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,
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Interveners

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ONTARIO

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TABLE OF ABBREVIATIONS USED IN TEXT AND CITATIONS

aff – Affidavit
AG – Attorney General of Ontario
cr-x – Cross-examination transcript
exh – Exhibit
FEDs – Federal Electoral Districts
OMB – Ontario Municipal Board
p – Page
RBOA – Respondent's Book of Authorities
SR – Short Record
t –Tab
TWBR – Toronto Ward Boundary Review
v – Volume
¶ – Paragraph

FRESH EVIDENCE CITED IN THIS FACTUM
(Admitted by Order of this Court, dated August 28, 2020)

(*identified by italic script in the footnotes*)

Answers to undertakings provided on transcript #1 of the Cross-examinations of Lily Cheng, Giuliana Carbone and Myer Siemiatycki

Answers to undertakings provided on transcript #2 of the cross-examinations of Megann Willson, Jennifer Hollett, Chiara Padovani, Giuliana Carbone and Dyanoosh Youssefi

Book of documents to be entered in lieu of the cross-examination of Fiona Murray on her Affidavit, affirmed August 22, 2018

Carbone 2nd aff – Affidavit of Giuliana Carbone, Interim City Manager, sworn December 3, 2018, and the exhibits thereto

Carbone cr-x – Transcript of Cross-examination of Giuliana Carbone on her Affidavits sworn August 22, 2018, and December 3, 2018, held on March 5, 2019, and the exhibits thereto

Cheng cr-x – Transcript of Cross-examination of Lily Cheng, on her Affidavit affirmed August 21, 2018, held February 13, 2019, and the exhibits thereto

Davidson cr-x - Cross-examination of Gary Davidson, on his Affidavit affirmed August 27, 2018, held on March 11, 2019, and the exhibits thereto

Dexter cr-x – Transcript of Cross-examination of Susan Dexter, on her Affidavit sworn August 21, 2018, held February 11, 2019, and the exhibits thereto

Fowler aff – Affidavit of Professor Anthony Fowler, sworn October 30, 2018, and the exhibits thereto

Hollett cr-x – Transcript of Cross-examination of Jennifer Hollett, on her Affidavit affirmed August 21, 2018, held February 13, 2019, and the exhibits thereto

Kettel cr-x – Transcript of Cross-examination of Geoffrey Kettel, on his Affidavit sworn August 21, 2018, held February 11, 2019, and the exhibits thereto

Khosla cr-x – Transcript of Cross-examination of Prabha Khosla, on her Affidavit sworn August 18, 2018, held on March 4, 2019, and the exhibits thereto

Moise cr-x – Transcript of Cross-examination of Chris Moise, on his Affidavit sworn August 20, 2018, held February 14, 2019

Padovani cr-x – Transcript of Cross-examination of Chiara Padovani, on her Affidavit sworn August 21, 2018, held on March 1, 2019, and the exhibits thereto

Sancton aff – Affidavit of Professor Andrew Sancton, sworn October 30, 2018, and the exhibits thereto

Siemiatycki cr-x – Transcript of Cross-examination of Myer Siemiatycki, on his Affidavit sworn August 21, 2018, held on March 8, 2019, and the exhibits thereto

Valverde cr-x – Transcript of Cross-examination of Mariana Valverde, on her Affidavit sworn August 20, 2018, held on March 7, 2019, and the exhibits thereto

Willson cr-x – Transcript of Cross-examination of Megann Willson, on her Affidavit sworn August 21, 2018, held February 12, 2019, and the exhibits thereto

Youssefi cr-x – Transcript of Cross-examination of Dyanoosh Youssefi, on her Affidavit affirmed August 22, 2018, held of March 5, 2019, and the exhibits thereto

PART I – OVERVIEW AND STATEMENT OF FACTS

1. This is an appeal by the City of Toronto from the order of the Court of Appeal which upheld the constitutionality of the *Better Local Government Act, 2018*, SO 2018, c 11 (Bill 5).

2. The impugned provisions of Bill 5 cut the size of Toronto's municipal council, by reducing the number of councillors to 25, in an effort to improve its effectiveness. For 20 years after Toronto's amalgamation in 1997, the council was unreasonably large for a city without a strong mayor system or partisan discipline. The 45-member council was unwieldy and, with each councillor representing one of the City's 44 wards, it suffered from ward-based parochialism at the expense of a focus on broader policy. For the 2018 municipal election, City Council had in fact voted to increase the number of councillors to 47, redrawing the City into 47 wards.

3. Bill 5 also provided for voter parity for the 2018 election, adopting as wards the 25 electoral districts used for federal and provincial elections (referred to as the FEDs), drawn by an independent federal Commission based on the decennial Census. The City's 44 wards, in place since 2000 (based on the then 22 FEDs), had grown to deviate from voter parity, with some wards double the population of others. The City's newly drawn 47 wards failed to address the problem of parity for the 2018 election, as they were designed to "grow into" parity by 2026.

4. The new provincial government, elected in June 2018, wanted to ensure its policy changes aimed at council effectiveness and voter parity were in place before the municipal election on October 22, 2018, instead of waiting for another election cycle in 2022, or, more disruptively, allowing the 47-ward election to proceed and then enacting the reform.

5. As a result, Bill 5 was introduced just two-and-a-half weeks after the newly elected legislature commenced sittings in July, and was enacted by August 14. To accommodate candidates, Bill 5 extended the nomination deadline to September 14, a timeline generally consistent with the four previous Toronto municipal elections.

6. The province worked closely with the City Clerk to make sure the changes under Bill 5 could be implemented quickly, with the least disruption possible. By mid-August, all the new rules were published, and on August 17, the Clerk confirmed she was confident the election under Bill 5 could proceed smoothly and with integrity on October 22.

7. Some candidates, including members of the existing council, and their organizers, were

surprised and disappointed by the changes under Bill 5. Council voted on August 20 to bring a court challenge, and three applications (one by the City and two by individuals) were heard together on August 31.

8. On September 10, the Application Judge invalidated the impugned provisions of Bill 5 and ordered the election to proceed under the City's 47-ward structure. As a result of a stay ordered by the Court of Appeal, the election proceeded on October 22, 2018 under Bill 5.

9. There is no issue with the integrity or democratic nature of the election held under Bill 5. The newly elected council, comprised of 25 councillors plus the mayor, has been governing Toronto without questions as to its legitimacy since assuming office. The council has increased staff budgets and taken other measures to operate as a smaller body, more efficiently allocating councillors' time. There is no evidence these measures have been ineffective, nor evidence that the residents of Toronto have since suffered a lack of effective representation or governance.

10. Although the individuals abandoned their applications after the election and consented to Ontario's appeal, the City opposed the appeal and now pursues an appeal in this Court. The Appellant relies on *Charter* s. 2(b), the unwritten constitutional principle of democracy and limitations said to lie in s. 92(8) of the *Constitution Act, 1867*.

11. One of the s. 2(b) claims is that the enactment of Bill 5 after candidate nominations opened on May 1, 2018 interfered with free expression during the campaign, because participants had already started organizing, fundraising and expressing themselves.

12. Bill 5 did not limit anyone at any time from obtaining or conveying information or expressing themselves – whether by standing as a candidate, campaigning, donating, organizing, researching, advocating or voting. Bill 5 provided an equally meaningful electoral forum.

13. There is no s. 2(b) right to campaign or vote in a 47-ward election, as opposed to the 25-ward election under Bill 5. No particular ward model or council is guaranteed. Section 2(b) does not compel the province, in respect of its delegate the City, to maintain a particular "platform for expression." A positive right under s. 2(b) for access to a legislated platform can be found only in limited and exceptional circumstances not present here.

14. Even if some prior expression lost effectiveness due to changes in the size and number of wards or an extended nominations deadline, s. 2(b) does not guarantee expression that is *effective*

in achieving its objective nor that expression, once made, must *retain* its effectiveness or worth.

15. The Appellant pursues a second s. 2(b) claim, rejected unanimously on appeal, that the reduction in council size would impair residents' effective representation, because larger wards are more populous. Effective representation is protected by *Charter* s. 3, which only applies to federal and provincial elections. Even under *Charter* s. 3, effective representation does not prescribe a maximum ratio of constituents to representatives.

16. The Appellant's reliance on the unwritten principle of democracy and an alleged implicit limitation in s. 92(8) of the *Constitution Act, 1867* has no merit and was rejected unanimously below. No unwritten constitutional principles were engaged or breached by Bill 5, nor do they provide a basis to invalidate it. Bill 5 was enacted by the democratically elected legislature, in accordance with the province's long-recognized plenary power over municipal institutions under s. 92(8). The City's delegated authority can be revoked or amended at any time.

17. The Application Judge's findings on both s. 2(b) and s. 1, relied on by the City on appeal, were the result of procedural issues that deprived Ontario of a meaningful opportunity to respond to the claimants' experts or conduct cross-examinations on extensive materials filed just days before the first instance hearing. Ontario's fresh evidence, now admitted by this Court, contains Ontario's responding expert evidence and the cross-examinations on the claimants' evidence.

18. The evidence shows that Bill 5 is a justified, proportionate measure to address voter parity for the 2018 election and the problems caused by having a municipal council that was too large to be an effective governance body for Toronto.

19. The remedy sought by the Appellant is a declaration of invalidity suspended until *2022*, so that the City's 47-ward bylaw would come back in force for the next election. This remedy is inappropriate. If s. 2(b) were breached by the timing of Bill 5, at most a declaration to that effect might be appropriate: Bill 5 would still be valid for elections and council composition after 2018. Even if Bill 5 is constitutionally defective in some other respect, any remedy should permit the legislature to enact a constitutionally compliant replacement prior to the 2022 election.

A. History of legislative changes to Toronto ward boundaries

20. Ontario municipalities have always been creatures of statute. Throughout the history of the province, the legislature has repeatedly reformed them (by annexation, amalgamation or

governance changes) when it determined it was in the public interest to do so.

21. In the face of reform, municipalities and others have often protested in favour of the status quo. A 1965 Royal Commission Report explained this phenomenon as stemming from "a local patriotism" that develops from pre-existing boundaries and governance structures.[1] This observation applies to the claim here that the impugned legislation is an "unprecedented" interference with local democracy. The observation also applied to the 1997 precursor to this case which challenged the legislation that dissolved the Municipality of Metropolitan Toronto (a regional government) and amalgamated the current City from its constituent parts.[2]

22. The 1997 amalgamation was controversial, described in the Ontario courts as "imperious" and "megachutzpah," appearing "on the government's legislative agenda with little, or no, public notice and without any attempt [at] meaningful consultation." The six municipalities held referenda and majorities voted against change. However, the legislation was upheld against claims based on a purported "constitutional convention" governing the exercise of authority under s. 92(8) of the *Constitution Act, 1867* and *Charter* ss. 2(b) and (d), 7, 8 and 15.[3]

23. Bill 5, impugned in the present case, addressed what was understood to be unfinished business from the 1997 amalgamation.[4] The 1997 legislation divided the new city into 28 wards with a council of one mayor and 56 councillors, two per ward. Few believed this was an appropriate size for a municipal council without political parties. The Minister of Municipal Affairs regarded the council size of 57 as "transitional." In 2000, provincial legislation aligned the wards with the 22 FEDs at that time, but it permitted City Council to split each ward, creating 44.[5] The 45-member council is believed to be the only city council in the democratic world with a membership approaching 50, except those with party systems or strong-mayors. There has been concern ever since about Council's dysfunction, symptomatic of which are drawn-out meetings

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[1] H Carl Goldenberg, *Report of the Royal Commission on Metropolitan Toronto* (Toronto, 1965), SR, v II, t 26 at pp 49-50, and see *Journal Printing Co v McVeity* (1915), 21 DLR 81 (Ont CA) (per Falconbridge CJKB).
[2] *City of Toronto Act, 1997*, SO 1997, c 2 (Bill 103).
[3] *East York (Borough) v Ontario (AG)* (1997), 34 OR (3d) 789 (Ont Ct J (Gen Div)) at ¶¶11, 15 [*East York* (Gen Div)]; *East York (Borough) v Attorney General* (1997), 36 OR (3d) 733 (Ont CA) at ¶12 [*East York* (CA)].
[4] *Sancton aff, SR, v II, t 27, p 84 at ¶76.*
[5] *Sancton aff, SR, v II, t 27, p 83 at ¶74.*

focusing on dozens of local issues rather than broad objectives (e.g., transit or housing).[6]

24. Ontario's expert in this case, Professor Sancton, a leading expert on municipal governance, was opposed to amalgamation in 1997 and supplied expert opinion in the litigation against it. But he recognizes in his evidence in this case, "The megacity has been Toronto's reality for twenty years. It needs to be made to work." He believes that the "abnormally large" council "needs to be reduced so that the city as a whole can be governed more effectively."[7]

25. The 44-ward model put into effect in 2000 was unchanged for five elections. In the meantime, the province in 2006 granted City Council the authority to determine its own composition and ward structure. By 2014, uneven population growth resulted in wards that did not provide voter parity. Some wards approached or exceeded twice the population of others, meaning that the votes of residents in some wards carried more than twice the weight of votes in others.[8] Voter parity is the prime condition for effective representation, a policy goal for federal, provincial *and* municipal elections (but not a constitutional requirement at the municipal level). Parity ideally means each ballot carries the same weight.

