Court File No.: 38921

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

APPLICANT
(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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PART I AND II – OVERVIEW AND POSITION

[1] The intervener, the International Commission of Jurists (Canada) ("**ICJC**"), relies on the facts as set out by the Court of Appeal for Ontario.

[2] The ICJC submits that, properly interpreted and with the use of the unwritten constitutional principle of democracy and the underlying values of s. 3 of the *Charter*, the right to freedom of expression protected by s. 2(b) precluded the Ontario Legislature from enacting Bill 5 *during* a municipal election. The amendment of election rules in the middle of a municipal electoral campaign is an infringement of the participants' freedom of expression under s. 2(b) of the *Charter*. It is an infringement to the freedom of expression of both the candidates and the voters.

[3] The ICJC also submits that the unwritten principles of the constitution cannot be used as an independent basis to strike legislation. Indeed, while unwritten constitutional principles may give rise to substantive legal obligations and have normative value, they can only be used to construe the proper scope of a *Charter* right, or to invalidate administrative decisions.

[4] Finally, the ICJC submits that contrary to the *obiter* of the majority of the Court of Appeal for Ontario, s. 33 of the *Charter* may not be available, in the context of this case, to override the constitutional invalidity.

PART III –ARGUMENT

1. The normative value of the unwritten principles of the Constitution

1.1 The unwritten principles and their use as interpretive aid

[5] The unwritten principles of the Constitution constitute normative rules that could (and in this situation must) be relied upon in determining the proper scope of a *Charter* protected right, of legislative powers under the *Constitution Act, 1867*, or indeed of any constitutional provision.

[6] The unwritten principles are part of the Constitution's "internal architecture".[1] Their discussion by this Court in *Re Secession of Quebec* invites the courts to turn to those principles to fill gaps in the express terms of the constitutional text.[2] The unwritten principles are vital unstated

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[1] See *OPSEU v Ontario (Attorney General)*, [1987] SCJ No 48, [1987] 2 SCR 2 at 57; *Re Resolution to amend the Constitution*, [1981] SCJ No 58, [1981] 1 SCR 753 at 852-53, 876-77.
[2] *Reference re Secession of Quebec*, [1998] SCJ No 61, [1998] 2 SCR 217 [*Re Secession of Quebec*]; see also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince*

assumptions that inform and sustain the constitutional text.[3] These principles must be considered in the proper interpretation of the Constitution as a whole, as they breathe life into the written provisions.[4] Properly construed, the principles assist the courts in "the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions".[5]

1.2 The content of the unwritten constitutional principle of democracy

[7] Several provisions in the written Constitution protect and affirm the essential elements of Canadian democracy. Each of these provisions protect a different dimension of democracy. For example, the *Constitution Act, 1867* created legislative assemblies and electoral districts. For its part, the *Charter* protects, among other things, the right to vote, the electoral cycle, freedom of expression and the right to equality.

[8] The unwritten principle of democracy informs the design of our constitutional structure and is an essential interpretive tool. Democracy relates both to the process of government and to substantive policy goals, such as the promotion of self-government and the accommodation of cultural and group identities. Democracy must allow for the participation of the people through public institutions created under the Constitution, as democracy requires a continuous process of discussion leading to compromises, negotiation and deliberation, and the consideration of dissenting voices.[6]

[9] The unwritten principle of democracy has been used as an interpretive tool, such as in *Reference re Secession of Quebec*:

> The principle of democracy has always *informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day*. […T]he democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference*, *supra*, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet

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Edward Island, [1997] SCJ No 75, [1997] 3 SCR 3 at paras 93-95, 104 [*Re Remuneration of Judges*].

[3] *Re Secession of Quebec* at para 51.

[4] *Re Secession of Quebec* at para 50.

[5] *Re Secession of Quebec* at para 52.

[6] *Re Secession of Quebec* at paras 61-68.

