



Osgoode Hall Law School of York University

Osgoode Digital Commons

All Papers

Research Papers, Working Papers, Conference
Papers

2022

The text and the ballot box: s.3, s.33 and the right to cast an informed vote

Jamie Cameron

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/all_papers



Part of the [Constitutional Law Commons](#), and the [Election Law Commons](#)

The text and the ballot box: s.3, s.33 and the right to cast an informed vote
Jamie Cameron*
July 2022

Introduction

Since its enactment in 1982, expectations and apprehensions about how the *Charter* might change us – for better or for worse – have had time to settle. While constitutional rights will ever spark controversy, Canada is for the most part content with, and proud of, its *Charter of Rights and Freedoms*.¹

As always, the override stands watch over the *Charter*'s guarantees, its presence a constant and implacable warning that rights are subject to legislative recall. Section 33's "notwithstanding" mechanism acts as a brake on rights, empowering legislatures to override constitutional guarantees and immunize laws from *Charter* review.² Without it, constitutional rights would have failed, because a textual caveat preserving a role for legislative supremacy was a non-negotiable condition of the *Charter*'s adoption.³ Since its inception, s.33 has ruled from the background, placing a constant and unpredictable burden on the *Charter*'s rights and freedoms.

Always a provocation, the override stirs controversy even when quiescent. It can easily be forgotten that constitutional rights were initiated amid profound uncertainty about s.33 and its impact on the *Charter*. To some, planting an override in a document purporting to constitutionalize

*Professor Emerita, Osgoode Hall Law School. I thank Peter Biro and Nathalie Desrosiers for inviting me to speak at "The NWS Clause at 40: Canadian Constitutional Democracy at a Crossroads". Note that I represented the Centre for Free Expression, one of the intervenors in *Working Families v. Ontario (Working Families #2)*, 2021 ONSC 4076 (with Christopher Bredt). This article offers an academic analysis and does not represent the views of the CFE or of co-counsel.

¹ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c.11.

² Section 33, which in this article is referred to as the override, empowers legislatures to enact laws "notwithstanding" s.2 and ss.7 to 15 of the *Charter* (s.33(1) & 2), requires an express declaration to activate the override (s.33(1)), places a 5-year limit on s.33 legislation (s.33(3)), and provides for the override's renewal (s.33(4)).

³ In the words of then Prime Minister Trudeau, "it is a regressive Section but it was necessary to reach a compromise ... because some Premiers did not want the full Charter", *House of Commons Debates*, 20 September 1983, at 27292.

rights was incoherent because it legitimized derogations and encouraged legislatures to negate *Charter* entitlements.⁴ In allaying those concerns, the leaders of Canada's constitutional patriation described s.33 as a failsafe that would remain dormant in all but rare or exceptional circumstances.⁵ Little in the provision supports that view because the textual constraints are modest, and legislatures have the power to override the *Charter*'s rights and freedoms essentially at will.

Once the text's architectural see-saw of rights and their override was set in motion, the *Charter*'s guarantees initially co-existed in relative peace with s.33.⁶ While not dormant, the override was used sparingly and, albeit with exceptions, did not corrode the *Charter*'s core protections.⁷ Over the years, s.33 was feted in academic scholarship praising the override as part of dialogue theory, an innovative feature of rights constitutionalism, and the inspiration for the "Commonwealth" model of rights protection.⁸

Recently, the override has resurfaced more ominously than before, and fears that s.33 will be invoked with increasing regularity to emasculate the *Charter*'s essential promises are now real. Those concerns arise principally in Quebec and Ontario, where provincial governments have relied

⁴ As Maxwell Cohen stated, "[i]t is simply not possible to say, in the same breath, let us have a doctrine of supremacy of Parliament, let us have a supremacy of *Charter* regime". "Colliding Visions: The Debate over the *Charter of Rights and Freedoms*, 1980-81" in J. Weiler and R. Elliott, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto, Carswell, 1986) 24.

⁵ J. Chrétien, "Bringing the Constitution Home", in T. Axworthy and P.E. Trudeau, eds., *Towards a Just Society: The Trudeau Years* (ON: Viking Press, 1990) 306 (stating that the override would "only be used in the most extreme and compelling circumstances").

⁶ In 2000, Howard Leeson described the override as a compromise that "leaves no one happy, but no one hurt". "Section 33, the Notwithstanding Clause: A Paper Tiger?", in Russell and Howe, eds., *Choices: Courts or Legislatures*, Vol.6 No.2 (2000), at 4.