26. The lack of parity among the 44 wards was challenged at the Ontario Municipal Board (OMB) and, although the applications were eventually withdrawn, parity remained of concern to City staff. Council risked having its authority to fix ward boundaries superseded by the OMB.[9]

27. The City Manager's recommendation, adopted by Council in 2013, was to retain a third-party consultant for a ward boundary review. Council's Executive Committee voted for

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[6] *Sancton aff, SR, v II, t 27, pp 82, 85-86 at ¶¶70, 81*; *Valverde cr-x, SR, v IV, t 39, q 400*; *Mariana Valverde, "City Bureaucrats and Village Elders: The Dysfunctional Dance of Local Governance," in Everyday Law on the Street* [*Chapter 4 in Everyday Law on the Street*], *SR, v IV, t 39, exh 1*.

[7] *Sancton aff, SR, v II, t 27, pp 84-85 at ¶¶76, 79*.

[8] TWBR, Ward Population Background Brief (Toronto, July 2015) [Ward Population Background Brief], SR, v II, t 19 at pp 8-10; Davidson aff, SR, v I, t 15, p 128 at ¶13; City Council Decision of June 11-13, 2013 to retain a third-party consultant to conduct the TWBR [City Council Decision of June 11-13, 2013], SR, v I, t 9 at p 108.

[9] *Carbone cr-x, SR, v IV, t 37, qq 54-61, 100-101*; *Answers to undertakings of Giuliana Carbone (Transcript #1), SR, v IV, t 42, p 137, nos 1-3*; City Council Decision of June 11-13, 2013, SR, v I, t 9 at p 106; *City of Toronto Act, 2006*, SO 2006, c 11, Sch A, ss 128, 129 (historical version as of August 13, 2018); *Municipal Act, 2001*, SO 2001, c 25, s 222.

consideration of a *reduction* in council size, but Council left the issue to the consultants.[10]

28. In 2014, the consultants began the Toronto Ward Boundary Review (TWBR) to develop a recommended option for Council's consideration. The Terms of Reference directed them "not [to] assume a pre-determined number of wards or specific boundaries," to "[c]onsider[…] and accommodate[…] Toronto's projected growth and population shifts for a reasonable period of time" and to "[c]onsider[…] the appropriate number of wards as well as ward boundaries." [11]

29. The consultants' engagement did not specify a target year for voter parity. They understood their mandate was to develop a model to last for "a reasonable period," which they took to mean until 2026 and possibly 2030. They settled on 2026 as the target year.[12] They would design a system to *aim* for parity by 2026: the wards would "grow into" parity based on projections as to how population growth and development would be distributed across the city.[13]

30. Early in their engagement, the consultants rejected the possibility of adopting wards based on the FEDs drawn by the independent Federal Boundaries Commission for Ontario (the Commission) and used for both federal and provincial elections in Ontario.[14] The FEDs consisted of 25 districts, drawn in 2012 based on the 2011 Census, to be revised after the 2021 Census.[15]

31. The consultants did not include the FEDs option among those presented to Council and the public in the consultation phase. The *only* reason provided for rejecting the 25-ward FEDs option was that "25 very large wards gained virtually no support during the public process."[16] This conclusion was not based on representative, professionally-conducted sampling, but on

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[10] *Carbone cr-x, SR, v IV, t 37, qq 44-55, 136-140*; City Council decision of June 11-13, 2013, SR, v 1, t 9 at pp 103-105.
[11] City Council Decision of June 11-13, 2013, SR, v 1, t 9 at pp 108-110; *Carbone cr-x, SR, v 1, t 9, qq 44, 143, 146, 151*.
[12] *Carbone cr-x, SR, v IV, t 37, qq 146-149, 214-222*; *Davidson cr-x, SR, v IV, t 41, qq 4-6*; TWBR, Options Report [Options Report], SR, v II, t 21 at p 15.
[13] Alexandra Flynn, *(Re)creating Boundary Lines: Assessing Toronto's Ward Boundary Review Process*, SR, v II, t 27, exh C at pp 140-141 [Flynn, *(Re)creating Boundary Lines*)].
[14] *Sancton aff, SR, v II, t 27, p 72 at ¶47*; Options Report, SR, v II, t 21 at p 18.
[15] TWBR, Additional Information Report [Additional Information Report], SR, v II, t 22 at p 21.
[16] *Sancton aff, SR, v II, t 27, pp 72-73 at ¶48*; Options Report, SR, v II, t 21 at pp 18-19; TWBR, Round Two Report – Civic Engagement and Public Consultation [Round Two Report], SR, v I, t 11 at p 114.

feedback received during the TWBR's 24 public meetings, which had an average attendance of 13 people,[17] and an online survey with about 700 responses.[18] The survey results were more ambiguous than the consultants suggested.[19] Lead consultant Gary Davidson admitted that those who attended the public meetings or participated in the survey were self-selecting. No measures were taken to determine if councillors' staff or supporters attended or participated, potentially skewing the outcome.[20]

32. It is well understood that councillors may have a bias in favour of the status quo, or more rather than fewer wards, based on electoral self-interest. This is why boundary reviews need to be at arms-length to the politicians who will seek re-election in any new structure. Councillors' views are considered for their "valuable and detailed information about their wards, especially with respect to boundary issues and communities of interest" but *not* because of their own preferences on council size or ward boundary changes.[21]

33. After settling on five options, however, the TWBR consultants presented them to *councillors to rank by order of preference*. A majority, unsurprisingly, ranked "Option 1 – *minimal change*" as their first choice. These rankings were given weight in the consultants' ultimate recommendation.[22] As the councillors simply ranked their preferences, the consultants could not determine whether the rankings were based on genuine policy reasons or self-interest.

34. The TWBR was seriously criticized in a study by the Institute on Municipal Finance and Governance, and by Professor Sancton, who agrees with the Institute's conclusion that: "it is uncertain whether the [TWBR] model achieved a sufficiently arm's-length process" and this "raises the question of whether other ward options – for example, a smaller council or wards

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[17] *Sancton aff, SR, v II, t 27, pp 70-71 at ¶44*; *Davidson cr-x, SR, v IV, t 41, q 189*.
[18] Round Two Report, SR, v I, t 11 at p 113; *Davidson cr-x, SR, v IV, t 41, qq 173-175, 189*.
[19] *Sancton aff, SR, v II, t 27, pp 71-72 at ¶¶45-46*; Round Two Report, SR, v I, t 11 at pp 114-115.
[20] *Davidson cr-x, SR, v IV, t 41, qq 182-184*.
[21] City Council Decision of June 10, 2014 to Approve the TWBR Work Plan; SR, v I, t 10 at pp 111-112; City Council Decision of June 11-13, 2013, SR, v I, t 9 at pp 106-107; *Carbone cr-x, SR, v IV, t 37, qq 194-201*; *Valverde cr-x, SR, v IV, t 39, qq 695-696*; *Davidson cr-x, SR, v II, t 27, qq 226-235, 247*.
[22] Round Two Report, SR, v I, t 11 at p 90; *Davidson cr-x, SR, v II, t 27, qq 240-243*.

overlapping with federal districts – were fairly considered" in the TWBR.[23]

35. After the TWBR Final Report, the City's Executive Committee, on motion by Mayor Tory, asked the consultants to examine other options, including "increased consistency" with the 25 FEDs.[24] In response, the consultants held four public meetings and produced two reports. The reports contained virtually no new information or analysis regarding the 25-ward option. The consultants claimed that most people who supported the FEDs option favoured splitting the FEDs to produce 50 wards. They also claimed the FEDs would not achieve "voter parity" *in 2026*. In saying this, the consultants simply assumed that the 25 wards for 2026 would depend on the 2012 FEDs rather than the 2022 FEDs to be based on the 2021 Census.[25]

36. The City Manager then commissioned a separate poll of Toronto residents by a professional polling firm. The results showed that as many Torontonians (41%) wanted 25 or fewer wards as those (42%) who wanted more than 25.[26]

37. In the end, Council adopted the 47-ward model by bylaw in March 2017.[27] Thus, after the 2018 election, Toronto would enlarge its council by three members, or seven percent. Council's decision to increase its own size is not surprising. As Professor Sancton observed (quoting the US literature), municipal legislative bodies "when left to their own devices, almost always expand in size. When reduction has occurred in recent years … it is almost always a result of extrinsic actors," such as courts or legislatures.[28]

38. Quite apart from the unnecessary growth in the size of the council, the 47-ward model did not meet the goal of voter parity. For the 2018 election, it would achieve markedly poorer parity than the 2012 FEDs. Only if the City's projections – which were "inexact" and subject to

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[23] *Sancton aff, SR, v II, t 27, pp 62-63 at ¶29*; Flynn, *(Re)creating Boundary Lines*, SR, v II, t 27, exh C at p 146.
[24] *Sancton aff, SR, v II, t 27, p 74 at ¶51*; Executive Committee Decision Requesting Additional Information, SR, v I, t 12 at p 116.
[25] Additional Information Report, SR, v II, t 22, pp 21-27; Davidson aff, SR, v I, t 15, pp 130-131 at ¶19; *Sancton aff, SR, v II, t 27, pp 65-66, 73 at ¶¶37-40, 49*; *Davidson cr-x, SR, v IV, t 41, qq 105-110*.
[26] *Sancton aff, SR, v II, t 27, pp 77-78 at ¶59*.
[27] *Sancton aff, SR, v II, t 27, pp 77-78 at ¶59*; City of Toronto By-law 267-2017, *A By-law to Re-divide the City of Toronto's Ward Boundaries* (March 29, 2017) [By-law 267-2017], SR, v I, t 14.
[28] *Sancton aff, SR, v II, t 27, p 99 at ¶121*.

uncertainties[29] – were realized, would the 47-ward model come closer to parity in 2026.[30]

39. City Council's decision was challenged at the OMB in the Fall of 2017, where the issue of voter parity was a focus of controversy. The question of council size was not within the OMB's remit. The challengers at the OMB argued that expecting a ward model to serve unchanged for several four-year election cycles was unrealistic. They contended that the TWBR sacrificed voter parity in 2018 and that, instead of focusing on 2026, parity should be achieved as soon as possible. They proposed adopting the 25 FEDs.[31]

40. A majority of the OMB dismissed the challenge in December 2017, giving deference to City Council's decision, as it found there were no "clear and compelling reasons to interfere."[32] There was, however, a strong dissent. The dissent would have divided the city into 25 wards consistent with the FEDs because doing so would achieve *much better* voter parity in 2018, with only two wards with a +/-10% variance and one with a +/-20% variance. By contrast, in the 47-ward model, 17 had variances greater than +/-10% with two having a variance greater than +/-30%. While the FEDs did not result in "perfect parity" for 2018, it was "far superior" to the 47-ward model. The dissent noted, and the OMB majority did not dispute, that there was no case for overriding the principle of parity on the basis of communities of interest, physical and natural boundaries or ward history because those criteria had been "duly considered in the FEDs."[33]

41. Leave to appeal to the Divisional Court was refused in March 2018 on the basis that the OMB appropriately exercised deference.[34] With judicial proceedings exhausted, the City confirmed the composition of council under the new 47-ward model by bylaw on May 24, 2018,[35] more than three weeks *after* candidate nominations had opened on May 1.

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[29] *Davidson cr-x, SR, v IV, t 41, qq 140-165*.
[30] *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (OMB) [OMB Decision], SR, v I, t 13, pp 121-122, 125 at ¶¶5, 14, 49 (per Member Taylor, dissenting), leave to appeal to Div Ct refused, *Natale v Toronto*, 2018 ONSC 1475 (Div Ct).
[31] OMB Decision, SR, v I, t 13, pp 117-119 at ¶¶5, 30-31.
[32] OMB Decision, SR, v I, t 13, p 120 at ¶41.
[33] OMB Decision, SR, v I, t 13, pp 123-125 at ¶¶37-38, 47, 49-50 (per Member Taylor, dissenting); *Sancton aff, SR, v II, t 27, pp 66-68 at ¶40*.
[34] *Natale v Toronto*, 2018 ONSC 1475 (Div Ct).
[35] City of Toronto By-law 598-2018, *To confirm the composition of council* (May 24, 2018), SR, v III, t 29, exh 3 at p 78.

