File No. 38921

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CITY OF TORONTO

Appellant
(Respondent in the Court of Appeal)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant in the Court of Appeal)

- and -

TORONTO DISTRICT SCHOOL BOARD

Intervener
(Intervener in the Court of Appeal)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF CANADA

Interveners

FACTUM OF THE APPELLANT
CITY OF TORONTO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

"The 2018 Toronto municipal election concluded on October 22, 2018 with the election of a 25-member City Council. Yet the actions taken by Ontario to secure that result left a trail of devastation of basic democratic principles in its wake. By extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters. This infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history."

- Justice J.C. MacPherson, for the dissenting justices of the Court of Appeal, at para 136

Overview

1. This appeal raises important constitutional questions in the context of unprecedented interference in a democratic municipal election. Specifically, this appeal raises questions about the *Charter*'s guarantee of freedom of expression, the scope of unwritten constitutional principles and whether municipal electors are entitled to effective representation. But at the heart of it, this case asks this question: What is a *democratic* election, in Canada?

2. The appellant City of Toronto (the "City") submits that a truly democratic election—at a minimum, and among other things—is free from significant mid-election interference and provides electors with the right to effective representation. The City also submits that these basic democratic norms were trampled on by the government of Ontario ("Ontario") when, without notice, it radically changed the City's ward structure in the middle of an election. In doing so, Ontario violated the constitutional rights of Toronto's electoral candidates and voters.

3. The *City of Toronto Act, 2006* provides Torontonians with a democratically elected Council.[1] On May 1, 2018, anyone qualified to run for election to be a City of Toronto Councillor in the 2018 election (the "Election") could file nomination papers with the City Clerk for one of 47 electoral wards. Once they had filed their papers, the candidates could seek donations, could spend money on their election campaigns, and could begin campaigning.

4. On August 14, 2018, 105 days after campaigning had begun, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("Bill 5") received Royal Assent and became law. Bill 5,

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[1] *City of Toronto Act, 2006*, SO 2006, c 11, Sch A [COTA], s 1(1).

inter alia, reduced the number of electoral wards for the Election from 47 to 25 (the "Impugned Provisions"). This was a substantial change to the structure of the Council and the boundaries of all wards. Ontario did this without notice to the City, candidates or electors. It was directed solely at Toronto and no other municipality. The result was widespread disruption of the Election and confusion among candidates and voters alike.

5. Candidates had campaigned in areas that were no longer part of their ward and had never campaigned in areas that were now part of their ward; ward sizes approximately doubled; electors were no longer sure what ward they were in or who was a candidate in their ward; endorsements that had been provided for candidates were rescinded; people who did not run when it was a 47-ward Election decided to enter the race when it became a 25-ward Election; the Clerk, who was preparing for months for a 47-ward Election, had to suddenly begin preparing for a 25-ward Election; candidates spent more time speaking to electors about the reduction in the number of wards than election issues.

6. Municipalities are an important level of government. They pass laws that bind their residents. They govern countless aspects of Canadians' everyday life. Yet the majority decision of the Court of Appeal leaves these democratic institutions and their citizens without any constitutional protection against substantial mid-election interference and without a guarantee of effective representation.

7. The City submits that the majority of the Court of Appeal erred in interpreting the scope of freedom of expression and in treating the City's claim as a positive rights claim to be rejected under *Baier*. The City's position is that this case is not about access to an underinclusive platform but rather that s. 2(b) protects the expression of electoral participants from substantial mid-election changes to the election framework and rules. Freedom of expression is crucial to a democratic society, and the political expression of candidates and voters is at the very core of the values protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[2] Further, the framework of an election governs the electoral expressive activities that occur during an election. Substantial interference with the framework in the middle of an election disrupts the electoral

[2] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Sch B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], s 2(b).

expression of participants and upends the political discourse at the heart of an election. The Impugned Provisions offend s. 2(b) and are not saved by s. 1.

8. The City submits that the Impugned Provisions also offend the unwritten constitutional principle of democracy and should be struck on this basis. The Court of Appeal's categorical dismissal of the ability of unwritten constitutional principles to independently strike down legislation conflicts with this Court's jurisprudence. The City submits that the content of this principle (as it applies to elections) requires that democratic elections be free and fair without state interference. The Impugned Provisions run afoul of that principle and are therefore inconsistent with the Constitution of Canada.

9. Finally, the City submits that where municipal electors have been given a vote in a democratic election, it necessarily flows from the Constitution that these electors are also entitled to effective representation.

Statement of Facts

A. Role of the City of Toronto and its Councillors

10. The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and its Council is a democratically elected government which is responsible and accountable.[3]

11. Like other municipalities, the City as the local government is the closest to its residents and is responsible for providing a broad range of services that residents rely on daily. This includes social services, public health services, water supply and treatment, parks, libraries, garbage collection, public transit, land use planning, transportation services including road design and repair, bicycle lanes and traffic signals, tree maintenance and urban forestry, police, paramedics, fire services, sewers, supportive housing and homeless shelters, childcare, recreation centres, business licensing, building permit and inspection services and more.[4]

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[3] COTA, s 1(1).

[4] Affidavit of Giuliana Carbone (Aug 22, 2018) [Carbone 1st Aff], Record of the Appellant, City of Toronto [AR] Vol IV, Tab 30, ¶ 4 & Ex A.

12. Toronto is the largest city in Canada and the sixth largest government in Canada. Based on 2016 census data, Toronto's population exceeded 2.7 million people[5] and is growing rapidly. In 2017, the City had an operating budget of $10.5 billion dollars and a 10-year capital budget of $26.5 billion dollars.[6] To provide the services listed in the previous paragraph, the City has a complex administrative structure of approximately 35,000 active employees.[7]

13. The role of City Council, and accordingly Councillors, is expressly set out in section 131 of COTA. It is extensive and includes, among other things:

i) to represent the public and to consider the well-being and interests of the City;

ii) to develop and evaluate the policies and programs of the City;

iii) to determine which services the City provides; and

iv) to maintain the financial integrity of the City.[8]

14. Further, section 132 of COTA expressly requires that the powers of the City shall be exercised by City Council.[9] Bill 5 did not change the role of Council or its mandate to exercise the City's powers.

B. Toronto Ward Boundary Review

15. The *City of Toronto Act, 2006* was an important development in providing the City with a new legislative framework and recognition of its importance as a mature democratic government. When COTA was enacted, City Council was given the power, *inter alia*, to divide or redivide the City into wards, to dissolve existing wards, and to change its Council composition.[10]

16. Beginning in 2013, City Council approved an extensive third-party review of its then 44-ward structure, with the goal of adopting a new ward boundary model which would address

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[5] Affidavit of Gary Davidson (Aug 27, 2018) [Davidson Aff], AR Vol IX, Tab 31, Ex C; Carbone 1st Aff, AR Vol IV, Tab 30, ¶ 2.
[6] Carbone 1st Aff, AR Vol IV, Tab 30, ¶ 2-3.
[7] Carbone 1st Aff, AR Vol IV, Tab 30, ¶ 4.
[8] COTA, s 131.
[9] COTA, ss 6-11, 131-132.
[10] COTA (prior to Bill 5 amendments), ss 1-2, 128, 135.

population discrepancies across the wards and be more reflective of "effective representation". The review process was to be independent and unbiased, include substantial public consultation, and comply with principles set out by the courts[11] and the Ontario Municipal Board ("OMB").[12]

17. The City engaged independent external consultants, who conducted the Toronto Ward Boundary Review ("TWBR") over a period of more than three years. The TWBR held over 100 face-to-face meetings with members of City Council, school boards and other stakeholder groups and held 24 public meetings and information sessions and produced several substantial reports.[13]

18. The City's consultants thoroughly considered using the federal electoral districts ("FEDs") scheme. They examined it twice: both before presenting their report to the City's Executive Committee and after the Executive Committee asked for additional information.[14] They ultimately did not recommend it because it did not provide voter parity for multiple elections, divided a number of communities of interest, and would not accommodate growth in areas of the City that were growing rapidly.[15]

19. The consultants were also of the opinion that the FEDs model impaired the capacity of Councillors to represent their constituents, as it would create wards with an average population of about 111,000 people in 2018.[16]

20. The Application Judge made the following factual findings regarding the TWBR:

> The TWBR considered the "effective representation" requirement and the ward size that

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[11] The leading case is *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 [*Carter*].

[12] City Council Decision (June 11-13, 2013), AR Vol VII, Tab 30, Ex J, pp 27-28, 32.

[13] Davidson Aff, AR Vol IX, Tab 31, ¶ 9-10. Also, Council approved $800,050.00 to cover the costs of the TWBR: Council Decision (June 13, 2013), AR Vol VII, Tab 30, Ex K, pp 42, 47.

[14] Options Report (Aug 11, 2015), AR Vol XIV, Tab 48, Ex 4, p 65; Final Report (May 2016), AR Vol XII, Tab 46, Ex 3, pp 27, 32; Executive Committee Decision (May 24, 2016), AR Vol VII, Tab 30, Ex M, p 148; Council Decision (Nov 8-9, 2016), AR Vol VIII, Tab 30, Ex N, pp 2, 12, 64.

[15] Davidson Aff, AR Vol IX, Tab 31, ¶ 34, 56-61.

