

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

B E T W E E N:

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-

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(Pursuant to Rule 42 of the Rules *of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. The introduction and passage by the Provincial Government of the *Better Local Government Act*¹, (“Bill 5”) on August 14, 2018 affected not just the municipal election process but also dramatically impacted Toronto District School Board (“TDSB”) and the other public school boards whose elections for school board Trustees take place every four years simultaneous to, and in conjunction with the local City of Toronto municipal elections.
2. The 2018 introduction of Bill 5 by the Province of Ontario mid-election stream undermined the fundamental protections enshrined in section 2(b) of the *Charter* and substantially interfered in an unreasonable and unwarranted manner with the freedom of expression rights of candidates in the municipal elections, the Trustee candidates in the school board elections and the rights of the electorate as a whole.
3. In the unprecedented fray that ensued upon the introduction of Bill 5 in 2018 and its ultimate enactment mid-election, what was virtually forgotten was that not one, but five elections were simultaneously taking place in October 2018 – one election for candidates contesting for Toronto City Council positions, and a second election for candidates running in the four school boards in the City including the 22 School Board Trustee positions at TDSB.
4. By virtue of the provisions of the *Education Act* and its regulations, TDSB is required to align its electoral boundaries with municipal ward boundaries in the City. Between 2014 and 2016, the City conducted a Ward Boundary Review, as a result of which review it increased the number of its wards in Toronto from 44 to 47. As a result of the City’s ward boundary review and the consequential changes its municipality wards, TDSB conducted its own extensive community consultation and in February 2018, TDSB approved its new Trustee ward boundaries and approved the number and distribution of Trustees for the October 2018 election, well in advance of the election and before the opening of candidate nominations and the start of the campaign period.

¹ *Better Local Government Act*, S.O. 2018, c. 11.

5. Bill 5 was introduced in the Ontario Legislative Assembly on July 30, 2018 and *The Better Local Government Act*², was passed and received Royal Assent on August 14, 2018. Simultaneous to the passage of Bill 5, complementary amendments were made to O. Reg. 412/00 of the *Education Act* through the passage of O. Reg 391/18 requiring TDSB and the other school boards in the City of Toronto to realign their Trustee ward boundaries to the 25 provincial/federal boundaries in the City as mandated by Bill 5.

6. On July 30, 2018, Ontario directed that TDSB communicate its intended determination (number) and distribution (geographic allocation) of Trustees to the Minister of Education by August 14, 2018, failing which the Minister of Education would impose a distribution plan on TDSB.

7. The limited timeline prescribed by Ontario provided no opportunity whatsoever for TDSB to conduct any further public consultation on the government-imposed changes to the Trustee ward boundaries. With the passage of Bill 5 and the amendments to the *Education Act*, months of planning, public consultation and debate by TDSB regarding the boundaries of its Trustee wards was effectively rendered meaningless and its ward boundaries were adjusted mid-election stream, leading to the same chaos and confusion to school board Trustees, candidates and the public that were experienced by candidates and the electorate engaged in the municipal election. In short, what started out as an orderly and informed school board Trustee election soon devolved, as a result of the passage of Bill 5 and amendments to the *Education Act*, into disarray.

8. On September 10, 2018, TDSB was added as an intervening party to the multiple court proceedings effective August 21, 2018 as a result of the unique and direct impact the enactment of Bill 5 and the companion amendments to the *Education Act* had upon TDSB.

9. TDSB supports the position taken by the City of Toronto on this appeal and submits that the provisions of Bill 5 offend the most basic principles of our democratic process and undermine the electoral process to an unwarranted and unjustifiable degree.

² *The Better Local Government Act*, 2018, S.O. 2018, c. 11

STATEMENT OF FACTS

10. At the TDSB Board meeting held on February 7, 2018, the Board considered options for realignment of Trustee ward boundaries to align the TDSB ward boundaries with the City of Toronto's decision to increase the number of councillors from 44 to 47. In doing so, the Board of Trustees considered a staff report dated January 10, 2018, which laid out various options for realignment (the "Report"). The Report was submitted to the Board for its approval following months of consultations.³

11. In order to comply with the provisions of O. Reg 412/00 under the *Education Act*, staff submitted a report to the Board for its regular meeting on March 21, 2018 for the Board to confirm the number of Trustees and their distribution and confirm that same with the Minister of Education, the school board election clerk, and the secretary of all other school boards in the City of Toronto no later than April 3, 2018, as mandated by the regulations and well in advance of the opening of candidate nominations and the start of the campaign period for the municipal election being held on October 22, 2018.⁴

12. On July 27, 2018, the government of Ontario announced its intention to introduce legislation to reduce the number of municipal councillors from 47 to 25 to align with the current provincial and federal ridings for the 2018 election. On July 30, 2018, *Bill 5*, the *Better Local Government Act, 2018*, was introduced in the Ontario Legislature. The *Better Local Government Act*⁵ was subsequently passed, received Royal Assent, and became law on August 14, 2018.