B. The Federal Boundaries Commission established the 25 FEDs in Toronto

42. As noted, the 25 wards in the FEDs model adopted by Bill 5 were set by the federal Commission in 2012. The Commission is an independent body responsible for readjusting Ontario's federal electoral boundaries, and the federal districts it draws are also used for 121 of Ontario's provincial electoral districts.[36] In July 2012, the Commission released a proposal for the 121 Ontario electoral districts, including the 25 Toronto districts. The Commission held 31 public hearings across the province, including two days in Toronto.[37]

43. The Commission's work is subject to: (1) s. 15 of the federal *Electoral Boundaries Readjustment Act*, which states that "the population of each electoral district shall be as close as reasonably possible to the electoral quota for the province;" and (2) s. 3 of the *Charter* and the *Carter* decision, which held that s. 3 guarantees the right to effective representation, the prime condition for which is relative parity of voting power.[38] The Commission also takes account of the other *Carter* factors – communities of interest, geography, history and minority representation. The Commission's work is repeated after each decennial Census.

C. Bill 5 adopted the FEDs for Toronto prior to the 2018 election

44. The nomination period for Ontario's 2018 municipal elections was prescribed as May 1 to July 27, 2018. Election signage was permitted starting September 27, 2018. The elections were fixed for October 22, 2018.[39]

45. Meanwhile, on May 8, 2018, the Ontario legislature was dissolved, and writs issued for a general election to be held June 7, 2018, in accordance with a provincial fixed election date law.[40] The government entered "caretaker mode." The provincial election resulted in a change of government, sworn in June 29, 2018. The new legislature began sitting in mid-July 2018.

46. Two weeks later, on July 30, 2018, Bill 5 (announced the previous week) was introduced.

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[36] *Representation Act, 2015*, SO 2015, c 31, Sch 1, ss 1-2.
[37] Federal Electoral Boundaries Commission Report [FEBCR], SR, v II, t 24 at pp 39, 41.
[38] FEBCR, SR, v II, t 24 at pp 39-40, 42-43; *Davidson cr-x, SR, v IV, t 41, qq 309-313*; *Sancton aff, SR, v II, t 27, pp 59-60, 64 at ¶¶20, 32*; *Siemiatycki cr-x, SR, v IV, t 40, qq 281-285*; *Reference re Provincial Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 183 [*Carter*].
[39] *Municipal Elections Act, 1996*, SO 1996, c 32, s 5 [*MEA*]; *Toronto Municipal Code*, dated February 1, 2018, ch 693-9, A(2); *Willson cr-x, SR, v III, t 30, qq 164-165*.
[40] *Election Act*, RSO 1990, c E.6, s 9.1(5).

For the Toronto election, Bill 5 adopted the 25 FEDs determined by the 2012 federal Commission as wards for Toronto's 2018 election, with corresponding changes to the size of the council. No change was made to the mayoral election. The authority granted in 2006 to Council to determine its council composition and wards was revoked.

47. At Second Reading, the responsible Minister set out the rationale for Bill 5:

> First, they [councillors in support of a 25-ward model] agree that a smaller council will lead to better decision-making at Toronto city hall, which would benefit Torontonians as a whole. They gave an example of the current 44-member council having 10-hour debates on issues that would end with the vast majority of councillors voting the same as they would have at the beginning of the debate. …
>
> Second, they point out that it will save money, and those savings go beyond just the savings of those councillors' salaries. The current 44-member council also creates a huge challenge for the Toronto bureaucracy, which has to respond to motion upon motion, to reports, reports and more reports, and then to deferrals and then more deferrals. [At the] most recent city council meeting, … there were 128 members' motions presented. If we allowed council to grow to 47 and hadn't acted quickly, many believe the situation would have become worse. …
>
> Third, it would result in a fair vote for residents, which was the very reason Toronto itself undertook a review of its ward boundaries. The Toronto councillors I referred to earlier reminded everyone that the Supreme Court of Canada said that voter parity is a prime condition of effective representation. They gave examples of the current ward system, where there are more than 80,000 residents in one ward and 35,000 in another. They acknowledge that this voter disparity is the result of self-interest, and that the federal and provincial electoral district process is better because it is an independent process which should apply to Toronto as well. … The wards we are proposing are arrived at through an independent process.[41]

48. The new provincial government's intention was to have Bill 5 in place for the 2018 election.[42] Otherwise, contrary to its policy preferences, voter parity would not be achieved for that election. Moreover, delaying reform until after the election would mean that the government would either: (a) need to wait until the October *2022* municipal election – past even the fixed date for the *next* provincial election in June 2022 – to realize its policy goals of voter parity and a smaller, more effective council; or (b) reduce the size of the council after the election and either determine which councillors would remain in office or provide for a fresh election. The former

[41] Hansard, August 2, 2018, SR, v II, t 25 at pp 46-47.
[42] Hansard, August 2, 2018, SR, v II, t 25 at p 45.

option involved an unacceptable, lengthy delay for a government seeking to have a new, more functional Toronto council; whereas the latter option would have been more disruptive.

49. Bill 5 does not include a "rolling" incorporation of the FEDs as determined in the future to apply in elections beyond 2018. However, as Professor Sancton observes, an amendment to incorporate the new FEDs established in 2022 after the 2021 Census is an easily implemented method of keeping the wards based on the FEDs up to date with Toronto's changing population distribution, ensuring continued voter parity through a reliable, consultative and arm's-length process at no cost to the city or province. The province takes the same approach to keep 121 of its provincial electoral districts up to date with the FEDs after each Census.[43]

50. The contention that the FEDs developed by the federal Commission are unsuitable for Toronto's municipal elections because, for example, the Commission does not turn its mind to the appropriateness of boundaries for "municipal" purposes (Appellant's Factum at para 136), is rebutted by a review of the Commission's work, the evidence of Professor Sancton (himself a past Commissioner) and admissions by the applicants' experts on cross-examination.[44] The Commission does not assess communities of interest for "federal" purposes, but simply communities of interest as defined by the communities themselves. For example, the Commission gave effect to concerns that the Seaton Village and Annex areas near the University of Toronto consider themselves a community of interest linked to the University.[45] Similarly, it accepted that Bennington Heights in mid-town has a community of interest based on "shopping, entertainment, sports, parks, schools and other public services" with Leaside.[46] There is no "federal" dimension to this analysis. It is equally concerned with distinctly local pre-occupations.

51. Some councillors told the TWBR that more populous wards (as under the 25-ward FEDs) would make it hard to fulfill their informal "ombudsman" role. Three objected to any increase in ward size even with increased resources.[47] Under the 44-ward structure, ward population varied

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[43] *Sancton aff, SR, v II, t 27, pp 56, 63-66 at ¶¶12-13, 30-32, 38, 39*; *Representation Act, 2015*, SO 2015, c 31, Sch 1, ss 1-2.
[44] FEBCR, SR, v II, t 24 at pp 42-43; *Sancton aff, SR, v II, t 27, pp 59-60, 64 at ¶¶20, 32*; *Siemiatycki cr-x, SR, v IV, t 40, qq 281-285*; *Davidson cr-x, SR, v IV, t 41, qq 309-313*.
[45] FEBCR, SR, v II, t 24 at p 43.
[46] *Davidson cr-x, SR, v IV, t 41, qq 271-274*.
[47] TWBR, Round One Report, SR, v II, t 20 at p 11.

from 44,000 to 109,000.[48] Under the FEDs, wards had an average 2018 population of 111,000, ranging from 94,000 to 129,000. Under the 47-ward model, they would have varied from 33,000 to 69,000.[49] As the City's population grows, the average ward population will grow.

52. Professor Valverde, an urban studies expert on Toronto councillor behavior who lauded the ombudsman role in her affidavit before the Application Judge, later admitted in cross-examination that her substantial empirical work demonstrates significant governance dysfunction, acute in Toronto, arising from this very role. (She calls councillors "village elders"). Rather than focusing on city-wide issues, councillors devote themselves to the particular interests and complaints of residents and businesses in their wards, parochial "ward-heeling" that misallocates resources and gives rise to issues of inequities across wards.[50] Her work on the subject concurs with a description of the situation as "feudalism." Professor Sancton agrees and believes a smaller council with larger wards can help address this problem.[51]

53. Professor Valverde also admitted in cross-examination that the reduction in council size is not in and of itself problematic: "[I]t is not that it is 25. That is not why I am against Bill 5. It is not because of the number of councillors." Her main complaint was the lack of consultation and a comprehensive review of governance prior to Bill 5's enactment.[52]

54. In Professor Sancton's opinion, a smaller council will improve its effectiveness and efficiency as a deliberative body and lessen the burden on staff who, in the absence of political parties or a strong-mayor system, must cater to individual councillors, not only *qua* ombudsmen but also at council meetings dominated by ward-specific items.[53]

55. In his evidence, Professor Sancton described the situation in Winnipeg, which briefly had a council of 50 members (plus a mayor) following amalgamation in the 1970s. This was widely viewed as unwieldy. Winnipeg's council was progressively cut to 15 aiming to "reduc[e] parochialism and encouraging Council to take a broader more city-wide approach to planning

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[48] Ward Population Background Brief, SR, v II, t 19 at p 10.
[49] *Sancton aff, SR, v II, t 27 at pp 67-68.*
[50] *Valverde cr-x, SR, v IV, t 39, qq 50-56, 112, 257-258, 353, 429-432, 442, 488-494, 500, 724-728*; *Chapter 4 in Everyday Law on the Street, SR, v IV, t 39, exh 1*; *Sancton aff, SR, v II, t 27, pp 92-93 at ¶¶99-102.*
[51] *Sancton aff, SR, v II, t 27, pp 55, 79, 82-91, 94 at ¶¶11, 61, 69-96, 103.*
[52] *Valverde cr-x, SR, v IV, t 39, qq 570-575.*
[53] *Sancton aff, SR, v II, t 27, pp 93-95 at ¶¶101-106.*

Winnipeg's future; streamlining and speeding up the decision-making process; and fostering a more cohesive, smaller group to manage City Hall."[54] Vancouver, meanwhile, has no ward-based system. It has 10 councillors, plus the mayor, elected at-large.[55]

D. Implementation of Bill 5 and Litigation

56. To ensure the 2018 election could occur as scheduled, Bill 5 extended the nomination deadline to September 14, and the Ministry of Municipal Affairs and Housing, Elections Ontario and Municipal Property Assessment Corporation assisted the City Clerk with implementation. Quick passage of Bill 5 and cooperative action by the Clerk, City staff and the Ministry meant that any uncertainty as to the rules for the upcoming election resulting from the announcement of Bill 5 was limited to the first two weeks of August.[56] By mid-August, the City's website was updated with detailed information on the transition to 25 wards,[57] answering any alleged confusion about the new rules.[58]

57. As of August 17, the City Clerk reported to Council that she was confident she could administer the 2018 municipal election on a 25-ward basis. In contrast, she was concerned about the risk to the 2018 election if a court challenge resulted in a reversion to a 47-ward election. The Clerk stated: "Reverting back to a 47 ward model so close to election day raises unacceptable levels of risk and undermines the trust and confidence of candidates and voters." [59] Similarly, in answer to councillors' questions on August 20, the Clerk stated that, if she had to revert to 47 wards, it could result in a controverted election.[60]

58. By August 22, three applications had been launched and were heard on August 31. On September 10, the Application Judge invalidated the impugned provisions and ordered a 47-ward election. A three-judge panel of the Court of Appeal stayed the Order on September 19, 2018, on

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[54] *Sancton aff, SR, v II, t 27, pp 82-83 at ¶¶71-73*.
[55] Vancouver Charter, SBC 1953, ch 55, ss 137-138.
[56] Ontario also filed O Reg 407/18 and O Reg 408/18 on August 15, 2018, clarifying the rules for the 2018 election.
[57] Kanji aff, SR, v II, t 23, pp 34-36 at ¶¶11, 14.
[58] Campaign spending limits were based on the number of voters (electors) in each ward: *MEA*, s 88.20 (6), along with O Reg 101/97, s 5 (spending limit).
[59] Report for Information: The Impact of the *Better Local Government Act, 2018* (Bill 5) on Toronto's 2018 Municipal Election (August 17, 2018), SR, v II, t 23 exh A at p 38.
[60] Kanji aff, SR, v II, t 23, p 31 at ¶7; Unofficial transcript of Toronto Special City Council Meeting admitted on consent, SR, v II, t 18 at pp 1-7.

the basis of "a strong likelihood that [the] application judge erred in law."[61]

E. The 2018 Election under Bill 5

59. The October 22, 2018 election proceeded under Bill 5 without further incident or controversy. There is no issue with the integrity or democratic nature of the election held under Bill 5, nor with the election campaign that proceeded after its enactment. There is no issue as to the democratic legitimacy or mandate of the newly elected council. (There is a court challenge to the mayoral contest, which was unaffected by Bill 5.[62])

60. Contrary to the suggestion put to the Application Judge that Bill 5 might disfavour visible minorities, the proportionate representation of historically underrepresented groups increased from 11 to 16 percent. Thirty-two percent of councillors are now women; in the four previous elections, the proportion was 23 to 34 percent. Previously, Council had only one openly LGBTQ+ member among 44; it now has one among 25.[63]

61. Of the affiants who were candidates in the 47-ward election and whose evidence remains in the record,[64] only Mr Moise and Ms Hollett did not run in the 25-ward election against Kristyn Wong-Tam whom they wanted to see re-elected. Ms Hollett chose to campaign for Ms Wong-Tam and other progressive candidates. Mr Moise ran and was re-elected by a wide margin as school trustee. He campaigned for Ms Wong-Tam and Mike Layton and they supported him.[65]

62. Mr Moise's affidavit before the Application Judge complained that he quit his job and later moved to a new ward where he intended to run as a candidate. Yet the evidence shows that he quit his job in January 2017 and then started organizing his campaign.[66] By this point, the creation of new wards under the TWBR had not even been adopted by Council, let alone

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[61] Reasons for Decision on Stay Motion of Hoy A.C.J.O., Sharpe and Trotter JJ.A. (2018 ONCA 761) [Stay Decision], SR, v I, t 7, pp 93-94 at ¶11.
[62] *Dionne Renée v City of Toronto et al*, CV-19-00613778-0000.
[63] *Fowler aff, SR, v III, t 28 at ¶73*; *Siemiatycki cr-x, SR, v IV, t 40, qq 417-441*.
[64] Cheryl Lewis-Thurab and Rocco Achampong did not appear for their cross-examinations, and their affidavits are excluded from the record on consent.