[16] Davidson Aff, AR Vol IX, Tab 31, ¶ 37-52; Reasons for Decision of Belobaba J, 2018 ONSC 5151 (Sept 10, 2018) [Reasons of Belobaba J], AR Vol I, Tab 2, ¶ 55-56, 58.

> would best accomplish this objective. The option of reducing and redesigning the number of wards to mirror the 25 Federal Election Districts was squarely addressed and rejected by the TWBR. . . .
>
> Put simply, the 25 FEDs option was considered by the TWBR and rejected because, at the current 61,000 average ward size, city councillors were already having difficulty providing effective representation.[17]

21. At its November 2016 meeting, Council adopted the recommended 47-ward structure.[18]

C. Appeals to the Ontario Municipal Board and Divisional Court

22. Several appeals of Council's decision were commenced. After an extensive seven day hearing, the majority of the OMB panel approved the 47-ward option with one small amendment to the boundary between two wards. The OMB issued its order on December 15, 2017, in time for the 2018 Election. The OMB concluded that the TWBR's work was comprehensive, and that the 47-ward model provided for effective representation and best respected communities of interest.[19]

23. The OMB considered the position of two appellants who sought an order dividing the City into 25 wards along the FEDs boundaries. The OMB reviewed the expert evidence—including that of Andrew Sancton, on whom Ontario now relies—and concluded that the FEDs scheme would significantly impact the capacity of Councillors to represent their constituents.[20] The OMB carefully considered the voter parity arguments that Ontario has relied on in the lower courts as a purported justification for Bill 5. The OMB (majority) concluded that neither the 47-ward nor the 25-ward model achieves perfect voter parity and that absolute parity is impossible to achieve. In addition, consistent with the principles in *Carter*, the 47-ward model was designed for at least three and perhaps four election cycles. In a rapidly growing City, the FEDs model will continue to grow out of parity as it is based on historical census data.[21]

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[17] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 54-55.
[18] Council Decision (Nov 8-9, 2016), AR Vol VIII, Tab 30, Ex N, pp 2-16.
[19] OMB Decision, 2017 CanLII 85757 (Dec 15, 2017) [OMB Decision], AR Vol VIII, Tab 30, Ex Q, ¶ 36, 51.
[20] OMB Decision, AR Vol VIII, Tab 30, Ex Q, ¶ 36.
[21] *Carter*, p 195; OMB Decision, AR Vol VIII, Tab 30, Ex Q, ¶ 26. See also: Davidson Aff, AR Vol IX, Tab 31, ¶ 34.

24. The same two appellants then sought leave to appeal. On March 6, 2018, Justice Swinton of the Divisional Court dismissed the motion for leave to appeal. In doing so, Justice Swinton noted that the OMB had applied the correct legal test for determining ward boundaries laid down in the *Carter* case, and that the OMB considered relative voter parity as well as other factors. She noted that the OMB "concluded that communities of interest are best respected in a 47 ward structure . . . [the OMB] also noted that a 25 ward structure could increase voter population in the wards 'resulting in a significant impact on the capacity to represent'".[22]

D. 2018 Election Based on 47-Ward Structure

25. With these proceedings completed, the City moved ahead with the 2018 Election based on a 47-ward structure. The municipal election day was fixed for the whole province under the *Municipal Elections Act, 1996* to be October 22, 2018.[23]

26. The City Clerk was charged with administering the Election. Since as early as January 2018, the Clerk and her staff began preparing to conduct an election for 47 Councillor positions and 39 school board trustees, all based on the new 47-ward structure, including communicating information to candidates.[24]

27. The nomination period began May 1, 2018. From that date, once nominated, candidates could and did begin campaigning, which included engaging in a myriad of expressive activities, not limited to canvassing, posting signs, spending money on their campaigns and receiving donations in accordance with the provisions of the MEA.[25]

28. The nomination period ended July 27, 2018. As of July 30, the Clerk had certified the nominations of the 509 candidates qualified to run in the Election.[26] The certification of candidates is an important milestone in an election. At that point, the candidates running for

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[22] Reasons for Decision of Swinton J, 2018 ONSC 1475 (Mar 6, 2018), AR Vol VIII, Tab 30, Ex R, ¶ 10.
[23] *Municipal Elections Act, 1996*, SO 1996, c 32, Sch [MEA], s 5.
[24] Affidavit of Fiona Murray (Aug 22, 2018) [Murray Aff], AR Vol II, Tab 29, ¶ 8, 11-13.
[25] Reasons for Decision of the Court of Appeal, 2019 ONCA 732 (Sept 19, 2019) [ONCA Reasons], AR Vol I, Tab 4, ¶ 126; Affidavit of Megann Willson (Aug 21, 2018) [Willson Aff], AR Vol X, Tab 41, ¶ 10-11; Affidavit of Dyanoosh Youssefi (Aug 22, 2018) [Youssefi Aff], AR Vol XV, Tab 50, ¶ 18.
[26] Murray Aff, AR Vol II, Tab 29, ¶ 11.

Councillor in each of the 47 wards were fixed and known to all.[27]

29. There is significant evidence from candidates and others that:

i) candidates made their decisions to run for Councillor due to the 47-ward structure;[28]

ii) candidates chose a ward to run in based on their involvement and connection to it;[29]

iii) candidates had already conducted extensive campaigning and communications to residents based on the 47-ward model at the time Bill 5 was enacted;[30]

iv) candidates raised campaign funds based on the 47-ward structure;[31]

v) campaign materials were prepared in reliance on the 47-ward structure;[32] and

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[27] Carbone 1st Aff, AR Vol IV, Tab 30, ¶ 41.

[28] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29; ONCA Reasons, AR Vol I, Tab 4, ¶ 121; Affidavit of Chris Moise (Aug 20, 2018) [Moise Aff], AR Vol IX, Tab 33, ¶ 13-14; Affidavit of Jennifer Hollett (Aug 21, 2018) [Hollett Aff], AR Vol XI, Tab 46, ¶ 15-19, 45, 49; Affidavit of Lily Cheng (Aug 21, 2018) [Cheng Aff], AR Vol XIII, Tab 47, ¶ 9-10, 16; Youssefi Aff, AR Vol XV, Tab 50, ¶ 38.

[29] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29; ONCA Reasons, AR Vol I, Tab 4, ¶ 121; Moise Aff, AR Vol IX, Tab 33, ¶ 5-15, 27; Willson Aff, AR Vol X, Tab 41, ¶ 3-4, 20; Affidavit of Chiara Padovani (Aug 21, 2018) [Padovani Aff], AR Vol XI, Tab 42, ¶ 4, 10; Hollett Aff, AR Vol XI, Tab 46, ¶ 15-20, 45; Cheng Aff, AR Vol XIII, Tab 47, ¶ 4-7, 9-11, 13-14; Youssefi Aff, AR Vol XV, Tab 50, ¶ 5, 12-14.

[30] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-30; ONCA Reasons, AR Vol I, Tab 4, ¶ 121; Moise Aff, AR Vol IX, Tab 33, ¶ 26, 28; Willson Aff, AR Vol X, Tab 41, ¶ 12, 15; Padovani Aff, AR Vol XI, Tab 42, ¶ 14-17; Hollett Aff, AR Vol XI, Tab 46, ¶ 41-42; Cheng Aff, AR Vol XIII, Tab 47, ¶ 25, 28; Youssefi Aff, AR Vol XV, Tab 50, ¶ 23, 29; Affidavit of Jamaal Myers (Aug 21, 2018) [Myers Aff], AR Vol XI, Tab 43, ¶ 22, 26, 29; Printouts of Candidate Websites (Aug 10, 2018), AR Vol V, Tab 30, Ex H; Samples of Campaign Pamphlets, AR Vol VII, Tab 30, Ex I.

[31] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29; ONCA Reasons, AR Vol I, Tab 4, ¶ 121; Moise Aff, AR Vol IX, Tab 33, ¶ 19, 28; Willson Aff, AR Vol X, Tab 41, ¶ 21-22; Padovani Aff, AR Vol XI, Tab 42, ¶ 21; Hollett Aff, AR Vol XI, Tab 46, ¶ 40; Cheng Aff, AR Vol XIII, Tab 47, ¶ 17, 27; Youssefi Aff, AR Vol XV, Tab 50, ¶ 19, 32.

[32] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-30; ONCA Reasons, AR Vol I, Tab 4, ¶ 126, 128, 136; Moise Aff, AR Vol IX, Tab 33, ¶ 28; Willson Aff, AR Vol X, Tab 41, ¶ 12; Padovani Aff, AR Vol XI, Tab 42, ¶ 22; Hollett Aff, AR Vol XI, Tab 46, ¶ 26, 36; Cheng Aff, AR Vol XIII, Tab 47, ¶ 18, 28; Youssefi Aff, AR Vol XV, Tab 50, ¶ 16, 20, 33; Affidavit of

vi) candidates engaged in expressive activities and framed the content of their expression based on the 47-ward structure in place at the start of the Election.[33]

E. Bill 5

30. On July 27, 2018—the same day the nomination period ended—Ontario announced for the first time its intent to reduce the number of City Councillors from 47 to 25 for the Election. Bill 5 was introduced on July 30, 2018 and came into force on August 14, 2018.[34] It redivided the City into 25 wards with boundaries aligned with the FEDs model, and declared that this ward structure would be used for the Election.[35] The City's powers to set its own ward boundaries and Council composition were eliminated.[36]

31. When Bill 5 came into force, the City's Election was past the halfway mark.[37] This caused unprecedented disruption to candidates, voters and the City.[38] In his dissent at the Court of Appeal, Justice MacPherson summarized the effects of Bill 5 this way:

> First, it diminished the value of all past expression that had been framed around a 47-ward election already underway. Candidates could no longer run in the wards where they had already spent considerable time, money and energy campaigning, which demoralized many and caused at least some to drop out of the race entirely. Second, the timing of the changes caused widespread confusion and uncertainty. It deflected attention away from important civic issues, triggered a flurry of foreseeable legal challenges, and jeopardized the viability of administering the election on schedule. Third, the *Act* restricted candidates, volunteers, voters, donors and commentators from continuing to express themselves within the established terms of an election then in progress.[39]

Ish Aderonmu (Aug 20, 2018) [Aderonmu Aff], AR Vol IX, Tab 34, ¶ 14; Myers Aff, AR Vol XI, Tab 43, ¶ 24, 27 & Ex E.