⁷ The government of Quebec passed omnibus legislation overriding the *Charter* following the Constitution's 1982 patriation; *An Act Respecting the Constitution Act, 1982*, C.Q.L.R., c-L-4.2. The province also used the override in response to *Ford v. Quebec*, [1988] 2 S.C.R. 712; *An Act to Amend the Charter of the French Language*, 1988, c.54.

⁸ See generally, S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (UK: Cambridge University Press, 2013). For a comment on this phenomenon, see J. Cameron, "Collateral Thoughts on Dialogue's Legacy as Metaphor and Theory" (2016), 35(1) U. of Queensland L.J. 157.

on s.33 to enact legislation promoting majoritarian dominance and suppressing electoral rights of democratic participation.⁹

The override's ascent as a rights-negating mechanism has prompted renewal in the scholarship and a quest to carve out a residual role for judicial review of s.33 legislation. Emergent theories challenge the longstanding assumption that the override is a "no go" zone, maintaining instead that s.33 does not disable it, but accepts and even requires a form of constitutional review. Though there are variations, these proposals maintain that, short of invalidating it, courts can play an active role in interpreting s.33 legislation.¹⁰ Others resist the suggestion that the override is amenable to review, even dismissing it as a form of constitutional heresy.¹¹ This debate is the current generation's iteration of and response to the contradiction that defined the *Charter* in 1982 and has dogged its evolution in the first 40 years. At this time, the discussion is no longer abstract, but arises in settings where s.33 legislation has endangered the central foundations of rights protection under the *Charter*.

A fresh issue stirred by recent s.33 legislation concerns the untouchable rights that cannot be overridden. Only three in number, these guarantees comprise the *Charter*'s democratic rights

⁹ See *An Act respecting the laicity of the State*, S.Q. 2019, c.12 (Bill 21), and *An act respecting French, the official and common language of Quebec*, S.Q. 2022, c.14 (Bill 96). In Ontario, see *The Protecting Elections and Defending Democracy Act, 2021*, S.O. 2021, c.31 (Bill 307).

¹⁰ See, e.g., G. Webber, E. Mendelsohn & R. Leckey, "The Faulty Received Wisdom around the Notwithstanding Clause", *Policy Options* (10 May 2019), online: <https://policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause/>; R. Leckey & E. Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72 UTLJ 189; G. Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71 UTLJ 537.

¹¹ See, e.g., M. St-Hilaire & X. Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29 *Constitutional Forum* 38 (stating that their arguments constitute a "creative but ultimately erroneous development in legal thought on s.33"), online: https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29401. See also, G. Rousseau & F. Coté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights", (2017) 47 R.G.D. 343; D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identity", in G. Sigalet, G. Webber & R. Dixon, *Constitutional Dialogue: Rights, Democracy, Institutions* (UK: Cambridge University Press, 2019).

(ss.3-5), mobility rights (s.6), and minority language rights (s.23).¹² As *Hak v. Quebec* demonstrates, setting these rights apart and insulating them from s.33 can lead to seeming anomalies. There, the Quebec Superior Court selectively invalidated provisions that violate s.3's right to vote and s.23's minority language education, but found that Bill 21's override pre-empted challenges to Quebec's mandatory secularism law under ss.2 and 7 to 15 of the *Charter*.¹³ Those carve-outs from s.33 provided vital relief from Bill 21's ban on wearing religious symbols to give or receive certain public services, but only in those domains.

In Ontario, Bill 307 relied on s.33 to re-instate Bill 254 and its unconstitutional restrictions on third party political advertising.¹⁴ Though both Bills unjustifiably violate s.2(b), whether Bill 307 also breaches s.3 raises a different set of considerations, which includes the relationship between the *Charter*'s democratic rights and s.33.¹⁵ The right to vote may not be subject to s.33, but that does not sideline the override in an analysis of Bill 307's constitutionality.

In marking the first time override legislation forms the backdrop to s.3's interpretation, *Working Families v. Ontario (Working Families #2)* contemplates s.33's novel role in the analysis.¹⁶ Bill 307's use of the override places the relationship between ss.33 and the right to vote in sharp relief, exposing a symbiotic relationship between the two that informs the *Charter*'s democratic rights. Democratic accountability, a principle that grounds the underlying assumptions

¹² Section 33(1) explicitly states that s.2 and ss.7 to 15 of the *Charter* are subject to the legislative override; other guarantees that are not specifically included in its scope are excluded.

¹³ 2021 QCSC 1466.