[65] *Moise cr-x, SR, v III, t 34, qq 131-132, 143-147, 156-160*; *Hollett cr-x, SR, v III, t 33, qq 187-192, 197-199, 201*; 2018 Clerk's Declaration of Results, SR, v III, t 28, exh E at p 77; *Carbone cr-x, SR, v IV, t 37, q 463*.
[66] Moise aff, SR, v I, t 16, pp 133, 137-138 at ¶¶4, 16-19; *Moise cr-x, SR, v III, t 34, qq 52-60*.

survived scrutiny at the OMB.[67] Similarly, the election organizers who filed evidence describe commencing their organizing efforts well before the May 1, 2018 opening date for nominations, in the hope and expectation that ward changes were in the offing.[68]

63. Although not elected, Ms Padovani, Ms Youssefi, Ms Cheng and Ms Willson continued to campaign in the 2018 municipal election. Bill 5 did not hamper their ability to do so. Ms Padovani views her campaign in Ward 5 in the 25-ward system as a success. She had 20% of the vote and finished 200 votes behind the two incumbents. She said: "If there is one thing a campaign like mine showed a lot of people: Yeah a young woman, a social worker from our community can actually mobilize over 5,000 people to vote for her." She raised about $55,000 of the ward campaign limit of $68,000. Ms Youssefi came in third in Ward 8 with 5,253 votes (2,000 behind an incumbent, who herself finished second, 6,000 votes behind the winner, a former MPP). She raised about $42,000 of her ward campaign limit of $80,000. Ms Willson continued in Ward 13 against Ms Wong-Tam and former provincial MPP George Smitherman. She wanted to raise issues important to her. She had 411 votes. Ms Cheng came in second in Ward 18 with 5,149 votes, about 2,000 votes behind incumbent John Filion, who had retired and encouraged Ms Cheng to run, but later decided to run himself. The Toronto Star endorsed her. She raised over $50,000 of the $60,000 limit.[69]

F. Post-election changes made by Council address smaller Council / larger wards

64. On December 4, 2018, the newly elected Council adopted measures to allow it to operate effectively with a reduced complement. After considering a joint report from the City Manager and Clerk providing recommendations regarding Council's ability to remain "effective and sustainable," Council approved: a doubling of each councillor's staffing budget; the establishment of a Special Committee on Governance to review Council's governance structure

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[67] By-law 267-2017, SR, v I, t 14 at p 126; *Sancton aff, SR, v II, t 27, pp 77-78 at ¶59*; OMB Decision, SR, v I, t 13.
[68] Khosla aff, SR, v I, t 17, pp 145, 150-151 at ¶¶19, 35-37.
[69] *Padovani cr-x, SR, v III, t 35, qq 130-230, 260-262*; *Lauren Pelley, "Women make up only 30% of Toronto's next council but advocates 'encouraged' by strong showings", CBC News (30 October 2018), SR, v IV, t 44 at pp 139-142*; 2018 Clerk's Declaration of Results, SR, v III, tab 28, exh E at p 76; *Youssefi cr-x, SR, v IV, t 38, qq 137-38, 143, 247-250*; *Willson cr-x, SR, v III, t 30, qq 142, 149*; *Khosla cr-x, SR, v IV, t 36, q 159*; *Cheng cr-x, SR, v III, t 31, qq 407-408, 419-420, 469-472*; *Toronto Star Editorial Board, "These are the Council Members Toronto Needs" (October 16, 2018), SR, v III, t 32, at pp 120-121*.

and recommend further changes; a reduction in the number of Council member appointments to boards, committees and external bodies to "better manage demands on Council Members' time for meetings"; and an amendment of the public appointments process for City boards, committees and tribunals to reduce the time councillors spend conducting interviews for them.[70]

G. Court of Appeal Decision on the Appeal

65. On September 19, 2019, the majority of a five-judge panel granted Ontario's appeal, holding that what the City sought was a positive right to a particular platform for expression – a 47-ward election. Applying the test set out by this Court in *Baier* for a positive rights claim, it found no breach of s. 2(b). Two dissenting justices would have held that although Bill 5 was constitutionally valid, s. 2(b) was infringed in relation to its *timing*. The five-judge panel was unanimous in dismissing the balance of the claims relating to effective representation, an alleged duty to consult, the principles of democracy and rule of law and implied limits in s. 92(8) of the *Constitution Act, 1867*.

H. Procedural issues and fresh evidence

66. To the extent that the Appellant relies upon findings made at first instance, such findings must be considered in light of the significant procedural issues which deprived Ontario of a meaningful opportunity to respond to the voluminous records, including expert evidence, filed days before hearing, and to conduct cross-examinations. A case management schedule provided for adducing fresh evidence prior to the appeal in the Court of Appeal. The majority allowed Ontario's appeal without having to consider the motion for fresh evidence or the ground of appeal based on procedural fairness. The dissent did not address either matter.

67. This Court has now admitted the fresh evidence, which includes the cross-examinations of the individual claimants and interveners, the City's witnesses, and the claimants' supporting experts, plus the responding expert affidavits of Professor Sancton (described above) and Professor Anthony Fowler (who addressed the speculative claims that Bill 5 might affect minority candidates and representation).[71] Despite the opportunity to do so, the City did not

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[70] *Carbone cr-x, SR, v IV, t 37, qq 424-427, 431-436*; *Recalibrating City Council's Governance System for 26 Members* (November 26, 2018), SR, v IV, t 37, exh 1 at pp 27-28; *City Council Consideration on December 4, 2018*, SR, v III, t 29, exh 5 at pp 79-86.
[71] *Fowler aff, SR, v III, t 28, pp 72-73 at ¶¶47-51*.

cross-examine Professors Sancton or Fowler, nor did it respond with any reply expert evidence.

68. The City has not filed, or sought to file, evidence to show any adverse consequences Toronto has experienced in Council's functioning or representation following the 2018 election.

PART II – QUESTIONS IN ISSUE

69. Ontario's position on the issues (nos. 1-4) raised by the City and on remedy (no. 5) is:

1) Neither Bill 5, nor the timing of its enactment, infringed *Charter* s. 2(b).

2) The unwritten principle of democracy cannot be used to invalidate Bill 5. In any event, Bill 5 and the timing of its enactment comport with the democracy principle.

3) Municipal elections are not subject to a constitutional requirement of effective representation under the *Charter*, the democracy principle, or the province's authority under s. 92(8) of the *Constitution Act, 1867*. In any event, Bill 5 does not impair effective representation.

4) Any alleged infringement of the *Charter* is justified under s. 1.

5) The City's requested declaration of invalidity of Bill 5 suspended until the 2022 election, would not be an appropriate remedy.

PART III – ARGUMENT

ISSUE 1 – Neither Bill 5, nor the timing of its enactment, infringed Charter s. 2(b)

70. This Court has held that, in general, s. 2(b) of the *Charter* protects against government interference in activities that have expressive content.[72] As stated in *Haig*: "The traditional view, in colloquial terms, is that the freedom of expression protected in s. 2(b) prohibits gags, but does not compel the distribution of megaphones."[73]

71. *Irwin Toy* articulated a two-step test to establish a breach of s. 2(b) arising from government *interference* in expression. The claimant must establish first that the activity for which they claim protection conveys or attempts to convey meaning. If it does, it has expressive

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[72] On the test for breach of s. 2(b), see *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 971 [*Irwin Toy*]; *Baier v Alberta*, 2007 SCC 31 at ¶¶19-20 [*Baier*]; *Montréal (City) v 2952-1366 Québec Inc*, [2005] 3 SCR 141 at ¶56.

[73] *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1035 [*Haig*].

content and *prima facie* falls within s. 2(b). The second step asks if the impugned legislation infringes that protection in purpose or effect.[74] This Court has since clarified that the method or location of expression may exclude it from s. 2(b) protection.[75]

72. In *Baier*, this Court identified the limited circumstances (discussed below) in which s. 2(b) imposes a positive obligation on government to provide access to a particular means of expression – a "megaphone" or "platform."[76]

73. The Appellant argues that the Court of Appeal erred by analyzing its claim under the *Baier* framework. On the contrary, the Court correctly applied *Baier* since the claim is based on the assertion of a right to the maintenance of a preferred platform – namely, a 47-ward election.

74. Regardless of whether the *Irwin Toy* or *Baier* test is applied, there is no s. 2(b) breach:

a) there has been no government interference in freedom of expression;
b) s. 2(b) does not protect a right of ongoing access to a 47-ward electoral framework;
c) s. 2(b) does not protect the effectiveness of expression and thus does not protect expression (once made) from government action that impairs its continued relevance;
d) an approach to s. 2(b) that would constitutionalize, even on a temporally-limited basis, municipal electoral contests undermines parliamentary sovereignty by limiting the legislature's power over its delegates; and
e) there is no evidence of an impairment of s. 2(b) related to election finance.

a) No government interference in freedom of expression

75. The City seeks to invalidate Bill 5 on the basis that it interfered with freedom of expression in the 2018 election. Political expression is at the core of what is protected under s. 2(b). However, Bill 5 regulates municipal governance and, in particular, ward boundaries and Council composition. These are not activities that convey or attempt to convey a message. Bill 5 does not regulate voting, campaigning or political expression. Citizens can freely stand for election, organize, donate, campaign, communicate and gather information on any matter and vote, without limitation. The candidates and electors who filed evidence below continued to

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[74] *Irwin Toy* at 978.
[75] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at ¶¶28-29 [*Greater Vancouver Transportation*], citing *Baier* at ¶20.
[76] *Baier* at ¶¶20-21, 27, 34-35; *Greater Vancouver Transportation* at ¶30.

engage in political expression untrammeled by Bill 5.[77] In fact, the election under Bill 5 was a successful exercise in democracy, the integrity and legitimacy of which is not in doubt.

76. There may be cases where a government actor behaves in a manner contrary to statutory or regulatory rules of an election, including as to the conduct or timing of the election, for partisan advantage. But this is not such a case. There is no evidence that the ward boundary changes and reduction in council size were intended to, or did in fact, confer a partisan, ideological or other advantage or disadvantage on any candidate or group. This is not a "gerrymandering case" or a case of a party in power changing the rules for an election in which it is, or will shortly become, a participant. Indeed, under the Westminster parliamentary system, even with a fixed election date law in effect, the party with a majority can trigger an election at a date that advantages it (e.g., when the opposition parties are unprepared or the polls are auspicious), despite this amounting to "changing the rules in the middle of the game."[78]

77. In the present case, by contrast, the newly elected provincial legislature, in pursuit of stated public policy goals, modified the ward system and council composition of *its delegate*, the City, at the earliest opportunity available to it and well prior to the fixed election date.