[33] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-36; ONCA Reasons, AR Vol I, Tab 4, ¶ 128; Moise Aff, AR Vol IX, Tab 33, ¶ 28; Willson Aff, AR Vol X, Tab 41, ¶ 12; Padovani Aff, AR Vol XI, Tab 42, ¶ 14; Youssefi Aff, AR Vol XV, Tab 50, ¶ 16; Aderonmu Aff, AR Vol IX, Tab 34, ¶ 14.

[34] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 5.

[35] *Better Local Government Act, 2018*, SO 2018, c 11 [Bill 5], Sch 1, ss 5, 7; ONCA Reasons, AR Vol I, Tab 4, ¶ 127.

[36] Bill 5, Sch 1, ss 1-3, 5.

[37] ONCA Reasons, AR Vol I, Tab 4, ¶ 114.

[38] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-32; ONCA Reasons, AR Vol I, Tab 4, ¶ 2, 128, 136.

[39] ONCA Reasons, AR Vol I, Tab 4, ¶ 128.

F. Decisions of the Courts Below

1. Application Judge

32. Several affected parties, including the City, challenged Bill 5. Justice Belobaba allowed the applications and declared that the Impugned Provisions violated s. 2(b) of the *Charter* and that the violations were not saved by s. 1. He found that Ontario had clearly crossed the line of what is acceptable in our democratic society. Based on the evidence, Belobaba J. determined that Bill 5 infringed s. 2(b) of the *Charter* in two ways:

i) Bill 5's enactment in the middle of the Election substantially interfered with candidates' freedom of expression (the "mid-election interference" aspect); and

ii) Bill 5's reduction of City wards from 47 to 25 and the corresponding increase in ward-size population from an average of about 61,000 to 111,000 substantially interfered with voters' freedom of expression by denying them a vote that can result in effective representation (the "effective representation" aspect).[40]

33. Under s. 1, Belobaba J. found that Ontario had not established that the Impugned Provisions had a pressing and substantial objective or that they were minimally impairing.[41] As it was unnecessary to make his decision, Belobaba J. made no findings with respect to the City's arguments regarding unwritten constitutional principles.[42]

34. Justice Belobaba declared the provisions of Bill 5 that reduced the number of City wards to be unconstitutional, and ordered the Election to proceed on the basis of 47 wards.

2. Court of Appeal for Ontario

35. Ontario sought a stay pending appeal of Justice Belobaba's decision due to the upcoming Election. A panel of the Court of Appeal concluded there was a strong likelihood that the appeal

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[40] Reasons of Belobaba J, AR Vol II, Tab 2, ¶ 20, 60.
[41] Reasons of Belobaba J, AR Vol II, Tab 2, ¶ 62-78.
[42] Reasons of Belobaba J, AR Vol II, Tab 2, ¶ 13.

would succeed. Accordingly, it granted the stay and the Election proceeded based on 25 wards.[43]

36. The Court of Appeal convened a five-judge panel to hear Ontario's appeal. By a majority of three judges to two, the appeal was allowed.

a) Decision of the Majority

37. The Court of Appeal majority held that the Impugned Provisions of Bill 5 were constitutional, finding that:

- Section 2(b) of the *Charter* does not guarantee effective expression and the impugned government action only reduced the effectiveness of candidates' expression;[44]
- The City advances a positive rights claim (i.e. the restoration of a statutory platform: the 47-ward election), but does not meet the test for such a claim;[45]
- Section 2(b) of the *Charter* does not require that a vote in a municipal election must provide for effective representation, because that protection flows from s. 3 of the *Charter*, which does not apply to municipal elections;[46]
- Unwritten constitutional principles cannot be used as an independent basis to invalidate legislation;[47]
- Unwritten constitutional principles do not limit Ontario's jurisdiction over municipal institutions pursuant to s. 92(8) of the *Constitution Act, 1867*.[48]

38. Given their finding on s. 2(b), the majority did not consider s. 1 of the *Charter*.

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[43] Reasons for Decision on Stay Motion, 2018 ONCA 761 (Sept 19, 2018), AR Vol II, Tab 26.
[44] ONCA Reasons, AR Vol I, Tab 4, ¶ 41-46.
[45] ONCA Reasons, AR Vol I, Tab 4, ¶ 52-69.
[46] ONCA Reasons, AR Vol I, Tab 4, ¶ 70-77; *Charter*, s 3.
[47] ONCA Reasons, AR Vol I, Tab 4, ¶ 81-89.
[48] ONCA Reasons, AR Vol I, Tab 4, ¶ 90-95; *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [*Constitution Act, 1867*], s 92(8).

b) Decision of the Dissenting Justices

39. In dissent, Justice MacPherson (Nordheimer J.A. concurring) would have upheld the decision of Belobaba J. While he agreed with the majority on all other issues, MacPherson J.A. found that Bill 5 should be invalidated under s. 2(b) because of its mid-election interference.

40. In his view, candidates' and voters' expressive activities unfold and intersect within the established terms of an election, and to upend these terms mid-stream does not merely render candidates' and voters' free expression less effective—it becomes meaningless.[49] MacPherson J.A. found that the instability and risk of such meddling was irreconcilable with genuine democratic deliberation.[50]

41. MacPherson J.A. also disagreed with the majority that the City's s. 2(b) argument was a positive rights claim.[51] He distinguished *Baier v. Alberta*[52] because, in this case: (i) the issue is not exclusion from a platform, but protection from the mid-stream destruction and replacement of an electoral platform; (ii) there is no positive rights claim since the City's plea is for non-interference in an election that had already started; and (iii) in *Baier*, the impugned legislation was enacted two years before the election itself, not three months after the election started.[53]

42. Having concluded that Bill 5 infringed s. 2(b) of the *Charter*, MacPherson J. also agreed with the Application Judge that the Impugned Provisions were not saved by s. 1 of the *Charter*.[54]

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[49] ONCA Reasons, AR Vol I, Tab 4, ¶ 122-123.
[50] ONCA Reasons, AR Vol I, Tab 4, ¶ 123.
[51] ONCA Reasons, AR Vol I, Tab 4, ¶ 124.
[52] *Baier v Alberta*, 2007 SCC 31 [*Baier*].
[53] ONCA Reasons, AR Vol I, Tab 4, ¶ 132.
[54] ONCA Reasons, AR Vol I, Tab 4, ¶ 135.

PART II – QUESTIONS IN ISSUE

43. This appeal raises the following issues:

ISSUE 1: Does s. 2(b) of the *Charter* protect the expression of electoral participants from substantial mid-election changes to the election framework and rules?

ISSUE 2: Can the unwritten constitutional principle of democracy be used as a basis for striking down the Impugned Provisions?

ISSUE 3: Are municipal electors who are given a vote in a democratic election entitled to effective representation?

ISSUE 4: Has Ontario met its burden under s. 1 of justifying the *Charter* infringements?

PART III – ARGUMENT

ISSUE 1: Does s. 2(b) of the *Charter* protect the expression of electoral participants from substantial mid-election changes to the election framework and rules?

A. The Limits of *Baier* and Application of *Irwin Toy*

44. This Court has warned against an overly broad application of *Baier*. In *Greater Vancouver Transportation*, this Court wrote that, taken out of context, *Baier* could be applied to transform many freedom of expression cases into "positive rights claims".[55] This Court clarified that the test in *Baier* applies only to claims that would require the government to provide a particular means of expression or, more specifically—and in the words of *Baier* itself—it applies to claims by excluded speakers for access to those "underinclusive" statutory platforms for expression.[56]

45. The danger in misapplying *Baier* is simple. Stretching *Baier* beyond its discrete purpose risks a departure from the broad, inclusive approach to expression advanced by this Court in *Irwin Toy*.[57] It threatens the unwarranted application of a more stringent test for securing constitutional protection and risks denying constitutional protection to deserving expressive

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[55] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 [*Greater Vancouver Transportation*], ¶ 34.
[56] *Greater Vancouver Transportation*, ¶ 30, 35.
[57] *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 [*Irwin Toy*].

activities or claims, simply because they do not fit into existing, familiar models of protected expression. The case at bar is an opportunity for this Court to securely limit the application of *Baier* and dissuade both litigants and courts from expanding its application beyond its intended purpose of addressing claims for access to underinclusive statutory platforms.

46. Faced with an unfamiliar freedom of expression claim, the Court of Appeal majority and Ontario fit the present case into *Baier*. That is a mistake. Instead, as suggested in *Criminal Lawyers' Association*,[58] the methodology of *Irwin Toy* is best suited to tackle the unfamiliar.