¹⁴ After *Working Families Ontario v. Ontario*, 2021 ONSC 4076 (*Working Families #1*), declared Bill 254 invalid on June 8, 2021, the Ontario legislation responding by enacting Bill 307 less than one week later. The legislation was introduced, debated, and enacted, receiving royal assent by June 14, 2021.

¹⁵ Bill 254 amended the *Election Finances Act*, R.S.O. 1990, c.E7, which for the first time introduced pre-writ restrictions on third party political advertising. Among other things, Bill 254 – *The Protecting Ontario Elections Act, 2021* – doubled the pre-election restrictions to twelve months, but retained the third party global spending amount of \$600,000. Bill 254's 12-month period of restrictions was declared unconstitutional, and Bill 307, which re-enacted the same restrictions, is also unconstitutional under s.2(b), but protected by the override.

¹⁶ 2021 ONSC 4076 (upholding Bill 307). *Working Families #2* is on appeal to the Ontario Court of Appeal, where decision is pending.

of both, establishes a critical bond between these provisions of the *Charter*. That bond requires vigorous enforcement of the right to vote, not only to protect s.3's democratic rights, but also to legitimize s.33's legislative override. Put simply, the legitimacy of s.33 and its theory of democratic accountability are contingent on an interpretation of s.3 that prohibits interference with the democratic process. As explained below, Bill 307 violates s.3 because it interferes with that process and undermines the voter's right to cast an informed vote.

Not only does it inform the constitutionality of Bill 307, the symbiosis between ss.3 and 33 has broad implications for Canada's system of democratic constitutionalism. A finding that Bill 307 breaches s.3 re-inforces established principles of interpretation that anchor democratic accountability in the *Charter's* text and architecture. *Working Families #2* therefore marks a turning point in the evolution of the override because it calls on the courts to protect the *Charter's* democratic rights, especially and *a fortiori* when s.33 legislation substantially impairs critically important avenues of participation in pre-electoral public discourse.

This brief article develops a revelatory interpretation of ss. 3 and 33. The next section analyzes the textual relationship between these provisions, showing how deeply the accountability principle is embedded in each. That principle informs the legitimacy of s.33 and plays a key role in defining the scope of s.3's entitlements. From there, the discussion turns to s.3 to explain how legislation that violates the s.2(b) rights of third party political advertisers also offends and undermines the s.3 rights of citizen voters. Throughout, the analysis draws on unwritten constitutional principles – specifically, the democratic principle and its corollaries of accountability and unfettered and free public discussion – to inform the interpretation of s.3.

On that point, the Supreme Court's recent decision in *City of Toronto v. Ontario* emphasized the primacy of the text in constitutional adjudication and directed a relatively narrow

interpretive role for unwritten principles.¹⁷ Notably, the majority opinion stated that protection from perceived injustices cannot be found in “amorphous” underlying principles but rests, instead, “in the text of the Constitution and the ballot box”.¹⁸ That, in short, is precisely and exactly the point of this article: that the texts of ss.3 and 33, informed by the principle of democratic accountability, guarantee the integrity of the ballot box and the entitlements that safeguard the democratic rights of the electorate.

While s.33 empowers legislatures to override s.2(b)’s rights of democratic participation, its carve-out for s.3 expresses textual intolerance for derogations from ballot-box rights that are guaranteed by the *Charter*. As explained below, the accountability principle requires vigilant scrutiny and enforcement of these entitlements, which include the right of meaningful participation and access to information that can influence the vote, both during and outside the period of the election writ.

Sections 3 and 33: constitutional text and the principle of democratic accountability

The constitutionality of Bill 307’s restrictions on pre-writ third party political advertising pivots on the texts of ss.3 and 33, and their symbiotic connection to the principle of democratic accountability. That principle aligns these provisions, creating a textual and interpretive bond between the two and the democratic imperative that is the foundation of Canada’s system of constitutionalism. In complement, these provisions of the *Charter* serve this unassailable function mutually and symbiotically with each other.

¹⁷ *City of Toronto v. Ontario*, 2021 SCC 34, at para. 73 (citing *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473).

¹⁸ *Ibid.* at para. 59 (citing *Imperial Tobacco*).