13. Complementary amendments were made to O. Reg. 412/00 under the *Education Act* through the enactment of O. Reg. 391/18 requiring that the TDSB realign its Trustee ward boundaries to the (25) provincial/federal boundaries in the City of Toronto. The Ministry of Education confirmed the purpose of the amendments in the following terms:

³ Affidavit of Andrew Gowdy (August 24, 2018), Record of the Appellant [AR] Vol. XV, Tab 51, para 2-3.

⁴ Affidavit of Andrew Gowdy (August 24, 2018), AR Vol. XV, Tab 51, para 4-5.

⁵ The *Better Local Government Act*⁵, 2018, S.O. 2018, c. 11.

I am writing to inform you of proposed changes to the municipal ward boundaries in the City of Toronto that have implications for the distribution of your school board trustee positions for the October 22, 2018, election.

...

These changes would not affect the number of trustees for school boards with jurisdiction in the City of Toronto . . . However, these changes would impact the distribution of trustee positions on these boards.

To ensure that trustee nomination and election processes run as efficiently as possible, complementary amendments have been made to Ontario Regulation 412/00 - Election to and Representation on District School Boards, under the Education Act. These changes will ensure that your board is able to re-distribute its trustee positions according to the new ward boundaries.

...

As is the case with the current trustee determination and distribution process, school board ward boundaries can combine but not split municipal wards.⁶

14. The government of Ontario demanded that school boards in Toronto communicate their intended determination (number) and distribution (geographic allocation) to the Minister of Education by August 14, 2018.⁷

15. The timelines imposed by the government of Ontario did not provide TDSB with any opportunity to conduct consultations on the changes to Trustee ward boundaries. The months-long consultation undertaken by TDSB that resulted in the new Trustee ward boundaries adopted in February 2018, was effectively rendered meaningless. TDSB complied with the amendments to O. Reg. 412/00 requiring realigning ward boundaries, such that several Trustees ended up representing different communities than in the past.⁸

16. On September 10, 2018, Justice Belobaba found the impugned provisions of Bill 5 violated section 2(b) of the *Charter* and were of no force or effect. In respect of the amendments to the Education Act, Justice Belobaba granted a declaration that O. Reg. 391/18 made under the *Education Act* which amended O. Reg. 412/00 for the purposes of aligning boundaries with the 25-ward boundaries mandated by the provisions of Bill 5 was also of no force or effect and that

⁶ Affidavit of Andrew Gowdy (August 24, 2018), AR Vol. XV, Tab 51, para 9.

⁷ Affidavit of Andrew Gowdy (August 24, 2018), AR Vol. XV, Tab 51, para 9.

⁸ Affidavit of Andrew Gowdy (August 24, 2018) AR Vol. XV, Tab 51, para 10-12.

any steps taken under O. Reg. 391/18 were of no force or effect. On September 19, 2018, the Order was stayed by the Court of Appeal for Ontario pending the appeal.⁹

PART II – QUESTIONS IN ISSUE

17. TDSB raises the following issue in this appeal:

Does the Impugned Legislation violate the right to freedom of expression guaranteed by s. 2(b) by effectively nullifying the political speech of the candidates and voters in the 2018 municipal and school board elections?

PART III – ARGUMENT

ISSUE: Does the Impugned Legislation violate the right to freedom of expression guaranteed by s. 2(b) by effectively nullifying the political speech of the candidates and voters in the 2018 municipal and school board elections?

18. TDSB submits that the applicable test in this case for a breach of s. 2(b) of the *Charter* is set out in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The three-part test is:

1. *Does the activity in question have expressive content, thereby bringing it within section 2(b) protection?*
2. *Does the method or location of this expression remove that protection?*
3. *If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect?*

19. There is no doubt that both contesting an election and voting during an election are acts of expression. In *Baier v. Alberta*¹⁰ (“*Baier*”) this Court held that seeking election to the position of a school board Trustee position is an act of expression and similarly in *Siemens v. Manitoba (Attorney General)*¹¹ this Court held the act of voting is an act of expression. Accordingly, both

⁹ Order of Belobaba J., AR Vol. II, Tab 1, par 2; Reasons for Decision on Stay Motion, 2018 ONCA 761 (September 19, 2018), AR Vol. II, Tab 26.

¹⁰ *Baier v. Alberta*, 2007 SCC.