47. While it may not fit into a recognizable model of free expression claims, this is not a case of underinclusion. Everyone who was a candidate could continue to be a candidate and everyone who was entitled to vote could still vote. The minority of the Court of Appeal was correct when it found that the analysis in *Baier* is inapplicable to the case at bar and applied the test in *Irwin Toy*.[59]

48. When Bill 5 came into force, the Toronto municipal Election was already underway. Candidates and voters had already been using the existing statutory platform to engage in the many expressive activities that underlie the democratic discourse of any election. What Bill 5 did was upend the existing Election in such a way as to render expression on that platform meaningless and to interfere with the continued ability of electoral participants to express themselves.

49. This is a traditional negative rights claim. The City has never sought state support or action to broaden access to a narrowed statutory platform for expression, as contemplated by *Baier*.[60] It has only ever sought to uphold the continued freedom of its residents, candidates and voters to express themselves—by means of an existing platform that they were entitled to use—without undue state interference in that expression. The City has only ever asked for government restraint. As correctly decided by the Application Judge and the minority of the Court of Appeal,

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[58] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 [*Criminal Lawyers' Association*], ¶ 31.
[59] ONCA Reasons, AR Vol I, Tab 4, ¶ 124.
[60] *Greater Vancouver Transportation*, ¶ 33-35.

this is a negative rights case attracting the application of *Irwin Toy*.[61] To characterize it otherwise is an error.

B. Was there an infringement of s. 2(b)?

50. The minority of the Court of Appeal correctly determined that there was an infringement of s. 2(b) and that freedom of expression protects electoral participants from substantial mid-election changes to the election framework and rules.

51. The *Irwin Toy* test requires this Court to determine two things:

i) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b)?

ii) If the activity is protected, does the state action infringe that protection, either in purpose or effect?

1. Does the Activity in question have Expressive Content?

52. Both the majority and the minority of the Court of Appeal accepted that the activity at issue was expression for the purposes of s. 2(b).[62] They differed, however, in their view of what that activity was.

53. The majority viewed the relevant expressive activity narrowly. It recognized only the individualized expressive activities of both candidates and voters and focused on the impact of Bill 5 on such past expression.[63] It paid little attention to the actual complexity and interrelatedness of the expression at issue and its connection to the framework of the Election. The minority, however, recognized that the expressive activity at issue was actually a complex ecosystem of expression dependent on the very stability of the electoral framework itself.[64]

54. The minority is correct. The specific expression at issue in this case is electoral expression. It is expression in the context of an ongoing democratic election. As such, it is more

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[61] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 37; ONCA Reasons, AR Vol I, Tab 4, ¶ 110.
[62] ONCA Reasons, AR Vol I, Tab 4, ¶ 51, 111.
[63] ONCA Reasons, AR Vol I, Tab 4, ¶ 58-60.
[64] ONCA Reasons, AR Vol I, Tab 4, ¶ 117.

than just the individual, isolated and unconnected expressive acts passing between voters and candidates. The purpose of any election is not only to inform the vote through the democratic exchange of views, but also to select a representative government. As such, all the expressive activity of an election is connected not only to each other but to the framework of the election itself and the nature of the government being elected.

55. Where, as here, the election and government is based on a ward structure, the content of electoral expression will be inexorably connected to that structure and, for the duration of the election, s. 2(b) protection will extend to that structure as well as the expressive activities taking place within it.

56. That protection should be afforded to electoral expression is undeniable. This Court has repeatedly reminded us that the free flow of diverse opinions is fundamental to a free and democratic society and that full political debate ensures ours is an open society with the benefit of a broad range of ideas and opinion.[65]

57. In *R. v. Keegstra*, this Court described the fundamental relationship between free expression and the political process:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity.[66]

58. In creating a democratic election to select Toronto municipal representation, Ontario engaged all these interests. As noted by the minority of the Court of Appeal in the case at bar, the intersection of s. 2(b) of the *Charter* and the unwritten principle of democracy requires "governments to respect the s. 2(b) right of all persons to freely express themselves *within the*

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[65] *Figueroa v Canada (AG)*, 2003 SCC 37 [*Figueroa*], ¶ 28-29.
[66] *R v Keegstra*, [1990] 3 SCR 697, pp 763-764; see also *Libman v Quebec (AG)*, [1997] 3 SCR 569, ¶ 29.

terms of a municipal election once that election has commenced" (emphasis in original).[67]

2. Did Bill 5 Infringe the Expression of Electoral Participants?

59. To suggest, as the majority of the Court of Appeal did, that Bill 5 only "altered the composition of the Toronto City Council"[68] denies the reality of an election and its associated electoral expression. It is similarly incorrect to describe the effect of Bill 5 as simply causing "a person's past communications [to] lose their relevance and no longer contribute to the desired project (election to public office)".[69]

60. Toronto was in the midst of a democratic municipal election.[70] That election began on May 1, 2018, when candidates could register. They began to campaign. They raised money. They had volunteers. They knocked on doors. They printed literature and signs. They spoke about issues relevant to the voters who lived in the ward that they were running in. To say that all such electoral expression was simply made "less effective" after Bill 5 came into effect is to ignore the reality of what Bill 5 did.

61. With the introduction of the Impugned Provisions, the previous electoral expression of candidates and voters was made meaningless. While it is true that Bill 5 did not prevent candidates from saying exactly the same things that they were saying to exactly the same people as before, such expression would have had no meaning *in the context of an election*. What would be the point of saying, "Please vote for me as your candidate for Ward 47", when there was no longer a Ward 47?

62. Moreover, Bill 5 changed all ward boundaries.[71] Accordingly, mid-election, candidates had to choose the new ward in which they sought to be elected as Councillor.[72] There were necessarily candidates who had spoken to voters who were no longer in their ward and those who had not spoken to voters who were now in their ward.

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[67] ONCA Reasons, AR Vol I, Tab 4, ¶ 123.
[68] ONCA Reasons, AR Vol I, Tab 4, ¶ 44.
[69] ONCA Reasons, AR Vol I, Tab 4, ¶ 41.
[70] COTA, s 1(1).
[71] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 76; ONCA Reasons, AR Vol I, Tab 4, ¶ 100, 114.
[72] City Clerk's Updates, AR Vol XII, Tab 46, Ex 7, p 141-145.

63. Where a candidate was no longer in the ward of a voter to whom they had previously campaigned[73] and to whom previous literature was distributed and for which previous campaign funds had been spent, and where the voter could no longer vote for that candidate, that electoral expression was rendered "meaningless".

64. The Application Judge made specific findings of fact of the negative impacts of Bill 5 on the ongoing Election and associated expressive activities. These impacts were summarized as follows:

i) candidates could no longer run in the wards where they had been campaigning;[74]

ii) there was confusion about the impact of Bill 5 on the Election;[75]

iii) money was spent on campaign materials and literature that were tied to a specific ward;[76] and

iv) all communications could no longer continue along the terms of the originally expressed terms of the Election.[77]

Those findings are entitled to deference by this Court.[78]

65. Indeed, the impact of Bill 5 did not just affect the expression that had occurred before it came into force, but continued even after that date. The Application Judge found that, after Bill 5 came into force, candidates and voters continued to struggle with the confusing state of affairs, there was uncertainty of the results of the court challenges, the City Clerk had to prepare for two

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[73] Moise Aff, AR Vol IX, Tab 33, ¶ 23-24.
[74] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-30; City Clerk's Updates, AR Vol XII, Tab 46, Ex 7, p 141-145; Moise Aff, AR Vol IX, Tab 33, ¶ 23-26; Aderonmu Aff, AR Vol IX, Tab 34, ¶ 14.
[75] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 30-31; Willson Aff, AR Vol X, Tab 41, ¶ 12-13; Hollett Aff, AR Vol XI, Tab 46, ¶ 35, 43-44, 47; Cheng Aff, AR Vol XIII, Tab 47, ¶ 21-22; Youssefi Aff, AR Vol XV, Tab 50, ¶ 25.
[76] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-30; see also footnote 32.
[77] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-38; Moise Aff, AR Vol IX, Tab 33, ¶ 24, 26-28; Willson Aff, AR Vol X, Tab 41, ¶ 12, 15; Hollett Aff, AR Vol XI, Tab 46, ¶ 40, 46; Youssefi Aff, AR Vol XV, Tab 50, ¶ 23, 28-29.
[78] *Housen v Nikolaisen*, 2002 SCC 33, ¶ 25; *Canada (AG) v Bedford*, 2013 SCC 72, ¶ 56.

ward structures, and candidates had already spent financial resources.[79] Bill 5 did not reset spending limits, so any amounts already spent on campaigning by candidates who started under a 47-ward structure were lost.[80] By contrast, any new candidates who joined the Election after Bill 5 took effect had access to an unreduced amount of campaign funding and thus had a greater ability to engage in electoral expression going forward than those candidates who had already spent campaign funds on the 47-ward Election.[81] Campaign endorsements were rescinded.[82]

66. Nothing in the fresh evidence contradicts any of these findings of fact.

67. Finally, it is wrong to analogize the effect of Bill 5 with the potential impact of a government entering the marketplace of ideas or responding to criticism of its policies, as the majority did.[83] It is irrelevant that a government could enter the marketplace of ideas and provide counter messages that might make earlier expression "less effective" because freedom of expression (though it does not apply to government) permits and even encourages counter messages by anyone. That is the hallmark of the marketplace of ideas, particularly so, for electoral expression. But Bill 5 did not do that.