Democratic accountability is a constituent element of the democratic principle and one of the Constitution's primordial values. In the *Secession Reference*, the Supreme Court linked accountability to the consent of the governed and the legitimacy of democratic institutions that "must allow for the participation of, and accountability to, the people, through public institutions".¹⁹ The Court bolstered the point, drawing a link between a functioning democracy and a continuous process of discussion, stating that the Constitution mandates government by democratic legislatures, and an executive accountable to them.²⁰

As a matter of text, ss.3 and 33 are explicitly linked to the principle of democratic accountability. For instance, in guaranteeing the citizen's right to vote and requiring a general election to be held not less than once every five years, ss.3 and 4 clearly and purposively serve the democratic principle and its objective of democratic accountability.²¹ Moreover, excluding ss.3 and 4 from the override highlights the sacrosanct status of these entitlements and prohibits legislatures from interfering with or corrupting the democratic process.²² These points are insistently confirmed and entrenched in the s.3 jurisprudence.²³

Meanwhile, s.33 serves democratic purposes somewhat differently, empowering legislatures to override *Charter* guarantees and shield statutory provisions from *Charter* review. Democratic accountability is the fundamental condition of s.33, because that is what makes it

¹⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 67.

²⁰ *Ibid.* at para. 68.

²¹ Section 3 guarantees every citizen the right to vote in provincial and federal, but not municipal or other elections, and s.4 places a 5-year limit on a legislature's electoral mandate.

²² See *Secession Reference*, *supra* note 19, at para. 65 (stating that the democratic principle is affirmed with particular clarity in that s.4 is not subject to s.33). See also P. Weiler, P. Weiler, "Rights and Judges in a Democracy: A New Canadian Version", 18 U of Mich J of Law Reform 51, at 84 (1984) (describing the "full entrenchment" of democratic rights as "insurance against the remote possibility of a government's attempt to perpetuate itself by denying basic rights of participation").

²³ *Infra*, note 34. See also *Thomson Newspapers v. Canada (AG)*, [1998] 1 S.C.R. 877, at para. 79 (stating that although the override is rarely invoked, "the fact that s.3 is immune from such power "clearly places it at the heart of our constitutional democracy").

legitimate for legislatures to override the *Charter*'s rights and freedoms. For that reason, the text promotes accountability by hedging s.33's democratic prerogative in important ways. First, a legislature that chooses to engage the override must provide a "sufficiently express declaration of override" to meet s.33(1)'s requirement of form.²⁴ Albeit far from onerous, this requirement is designed to draw attention to the override, promoting an informed and reasoned debate in the legislature and public discourse about the decision to invoke s.33. Accountability is contingent on a concept of transparency that requires governments to disclose the essential elements of s.33 legislation and engage a process of wide public discussion.²⁵

Second, s.33(3)'s "sunset clause" textualizes the principle of accountability by automatically expiring override legislation five years after its enactment. It is no accident that s.33's 5-year lifespan cross-references s.4's equivalent lifespan for the mandate of federal and provincial governments: to pause and emphasize this critical point, s.33's sunset clause is precisely in tempo with s.4's requirement of a general election within the same interval. Separately and together, the 5-year limit on an electoral mandate and lifespan of s.33 legislation entrench mechanisms of democratic accountability. Just as democratically elected governments are subject to accountability through s.4's 5-year electoral interval, s.33 demands accountability five years after any s.33 legislation it has enacted.

The principle of democratic accountability is valuable to constitutional interpretation in this context because it aligns ss.3 and 33. Specifically, s.33's requirement of accountability cannot be satisfied unless the *Charter*'s democratic rights are vigorously protected. The sunset clause and its objective of calling governments to account for enacting s.33 legislation can only work where

²⁴ *Ford v Quebec*, [1988] 2 SCR 712, at para 33.

²⁵ See Weiler, *supra* note 22, at 81 (stating that to use s.33 a government would have to "use a formula" designed to draw the proposal to the attention of the opposition, the press, and the general public).

s.3's rights are protected from partisan and other forms of interference. The result may seem paradoxical – even subversive – because it requires s.3's voting rights to be enforced against s.33 legislation in order to defend the override's own democratic purposes. Few objectives are as close to the heart of the *Charter* as this.

At its inception, s.33 was grounded in and contingent on these principles of accountability and transparency. In reflecting on the override, Jean Chrétien explained that s.33's requirements of a notwithstanding declaration and 5-year lifespan were intended to discourage governments from using the override. In particular, the sunset clause would require periodic public debate about the legitimacy of overriding the *Charter* and discourage the “ill-considered” use of s.33.²⁶ Roy McMurtry, another prominent leader during the patriation negotiations, declared that “political *accountability* is the best safeguard against any improper use of the ‘override clause’ by any parliament in the future”.²⁷ Civil liberties leader Alan Borovoy called the override a “red flag” for the opposition parties and press, predicting that it would be politically difficult for a legislature to override the *Charter*, and concluding that “[p]olitical difficulty is a reasonable safeguard for the *Charter*”.²⁸

These views are also reflected in the academic commentary. Professor Weiler, who promoted and defended the override, explained that “representative democracy implies a structural core consisting of periodic elections” and a public that has been educated about the issues “through vigorous public commentary, especially by an uninhibited press”.²⁹ Though it gives the people a say after the fact, the five-year sunset mechanism requires the legislatures and the electorate to

²⁶ J. Chrétien, “Bringing the Constitution Home”, *supra* note 3, at 305.