> this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.[7]

[10] In *Reference re Provincial Electoral Boundaries (Sask.)*, a majority of this Court held that democracy meant the right of citizens to participate in the political process, as candidates or otherwise, and the process of representative and responsible government in order to achieve the goal of universal suffrage and more effective representation.[8]

[11] In *Figueroa*, a majority of this Court held that democracy meant that each citizen must have a genuine opportunity to take part in the governance of the country and to play a meaningful role in the political life in Canada through participation in the selection of elected representatives. Indeed, everyone has a right to have an equal opportunity to try to influence one's fellow citizens on politics, to compete for votes, and to have a level playing field.[9]

[12] As for s. 3-5 of the *Charter*, they also reflect the principle of democracy, but are limited to their specific content.[10] While the values underlying s. 3 are important, s. 3 plays no other significant part in this case because municipalities are provincial creatures under s. 92(8) of the *Constitution Act, 1867*. Certainly, the fact that s. 3 does not include municipal elected institutions is irrelevant to the scope of the s. 2(b) right. Indeed, much of the adjudication on the regulation of elections and the values of democracy have been under other *Charter* rights in conjunction with or instead of under s. 3, with s. 2(b) having been particularly important in this area.[11]

[13] The principles underlying s. 3 of the *Charter*, along with the unwritten principle of democracy, are therefore relevant in determining the proper scope of s. 2(b) in this case. In fact, freedom of expression is the essence of any electoral campaign, allowing candidates and voters to meet, exchange ideas and positions; and for candidates to debate each other to obtain voters' support. This is the essence of freedom of expression as protected by s. 2(b) of the *Charter*.

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[7] *Re Secession of Quebec* at para 62 [emphasis added].
[8] *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] SCJ No 46, [1991] 2 SCR 158 at 189.
[9] *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37 at paras 30, 39-46.
[10] *Haig v Canada (Chief Electoral Officer*), [1993] SCJ No 84, [1993] 2 SCR 995 at 1033; *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 at para 39.
[11] *Thomson Newspapers (c.o.b. Globe and Mail) v Canada (Attorney General)*, [1998] SCJ No 44, [1998] 1 SCR 877; *Harper v Canada (Attorney General)*, [2004] SCJ No 28, [2004] 1 SCR 827.

2. Amendments to election rules in the middle of the election process are in breach of section 2(b) of the *Charter*

2.1 The relationship between political speech and freedom of expression in Canada

[14] The right to freedom of expression in Canada is premised upon fundamental values that promote the search for and attainment of truth, participation in social and political decision-making and the opportunity for individual self-fulfillment through expression.[12] Freedom of speech has been recognized as an essential feature and instrumental to democratic governance in Canada. In *Dolphin Delivery*, this Court opined that: "Representative democracy, […] is in great part the product of free expression and discussion of varying ideas, [and] depends upon its maintenance and protection";[13] and that "[t]he principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy."[14]

[15] This Court has long held that political expression is at the core of the s. 2(b) guarantee of freedom of expression. In *Harper*, this Court held that political speech is the single most important and protected type of expression.[15] In *Thomson Newspapers*, the SCC held that by denying access to electoral information, a publication ban interfered with the free political expression of some voters as well as their perception of the freeness and validity of their vote.[16] In *Figueroa*, the majority opined that :

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. […].[17]

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[12] *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, [1989] SCJ No 36 at 932 [*Irwin Toy*]; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 at para 65.
[13] *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 583 [*Dolphin Delivery*].
[14] *Dolphin Delivery* at 583.
[15] *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33 at para 11.
[16] *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877 at para 129.
[17] *Figueroa v Canada (Attorney General)*, [2003] SCJ No 37, [2003] 1 SCR 912 at para 28 [emphasis added].

2.2 Properly interpreted, and relying on the unwritten principle of democracy, s. 2(b) of the *Charter* protects the rights of candidates and voters during elections

[16] Properly construed, in reliance on the unwritten principle of democracy, the ICJC submits that the proper scope of s. 2(b) *in the context of this case* restricted the Ontario Legislature's power to amend the election process *after* that process had started.

[17] ICJC agrees with MacPherson J.A. that "political expression during an active municipal election consists of far more than the pursuit or casting of a ballot on voting day."[18] Rather, political expression is expansive and covers a wide range of activities, including deliberative engagement of voters, incumbents, new candidates, volunteers, donors, campaign organizers and staff, and the media.[19] In that sense, in the context of an existing election, the scope of s. 2(b) protects the right of candidates and of voters.

[18] The ICJC supports MacPherson J.A.'s opinion that the mid-election changes breached the freedom of expression of candidates.[20] Indeed, candidates made decisions, engaged in discussions with citizens and expressed their views in light of the current rules of the municipal election. Their legitimate expectation was for these rules to remain unchanged without interference mid-election. Accordingly, any interference with this expectation in the middle of the election process engages s. 2(b) of the *Charter*.