78. Bill 5 was announced more than 12 weeks and enacted approximately 10 weeks prior to the election. It substituted the July 27, 2018 deadline for nominations under provincial law with a deadline of September 14, 2018, a date more than five weeks before voting day.[79] (On the joint request of the City Clerk and Ontario, this date was extended to September 21 by the Court of Appeal's stay Order.[80])

79. As the Court of Appeal observed in its stay decision, the closing date for the 2010 and 2014 elections was the same as under Bill 5.[81] (For 2010 and 2014, the nomination period ran

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[77] *Hollett cr-x, SR, v III, t 33, qq 191-192, 196-199*; *Cheng cr-x, SR, v III, t 31, qq 329-378*; *Youssefi cr-x, SR, v IV, t 38, qq 148-164, 171-218*; *Moise cr-x, SR, v III, t 34, qq 135, 142-148*; *Willson cr-x, SR, v III, t 30, qq 58-70, 80-84, 88-117*; *Answers to Undertakings of Megann Willson (Transcript #2), SR, v IV, t 43 at p 138, no 1*.
[78] *Conacher v Canada (Prime Minister)*, 2009 FC 920 at ¶53 aff'd 2010 FCA 131, leave to appeal to SCC refused, 33848 (20 January 2011).
[79] Stay Decision, SR, v I, t 7, p 95 at ¶14.
[80] Order on Stay Motion of Hoy A.C.J.O., Sharpe and Trotter JJ.A. (dated September 19, 2018), SR, v I, t 6.
[81] Stay Decision, SR, v I, t 7, p 95 at ¶14.

from January to mid-September; and for 2003 and 2006, the closing deadline was 45 days prior to voting day.) There can be no suggestion that a mid-September nomination deadline for a municipal election somehow impairs the expressive rights of candidates, organizers or voters in those elections.

80. The period from dissolution of the provincial legislature (May 8) until election day (June 7) for the 2018 provincial election was 30 days (in accordance with provincial legislation),[82] whereas the period from the enactment of Bill 5 (August 14) to voting day (October 22) was 69 days. It cannot be suggested that an election duration more than double that of a provincial election is insufficient for s. 2(b) (or any other constitutionally mandated) requirements.

81. In the run-up to the 2018 election, voters and candidates had all the necessary information on everyone who was running in each ward. There is no evidence of any interference with the ability of candidates or voters to understand the rules of the election or to receive any information concerning the election or any candidate's campaign. The City's website was promptly and fully updated with detailed information on the transition to 25 wards and answers to questions on the new rules.[83] Any uncertainty after Bill 5 was enacted was occasioned by the litigation, as the Application Judge observed: "There was uncertainty flowing from the court challenge, the possibility that [it] might succeed and the consequences … if this were to happen."[84]

82. The record demonstrates that the candidates continued to engage in meaningful public discussion with respect to the election after Bill 5's enactment (see paras 61-63 above).

83. The October 22, 2018 election proceeded freely, openly and fairly and was certified by the City Clerk. There is no doubt as to it being a legitimate, democratic election; there is no issue as to its integrity. The City does not contest the validity of the results – on appeal, the City does not seek to have the 2018 election invalidated (Appellant's Factum at para 152).

b) Section 2(b) does not require ongoing access to a 47-ward electoral framework

84. The Appellant's characterization of the protected activity in question demonstrates that what is claimed is continued access to a particular platform for expression and not freedom from

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[82] *Election Act*, RSO 1990, c E.6, s 9.1(5).
[83] Kanji aff, SR, v II, t 23, pp 34-36 at ¶¶11, 14; *Carbone cr-x, SR, v IV, t 37, q 309*.
[84] Reasons for Decision of Belobaba J. (2018 ONSC 5151) [Superior Court Decision], SR, v I, t 2, pp 14-15 at ¶30; Stay Decision, SR, v I, t 7, p 99 at ¶¶21-23.

interference with expression. The City alleges not only that the activity in question is "expression in the context of an ongoing democratic election" but that the 47-ward electoral framework itself is part of the activity that is subject to s. 2(b) protection (Appellant's Factum at para 54). The City's argument is not that Bill 5 infringes s. 2(b), but rather that its preferred electoral framework is protected by s. 2(b).

85. This is thus a case about *access to a statutory platform*, and indeed a highly particular one: a ward-based election for a council consisting of 47 councillors, each elected to a ward, in which nominations open on May 1 and close on July 27, with voting day on October 22.

86. As such, *Baier* is the relevant authority for this case. At issue in *Baier* was legislation that prevented school employees from standing for election for school trustee anywhere in the province. Previously, school employees could run for school trustee outside the school board where they were employed. The impugned law therefore removed *entirely* an existing electoral platform for a category of potential candidates for municipal office. This Court held that while the legislation may have deprived school employees of a *particular means* of expression (which was quite effective when exercised *qua* candidate or elected trustee), it had not been demonstrated that the claimants were "unable to express themselves on education issues:"

> As Bastarache J. noted in *Delisle* …, diminished effectiveness in the conveyance of a message does not mean that s. 2(b) is violated. There must be substantial interference with the fundamental freedom. School employees may express themselves in many ways other than through running for election as, and serving as, a school trustee.[85]

87. As noted by the Court of Appeal, the only difference between *Baier* and the present case is that in *Baier* the claimants "lost access to a platform that remained available to everyone else"; whereas here, "the applicants lost access to a platform to which no one retained access, but gained access to another."[86]

88. In *Baier*, this Court reiterated that claims regarding a right to a particular platform for expression (positive rights claims) must meet a three-step test which will apply only in exceptional circumstances, requiring proof that:

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[85] *Baier* at ¶48.
[86] *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732, SR, v I, t 4, p 52 at ¶54 [Court of Appeal Decision].

i. the claimants are excluded from a particular statutory regime enabling expression, and their claim that the legislation is under-inclusive is grounded in a fundamental *Charter* freedom *rather than the desire to access the particular statutory regime*;
ii. exclusion from the statutory regime substantially interferes with the claimant's freedom of expression or has the purpose of infringing s 2(b); and
iii. the state is responsible for the claimant's inability to exercise the freedom.[87]

89. The City's claim fails at the first step because the claim is for continued access to a *particular statutory* platform for expression and *not* for the exercise of a fundamental freedom.

90. The second and third elements of the test are also not met. Exclusion from the 47-ward platform did not substantially interfere with freedom of expression. Candidates and electors continued to express themselves robustly on municipal issues (see paras 59-64 above). The only impediment was the claimants' access to a preferred statutory platform, not their exercise of a fundamental freedom. Moreover, any claimed inability to exercise their freedom of expression is not attributable to Ontario or Bill 5. Ontario, through Bill 5, removed the claimants' preferred election format, but supplied an alternative, equally free and open platform, in the form of the 25-ward model.

91. The City relies on *Greater Vancouver Transportation* to argue that the present s. 2(b) claim is not a positive rights claim to be assessed under the *Baier* framework (Appellant's Factum at para 49). At issue there was a transit authority's policy prohibiting political advertising on buses. This Court held that the *Baier* framework was inapplicable since the claimant was not being denied access to a particular means of expression (i.e., not denied the ability to advertise on buses), rather *it was the content of expression that was restricted*:

> …In *Baier*, a distinction was drawn between placing an obligation on government to provide individuals with a particular platform for expression and protecting the underlying freedom of expression of those who are free to participate in expression on a platform (para. 42). Consequently, the transit authorities' interpretation of the notion of a positive rights claim is overly broad and was in fact rejected in *Baier*. The respondents seek the freedom to express themselves — by means of an existing platform they are entitled to use — without undue state interference with the content of their expression. They are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression

[87] *Baier* at ¶¶27, 30; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at ¶¶24-26.

from which they are excluded.[88]

92. Nothing in *Greater Vancouver* suggests that the state was obliged to supply the claimants with a *continued* platform (or vehicle) for their expression. Rather, the state could not deprive the claimants, *because of the content of their expression*, of a platform that others were entitled to use for their expression. The apt analogy to the present case is if the transit authority replaced all of its buses – which were suitable for one size or format of signage – with another fleet of vehicles for which the old signage was not suitable, and differently sized or formatted signs would have to be used. The advertisers might be disappointed that they would have to re-do their signs, upon which they had wasted their efforts, or that their new-format signs might not be as effective. But this change in available state-supplied platforms would not breach s. 2(b).

c) Section 2(b) does not protect the effectiveness of expression and thus does not protect expression (once made) from government action that impairs its continued relevance

93. The City argues that Bill 5 "upend[ed] 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" (Appellant's Factum at para 48). However, the state has no duty to refrain from rendering speech less relevant or effective.[89]

94. Government action occurring in the middle of a municipal campaign may undermine participants' messages (e.g., if the province cancels a program that a candidate advocates). Government action may require candidates for municipal office to work harder – as may happen when a provincial initiative "crowds out" the messages being made during the municipal campaign. This does not render *freedom* of expression less "meaningful." Section 2(b) protects *meaningful freedom* of expression, not *meaningful expression*, or the objects or goals of expression. The idea that the state must refrain from conduct that would render expression, once made, less valuable, or "meaningless," "wasted" or "for naught" would greatly overshoot the purpose of the constitutional guarantee. It would undermine the foundational concept that free speech is designed to encourage a marketplace of ideas – good, bad and indifferent, some destined to be taken up, many to be beaten back or refuted and others simply to wither unheeded.

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[88] *Greater Vancouver Transportation* at ¶35.
[89] *Longley et al v Canada*, 2007 ONCA 852 at ¶110 [*Longley*]; *Baier* at ¶¶47-48; Stay Decision, SR, v I, t 7, pp 96-97 at ¶¶16-17.

95. While some evidence filed by individuals in this case offers a narrative of reliance upon changes to the Toronto ward structure, and expressive efforts based on that reliance, both before and after the 47-ward model was adopted by the City, protecting these reliance or expectation interests from disappointment because the ward structure they expected was not ultimately the basis of the 2018 election falls outside the scope of s. 2(b).

96. Election expression is political speech deserving of a high degree of protection. If, in the context of an election or pending vote, speech is *suppressed* by a governmental measure, considerable scrutiny will be applied in assessing the measure under s. 1. But that is different from saying that a particular existing election or voting format itself is protected under s. 2(b).

97. A claim that a mid-campaign change to a democratic voting process engages s. 2(b) and must be justified under s. 1 begs the question of *which* processes are so protected. For example, a change of government may result in the abandonment of a legislated provincial referendum, even if underway. Or the new government may wish to change the referendum question before the vote is held. Equally, a province may wish to preclude a municipality from proceeding with a referendum and may legislate to cancel the vote, change the question or make the outcome non-binding, contrary to the municipality's original plan, even if the campaign has started.

98. While the City claims that *its* election format is immune from alteration once commenced, there are many other institutions with legislated voting or electoral processes that could claim similar protection: professional regulatory bodies, school boards, corporations (directors and shareholders), condominium governance bodies, regulatory agencies and so forth.

99. This Court should be wary of putting the judiciary in the position of having to adjudicate calls to constitutionalize under s. 2(b) particular statutorily-supported endeavours or processes that rely upon or involve expressive activity for their functioning. Here, expressive activity is implicated in both the endeavour (municipal governance) and the process (the election), but that does not mean that s. 2(b) immunizes either from legislative change.[90] Although we *say* things with words (conveying meaning), we also *do* things with them (performing acts or tasks).[91]

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[90] Court of Appeal Decision, SR, v I, t 4, pp 48-49 at ¶¶44-46.
[91] JL Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962) at 4-9; JL Austin, *How to Do Things with Words*, 2nd ed (Cambridge, MA: Harvard University Press, 1975) at 4-9, RBOA, t 2.

While saying things with words is s. 2(b) protected, that does not mean that all the things we do with words (e.g., governing, establishing contractual relations, marrying, betting, calling a time-out in a game) are similarly protected.

100. In *Ktunaxa Nation v British Columbia*,[92] this Court declined the invitation to expand the scope of s. 2(a) in a similar manner to that called for here in relation to s. 2(b). The claim in *Ktunaxa* was that the religious belief in question would be rendered meaningless unless the object of the belief received protection. Here, it is alleged that expression would be rendered meaningless unless the object for which it was uttered (the selection of candidates for office on a 47-councillor municipal body) was also preserved.