²⁷ R. McMurtry, “The Search for a Constitutional Accord – A Personal Memoir”, (1982) 8 Queen’s LJ 28, at 65 (emphasis added).

²⁸ Quoted in Dickson, “Alberta and the Notwithstanding Clause” (2000) LawNow 41.

²⁹ *Ibid.* at 67.

think the problem through again and again.³⁰ Professor Russell is another influential scholar who supported it because the override would provoke a process of “wide public discussion so that the politically active citizenry participate in and share responsibility for the outcome”.³¹ At the same time, he cautioned that, though it provides an opportunity for “responsible and *accountable* public discussion of rights issues”, that purpose could be “seriously undermined” if legislatures were free to use the override without discussion and deliberation.³²

Exempting the *Charter*'s democratic rights from s.33 confirms that the legitimacy of the override is contingent on a process of democratic accountability. Legislatures can only be called to account for overriding *Charter* rights when the sanctity of the democratic process is preserved by prohibiting governments from violating ss.3 and 4. Put another way, the theory of the override requires ss.3 and 4 to be excluded, because empowering legislatures to negate these guarantees would defeat s.33's embedded principle of accountability. Ominously, subjecting democratic rights to an override would compromise s.33's legitimacy and threaten the Constitution's system of democratic constitutionalism.

Theories for the renewal of s.33 support this conception through a functional approach to s.33 and its underlying principle of accountability. As Leckey and Mendolsohn argue, the electorate cannot fully perform its duty to hold legislatures accountable without access to information about the constitutionality of s.33 legislation. Accordingly, they maintain that the judiciary can and should support the public's “constitutional role”, making declarations that enable the electorate to assess s.33 legislation and decide whether or how to hold the legislature accountable for enacting it. Though it does not rest on a textual link to s.3, and addresses the status

³⁰ Weiler, “Rights and Judges”, *supra* note 22 at 82, n99.

³¹ P. Russell, “Standing Up for Notwithstanding”, (1991) 29 *Alta L Rev* 293 at 299.

³² *Ibid.* at 299 (emphasis added).

of rights that are subject to s.33 legislation, this conception of review complements and is consistent with the proposition that the override's legitimacy depends on the efficacy of mechanisms of accountability. That point is especially compelling when s.33 legislation overrides s.2(b) in circumstances that place s.3's non-derogable democratic rights at stake.³³

Though s.3 should receive a robust and generous interpretation in all cases, Bill 307 presents a distinctive and unprecedented challenge to the *Charter's* democratic rights. Where s.33 legislation eliminates other guarantees like s.2(b), courts must be vigilant in thwarting any threat to the integrity of the democratic process. As explained, democratic accountability is as essential to the legitimacy of s.33 as it is to s.3's democratic rights. Where override legislation undercuts rights of democratic participation during a lengthy pre-writ period, s.33 and its concept of democratic accountability inform the interpretation of s.3. As such, s.33's underlying assumption of accountability aligns with s.3's role in protecting and preserving the *Charter's* concept of democratic constitutionalism.

Another aspect of the democratic principle that cannot be forgotten is the role of participation as a core element of a functioning democracy. That principle is also embedded in the architecture of the *Charter's* democratic rights, and a constitutional jurisprudence that identifies free, unfettered discussion and access to information as the *sine qua non* of a functioning democracy. As explained in the next section, these values inflect and infuse s.3's democratic rights.