68. To use the analogy of the marketplace, the government did not simply enter the marketplace in this case to set up its own stall and partake in the market's exchange of ideas. Rather, the government marched into the marketplace and rearranged all the stalls and people in the marketplace while they were actively engaged in the very exchange of ideas for which the original market had been set up. Both the voters and the candidates were left to try to continue

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[79] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-31, 79-80.
[80] Cheng Aff, AR Vol XIII, Tab 47, ¶ 28.
[81] For example, John Filion joined the Election after Bill 5 and ran (and won) against Lily Cheng, who had already spent funds in the 47-ward election: July 27 List of Certified Candidates (47 Ward Model), AR Vol XXXVIII, Tab 77, Ex C; Cheng Aff, AR Vol XIII, Tab 47, ¶ 28; Transcript of the cross-examination of Lily Cheng on her Affidavit affirmed Aug 21, 2018 (Feb 13, 2019) [Cheng Cr-exam], AR Vol XXXIII, Tab 71, p 82, q 442; 2018 Election Results (Oct 25, 2018), AR Vol XXII, Tab 65, Ex E, p 77.
[82] Cheng Cr-exam, AR Vol XXXIII, Tab 71, p 92-94, q 493-506, and p 96, q 517; Transcript of the cross-examination of Jennifer Hollett on her Affidavit affirmed Aug 21, 2018 (Feb 13, 2019), AR Vol XXXIV, Tab 72, p 49, q 225-226.
[83] ONCA Reasons, AR Vol I, Tab 4, ¶ 43.

their exchange, if at all, in the wake of that carnage. As the majority noted, Bill 5 itself "did not counter anyone's message".[84] However, as described by the minority, it "blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters. This infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history".[85]

ISSUE 2: Can the unwritten constitutional principle of democracy be used as a basis for striking down the Impugned Provisions?

A. Unwritten Constitutional Principles May be Used to Invalidate Legislation

1. General Principles

69. While Canada's constitution is in part written, this Court has recognized that it also embraces "unwritten" rules.[86] The case at bar calls upon this Court to once again give effect to these unwritten constitutional rules or principles.

70. While Ontario may suggest that these unwritten constitutional principles cannot be used to invalidate legislation, a review of this Court's jurisprudence confirms that this is not the case.

71. In the *Quebec Secession Reference*, this Court was asked several questions with respect to Quebec's ability to secede from Canada unilaterally. In its decision, the unanimous Court wrote that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action".[87]

72. The full passage from the *Patriation Reference* explicitly acknowledged that the full normative effect of those principles includes striking down legislation:

> It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the *British North America Acts* or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal

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[84] ONCA Reasons, AR Vol I, Tab 4, ¶ 44.
[85] ONCA Reasons, AR Vol I, Tab 4, ¶ 136.
[86] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*].
[87] *Quebec Secession Reference*, ¶ 54.

> character of Canada's Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the *Amax (supra)* case at p. 591, that: "There are no Canadian constitutional law precedents addressed directly to the present issue ... ". [Emphasis added.][88]

73. As such, the Court made clear that unwritten constitutional principles were capable of invalidating legislation in the right circumstances.

74. In *Babcock v. Canada*,[89] a more recent consideration of unwritten constitutional principles, the respondents sought access to documents for the purposes of litigation against the federal government. The government relied on s. 39 of the *Canada Evidence Act* to resist disclosure. One of the respondents' arguments was that s. 39 was unconstitutional. McLachlin C.J., writing for the majority, had this to say:

> The respondents in this case challenge the constitutionality of s. 39 and argue that the provision is *ultra vires* Parliament because of the unwritten principles of the Canadian Constitution: the rule of law, the independence of the judiciary, and the separation of powers. Although the unwritten constitutional principles are capable of limiting government actions, I find that they do not do so in this case. [Emphasis added.][90]

75. Although this Court did not find the challenge successful in that case, it is clear from this passage that the limitation of government action being advanced was the invalidating of legislation. As is sometimes the case with the unwritten constitutional principle of the "rule of law", this Court did not find that it embraced the aspect that the respondents were advancing. But it did confirm that, in an appropriate case, it could invalidate legislation.

76. In *Christie*,[91] another recent consideration of unwritten constitutional principles, the Court was faced with a challenge to a law from British Columbia that imposed a 7% tax on all legal services. The legislation was alleged to be contrary to the unwritten principle of the rule of law. Specifically, it was alleged that one aspect of the rule of law was general access to legal services. This was the only basis on which the legislation was attacked. In fact, the majority of

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[88] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*], p 845.
[89] *Babcock v Canada (AG)*, [2002] 3 SCR 3 [*Babcock*].
[90] *Babcock*, ¶ 54; see also ¶ 64 (per L'Heureux-Dubé J, concurring, who agreed on this point).
[91] *British Columbia (AG) v Christie*, 2007 SCC 21 [*Christie*].

the British Columbia Court of Appeal had found that the law was "unconstitutional as offending the principle of access to justice, one of the elements of the rule of law".[92]

77. Although the finding of unconstitutionality was reversed, this was because this Court found that general legal services was not a recognized aspect of the rule of law.[93] It was not because unwritten constitutional principles could not be used to strike down legislation. In fact, the Court explained that because it was "not a currently recognized aspect of the rule of law", it was necessary "to determine whether general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law".[94]

78. Again, and contrary to the findings of the Court of Appeal,[95] it is submitted that this Court has consistently left the door open to using unwritten constitutional principles to invalidate legislation in an appropriate case, and this is one of those cases.

2. *Imperial Tobacco* did not Change this Approach

79. In the Court of Appeal, both Ontario and the majority relied on *Imperial Tobacco*[96] to refute the ability of courts to invalidate legislation that conflicts with unwritten constitutional principles.[97]

80. It is therefore important to closely consider how this Court approached unwritten constitutional principles in that case.

81. In *Imperial Tobacco*, the challenged legislation was a law that authorized the government of British Columbia to sue manufacturers of tobacco products to recover health care costs incurred by the government for treating individuals who were exposed to those products. The legislation operated retroactively and reversed the burden of proof with respect to some elements of the claim. The appellant tobacco companies argued, *inter alia*, that the legislation was

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[92] *Christie v British Columbia*, 2005 BCCA 631, ¶ 76.
[93] *Christie*, ¶ 27.
[94] *Christie*, ¶ 21.
[95] ONCA Reasons, AR Vol I, Tab 4, ¶ 89.
[96] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 [*Imperial Tobacco*].
[97] ONCA Reasons, AR Vol I, Tab 4, ¶ 84.

unconstitutional because it offended the principles of judicial independence and the rule of law.

82. The unanimous Court found that neither principle was offended. Those, like Ontario, who argue that unwritten constitutional principles cannot be used to strike down legislation, often rely on the following paragraphs from *Imperial Tobacco*:

> So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. (references omitted)
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> This does not mean that the rule of law as described by this Court has no normative force. . . . But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).[98]

83. In the above excerpts, the Court in *Imperial Tobacco* did not develop a general rule that unwritten constitutional principles could not invalidate legislation. Rather, the Court made the more narrow point that the three aspects of the *particular* unwritten constitutional principle, the rule of law, being referred to in these passages do not in themselves speak to the *content* of legislation and therefore, logically, cannot invalidate the content of legislation.

84. In fact, the full Court in *Christie* confirms that *Imperial Tobacco* did not exhaustively define all the principles that may be embraced by the rule of law. It held: "… in *Imperial Tobacco*, this Court left open the possibility that the rule of law may include additional principles".[99] *Christie* also suggested that, in the right case, the right unwritten constitutional principle could strike down legislation. The case at bar is just such a case.

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[98] *Imperial Tobacco*, ¶ 59-60.
[99] *Christie*, ¶ 21.

3. Judicial Independence

85. Judicial independence is an unwritten constitutional principle[100] and has been relied upon to strike down legislation.[101]

86. This Court's development and application of the unwritten constitutional principle of judicial independence is informative, and the City submits that it should guide how this Court approaches the development and application of the unwritten constitutional principle of democracy in this case.

87. Although the principle of judicial independence finds expression in the written provisions of the Constitution, such as ss. 96-100 of the *Constitution Act, 1867*[102] (as it applies to superior courts in the province) and s. 11(d) of the *Charter* (as it applies to courts exercising jurisdiction over those charged with an offence),[103] this Court has clearly indicated that *the principle of judicial independence applies to all courts, regardless of the type of cases that they hear, or whether they are appointed by the federal government or the provinces*.[104] In other words, it is an unwritten constitutional principle that applies to, and has a normative effect on, situations beyond those expressly covered by the written text.

88. The fact that there are explicit *written* provisions in the Constitution that have been interpreted to ensure judicial independence does not prevent the application of the *unwritten* constitution principle of judicial independence to other contexts not covered by those written provisions.

89. For example, this Court has indicated that judicial independence would apply to statutory courts that were created by the provinces pursuant to their jurisdiction under s. 92(14) of the

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[100] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*Remuneration Reference*], ¶ 83; *Ell v Alberta*, 2003 SCC 35 [*Ell*], ¶ 20.

[101] *Mackin v New Brunswick*, 2002 SCC 13; *Conférence des juges de paix magistrats du Québec c Québec (Procureure générale)*, 2016 SCC 39 [*Conférence des juges*]; *Masters' Association of Ontario v Ontario*, 2011 ONCA 243.