101. It is of note that the majority in *Baier* rejected the dissenting reasoning of Fish J. Fish J's analysis was that the claim was grounded in a fundamental, constitutionally protected freedom to express oneself *meaningfully* on matters related to education. Seeking and holding office as a school trustee was, he held, a *uniquely effective* means of expressing one's views on education policy. He said that while "diminished effectiveness" in conveying a message may not always engage s. 2(b), the difference between writing a letter to a trustee and serving as trustee was not just of degree.[93] The state had created a "process grounded in the democratic election of school board trustees." In excluding school employees from running, the state "substantially interfered" with freedom of expression by denying "them access to the unique platform upon which debate on local education policy is meant mainly and effectively to proceed":

> Representative democracy is fundamental to our system of government. Where a legislature establishes a universal and democratic system of local governance, and then effectively prohibits the participation in that system of a particular group of otherwise qualified citizens, the state must be required to justify that prohibition.[94]

102. This reasoning is similar to the Appellant's argument in this case that the mid-election change of ward boundaries breached s. 2(b) because expression directed to the 47-ward election was "wasted" or rendered "meaningless." Such an approach was rejected not only by a majority of this Court in *Baier*, but also in *Haig* and *NWAC* where the highest order of political speech –

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[92] See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at ¶¶70-75.
[93] *Baier* at ¶¶107-109.
[94] *Baier* at ¶¶109-110.

debating and voting on the future of the Constitution – was involved.[95]

103. If s. 2(b) were held to protect expression from being wasted, government policy changes or activities that diminish the effectiveness of expression would be seen to infringe s. 2(b). The Court of Appeal explained why this cannot be so:

> …freedom of expression does not guarantee that government action will not have the side-effect of reducing the likelihood of success of the projects or joint enterprises that any person is working to achieve. Accordingly, legislation that changes some state of affairs (such as the number of electoral wards), such that a person's past communications lose their relevance and no longer contribute to the desired project (election to public office), is not, on that basis, a limitation of anyone's rights under s. 2(b)…
>
> Freedom of expression has an essentially negative orientation, an orientation that is especially important in the context of political expression. Freedom of expression is respected, in the main, if governments simply ***refrain*** from actions that would be an unjustified interference with it.
>
> Not that this requires governments to remain silent and passive. As Ontario argued, governments may, for example, enter the marketplace of ideas to offer messages that counter expression: consumer health warnings on various products are an obvious example. Governments may also respond to criticism of their policies. These responses, to the extent they are persuasive and effectively conveyed, may undermine the messages conveyed by others and diminish their intended effects. It is not part of a government's constitutional duty to promote, enhance, or even preserve the effectiveness of anyone's political expression…[96]

104. The City argues that during municipal electoral campaigns, the electoral framework cannot be altered by the legislature without engaging s. 2(b). It is unclear why a change after the electoral contest is over (and Council is elected) would not pose the same, if not greater, concern that the electoral speech had been rendered meaningless. The dissent in the Court of Appeal agreed that Ontario could have enacted Bill 5 the next day after the election.[97] However, as the majority noted, if expression was "wasted" due to diminished campaign effectiveness when ward composition changed, it would be more thoroughly wasted if Bill 5 had been enacted after an

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[95] *Baier* at ¶¶56-60; *Haig* at 1035, 1039; *Native Women's Assn v Canada*, [1994] 3 SCR 627 at ¶¶38, 43, 49, 52-53, 73-74.
[96] Court of Appeal Decision, SR, v I, t 4, pp 47-48 at ¶¶41-43, citing *Delisle v Canada (Deputy Attorney General*, [1999] 2 SCR 989, at ¶¶39-41; *Baier* at ¶¶21, 48; *Longley* at ¶110.
[97] Court of Appeal Decision, SR, v I, t 4, p 48 at ¶44.

election had taken place. In fact, "[a]ll expressive efforts would not simply have been diminished in their effect, but would have been entirely for nought; after all, the purpose of campaigning is not just to secure election, but to govern."[98]

d) Constitutionalizing municipal electoral contests undermines the legislature's sovereign power over its delegates

105. In any event, an approach to s. 2(b) of the *Charter* that would effectively constitutionalize electoral contests for the governance of subordinate bodies would violate a basic principle of parliamentary sovereignty, namely that the authority of the legislature to delegate *always* implies the authority to take back or amend the delegated power *at any time*.[99] Absent clear constitutional language requiring such a result, the *Charter* should not be interpreted to undermine this foundational element of our constitutional order.[100]

106. To accept the argument that the legislature is prevented from amending the terms of its delegation of authority to its municipal institutions during certain periods (e.g., during a municipal electoral campaign), this Court would have to treat as infirm or qualified the body of authority on the constitutionality of parliament's power to delegate, including:

- *Re Pan-Canadian Securities Regulation*, 2018 SCC 48: a delegation of authority is compatible with parliamentary sovereignty because the participating provinces retained "the complete authority to revoke any such delegated power" (para 74).
- *Public School Boards' Assn of Alberta v Alberta (AG)*, [2000] 2 SCR 409: despite their existence being alluded to in the *Constitution Act, 1867*, all municipal institutions are merely delegates of provincial jurisdiction without constitutional status.
- *Coughlin v Ontario (Highway Transport Board)*, [1968] SCR 569: a delegation of authority to regulate inter-provincial transportation to a provincial board was lawful because it could be terminated at any time.

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[98] Court of Appeal Decision, SR, v I, t 4, pp 48-49 at ¶45.
[99] *Reference re Liquor License Act of 1877*, [1883] JCJ No 2 at ¶37 (PC); *Re Regulations in Relation to Chemicals*, [1943] SCR 1 at 18 per Rinfret J and at 26 per Davis J; *R v Furtney*, [1991] 3 SCR 89 at 104; *Re Gray*, [1918] 57 SCR 150 at 157.
[100] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at ¶¶53-54, 62 [*Securities Reference*]; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 548-49 [*CAP Reference*].

- *Re Regulations in Relation to Chemicals*, [1943] SCR 1: delegation to subordinate agencies under the *War Measures Act, 1914* was legislative in nature and depended on the will of parliament for its continued existence. Parliament did not unconstitutionally "efface itself" because it retained full power to amend, repeal or alter the delegation.
- *Re Liquor License Act of 1877 (Ont.)*, 9 App Cas 177 (PC) (*Hodge v The Queen)*: Ontario delegated authority to License Commissioners which allowed them to make rules for establishments serving alcohol. Despite this delegation of powers, because it is sovereign in its assigned areas of jurisdiction, the province *always* maintains the ability to undo the agency it created and set up another agency or take the matter into its own hands.
- *AG of Nova Scotia v AG of Canada*, [1951] SCR 31 (the *Inter-delegation Case*): legislatures cannot delegate legislative powers to each other but may delegate powers to subordinate bodies and always retain the jurisdiction to revoke the authority.

107. The implication of the City's argument is that the legislature's delegation of authority over ward and council structure in the *City of Toronto Act, 2006* was a delegation to a legislative body (Council) that is temporally or permanently immune from having the authority revoked. This would be an unconstitutional impairment of sovereignty under the *Inter-delegation Case*.

e) No evidence of an impairment of s. 2(b) related to election finance

108. The City raises in passing an entirely speculative concern that Bill 5 did not reset spending limits and, as a result, candidates who entered the race at different times would have had different limits (Appellant's Factum at para 65). There is no evidentiary foundation for this Court to address a s. 2(b) challenge with respect to finances.[101] To advance a claim that Bill 5 or its timing differentially impacted the ability of candidates who registered at different times would require information on campaign fundraising and spending from a range of candidates who entered the race before or after Bill 5 was enacted, as well as expert evidence on such data.

109. Equalizing the playing field in electoral contests is a basis upon which governments may justify limiting campaign spending.[102] It does not follow that there is a s. 2(b) right to equalization of campaign finances based on the timing of one's entry into an electoral contest. In

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[101] *Toronto (City) v Ontario (AG)* (Reasons for Decision of Sharpe JA, dated May 22, 2019), Court File No. C65861, denying motion for intervention by Rowan Caister, RBOA, t 1.
[102] *Harper v Canada*, 2004 SCC 33 at ¶¶23-25 [*Harper*].

any event, as the relevant expense limits were calculated by reference to ward population, the larger wards under Bill 5 proportionally increased each candidate's expense limit.[103]

110. Meanwhile, no donor has complained that their intended donations were limited because they had already contributed their maximum allowable donation prior to Bill 5. The remedy for such a complaint (if one lies) would not be invalidation of Bill 5, but rather specific relief against the donor limits in s 88.9 of the *Municipal Elections Act.*[104]

ISSUE 2 – The unwritten principle of democracy cannot be used to invalidate Bill 5 – both Bill 5 and its timing comport with the democracy principle

111. Unwritten constitutional principles cannot be used to strike down legislation. Even if unwritten principles could be so used, there is no basis to find they were infringed:

a) Bill 5 is not inconsistent with the democratic principle (or other unwritten principles); and

b) Unwritten constitutional principles cannot be used to strike down legislation.

a) The impugned legislation is not inconsistent with the democratic principle (or other unwritten principles)

112. Bill 5 was introduced by a new government, whose assumption of office reflected the democratic outcome of a general election. During debate in the Assembly, the purposes of the Bill were explained and contested. The Bill received three readings, followed by Royal Assent, thereby meeting all legislative requirements as to manner and form. The passage of Bill 5 through the Ontario legislature is the democracy principle in action.[105] Once that process is completed, legislation within parliament's competence is unassailable unless it violates the written Constitution.[106]

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[103] *MEA*, s 88.20 (6), along with O Reg 101/97, s 5 (spending limit); *MEA*, s 88.9.1(1) (self-funding limit). See *Cheng cr-x, SR, v III, t 31, qq 468-469*; *Padovani cr-x, SR, v III, t 35, qq 259-261*; *Youssefi cr-x, SR, v IV, t 38 qq 246-248*.
[104] *MEA*, s 88.9(1) and (5).
[105] *Authorson v Canada (Attorney General)*, 2003 SCC 39 at ¶¶38-41 [*Authorson*]; *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 at provisions under "Legislative Power", "The House of Commons", and "Money Votes; Royal Assent", in particular ss 17-18, 37, 55, 133 [*Constitution Act, 1867*]; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at 36 [*Imperial Tobacco*].
[106] *Authorson* at ¶37; *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at

113. The Appellant points to no evidence of any pre-legislative procedural right to support their arguments regarding the timing of Bill 5 or a lack of consultation.[107] There is no constitutional obligation on government to consult before it introduces a bill into the legislature. Nor is there any general duty to consult that can bind the legislature.[108]

114. The *City of Toronto Act, 2006*, which speaks to the desirability of consultation between the City and the province, is an ordinary statute and cannot bind the legislature.[109] (Bill 5's changes to Toronto's council and wards were in fact effected by amending the *City of Toronto Act, 2006*.) The Toronto-Ontario Cooperation and Consultation Agreement provides for consultation between the parties but does not bind the legislature; s. 14 of the Agreement provides that no remedy can arise from its breach.[110]

115. Nor are there any constitutional constraints on *when* the legislature can pass legislation. There are no time periods during which the legislature is constitutionally prohibited from passing legislation. Such limits could very well offend the democracy principle, which in Canada's constitutional arrangements is expressed primarily through the sovereignty of the democratically elected federal and provincial legislatures.[111] This Court in *Comeau* recently observed that limits on the authority granted to the legislatures under ss. 91 and 92 of the *Constitution Act, 1867* "must be interpreted in a way that does not deprive Parliament and provincial legislatures of the powers granted to them to deal effectively with problems as they arise. Otherwise, there would be constitutional hiatuses – circumstances in which no legislature could act. This is something constitutional interpretation does not countenance."[112]

116. There is no assertion by the Appellant that the 2018 Toronto municipal election that followed the passage of Bill 5 was anything other than a free and fair, democratic election. In contrast to the facts of *Baier*, here the legislation did not prohibit anyone from running as a

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784-785 [*Patriation Reference*].
[107] See *Authorson* at ¶41.
[108] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at ¶¶2, 32, 34-37; *East York* (Gen Div) at ¶¶11-12.
[109] *CAP Reference* at 548, 565; Superior Court Decision at ¶¶17-18.
[110] *CAP Reference* at 563-564; *Securities Reference* at ¶¶48, 53, 60.
[111] *Patriation Reference* at 784-785; *Authorson* at ¶41; *R v Comeau*, 2018 SCC 15 at ¶¶85-86 [*Comeau*].
[112] *Comeau* at ¶72.

candidate or participating in the democratic electoral process. The election took place and a new council was elected. No one disputes the democratic legitimacy of the new council.

117. Regarding any suggested impacts of Bill 5 on Toronto's governance, there has been no evidence since the election that governance or democratic representation have been adversely affected. The evidence at first instance was speculative at best. It was asserted that larger wards would reduce the ability of councillors to engage individually with constituents, interfering with effective representation, which the Appellant asserts is a component of the unwritten principle of democracy (despite being a requirement of *Charter* s. 3, which by its express terms does *not* apply to municipalities). In any event, the wards are now identical to Toronto's federal and provincial electoral districts: the ratio of councillors to ward constituents is the same as the federal and provincial ratio. The democracy principle cannot mean that representation at the municipal level must be more "effective" than at the federal and provincial levels.

118. Since the 2018 election, City Council adopted several changes to its processes to accommodate its smaller complement and free more of councillors' time. The Appellant has not filed any evidence that these measures have been (or are likely to be) ineffective.

b) Unwritten constitutional principles cannot be used to strike down legislation

119. In any event, unwritten constitutional principles cannot apply to strike down legislation. They can inform the interpretation of the constitutional text where it is unclear. They can be used to assist in interpreting genuinely ambiguous legislation. In certain circumstances, they have been used to challenge the discretionary decision-making of administrative bodies exercising delegated power. But (outside the unique context of judicial independence) they cannot independently be used to strike down legislation.[113]

120. Unwritten constitutional principles should not be used to extend rights in the *Charter* where the Constitution's text clearly limits them or to limit powers in ss. 91 and 92 where the text does not support such limits. As this Court has emphasized most recently, the text of the

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[113] *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at ¶¶24-27; *Imperial Tobacco* at 35-36; *Comeau* at ¶¶77-78; *Lalonde v Ontario (Commission de restructuration des services de santé* (2001), 56 OR (3d) 505 (Ont CA) at ¶121; *Campisi v Ontario*, 2017 ONSC 2884 at ¶55 (per Belobaba J).