The text, the ballot box, and the right to cast an informed vote

Bill 307's override pushed s.2(b) aside and brought the *Charter's* democratic rights to the forefront, drawing attention to core questions about the relationship between s.3 and s.33. Under

³³ Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 198-99 (discussing the electorate and legislative accountability).

s.3, the right to vote is tantamount to inviolate: the entitlement cannot be overridden and any infringements are subject to an exacting standard of justification under s.1. In interpreting this guarantee, the Supreme Court has been unequivocal that s.3 demands robust and vigilant protection from interference by the state.³⁴ That conception of s.3 incorporates a basic and non-negotiable postulate of democratic accountability. A second postulate of accountability extends the scope of s.3 beyond the abstract right to vote and includes functional components such as the right to play a meaningful role in electoral discourse, the right to cast an informed vote, and the right to effective representation.³⁵

The democratic principle and democratic accountability require a functional approach that includes entitlements that make the right to vote meaningful. In recognition of that, the s.3 jurisprudence interprets the right to vote generously and inclusively of meaningful participation and a right of access to information that could influence an informed vote. Notably, these entitlements are not confined to the election, but extend beyond and throughout the pre-writ period. In developing a conception of democratic rights under the *Charter*, the Court's landmark decision in *Figueroa v. Canada* also proposed a standard for breach that asks whether legislative measures undermine s.3's bundle of entitlements.³⁶

There, the federal tax scheme created advantages for larger political parties vis-à-vis smaller parties that did not meet a 50-candidate threshold. These advantages and the disparities

³⁴ See, e.g., *Sauvé v. Canada*, [2002] 2 S.C.R. 519, at para. 15 (stating that “it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be diligent in fulfilling their constitutional duty to protect the integrity of this system”); *Frank v. Canada*, [2019] 1 S.C.R. 3 at para. 44 (confirming that any intrusions on s.3's “core democratic right” must be reviewed under a “stringent” justification standard that “carefully and rigorously” reviews the government's “proffered” justification for the violation).

³⁵ *Figueroa v. Canada*, [2003] 1 S.C.R. 913, at paras. 19-32 & 53-54 (explaining these entitlements).

³⁶ *Ibid.* at paras. 54, 57, 58 (establishing that the question in every case is whether a measure undermines any of the voter's entitlements under s.3).

they engendered were not limited to an electoral period but were of general application.³⁷ The Supreme Court held that this disparity under the tax regulations violated the rights of members and supporters of parties below the threshold, because it diminished their capacity to engage in meaningful participation by introducing their ideas and opinions into the open dialogue and debate the election process engenders.³⁸

In addition, *Figueroa* found that that the disparities for smaller parties had a “more general adverse effect” on the s.3 rights of voters.³⁹ As Iacobucci J. explained, the impact of the regulations on those parties had larger implications in undermining the right of each citizen to information that might influence their exercise of the vote. In finding a breach of s.3, he emphasized that a citizen cannot vote in a way that accurately reflects their preferences without access to information that enables them to assess the strengths and weakness of the political parties and their candidates.⁴⁰

There are compelling parallels between *Figueroa* and *Working Families #2*. While *Figueroa*'s disparate tax rules disadvantaged smaller political parties, Bill 307's advertising restrictions dilute the voices of third parties political participants, to the point of effectively preventing them from exercising rights of democratic participation for a prolonged period prior to an election. One difference is that the disparity in Bill 307 is not between political parties – which are not subject to the 12-month restrictions – but between political parties and third party participants.⁴¹ For purposes of s.3, that is not a principled difference. It matters little whether the restrictions are aimed at smaller political parties, as in *Figueroa*, or at third party speakers

³⁷ *Ibid.* at para. 47 (explaining that the regulations relating to parties below the statutory threshold applied outside the writ period).

³⁸ *Ibid.* at para. 53.

³⁹ *Ibid.* at para. 54 .

⁴⁰ *Ibid.* See also para. 57 (explaining how the regulations undermined the right to exercise the vote in a manner that “accurately reflects” the voter’s preference).

⁴¹ In leaving Bill 254's 6-month period for restrictions on political spending intact, Bill 307 created a significant disparity between those parties and s.2(b)'s third party political advertisers.

exercising their democratic rights under s.2(b): in both instances, the rights of voters are at stake. Bill 307's limits on third party participation substantially limited and unquestionably undermined voter access to information that could influence the ballot. Though limits on third party political advertising that violate s.3 might be justifiable, that is a s.1 issue and does not arise in determining the threshold question of breach. In addressing that issue, the question under *Figueroa* is whether Bill 307's 12-month restrictions on third party political advertising undermine the rights of voters under s.3.

A conception of s.3 that valorizes these entitlements is fortified by the democratic principle and its corollary of a right to participate in the free discussion of public affairs. As noted above, *City of Toronto* accepted this principle and its status as one of the Constitution's unwritten principles that legitimately informs the interpretation of s.3. There, the Supreme Court described it as a principle by which the Constitution is "to be understood and interpreted," and one that includes the right of citizens to participate in the process of representative and responsible government.⁴² In particular, the Court re-affirmed that the democratic principle is "relevant as a guide to the interpretation of the constitutional text" because it supports "an understanding of free expression as including political expression in furtherance of a political campaign".⁴³ That same principle is yet more indispensable to the interpretation of s.3.