[102] *The Queen v Beauregard*, [1986] 2 SCR 56; *Constitution Act, 1867*, ss 96-100.

[103] *Valente v The Queen*, [1985] 2 SCR 673; *Charter*, s 11(d).

[104] *Ell*, ¶ 20-24; *Conférence des juges*, ¶ 32; *British Columbia (AG) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, ¶ 30.

Constitution Act, 1867, but that are not mandated by the Constitution.[105] As Lamer C.J. (as he then was) noted in the *Remuneration Reference*:

> [T]he jurisdiction of the provinces over "courts", as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.[106]
>
> . . .
>
> I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.[107]

90. Similarly, this Court has decided that judicial independence also applies to justices of the peace appointed and regulated by the provinces pursuant to s. 92(14).[108]

91. Accordingly, this Court's treatment of the unwritten constitutional principle of judicial independence demonstrates that, in the right case, it can be relied on to invalidate legislation, even where that legislation affects a creature of statute not required by the Constitution, and even though there are other explicit provisions of the Constitution that protect judicial independence.

4. Application of the Unwritten Principle of Democracy to Democratic Municipal Elections

92. In the right circumstances, the unwritten constitutional principle of democracy, like judicial independence, can be relied upon to invalidate legislation.

93. The question posed by this Court in the cases involving judicial independence was whether the statutory court or officers performed the traditional functions of the judiciary, thereby justifying the application and protection of that constitutional principle.[109]

94. In the context of the unwritten principle of democracy, as in the case of judicial independence, the fact that democratic municipal elections are not mandated by the Constitution

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[105] *Remuneration Reference*, ¶ 106; *Conférence des juges*, ¶ 32; *Constitution Act, 1867*, s 92(14).
[106] *Remuneration Reference*, ¶ 108.
[107] *Remuneration Reference*, ¶ 126.
[108] *Ell*, ¶ 4, 24.
[109] *Ell*, ¶ 20-21.

is not determinative. The creation of a statutory representative government selected by a democratic election is sufficient to justify the application of the democratic principle.

95. Municipally elected councils have been held by this Court to be a third level of government in Canada, along with the federal and provincial governments.[110] Like their federal and provincial counterparts, municipalities provide government services to their residents and have the legislative power to enact laws that affect the general population and which laws can be enforced by fine, or, in some cases, even imprisonment.[111] The residents of municipalities like the Toronto bring their grievances to their councillors' attention.[112] Most importantly, COTA explicitly provides that City Council is a democratically elected government which is responsible and accountable.[113] Its democratic election, therefore, should be no less democratic than federal and provincial elections.

96. As the majority of this Court in *Sauvé* said about democracy:

> In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote.[114]

97. The importance of the electoral process and the right to vote to any democracy was addressed by Cory J. in *Haig* (and agreed to by L'Heureux Dubé J. for the majority at p. 1028):

> All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the *Canadian Charter of Rights and Freedoms* guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against

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[110] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, ¶ 3-4.
[111] See, for example: Toronto Municipal Code, Chapter 545, Licensing, s 545-8.5(D).
[112] Davidson Aff, AR Vol IX, Tab 31, ¶ 32(b), 36, 38, 45-47.
[113] COTA, s 1(1).
[114] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*], ¶ 31.

disenfranchisement.[115]

98. These connections between voting, the rule of law and democracy all apply with equal force to democratic elections at the municipal level.

99. The City submits that its democratic election is subject to the unwritten principle of democracy, even though it is a statutory one, and even though the explicit text of s. 3 of the *Charter* may have a similar effect in the context of provincial and federal elections.

5. Content of the Unwritten Principle of Democracy

100. Although this Court has acknowledged that democracy is an unwritten constitutional principle, it has not yet had an opportunity to clarify the content of this principle in the context of democratic elections.

101. In establishing the content of unwritten constitutional principles, this Court has, *inter alia*, looked to the purpose of the principle, the common law, the text of the Constitution, previous jurisprudence and history.[116]

102. The City submits that there is no reason to reinvent the wheel. Section 3 of the *Charter* is only a written expression of the unwritten principle of democracy in the context of democratic elections, like s. 11(d) of the *Charter* and ss. 96-100 of the *Constitution Act¸1867* were for the principle of judicial independence. As Sopinka J. stated in *Carter*, s. 3 did not create the right to vote.[117] As such, this Court's s. 3 *Charter* jurisprudence already provides significant insight into the content of the democracy principle because the right to vote is critical to democracy, and democracy is itself the election by popular franchise of government institutions with the power to make laws that govern those who elect them. There is no reason why a democratic election of federal or provincial representatives should be governed by different principles than a *democratic* election of municipal representatives. They are all democratic elections of

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[115] *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, p 1048.

[116] See, for example, with respect to judicial independence: *Ell*, ¶ 20-23; with respect to the rule of law: *Christie*, ¶ 23-27; and with respect to the protection of minorities: *Quebec Secession Reference*, ¶ 79-82.

[117] *Carter*, p 161.

representatives in government.

103. Just as the unwritten principle of judicial independence developed its content from the jurisprudence under s. 11(d) and ss. 96-100, the content of the unwritten principle of democracy can be adopted from the s. 3 jurisprudence. It is submitted that the unwritten constitutional principle of democracy requires democratic municipal elections, such as the Election, to at least have the following characteristics:

i) effective representation;[118]

ii) elections that are free and fair, without state interference, such as interference that "*affects the conditions* in which citizens exercise those rights" (emphasis added);[119]

iii) for candidates, "the opportunity to present certain ideas and opinions to the electorate as a viable policy option";[120]

iv) for voters, "the opportunity to express support for the ideas and opinions that a particular candidate endorses";[121] "to play a meaningful role in the selection of elected representatives, who in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate";[122] and to exercise their vote "in an informed manner", which requires the citizen to "be able to weigh the relative strengths and weaknesses of each candidate";[123] and

v) for all election participants, "meaningful participation" in the process.[124]

B. Application to the Facts of this Case

104. The same findings that led Justice Belobaba to conclude that the Impugned Provisions had interfered with candidates' and voters' s. 2(b) rights apply equally here in the context of the

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[118] *Carter*, p 183; see also paragraphs 107-121 of this factum.
[119] *Figueroa*, ¶ 33, 36.
[120] *Figueroa*, ¶ 29.
[121] *Figueroa*, ¶ 29.
[122] *Harper v Canada (AG)*, 2004 SCC 33 [*Harper*], ¶ 69 (emphasis removed). See also COTA Preamble and ss 1(1), 2¶4, 212(1)¶5.
[123] *Harper*, ¶ 71.
[124] *Harper*, ¶ 69-71.

principle of democracy.

105. Specifically, the Impugned Provisions:

i) did not provide for effective representation (see the discussion under Issue 3);

ii) profoundly affected the conditions of the Election by changing the fundamental building block[125] of that election, the wards, in the middle of the Election;

iii) significantly disrupted the ability of candidates to meaningfully speak to voters and get their votes, and of voters to engage with candidates, in an effort to decide for whom to vote, due to the confusion over which ward voters were in and who the candidates in their ward were, the reduction of electoral spending capability, the requirement of candidates to change wards, the introduction of new candidates, the loss of prior endorsements, and the time spent addressing the confusion around Bill 5 instead of campaign issues; and

iv) drastically interfered with candidates' ability to engage in proper campaign planning because Bill 5 changed, mid-election, how they raised money, how they spent money, where they campaigned, what issues needed to be discussed, what events to hold, and what materials to create and distribute.

106. The Impugned Provisions therefore did not provide for a fair democratic election process, are contrary to the unwritten constitutional principle of democracy and must be struck down as violating that principle.

ISSUE 3: Are municipal electors who are given a vote in a democratic election entitled to effective representation?

A. The Constitutional Requirement of Effective Representation

107. Where municipal electors are provided with a statutory democratic election, they are entitled to effective representation, like any electors in a democratic election who choose their

[125] Unofficial Transcript of City Council Meeting (Aug 20, 2018), AR Vol XI, Tab 44, p 105, at 1:12:43.

government representatives based on electoral districts.

108. Bill 5 does not provide for effective representation and this lack of effective representation therefore renders the Impugned Provisions unconstitutional in any of three ways:

i) as being contrary to s. 2(b) of the *Charter*;

ii) as being contrary to the unwritten constitutional principle of democracy; and

iii) as exceeding the limits of the power of provincial legislatures over municipal institutions pursuant to s. 92(8) of the *Constitution Act, 1867*.[126]

1. Interpretation of s. 2(b) of the *Charter*

109. Justice Belobaba correctly determined that *Charter* rights are not insular.

110. Where unwritten constitutional principles infuse our understanding of the explicit text of the Constitution, it is submitted that the principle can assist in interpreting that text wherever it is relevant, such as judicial independence does for s. 11(d) of the *Charter* and ss. 96-100 of the *Constitution Act, 1867*. Similarly, it is submitted that the unwritten constitutional principle of democracy underlies this Court's interpretation of s. 3 of the *Charter* and can be used to interpret both s. 3 and s. 2(b), where the latter is engaged in the context of electoral expression during a democratic election.

