful participation. But they also recognized that there is not just one option for achieving that goal. At the end of the day, the application judge was entitled to rely on the evidence he did and determine that the legislation did not infringe the right to vote.

(iv) The application judge did not err in failing to apply findings made in a different context

[182] The majority says that the application judge erred in "failing to apply his previous findings". In their view, the appellants were entitled to rely on the

application judge's findings in *Working Families 1* that the previous $600,000 restriction over six months was appropriate to ensure electoral equality, and that the extension of the restricted period, with no corresponding increase, was not justified.

[183] Again, I disagree. Although the records in both cases contained similar studies, *Working Families 1* engaged a different constitutional framework. In *Working Families 1*, it was conceded that there was a breach of s. 2(b) and so the case turned on whether the breach was justified under s. 1. The findings in question were made in the context of the application judge's analysis of whether the s. 2(b) breach was justified under s. 1, and more particularly, at the minimal impairment stage of his analysis.

[184] The Supreme Court has repeatedly emphasized the difference between s. 2(b) and s. 3 analyses. And, as discussed, the s. 3 analysis is not to be conflated with a s. 1 analysis.

[185] The application judge recognized that this case involved a different analytic framework. For instance, at para. 61, he stated:

> ...[U]nlike under section 2(b) of the *Charter*, where any restriction on political advertisement spending amounts to a *prima facie* infringement of the right of expression, under section 3 restrictions on spending for political advertisements can enhance citizens' exercise of the right to vote. As the Court explained it in *Libman*:

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. If 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. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others... Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources. [Footnotes omitted.]

[186] Just because it happened to be the same judge who decided the s. 2(b) and the s. 3 applications does not mean that he was somehow bound by findings he made in determining that the s. 2(b) breach was not justified under s. 1 in determining whether there was a s. 3 breach. The application judge properly recognized that he was required to make findings in this case through a different legal lens than in *Working Families 1*.

[187] Accordingly, I disagree that the appellants were entitled to rely on findings made in a different case with a different analytic structure.

(v) Conclusion: the application judge did not err in how he approached the analysis

[188] A review of the application judge's reasons confirms that he did not err in how he approached the analysis:

- He correctly recognized that the legislation must be "carefully calibrated in order to respect rather than impede voting rights": at para 5.
- He understood that any restrictions must be "carefully tailored to ensure that...third parties are able to convey their information to voters" and that overly restrictive provisions may undermine the informational component of the right to vote: at para. 80.
- He found that the legislation is tailored to the principle of electoral equality: at paras. 97, 105-106 and 109.
- He did not conflate s. 3 and s. 1, recognizing that the analysis is not to make the spending restrictions as minimal as possible: at para. 106.

[189] In short, the application judge applied the correct legal analysis and made no palpable and overriding errors.

(b) Proxy #2 – Modest Informational Campaign

[190] The majority says there is another "proxy" from *Harper* that was ignored by the application judge — that he failed to "specifically make a finding" that a modest informational campaign could be mounted.

[191] Read as a whole, the application judge's reasons make it clear that he was satisfied that a $600,000 spending limit on political advertising in the 12-month pre-writ period did not preclude third parties from mounting a modest informational campaign. He considered the scope of "political advertising" and what would and would not be caught by the $600,000 spending limit. He recognized that television advertising is particularly impactful but that in today's multi-media environment there are less expensive means of getting a message out. Finally, at paras. 106 and 109 he found:

> The goal of the voting rights analysis in the first instance is not to restrain government or to make its legislative interventions as minimal as possible. Rather, it is to allow government to do what it takes to foster the kind of "equality in the political discourse [that] is necessary for meaningful participation". This means that the spending restrictions must at least leave room for the conduct by third parties of "modest, national, informational campaigns", but need not ensure that any third party can mount an expensive media campaign with the potential for determining election results.
>
> ...
>
> ... But having done multiple studies which indicate that a 12-month pre-writ restricted period is also aimed at fostering an egalitarian electoral playing field, one cannot say that the EFA is not tailored to its appropriate goal. [Footnotes omitted; emphasis added.]

[192] This is a clear finding that the legislation permits a modest informational campaign. There is no error when the basis for the application judge's conclusion

is apparent in the reasons read as a whole: see *Marcoux v. Bouchard*, 2001 SCC 50, [2001] 2 S.C.R. 726, at para. 33.

[193] Appeal courts have been instructed to conduct a functional review of lower court reasons. In *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para. 79, the court said:

> To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review.... Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error.... It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated.... An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity. [Citations omitted.]

[194] I do not agree that the application judge's reasons were ambiguous, but even if they were, *G.F.* instructs that the interpretation consistent with the presumption of correct application must be preferred over those that suggest error.

CONCLUSION

[195] I am satisfied that the application judge followed the directives in *Harper* and made findings open to him on the evidence.

[196] Accordingly, I would dismiss the appeals.

Released: MAR – 6 2023

MLB

M. L. Benotto J.A.