¹¹ *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3.

the candidates and constituents attract the protection of s.2 (b) of the *Charter* under the first part of this test.

20. The stifling of political expression is an issue this Court has taken extremely seriously. In *R. v. Keegstra*¹² this Court emphasized that the connection between freedom of expression and the political process is the linchpin of section 2(b) protection. In *Harper v. Canada (Attorney General)*¹³ this Court highlighted the importance of free and unfettered political speech in a democracy during the period of an election. The Court held:

“In this application, we are dealing with one of the most valuable forms of speech: political speech. Canadians cherish the unimpeded diffusion of political ideas and opinions, and this Court has long recognized that freedom of expression is “essential to the working of a parliamentary democracy such as ours” (Switzman v. Elbling, [1957] S.C.R. 285, per Abbott J., at p. 326). Hence we must tread carefully in limiting political speech. It is speech that we recognize as invaluable, given its significance in our democratic process. We should be loathe to interfere with it, especially in the midst of a federal election. Free and unfettered political expression is the heart and soul of democracy.”

21. The election campaign of the candidates, including messaging to their respective constituents, and the act of voting may be considered separate incidents of expression while also being part of a larger form of collective expression. Viewed collectively, candidature, campaigning, political messaging and voting all form a single act of expression of a community as a whole. This collective expression was infringed, if not completely stifled by Bill 5.

22. This Court has recognised the value of collective expression under s. 2(d) of the *Charter* in the context of trade unions. In *Dunmore v. Ontario (Attorney General)*¹⁴ the SCC held at para 38

By protecting the freedom to organize, s. 2(d) of the Charter recognizes the dynamic and evolving role of the trade union in Canadian society. In addition to permitting the collective expression of employee interests, trade unions contribute to political debate. At the level of national policy, unions advocate on behalf of disadvantaged groups and present views on fair industrial policy. These functions, when viewed globally, affect all levels of society and constitute “an important subsystem in a democratic market-economy

¹² *R. v. Keegstra*, [1990] 3 S.C.R. 697.

¹³ *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764.

¹⁴ *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94.

system" (see K. Sugeno, "Unions as social institutions in democratic market economies" (1994), 133 Int'l Lab. Rev. 511, at p. 519).

23. By analogy, s. 2(b) of the *Charter* protects collective political expression during the election process. Similar to trade unions, municipal and school board elections also constitute an important democratic subsystem.

24. While the Province had the right to change the electoral boundaries of the City or compel TDSB to change its Trustee electoral boundaries, the timing and manner in which the Province brought these changes into force undermined the freedom of speech guaranteed by s. 2(b) of the *Charter* in an unjustified manner.

25. These interference with the s. 2(b) rights of the candidates, voters and the collective right to political expression of the collective cannot be justified under s. 1 of the *Charter*. For the reasons set out in the factum of the City, TDSB submits the Province has neither established that its objective was pressing and substantial in a free and democratic society, nor has it demonstrated that the means to attain the objective were reasonable. Bill 5 significantly undermined both the political expression of TDSB Trustees and the democratic electoral process itself.

The Impact of Changes to the *Education Act* and Regulations

26. This Court has described the connection between freedom of expression and the political process as the "linchpin" of the s. 2(b) guarantee. Indeed, one of the values underlying the protection of freedom of expression is participation in social and political decision-making.¹⁵

27. The work of school board Trustees is inherently political in nature. Trustees are elected officials charged with representing the interests of their constituents and making decisions to support those interests. Significant aspects of their roles involve communication of ideas about education, which this Court has recognized as a form of political expression.¹⁶

¹⁵ *R v Keegstra*, [1990] 3 SCR 697, p. 763; *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, par 53.

¹⁶ *Baier v Alberta*, 2007 SCC 31, paras 56, 75.

28. In this case, TDSB Trustees engaged in political expression during TDSB's Ward Boundary Review. The public consultation process embedded within this Review allowed TDSB Trustees to share their ideas, voice the concerns of their constituents, and have this feedback inform the final decision regarding TDSB's ward boundaries. Trustees engaged in this process specifically to ensure that the 2018 election would proceed with ward boundaries that allowed for a fair and representative election. This constituted a form of political expression rooted in upholding the integrity of the election process.

29. When the Province unilaterally threatened to impose its own ward boundaries upon TDSB through Bill 5 and amendments to O. Reg. 412/00, it directly impacted upon TDSB Trustees in two ways.