111. Unlike the cases cited by the majority of the Court of Appeal, this case does not involve interpreting s. 2(b) and s. 3 to avoid a conflict with each other. In *Harper*, which dealt with campaign spending limits, s. 2(b) suggested that no spending limits were permissible, but s. 3 suggested that spending limits were necessary. In *Thomson Newspapers*,[127] which dealt with publication bans of election poll results in the final days before an election, s. 2(b) would find that such bans were not permissible, whereas s. 3 may have required them in order to protect the integrity of the vote. This is not the case here, as there is no potential conflict of interpretation between ss. 2(b) and 3.

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[126] *Constitution Act, 1867* s 92(8).
[127] *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877.

112. Accordingly, it is submitted that s. 2(b) can be properly interpreted to ensure that a vote in a democratic election provides for effective representation.

2. Contrary to the Unwritten Constitutional Principle of Democracy

113. As indicated above, it is submitted that this unwritten constitutional principle embraces the concept of effective representation and can be used directly to invalidate legislation that does not provide for effective representation in a democratic election.

3. Limitations on s. 92(8) of the *Constitution Act, 1867*

114. The Court of Appeal was incorrect in concluding that the unwritten constitutional principle of democracy could not be used to limit the ambit of s. 92(8).

115. As noted above, in the *Remuneration Reference*, Lamer C.J. explained that "the jurisdiction of the provinces over 'courts', as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined".[128] As such, the province could not create statutory courts or appoint judicial officers who were not "independent".

116. Further, in *Trial Lawyers Association*,[129] this Court also recognized a substantive limitation to the scope of s. 92(14) in part because of its conflict with the unwritten constitutional principle of the rule of law.[130] In that case, court fees were found, in some cases, to be a barrier to access to the courts, which access was fundamental to the rule of law. Indeed, Rothstein J., who wrote the lone dissenting opinion, criticized the majority for using the rule of law in this way.[131]

117. Similarly, it is submitted that there is a limitation on the scope of s. 92(8) of the *Constitution Act, 1867* such that a province may not create a statutory democratic election that does not provide effective representation for its residents.

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[128] *Remuneration Reference*, ¶ 108.
[129] *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 [*Trial Lawyers Association*].
[130] *Trial Lawyers Association*, ¶ 38-41.
[131] *Trial Lawyers Association*, ¶ 98.

118. There is nothing controversial about that conclusion and it does not suggest that a province has lost the ability to legislate with respect to municipal institutions such as a municipality. Rather, if Ontario is going to create a municipality that has democratically elected councillors based on wards, such as the City pursuant to COTA, the election so created must then be democratic and provide for effective representation.

B. Application to the Facts of this Case

119. Justice Belobaba found that the 25-ward model did not provide voters with effective representation as that term has been explained by the majority of this Court in *Carter* because the ward sizes are too big and would impact Councillors' ability to properly serve voters in their ombudsman role. This finding, to which this Court should show deference, was based on the evidence of the City's expert, Gary Davidson.[132]

120. This finding has not been contradicted by the subsequent evidence of Professor Sancton. Indeed, he agrees that even having ward sizes of 80,000 residents for a municipality provides a "lack of municipal representation".[133]

121. As such, the Impugned Provisions do not provide the voters of Toronto with effective representation and should be struck down.

ISSUE 4: Has Ontario met its burden under s. 1 of justifying the *Charter* infringements?

122. Section 1 of the *Charter* can only be used to justify *Charter* infringements: it does not apply where legislation violates an unwritten constitutional principle.

123. The precise wording and contextual elements of s. 1 of the *Charter* are particularly relevant in a case that concerns such fundamental democratic issues as the freedom of expression rights of candidates and voters in a democratic election and respect for political institutions.[134] Section 1 states:

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[132] Davidson Aff, AR Vol IX, Tab 31, ¶ 41-46.
[133] Affidavit of Andrew Sancton (Oct 30, 2018) [Sancton Aff], AR Vol XXI, Tab 64, ¶ 75.
[134] *R v Oakes*, [1986] 1 SCR 103 [*Oakes*], p 136.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [Emphasis added.][135]

124. The burden of justifying an infringement of the *Charter* falls to the government that committed the infringement.[136] Ontario does not even come close to meeting the burden of justifying the *Charter* infringements in this case. The majority of the Court of Appeal did not deal with the s. 1 issues, concluding briefly it was not necessary as they found no *Charter* infringements. However, it is significant that the minority judges, like the Application Judge, had no trouble concluding that Ontario did not meet its burden under s. 1 of the *Charter*, stating:

> . . . I agree with the application judge that Ontario's argument fails at the first branch of the *Oakes* test. There was no "pressing and substantial" legislative objective to support the *Act*. Ontario was entitled to change the ward structure of municipal governments in the province, including the City of Toronto. However, in August 2018, there was no reason for Ontario to do this (1) for the City of Toronto only, (2) without any consultation as explicitly mandated by the *COTA* and the *TOCCA*, and (3) most importantly, after everybody in Toronto (candidates and voters alike) had completed almost two-thirds of a democratic municipal election.[137]

125. The choice of the word "demonstrably" in s. 1 of the *Charter* is important. As McLachlin J. (as she then was) stated: "The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word 'reasonable' of rational inference from evidence or established truths." (emphasis in original)[138]

126. It is helpful to contrast this case with other *Charter* cases before this Court where the government presented extensive compelling evidence to support its burden under s. 1. The contrast is stark.[139] In this case, there were no studies done by the government and no

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[135] *Charter*, s 1.
[136] *Oakes*, pp 136-137.
[137] ONCA Reasons, AR Vol I, Tab 4, ¶ 135.
[138] *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 [*RJR-MacDonald*], ¶ 128; see also: *Sauvé*, ¶ 12, 23.
[139] For example, see the comments in *Canada (AG) v JTI-Macdonald Corp*, 2007 SCC 30, ¶ 8, where the Court noted: "The government presented detailed and copious evidence in support

consultation—instead, Bill 5 was rammed through on an expedited basis.[140] Further, the main evidentiary justification presented by Ontario is an affidavit from Professor Sancton served after the application hearing for the purpose of the appeal. That affidavit is basically a rehashing of his opinion evidence presented at the OMB ward boundary hearing where the majority found in favour of the City's TWBR process that established a 47-ward Council structure.

127. The test for justifying an infringement is well settled. *Oakes* requires that two criteria be met. First, the government's objective must be an important one. The measure must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[141]

128. Second, once the importance of the objective is established, the government must show that the means chosen to attain the objective are reasonable. This second stage applies a proportionality test with three components:

i) the infringing measure is rationally connected to the legislative objective;

ii) the infringement impairs the right or freedom as little as possible and no more than reasonably necessary to accomplish the legislative objective; and

iii) there is proportionality between the effects of the infringement and the legislative objective in terms of the greater public good.[142]

129. Further, as this Court stated in *BC Freedom of Information and Privacy Association*:

> Political expression lies at the core of the *Charter*'s guarantee of free expression . . . Limitations on such speech, to be justified under s. 1 of the *Charter*, "must be supported by a clear and convincing demonstration that they are necessary, do not go too far, and

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of its contention that where the new legislation posed limits on free expression, those limits were demonstrably justified under s. 1 of the *Charter*."

[140] Bill 5 was not sent to Committee for consultation and the time for debate was shortened: Carbone 1st Aff, AR Vol IV, Tab 30, ¶ 37.

[141] *Oakes*, p 138; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 [*Conseil*], ¶ 145.

[142] *Oakes*, p 139; *Conseil*, ¶ 146.

> enhance more than harm the democratic process": *Harper*, at para. 21, per McLachlin C.J. and Major J. [References omitted.][143]

A. No Pressing and Substantial Objective

130. As stated in *Oakes*, in assessing a government's objective of being of "sufficient importance to warrant overriding a constitutionally protected right or freedom", the "standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."[144] The objective must "clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process".[145]

131. At the Court of Appeal, Ontario identified two objectives it claimed to be pressing and substantial: voter parity, and improved efficiency/effectiveness of decision making.

1. Objective: Voter Parity

132. Achieving greater voter parity was scarcely adverted to by the responsible Minister, and not at all by the Premier, in the course of discussion about the need for Bill 5. The focus was on the alleged saving of taxpayers money—an objective on which the government does not rely for the purposes of s. 1—and on "streamlining" Council to make it less "dysfunctional".[146]

133. Even if voter parity is said to be an objective of Bill 5, it is not pressing and substantial, as Justice Belobaba correctly found.

134. As noted above, in *Carter*, this Court held that the principles underlying a free and democratic society "are better met by an electoral system that focuses on effective representation

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[143] *BC Freedom of Information and Privacy Association v British Columbia (AG)*, 2017 SCC 6, ¶ 16.
[144] *Oakes*, pp 138-139; see also *Conseil*, ¶ 145.
[145] *Sauvé*, ¶ 23.
[146] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 65-68.

than by one that focuses on mathematical parity",[147] with effective representation including "the right to bring one's grievances and concerns to the attention of one's government representative".[148] To insist on voter parity may "deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their 'ombudsman' role".[149]

135. An objective that is antithetical to the values of a free and democratic society, as Justice Belobaba found,[150] cannot possibly be characterized as pressing and substantial, and thus cannot justify a *Charter* breach.