The principle of free and open discourse has deep pedigree in the constitutional jurisprudence, tracing its pre-*Charter* lineage from the *Alberta Press Case*, to *Switzman v. Elbling*, and from there to the *Charter*.⁴⁴ In the *Alberta Press Case*, Chief Justice Duff famously stated that

⁴² *City of Toronto*, *supra* note 17, at para. 77.

⁴³ *Ibid.* at paras. 77, 78.

⁴⁴ The most celebrated pre-*Charter* decisions are *Reference: Re Alberta Legislation*, [1938], S.C.R. 100 (the "*Alberta Press Case*"); *R. v. Boucher*, [1951] S.C.R. 265; *Saumur v. Quebec (City)*, [1953], 2 S.C.R. 299; and *Switzman v. Elbling*, [1957] S.C.R. 285. For a recent discussion of the formative role of these pre-*Charter* decisions, see J. Cameron, "Resetting the Foundations: Renewing Freedom of Expression under s.2(b) of the *Charter*", in B.

democratic institutions derive their efficacy from the free public discussion of affairs, and that citizens have a “fundamental right to express freely [their] untrammelled opinion about government policies and discuss matters of public concern”.⁴⁵ While his conception of democracy would demand “the freest and fullest analysis and examination from every point of view of political proposals”, Cannon J.’s endorsed “the right of the people” for access to information on questions of public interest “from sources independent of the government”.⁴⁶ The *Alberta Press Case* was followed many years later by *Boucher v. the King*, in which Rand J. explicitly confirmed the principle of accountability in stating that “the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties *accountably* to the public”.⁴⁷ In *Switzman v. Elbling*, Rand J. spoke of the “free public opinion of an open society” and the “condition of a virtually unobstructed access to and diffusion of ideas”.⁴⁸ These quotes are representative, but not exhaustive, of the degree to which accountability is linked in the jurisprudence to a process of open and unfettered public discourse. *City of Toronto* contemplates that this legacy can inform the interpretation of s.3, and in principle it must.

Nor are these views about the vital role of unobstructed access to ideas outdated. Rather, the *Secession Reference* incorporated a pre-*Charter* conception of democratic engagement and the bonds between accountability and a free and open democratic process. As the Court explained, the democratic principle predates the modern Constitution and is a “baseline against which the framers

Bird & D. Ross, eds., *The Forgotten Foundations of the Canadian Constitution*, (2022), 105 S.C.L.R. (2d) 121 at 130-38.

⁴⁵ *Alberta Press Case*, *ibid.* at p.148.

⁴⁶ *Ibid.* at 148, 106.

⁴⁷ *Boucher*, *ibid.* at 680 (emphasis added)

⁴⁸ *Switzman*, *ibid.* at 305, 306.

of our Constitution, and subsequently, our elected representatives under it, have always operated.”⁴⁹ The *Secession Reference* went on to state that this principle is fundamentally connected to the *Charter*’s promotion of self-government, as reflected in the guarantees protected by ss.3 and 4 of the *Charter*.⁵⁰ As the Court stated, s.4’s exemption from s.33’s legislative override affirms the democratic principle “with particular clarity”.⁵¹

The significance of these unwritten principles to s.3 and *Working Families #2* is this. Bill 307’s use of the override against s.2(b) also and additionally undermines citizen access to information that is the *sine qua non* of democratic participation and accountability. The affront to s.3 is not minor, but severe, insulating the incumbent government and other political parties from a process of pre-election accountability in the public discourse. Bill 307 violated the s.2(b) rights of third parties by substantially impairing their participation in political discourse. In addition, it undermined the democratic rights of the electorate, who were denied the benefit of unfettered debate on the merits of a government – as well as other parties and their candidates – that were standing for election. By subordinating democratic participation to the goal of protecting political incumbents, Bill 307 impoverished the electoral process and its foundation in principles of transparency and accountability.

The democratic principle and democratic accountability are a vital adjunct to the interpretation of ss.3 and 33, and fall squarely within *City of Toronto*’s directions for their use in decisionmaking. As explained, ss.3 and 33 are textually bound by a synchronous and immutable 5-year interval of democratic accountability. In principle, preserving rights of meaningful

⁴⁹ *Secession Reference*, *supra* note 19, at para 62.