30. First, the enactment by the Province of Bill 5 rendered prior political expression by TDSB Trustees meaningless. While Trustees were not prevented from communicating their ideas during the Ward Boundary Review or following the implementation of the Review Report, the entirety of this communication was suddenly stripped of all its content. The impact was not the result of the Province overriding a school board's decision, but rather specifically arose as a consequence of the Province imposing new ward boundaries *during* an election, which rendered political expression about that election meaningless. Notably, the Trustees' engagement during the Ward Boundary Review process, which is an inherently political decision-making process meant to determine the structure of the upcoming election, became meaningless. The Trustees may have just as well remained silent.

31. If, in the context of an election, the role of political expression is reduced to an exercise of performance rather than one of substance, important discourse becomes discouraged. This Court has frequently recognized that political expression "lies at the core of the [*Charter's*] guarantee of free expression." Safeguarding the importance of political expression requires a recognition of its inherent value in a democratic society. TDSB Trustees, like all other elected officials, have the right to engage in political expression about an election. While their expression may not always have meaningful impact, it must hold the potential to have some

impact. The failure by the Province undermined the value and integrity of both political expression but ultimately infringed the rights of TDSB Trustees.¹⁷

32. Second, the Province’s directions to implement new boundaries within a two-week period precluded any form of consultation, thereby inhibiting Trustees’ rights. In this short time frame, there was no opportunity to conduct any form of public consultation. The Province’s directions contained in its July 30, 2018 correspondence to TDSB imposed an ‘ultimatum’ on TDSB and other school boards, expressly precluded any rights of appeal and made it abundantly clear that if the boards failed to comply with its demands, the province would enforce compliance by setting its own ward boundaries.

33. The effect of this was essentially a complete silencing of the Trustees’ political expression. The incumbent Trustees and Trustee candidates were denied the ability to express their ideas regarding ward boundaries. They were denied any opportunity to engage in any form of public consultation or share their constituents’ concerns. The Province’s actions undermined the core tenets of democracy.

PART IV – SUBMISSIONS ON COSTS

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

PART V – ORDER REQUESTED

35. If the City’s appeal is granted and the “Impugned Provisions” as defined in the City’s factum are declared to be inconsistent with the Constitution of Canada and of no force and effect, Toronto District School Board seeks an additional declaration that O. Reg. 391/18 of the *Education Act* is similarly declared to be of no force and effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 25th day of November, 2020.



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¹⁷ *BC Freedom of Information and Privacy Association v British Columbia (AG)*, 2017 SCC 6, par 16.

PART VI – TABLE OF AUTHORITIES

Authorities	Paragraph(s) in Factum Where Cited
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1.C.R. 927	18, 26
<i>Baier v. Alberta</i> , 2007 SCC	19, 27
<i>Siemens v. Manitoba (Attorney General)</i> , 2003 SCC 3	19
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697	20, 26
<i>Harper v. Canada (Attorney General)</i> , [2000] 2 S.C.R. 764	20
<i>Dunmore v. Ontario (Attorney General)</i> , 2001 SCC 94	22
<i>BC Freedom of Information and Privacy Association v. British Columbia (AG)</i> , 2017 SCC 6	31

STATUTORY PROVISIONS

Statutory Provisions	Paragraph(s) in Factum Where Cited
<p><i>Constitution Act, 1982</i>, Sch B to the <i>Canada Act 1982</i>, 1982, c 11 (UK)</p> <p>French Version: <i>Loi constitutionnelle de 1982</i>, Annexe B de la <i>Loi de 1982 sur le Canada</i>, 1982, ch 11 (R-U)</p>	19
O. Reg. 391/18: ELECTIONS TO AND REPRESENTATION ON DISTRICT SCHOOL BOARDS (<i>under Education Act</i> , RSO 1990, c E.2)	5, 13, 16, 35

<p><i>French Version:</i></p> <p>E.2) Règl de l'Ont 391/18: ÉLECTIONS AUX CONSEILS SCOLAIRES DE DISTRICT ET REPRÉSENTATION AU SEIN DE CES CONSEILS (<i>en vertu de éducation (Loi sur l')</i>, LRO 1990, chap E.2) (<i>en vertu de éducation (Loi sur l')</i>, LRO 1990, chap E.2)</p>	
<p>O. Reg. 412/00: ELECTIONS TO AND REPRESENTATION ON DISTRICT SCHOOL BOARDS (<i>under Education Act, RSO 1990, c E.2</i>)</p> <p><i>French Version:</i></p> <p>Règl de l'Ont 412/00 : ÉLECTIONS AUX CONSEILS SCOLAIRES DE DISTRICT ET REPRÉSENTATION AU SEIN DE CES CONSEILS (<i>en vertu de éducation (Loi sur l')</i>, LRO 1990, chap E.2)</p>	5, 11, 13, 15, 16, 29