136. To support its position on voter parity, Ontario relies on work carried out by the Federal Boundaries Commission for Ontario (the "Commission"). The Commission has no role or mandate for considering or establishing municipal ward boundaries. The federal *Electoral Boundaries Readjustment Act* provides that the mandate of the Commission is to "report on the readjustment of the representation of the provinces in the House of Commons required to be made on the completion of each decennial census".[151] In its deliberations, the Commission has no reason to turn its mind to considerations that would dictate the appropriate number, size and boundary of districts necessary to achieve effective democratic representation in local municipal government. The Commission, in carrying out its work after the 2011 census, held only two public meetings in Toronto.[152] This is contrasted with the 24 public meetings and information sessions, amongst other opportunities for public engagement, held by the TWBR.[153]

137. No other municipality in Ontario has ward boundaries matching the FEDs. This has only been imposed on Toronto despite Ontario's assertions of the benefits of using federal boundaries.

138. In contrast, there is extensive evidence that the TWBR carefully looked at the issue of voter parity and came up with a model that addressed this component in a fast growing City. The

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[147] *Carter*, p 188.
[148] *Carter*, p 183.
[149] *Carter*, pp 187-188.
[150] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 72-73.
[151] *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3, s 3(2).
[152] Davidson Aff, AR Vol IX, Tab 31, ¶ 30 & Ex B.
[153] Davidson Aff, AR Vol IX, Tab 31, ¶ 9.

TWBR recommendations were upheld on appeal at the OMB and the Divisional Court. How can Ontario assert that voter parity is a pressing and substantial objective when independent, objective reviews have concluded that the 47-ward model meets the test of effective representation, of which voter parity is one component?

2. Objective: Efficiency and Effectiveness

139. Ontario bears the burden of demonstrating—not simply asserting—the harm it purports to address.[154] Ontario has not adduced reliable evidence of this alleged harm, namely the ineffectiveness and inefficiency of City Council, nor has it even explained what it means by "dysfunctional" or "inefficient". The rhetoric from the Premier about Council meetings being long[155] is not reliable evidence.[156] This is not a pressing and substantial objective.

140. Approximately three months after introducing Bill 5, Ontario's evidentiary justification for it emerged from the affidavit of Professor Sancton, who was the same expert witness used by the OMB appellants on the ward boundary appeal. Sancton's affidavit is substantially similar to his witness statement at the OMB.[157] In his affidavit, Sancton makes many general statements but does not describe what he means by "dysfunction", does not give any examples of Toronto City Council's decisions on major issues and has clearly not done his own study to support any general statements made about Toronto Council meetings.

141. In contrast, there is the City's evidence from Ms. Carbone, the Deputy City Manager with over 30 years of senior management experience in municipal government. Ms. Carbone gives detailed information about the significant, effective and efficient work carried out by City Council during its 2014-2018 term including, but not limited to, the planning and delivery of public transportation infrastructure, approval of affordable housing units, expansion of the City's emergency shelter system, billions of dollars in public works and infrastructure investments, and

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[154] See *R v Bryan*, 2007 SCC 12, ¶ 67 (per Fish J, concurring).
[155] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 67.
[156] *Sauvé*, ¶ 24.
[157] Affidavit of Giuliana Carbone (Dec 3, 2018) [Carbone 2nd Aff], AR Vol XLVI, Tab 85, ¶ 8 & Ex A.

a large number of important planning matters.[158]

142. Ms. Carbone, having extensive experience with Committees and Council, comments that having senior staff attend meetings is efficient for staff as it gives all Councillors an opportunity to hear from City staff at the same time without the need to conduct individual meetings with Councillors. It is also more transparent.[159]

143. Further, attending Council meetings is just one of the responsibilities of elected Councillors. They also must fulfill their ombudsman role consistent with their statutory mandate and effective representation. This role must be considered in any analysis about Council's effectiveness. There is no justification for the imposition of such large wards resulting in an average population ratio of approximately 110,000 people per Councillor. Wards of this size are nearly double what was supported during the TWBR and are significantly larger than the ward populations in other cities in Ontario. Dr. Davidson, the City's expert who conducted the TWBR, opined that ward sizes imposed under Bill 5 do not provide Councillors with an ability to provide effective representation at the municipal level.[160]

144. Professor Sancton himself describes municipal wards of this size as an "evil".[161] He says his preference would be to have each Councillor representing fewer than 80,000 residents.[162]

B. Proportionality Test

1. No Rational Connection

145. There is no rational connection between the objective of greater voter parity and the imposition of the FEDs 25-ward structure in the middle of the Election. As the OMB found, the difference between the FEDs and the 47-ward model is insignificant when variances are

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[158] Carbone 2nd Aff, AR Vol XLVI, Tab 85, ¶ 15-34.
[159] Carbone 2nd Aff, AR Vol XLVI, Tab 85, ¶ 20. This is contrasted with Professor Sancton's unsubstantiated criticism.
[160] Davidson Aff, AR Vol IX, Tab 31, ¶ 37-52.
[161] Sancton Aff, AR Vol XXI, Tab 64, ¶ 76.
[162] Sancton Aff, AR Vol XXI, Tab 64, ¶ 75-76.

considered in terms of number of people rather than percentages.[163]

146. Equally, there is no evidence of a rational connection between increased effectiveness of Council functioning and a decreased number of Councillors. As set out above, there is extensive evidence to the contrary that such a dramatically reduced number of Councillors cannot provide effective representation to their constituents.

2. No Minimal Impairment

147. Neither is the imposition of the FEDs minimally impairing, given that Ontario could have made more carefully tailored adjustments to ward boundaries in areas of concern while leaving the remainder of the 47-ward model intact.[164] Ontario's argument that it had no time to consider less intrusive alternatives should not be accepted. Not only is there no evidence from Ontario itself on this, but it would undermine the heavy burden on them under the s. 1 test.

148. Nor is there evidence that a *mid-election* reduction of City Council was the only reasonable way to achieve the objective of increased effectiveness, or that in the rush to legislate, the government adverted to any other options. They clearly did not.

3. No Proportionality

149. Ontario also cannot establish this part of the test. The alleged benefits consist of a questionable improvement[165] in voter parity as between Toronto wards, and whatever undefined efficiency gains *might* be achieved through reducing the number of Councillors.

150. The deleterious effects, in contrast, are both extensive and profound. As set out above, Ontario emphasizes voter parity at the price of effective representation, and a fair and democratic election. Bill 5 undermines expressive participation and trust in the electoral process[166] and

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[163] OMB Decision, AR Vol VIII, Tab 30, Ex Q, ¶ 38-39.
[164] See *RJR-MacDonald*, ¶ 160; Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 76.
[165] Discrepancies between FEDS will only increase as Toronto's population continues to change: Davidson Aff, AR Vol IX, Tab 31, ¶ 34; OMB Decision, AR Vol VIII, Tab 30, Ex Q, ¶ 26.
[166] As the Organization for Security and Cooperation in Europe [OSCE] observes in its *Guidelines for Reviewing a Legal Framework for Elections*: "Electoral legislation enacted at

deprives Torontonians of effective representation.

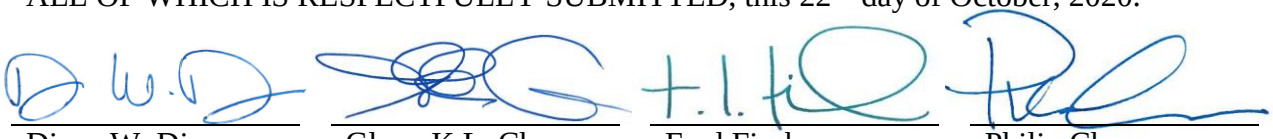
PART IV – SUBMISSIONS ON COSTS

151. The City, Ontario and Toronto District School Board have agreed not to seek costs.

PART V – ORDERS SOUGHT

152. The City seeks a declaration pursuant to s. 52(1) of the *Constitution Act, 1982* that the Impugned Provisions[167] are inconsistent with the Constitution of Canada and of no force and effect.[168] To avoid the immediate legal vacuum that could result from such a declaration, the City asks that the declaration of invalidity be suspended until a new City Council and Mayor are elected at the next regularly scheduled Toronto municipal election pursuant to the ward structure[169] and rules that were repealed by the Impugned Provisions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of October, 2020.



Diana W. Dimmer Glenn K.L. Chu Fred Fischer Philip Chan

Counsel for the Appellant, City of Toronto

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the 'last minute' has the potential to undermine trust in the process and diminish the opportunity for political participants and voters to become familiar with the rules of the electoral process in a timely manner": OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework for Elections, 2d ed.* (Warsaw: OSCE/ODIHR, 2013), p 11.

[167] At the hearing before Belobaba J., the City applied for an order declaring that ss. 4-7 of Sch. 1, and Sch. 3 of Bill 5, and O. Reg. 407/18 and O. Reg. 408/18 made pursuant thereto, and the companion provisions of O. Reg. 391/18 amending O. Reg. 412/00, are of no force and effect, except for the part of s. 1 of Sch. 3 of Bill 5 that adds ss. 10.1(1) and 10.1(10) to the MEA, to the extent that it permits these sections of O. Reg. 407/18 to remain in force: s. 4(1) as it applies to s. 23(2) of the MEA, and ss. 4(2), 5 and 12.

[168] *Constitution Act, 1982*, Sch B to the *Canada Act 1982*, 1982, c 11 (UK), s 52(1).

[169] By-law 267-2017 (Mar 29, 2017), AR Vol VIII, Tab 30, Ex O; By-law 464-2017 (Apr 28, 2017), AR Vol VIII, Tab 30, Ex P.

PART VI – TABLE OF AUTHORITIES

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