Constitution remains the most "primal constraint" on judicial review.[114] The constitutional text is also the source of the legitimacy of judicial review for constitutionality.[115] Adhering to the scope of *Charter* rights as reflected in the text promotes the rule of law by giving the public and institutions legal predictability.[116]

121. Using unwritten principles as an independent basis to strike down legislation risks re-interpreting the rights and powers expressly granted by the written text as if each were "an empty vessel to be filled with whatever meaning we might wish from time to time."[117]

122. The Appellant is effectively asking this Court to "rewrite" *Charter* s. 3 to include municipalities, through the use of the unwritten constitutional principle of democracy. The provision of the *Charter* relevant to electoral rights, s. 3, very clearly does not extend to municipalities. Our constitutional framers explicitly considered, and rejected, the possibility of including municipalities in s. 3. The proper avenue for extending the scope of s. 3 protection to municipalities is through a constitutional amendment.[118]

123. The Appellant's argument would in fact confer *greater* constitutional protection on municipal representation than federal or provincial representation under s. 3 of the *Charter*. Section 3 does not require a particular ratio of Members of Parliament, or Members of Provincial

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[114] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at ¶9 [*9147-0732 Québec inc*]; *Imperial Tobacco* at ¶¶66-67; *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 at ¶93 [*Provincial Judges Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at ¶53 [*Secession Reference*]; *Eurig Estate (Re)*, [1998] 2 SCR 565 at ¶66; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 376.

[115] *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at ¶¶74-75 [*Reference re PSERA*], citing *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at ¶48; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(1) [*Constitution Act, 1982*]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 24(1).

[116] *9147-0732 Québec inc* at ¶3.

[117] See *Reference re PSERA* at ¶151 and *Caron v Alberta*, 2015 SCC 56 at ¶36; each cited in *9147-0732 Québec inc* at ¶9; Ruth Sullivan, "Separation of Law and Politics" in *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 35-36, RBOA, t 4.

[118] *9147-0732 Québec inc* at ¶9; *Imperial Tobacco* at 35; *Secession Reference* at ¶53; *Baier* at ¶38, citing *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15 at ¶¶57-58; Federation of Canadian Municipalities, "Report of the Resource Task Force on Constitutional Reform" in *Municipal Government in a New Canadian Federal System* (Ottawa: May 1980), RBOA, t 3.

Parliament, to constituents. Yet the Appellant asserts that the unwritten constitutional principle of democracy mandates a maximum ratio of councillors to constituents.

124. The Appellant is misguided in relying on cases from the judicial independence context. In the *Provincial Judges Reference*, this Court held that judicial independence was a necessary corollary to the existence of a number of constitutional provisions – s. 11(d) of the *Charter*, s. 96 of the *Constitution Act, 1867*, and the preamble to the *Charter*. Reading these provisions together, the necessary implication was a principle of judicial independence.[119]

125. There is no similar confluence of provisions in the constitutional text that constitute "circumstantial evidence" of an underlying constitutional principle that would confer constitutional status on municipalities, their governance or elections. The Appellant points to no such evidence. The necessary implication of the exclusion of municipalities from s. 3 is that s. 3-like protections *do not apply to municipalities* whether under the *Charter* or otherwise.[120]

126. It comes as no surprise then that courts have consistently rejected arguments for a constitutional principle or convention of municipal autonomy. It is not for courts to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so.[121]

127. Unlike s. 3 of the *Charter*, unwritten constitutional principles, if employed to strike down legislation, would afford the government no corresponding s. 1-type of justificatory mechanism. The Appellant's contentions, if accepted, would confer *greater* protection on municipalities than currently exists for federal and provincial elections under s. 3 – and would sit uncomfortably with the architecture of the Constitution as a whole.[122]

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[119] *Provincial Judges Reference* at ¶¶107, 109.
[120] *9147-0732 Québec inc* at ¶9; *Lynch v The Canada North-West Land Co*, [1891] 19 SCR 204 at 209; *Imperial Tobacco* at 36; *Masters Association of Ontario v Ontario*, 2011 ONCA 243 at ¶25. See *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at ¶39; *Haig* at 1031; *Baier* at ¶39.
[121] *East York* (ONCA) at ¶¶11-12; *East York* (Gen Div) at ¶¶14-15; See *Baier* at ¶39; John P Robarts, "Local Decision Making and Administration," in *Report of the Royal Commission on Metropolitan Toronto*, vol 2 (Toronto: Queen's Printer, 1977) at 93-96.
[122] Court of Appeal Decision, SR, v I, t 4, p 63 at ¶88; *Reference re Senate Reform*, 2014 SCC 32 at ¶¶25-27, 54, 60 [*Senate Reference*]; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at ¶¶97-103 [*Supreme Court Reference*]; *Constitution Act, 1982*, ss 38-49.

128. If the Appellant's contention about municipalities is accepted, there is no principled reason to stop there. Municipalities are creatures of statute that have been delegated the power to hold elections, by statute. Thus, the principle at issue here should logically extend to every subordinate body that has received a legislative power to hold elections or democratic votes. The "right to vote" is conferred in respect of many subordinate bodies in Ontario but only by ordinary legislation which can be amended or repealed as the legislature sees fit.[123] The Constitution does not guarantee the "right to vote" in respect of municipalities or these other bodies.

ISSUE 3 – Municipal elections and governance are not subject to a constitutional requirement of effective representation under the *Charter*, the democracy principle, or s. 92(8) – Bill 5 does not impair effective representation

129. The City's assertion that Bill 5 breached a constitutional requirement on the province to provide for effective representation in City elections and governance (Appellant's Factum at paras 107-108) is not supportable:

a) Municipal elections and governance are not subject to a constitutional requirement of effective representation under the *Charter*, the democracy principle or s. 92(8); and

b) Bill 5, in any event, does not impair effective representation.

a) Municipal elections and governance are not subject to a constitutional requirement of effective representation

130. The concept of effective representation does not apply to the present case, whether as an aspect of s. 3 of the *Charter* or otherwise. As noted, the right to effective representation is protected under *Charter* s. 3, which is limited to federal and provincial elections.[124]

131. Nor does s. 2(b) guarantee a right to effective representation. To hold otherwise would be to import the content of s. 3 into s. 2(b). One *Charter* right cannot be used to circumvent an

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[123] See e.g. *Condominium Act, 1998*, SO 1998, c 19, s 28(1); *Law Society Act*, RSO 1990, c L 8, ss 25, 62, 62(0.1), 62(1)(6)-(6.2); *Business Corporations Act*, RSO 1990, c B.16, s 119(4); *Co-operative Corporations Act*, RSO 1990, c.35, s 90(1); *Local Roads Boards Act*, RSO 1990, c L 27, ss 7(7),11(1); *Ontario College of Teachers Act, 1996*, SO 1996, c. 12, s 6(1); *Labour Relations Act, 1995*, SO 1995, c.1, Sched A, ss 8, 128.1, 159, 160(1), 165(1); *School Boards Collective Bargaining Act, 2014*, SO 2014, c. 5, s 21.

[124] *Haig* at 1035, 1039-40; Stay Decision, SR, v 1, t 7, p 97 at ¶17.

express limitation on the scope of another right.[125]

132. There is no basis to read into s. 92(8) an effective representation requirement for democratic municipal governance structures that limits the authority of the province to establish and regulate municipal institutions as it sees fit. This would run counter to settled jurisprudence on the plenary power granted in s. 92(8).[126] It also fails to cohere with the architecture of the Constitution, which prescribes two sovereign levels of government, not three, and prescribes electoral rights only for those two.[127] The Constitution must be read as a harmonious whole.[128]

b) Effective representation has not been impaired by Bill 5

133. In any event, the evidence shows effective representation has *improved* as a result of Bill 5. It is not disputed that the FEDs achieved significantly *better* voter parity for 2018 than the City's 47-ward model would have achieved. Under *Carter* – which sets the test for what s. 3 requires for effective representation in federal and provincial elections – the "prime condition" for effective representation is parity of voting power.[129]

134. While voter parity is not the only factor that informs effective representation, there is no reasonable argument that all other factors were not appropriately considered in the setting of the ward boundaries under Bill 5. The federal Commission applies all of the *Carter* criteria in setting the FEDs adopted by Bill 5, including geography, community history, communities of interest and minority representation. The FEDs do not violate effective representation when they are set by a process that applies the *Carter* test for effective representation.[130]

135. It is not contended that the FEDs fail to afford effective representation at the federal and provincial levels. It would be absurd for municipalities, which do not have constitutional status,

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[125] *Baier* at ¶¶56-60; *9147-0732 Québec inc* at ¶¶8-13, 20-21, 37-38; *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148 at ¶¶61-64 [*Reference re Bill 30*]; *Adler v Ontario*, [1996] 3 SCR 609 at ¶35.
[126] *Haig* at 1031, 1033; *Baier* at ¶39; *East York* (ONCA) at ¶¶11-12; *East York* (Gen Div) at ¶¶14-15, 18.
[127] *Constitution Act, 1867*, ss 91-92; *Senate Reference* at ¶¶25-27, 54, 60; *Supreme Court Reference* at ¶¶97-103; *Constitution Act, 1982*, ss 38-49.
[128] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344; *Baier* at ¶58; *Provincial Judges Reference* at ¶107; *Reference re Bill 30* at ¶¶78-81.
[129] *Carter* at 193-195.
[130] OMB Decision, SR, v 1, t 13, p 123 at ¶¶37-38 (per Member Taylor, dissenting); *Sancton aff, SR, v II, t 27, pp 66-69 at ¶¶40-41*; *Siemiatycki cr-x, SR, v IV, t 40, qq 166, 181-195*.

to be constitutionally entitled to *more* representatives per constituents than that provided under the *Carter* framework at the federal and provincial levels.[131]

136. The Appellant asserts that municipalities require higher levels of individual interactions between councillors and constituents. This assertion is not borne out by the evidence. Municipalities, provinces, and the federal government all provide local "service-delivery" functions in different areas of responsibility.[132]

137. The City's delivery of services to its residents is supported by a public service staff of 35,000 active employees.[133] The Acting City Manager admitted on cross-examination that where service-delivery is concerned, the residents' point of access is not intended to be via councillors, but rather the City's counter-based service, as well as its 311 hotline and extensive web-based platform.[134]

138. The City claims that Professor Sancton's evidence does not contradict the finding that large ward sizes result in a lack of effective representation (Appellant's Factum at para 120). In fact, Professor Sancton (a former member of the federal Commission) states that it is "highly objectionable" to suggest that the ability of councillors to resolve local issues is an aspect of effective representation. He notes that Vancouver's at-large city council system results in each councillor representing 600,000 constituents, and yet it has never been suggested that Vancouver fails to provide effective representation in that context. The quotation in the Appellant's factum, out of context, is Professor Sancton's own description of his evidence in the 1997 amalgamation case. He explains that although he opposed amalgamation, twenty years later, a smaller council with larger wards is far preferable to the alternative, an "abnormally" large council.[135]

139. Professor Valverde, who supported the claimants, admitted that from a policy perspective, it is *preferable* for councillors not to be mired in resolving parochial constituent complaints, but rather to be focused on setting broader policy for the City. Professor Sancton agrees.[136] Professor Valverde's research illustrates the way that high levels of individual

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[131] *Carter* at 179-189; *East York* (Gen Div) at ¶20; *East York* (ONCA) at ¶3.
[132] *Sancton aff, SR, v II, t 27, p 94 at ¶104*; *Valverde cr-x, SR, v IV, t 39, qq 285-327*.
[133] Carbone aff, SR, v I, t 8, p 101 at ¶4.
[134] *Carbone cr-x, SR, v IV, t 37, qq 324-327*.
[135] *Sancton aff, SR, v II, t 27, pp 84-85, 91-93 at ¶¶75-79, 98, 102*.
[136] *Sancton aff, SR, v II, t 27, pp 92-94 at ¶¶99-104*.

councillor to constituent interactions can lead to inequitable distribution of governance and service resources in a way that disadvantages the less resourced. Privileged groups have more resources to lobby councillors.[137]

ISSUE 4 – Any alleged infringement of the *Charter* is justified under s. 1

140. As set out in the legislative debates, Bill 5 has the pressing and substantial objectives of improving City Council's functioning, effectiveness and efficiency, and of achieving better voter parity *for 2018* than would be the case under the 47-ward model. That cost saving was *an* additional objective does not negate the pressing and substantial nature of the other objectives.

141. With respect to Bill 5's objectives, "the proper question… is whether the [Attorney General] has asserted a pressing and substantial objective."[138] For the balance of the s. 1 inquiry, the government is entitled to rely on evidence obtained after enactment.[139]

142. The evidence shows that Bill 5 is a justified and proportional measure to address the legislature's objectives, impairing *Charter* rights as little as reasonably possible.