⁵⁰ *Ibid.* at para. 65.

⁵¹ *Ibid.*

participation and access to information about the electoral process is as central to s.33 as it is to s.3.

Section s.33 is an integral part of the *Charter* that interacts with and must be interpreted alongside other provisions which not only include, but point directly at the *Charter's* democratic rights. That is why the democratic principle and democratic accountability are fundamentally implicated when s.33 engages s.3's entitlements. In such circumstances, s.33's underlying assumption of democratic accountability inflects the interpretation of s.3's entitlements and the role they play in protecting the integrity of the democratic process. Override legislation that undermines the integrity of the democratic process – by stifling voter access to information on issues of public interest from sources independent of the government – cannot satisfy s.33's requirement of democratic accountability.

Conclusion

In *Quebec (AG) v. 9147-0732* and *City of Toronto*, the Supreme Court addressed models of constitutional interpretation, and pushed back against interpretive principles and sources not proximate to the text.⁵² Despite focusing on the text and ballot box, *City of Toronto* accepted that the text is not an exclusive interpretive tool and agreed that unwritten principles play a valuable role in purposive interpretation.⁵³ As the analysis above demonstrated, the constitutionality of Bill 307 under s.3 raises issues that fall squarely within the Court's conception of unwritten constitutional principles and their role in interpretation. The *texts* of ss.3 and 33 address and safeguard the accountability of the *ballot box*, and in doing so re-inforce the primacy of the

⁵² 2020 SCC 32 (addressing the status of international and comparative law in constitutional interpretation), and *City of Toronto*, *supra* note 17 (addressing the status of unwritten constitutional principles).

⁵³ *City of Toronto*, *ibid.* at para. 55.

democratic principle and its requirement of accountability. Put shortly, a theory of purposive interpretation is at work, demonstrating how the text works seamlessly with the democratic principle and democratic accountability to protect the integrity of the ballot box. Section 33's foundation in the ballot box demands a generous interpretation of s.3, and a conclusion that Bill 307's use of the override to defeat the s.2(b)'s rights of third party speakers violated the democratic rights of citizen voters.

Bill 307 could override s.2(b)'s guarantee of expressive freedom, but not the rights of the voter under s.3 of the *Charter*. The legislature's restrictions on third party political advertising undermined voter access to information – including opinions, perspectives and points of view – that could influence the minds of voters in deciding how to cast their ballot. The breach of s.3 in this instance is informed by the scope and extent of the infringement, which applied for a full twelve months prior to the writ period and targeted the voices of third party participants, but not political parties. As explained above, s.3's entitlements are not confined to the election *per se* but, in the interest of accountability, must extend into the pre-writ period. In the circumstances, it is less difficult to imagine that the restrictions had a substantial and even crucial impact on the s.3 rights of voters than to assume that the lack of discourse arising from Bills 254 and 307 made no difference to the electorate.

It is telling that voter turnout in Ontario's provincial election on June 3, 2022 was the lowest on record.⁵⁴ Though voter apathy may be a multifactorial phenomenon, both generally and in this election, it is not far-fetched to conclude that the Ontario government dampened voter engagement by doubling down on rights of democratic participation. First, Bill 254 prevented third

⁵⁴ 4.6 million of 10.7 millions eligible voters cast a vote. See Elections Ontario, <https://www.elections.on.ca/en/resource-centre/elections-results.html>

party political advertisers from robust engagement in the pre-election discourse for a prolonged period of twelve months, and violated their rights under s.2(b) in doing so. Then, after Bill 254 was declared unconstitutional, the government further undermined democratic accountability by invoking s.33 to all but negate the violation and effectively insulate itself from criticism for overriding ss.2 and 7 to 15 of the *Charter*.

The *Charter*'s democratic rights loom larger when s.33 legislation negates s.2(b)'s rights of democratic participation. Wisely, s.3 was excluded from s.33 to ensure that governments could not use the override to break the line of accountability that is the foundation of Canada's system of democratic constitutionalism. Interpreting s.3 to protect access to information and the principle of accountability links to and re-inforces the conditions under which it is legitimate for a legislature to rely on the override. Bill 307 and *Working Families #2* demonstrate that the legislature cannot invoke s.33 to override s.2(b)'s rights of democratic participation and simultaneously undermine the democratic rights of voters under s.3. Somewhat paradoxically, it is necessary to invalidate Bill 307 under s.3 to protect the principle of accountability and legitimacy of the override under s.33.