143. The impugned provisions are rationally connected to their objectives.[140] Bill 5 can be expected to improve governance by reducing the size of council from an unwieldy 48 to a manageable 26 (inclusive of the mayor), and Bill 5 manifestly improves voter parity for 2018 by adopting the FEDs.

144. The minimal impairment test asks whether there are any alternatives to the impugned means that could accomplish the government's objectives as effectively, with less impact on *Charter* rights. The test does not mandate recourse to less effective alternatives.[141] Here, there are no proposed alternatives that would achieve the legislature's purposes as effectively.

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[137] *Valverde cr-x, SR, v IV, t 39, qq 50-56, 112, 257-258, 353, 429-432, 442, 488-494, 500, 724-728*; *Chapter 4 in Everyday Law on the Streets, SR, v IV, t 39, exh 1; Sancton aff, SR, v II, t 27, pp 92-93 at ¶¶99-102*.
[138] *Harper* at ¶25.
[139] *Irwin Toy* at 983-985.
[140] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 925-926; *Sancton aff, SR, v II, t 27, pp 66-69, ¶¶40-41*.
[141] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at ¶¶160, 163; *RJR-MacDonald v Canada*, [1995] 3 SCR 199 at ¶160; *Canada (Attorney General) v JTI-MacDonald Corp*, 2007 SCC 30 at ¶¶42-44; *R v Chaulk*, [1990] 3 SCR 1303 at 1341-1343.

145. Toronto's council has been plagued with the dysfunction that results from a large membership and councillors focusing disproportionately on individual ward issues at the expense of broader governance issues. City staff have been over-burdened catering to 44 individual councillors' concerns and requests, even in the conduct of council meetings.

146. Bill 5 meaningfully and proportionately addresses this dysfunction by reducing council size. A smaller council will function better as a deliberative body and may help address the problem of ward-based parochialism and encourage a broader focus on the issues facing Toronto.

147. There is no post-election evidence that councillors have been overburdened, particularly with the measures Council took to address councillor staffing resources, workload and time. Nor is there evidence that constituents have been less able to voice their concerns.

148. There is no dispute that the FEDs achieve better voter parity for the 2018 election. As the 47-ward model does not come close to achieving 2018 voter parity as effectively as the FEDs, it is not a minimally impairing alternative. Adopting the FEDs incorporates an independent, decennially updated process, relying on Census data, at no cost to the province or City (see para 49 above).

149. Bill 5's timing, though it had an impact on 2018 candidates' reliance and expectation interests, was minimally impairing among the options available to achieve its objectives in a timely way. The goal was to enact Bill 5 before the 2018 election. Delaying reform until after the election would mean either: (a) waiting until the October *2022* municipal election to realize the policies of voter parity and a smaller, more effective council; or (b) modifying the council after the 2018 election, which would have been more disruptive.

150. The salutary effects – improved voter parity and a better-functioning council – exceed any deleterious effects. There is no evidence that election-related expression was anything but robust in 2018 or that the election was anything other than free, fair and democratic. Finally, there is no evidence that Council has had any challenges governing since.

ISSUE 5 – The City's requested declaration of invalidity of Bill 5 suspended until the 2022 election, would not be an appropriate remedy

151. The remedy sought by the City is a declaration of invalidity suspended *until 2022,* so that the City's 47-ward bylaw (deemed by ss. 129 and 135.1 of Bill 5 not to have been passed) would

spring back to life in time for the next election in 2022. This remedy is wholly inappropriate.

152. If s. 2(b) were breached by the timing of Bill 5, at most a declaration to that effect might be appropriate, for Bill 5 would still be valid in relation to elections and council composition after October 22, 2018. A remedy under s. 52(1) of the *Constitution Act, 1982* would not lie.

153. Even if Bill 5 is constitutionally defective in some other respect, the appropriate remedy should allow for the legislature to enact a constitutionally compliant replacement rather than effectively immunizing the City's 47-ward model from legislative change for the 2022 election.

154. If Bill 5 is invalidated, Ontario agrees with the Toronto District School Board (TDSB) that corresponding changes to align the trustee elections with the municipal election would be required. This agreement was made in both courts below. The balance of TDSB's submissions should be disregarded. The TDSB intervened on the narrow remedial question pertaining to the alignment of the trustee election if Bill 5 were invalidated; its intervention resulted in the agreement just described. On appeal, the TDSB filed no factum and took no position on the merits, but made brief oral submissions seeking only an order aligning the trustee wards if Ontario's appeal were dismissed. Although the TDSB now claims, referring to allegations unsupported by facts in the record, that the 2018 school trustee election "devolved … into disarray," no relief has ever been sought in relation to such an allegation.

PARTS IV AND V – ORDER SOUGHT AND SUBMISSIONS ON COSTS

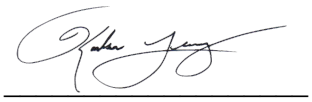
155. Ontario seeks an order dismissing the appeal.

156. The parties have agreed not to seek costs.

All of which is respectfully submitted this 18th day of December 2020.

Robin K Basu

Yashoda Ranganathan



Karlson K Leung

PART VI – TABLE OF AUTHORITIES

No.	Cases	Paragraph Reference in Factum
1.	*Adler v Ontario*, [1996] 3 SCR 609	131
2.	*Authorson v Canada (Attorney General)*, 2003 SCC 39	112-113, 115
3.	*Baier v Alberta*, 2007 SCC 31	70-72, 86, 88, 93, 101-103, 122, 125-126, 131-132
4.	*British Columbia (Attorney General) v Christie*, 2007 SCC 21	119
5.	*British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49	112, 119-120, 122, 125
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7.	*Canada (Attorney General) v JTI-MacDonald Corp*, 2007 SCC 30	144
8.	*Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892	143
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10.	*Conacher v Canada (Prime Minister)*, 2009 FC 920, aff'd 2010 FCA 131, leave to appeal to SCC refused, 33848 (20 January 2011)	76
11.	*Delisle v Canada (Deputy Attorney General*, [1999] 2 SCR 989	103
12.	*Di Ciano v Toronto (City)*, 2017 CanLII 85757 (OMB)	38-40, 62, 134
13.	*Dunmore v Ontario (Attorney General)*, 2001 SCC 94	88
14.	*East York (Borough) v Ontario (AG)* (1997), 34 OR (3d) 789 (Ont Ct J (Gen Div)), aff'd (1997), 36 OR (3d) 733 (Ont CA)	22, 113, 126, 132, 135
15.	*Eurig Estate (Re)*, [1998] 2 SCR 565	120
16.	*Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31	71-72, 91

17.	*Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995	70, 102, 125, 130, 132
18.	*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927	70-71, 141
19.	*Journal Printing Co v McVeity* (1915), 21 DLR 81 (Ont CA)	21
20.	*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54	100
21.	*Lalonde v Ontario (Commission de restructuration des services de santé* (2001), 56 OR (3d) 505 (Ont CA)	119
22.	*Longley et al v Canada*, 2007 ONCA 852	93, 103
23.	*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40	113
24.	*Montréal (City) v 2952-1366 Québec Inc*, [2005] 3 SCR 141	70
25.	*Natale v Toronto*, 2018 ONSC 1475 (Div Ct)	38, 41
26.	*Native Women's Assn v Canada*, [1994] 3 SCR 627	102
27.	*New Brunswick Broadcasting Co v Nova Scotia* (*Speaker of the House of Assembly)*, [1993] 1 SCR 319	120
28.	*Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15	122
29.	*Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32	120-122, 125, 131
30.	*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295	132
31.	*R v Chaulk*, [1990] 3 SCR 1303	144
32.	*R v Comeau*, 2018 SCC 15	115, 119
33.	*R v Furtney*, [1991] 3 SCR 89	105
34.	*Re Gray*, [1918] 57 SCR 150	105
35.	*Re Regulations in Relation to Chemicals*, [1943] SCR 1	105
36.	*Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148	131-132

37.	*Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525	105
38.	*Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3	120
39.	*Reference re Liquor License Act of 1877*, [1883] JCJ No 2 (PC)	105
40.	*Reference re Manitoba Language Rights*, [1985] 1 SCR 721	120
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52.	*Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732	87, 99, 103-104, 127
53.	*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59	125

No.	Secondary Sources	Paragraph Reference in Factum
1.	JL Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962) JL Austin, *How to Do Things with Words*, 2nd ed (Cambridge, MA: Harvard University Press, 1975)	99
2.	Federation of Canadian Municipalities, "Report of the Resource Task Force on Constitutional Reform" in *Municipal Government in a New Canadian Federal System* (Ottawa: May 1980)	122
3.	Ruth Sullivan, "Separation of Law and Politics" in *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016)	121
4.	*Toronto (City) v Ontario (AG)* (Reasons for Decision of Sharpe JA, dated May 22, 2019), Court File No. C65861, denying motion for intervention by Rowan Caister	108

No.	Legislation and Regulations	Paragraph Reference in Factum
1.	*Better Local Government Act 2018*, SO 2018, c 11 *amélioration des administrations locales (Loi de 2018 sur l')*, LO 2018, chap 11 (English) (Français)	
	Business Corporations Act, RSO 1990, c B.16 *sociétés par actions (Loi sur les)*, LRO 1990, chap B.16 (English): s 119(4) (Français): s 119(4)	128
2.	*City of Toronto Act, 1997*, SO 1997, c 2 (Bill 103) *cité de Toronto (Loi de 1997 sur la)*, LO 1997, chap 2 (English) (Français)	21

3.	*City of Toronto Act, 2006*, SO 2006, c 11, Sch A (historical version as of August 13, 2018) *cité de Toronto (Loi de 2006 sur la)*, LO 2006, chap 11, annexe A (version historique existait du 13 août 2018) (English): ss 128, 129 (Français): ss 128, 129	26
4.	*Condominium Act, 1998*, SO 1998, c 19 *condominiums (Loi de 1998 sur les)*, LO 1998, chap 19 (English): s 28(1) (Français): s 28(1)	128
5.	*Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 *Loi constitutionnelle de 1867*, 30 & 31 Victoria, ch 3 (RU) (English): ss 17-18, 37, 55, 91-92, 133 (Français): ss 17-18, 37, 55, 91-92, 133	112, 132
6.	*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 *Loi constitutionelle de 1982*, édictée comme l'annexe B de la Loi de 1982 sur le Canada, 1982, ch 11 (R-U) (English): ss 1, 2(b), 3, 24(1), 38-49, 52(1) (Français): arts 1, 2(b), 3, 24(1), 38-49, 52(1)	120, 127, 132
7.	*Co-operative Corporations Act*, RSO 1990, c.35 *sociétés coopératives (Loi sur les)*, LRO 1990, chap C.35 (English): s 90(1) (Français): s 90(1)	128
8.	*Election Act*, RSO 1990, c E.6 *électorale (Loi)*, LRO 1990, chap E.6 (English): s 9.1(5) (Français): art 9.1(5)	45, 80

9.	Labour Relations Act, 1995, SO 1995, c.1, Sched A relations de travail (Loi de 1995 sur les), LO 1995, chap 1, annexe A (English): ss 8, 128.1, 159, 160(1), 165(1) (Français): ss 8, 128.1, 159, 160(1), 165(1)	128
10.	*Law Society Act*, RSO 1990, c L 8 *Barreau (Loi sur le)*, LRO 1990, chap L.8 (English): ss 25, 62, 62(0.1), 62(1)(6)-(6.2) (Français): ss 25, 62, 62(0.1), 62(1)(6)-(6.2)	128
11.	*Local Roads Boards Act*, RSO 1990, c L 27 *régies des routes locales (Loi sur les)*, LRO 1990, chap L.27 (English): ss 7(7),11(1) (Français): ss 7(7), 11(1)	128
12.	*Municipal Act, 2001*, SO 2001, c 25 *municipalités (Loi de 2001 sur les)*, LO 2001, chap 25 (English): s 222 (Français): s 222	26
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	Règl de l'Ont 407/18 : élections ordinaires de 2018 et de 2022 – règles spéciales (English) (Français) O Reg 408/18: Wards Règl de l'Ont 408/18 : Quartiers électoraux (English) (Français)	
14.	*Ontario College of Teachers Act, 1996*, SO 1996, c. 12 *Ordre des enseignantes et des enseignants de l'Ontario (Loi de 1996 sur l')*, LO 1996, chap 12 (English): s 6(1) (Français): s 6(1)	128
15.	*Representation Act*, 2015, SO 2015, c 31, Sch 1 *représentation électorale (Loi de 2015 sur la)*, LO 2015, chap 31, Annexe 1 (English): ss 1-2 (Français):ss 1-2	42, 49
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17.	*Toronto Municipal Code*, dated February 1, 2018, ch 693-9, A(2)	44