[19] The majority of the Court of Appeal erred in not properly taking into account the unwritten principle of democracy in construing s. 92(8) of the *Constitution Act, 1867* in its inter-relation with s. 2(b) and s. 3 of the *Charter*, *in the context of this case*. The use of the unwritten principle of democracy, *on the facts of this case*, fill the gap by including the basic protections of the principle of democracy and the values of s. 3 within s. 2(b) of the *Charter*.

[20] Properly interpreted, once the Ontario Legislature had discharged its power under s. 92(8) and enacted a municipal council and provided for specific electoral rules, it was precluded under a proper interpretation of s. 2(b) from amending those electoral rules allowing candidate and citizen participation *during the election*. Such amendments, *during the election*, undermined the

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[18] *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 118.
[19] *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 117.
[20] *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 128.

democratic principle that entitles candidates and voters to a fair electoral process. Indeed, this Court held in *Haig*:

> While s. 2(b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply.[21]

[21] Properly construed in the context of this appeal, and in reliance on the unwritten principle of democracy, a gap therefore exists between the protections provided under s. 2(b) and the values underlying s. 3 of the *Charter*, when interacting with s. 92(8) of the *Constitution Act, 1867*.

[22] At paragraph 53, the majority discusses the "megaphone" example. While banning megaphones may or may not breach s. 2(b), it does so when the context is prejudicial to democracy and when the election process is under way. Banning "megaphones" prior to the election and when candidates and voters have sufficient time to adopt another method to participate and transmit their message to voters might not breach s. 2(b). However, to the extent that "megaphones" are allowed, the removal of that tool may, in some contexts such as during an election, be in breach of the s. 2(b) freedom of expression rights of both the candidates and the targeted voters.

[23] Likewise, in the political process, restricting political contributions may not be invalid.[22] However, if such amendment is adopted in the context of a majority government where the ruling party has, throughout its years in power, amassed sufficient funds to spend in an upcoming election, and the prohibition aims at precluding any possibility for the opposition to finance the electoral campaign, such restriction to political financing could represent a violation of s. 2(b) of the *Charter*. Certainly, the principle of democracy requires that election procedures be neutral and impartial thereby preventing incumbents or political parties from re-writing or manipulating laws for the sole purpose of making their preferred electoral outcome more likely.

[24] Finally, the ICJC agrees with the MacPherson J.A. that the facts of this case are different from the facts of the *Baier*[23] case. Given that the amendments were made *during* the election as opposed to in-between elections, the proper test to analyze the breach is not the test discussed by

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[21] *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, [1993] SCJ No 84 at 999.
[22] *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827.
[23] *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 [*Baier*].

this Court in *Baier*, but rather the conventional test advanced in *Irwin Toy*.[24] Contrary to *Baier*, the impugned amendments did not provide an under-inclusive platform for political discourse; rather, it *took away* an existing platform for both candidates and voters, during its use, and changed it in a manner that caused important damage to anyone wishing to partake in the election within the new platform. Such intervention by the Legislature on the existing platform, in the midst of an election, represents a negative interference on s. 2(b) for both candidates and voters.

[25] In the alternative, the three-step test in *Baier* is met. First, the impugned fundamental freedom in this case is not "the right to run for election", but rather the fundamental right not to have expression planned and executed, made within the context of an electoral campaign, nullified by changing electoral procedure in the middle of an election period. Second, candidates and voters, as explained by the dissenting judges, suffered substantially from that interference, including the waste of valuable time, money and energy, as well as confusion and uncertainty. Third, the Legislature is responsible for that breach.[25]

[26] Similar amendments to the electoral process, made before the election has started and provided they do not otherwise undermine the unwritten principles of the rule of law, democracy and constitutionalism, may be valid. However, this is not the case here where Bill 5 was adopted *during* the electoral process.

[27] If the impugned amendments are valid, would it not become an incentive for some governments to tinker with s. 2(b) freedom of expression rights just before an election period thereby infringing the *Charter* and its underlying principles? It is ICJC's position that even s. 33 of the *Charter* would not be available in such circumstances.[26]

[28] Certainly, Parliament and provincial legislatures are free to amend electoral rules outside the context of an election, but any restriction of vital forms of political expression must be justified under s. 1. That was not done in this case. In ICJC's view, such fundamental changes to political expression would have a hard time passing the foundations of the s. 1 test as Dickson C.J. referenced in the *Oakes* formulation:

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[24] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927.
[25] *Baier* at paras 27, 30.
[26] Contrary to the *obiter* of the majority : *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 88.

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[27]

[29] Manipulating the rules of an election in the middle of the process, as done in this case, can hardly be said to promote faith in social and political institutions that enhance the participation of individuals and groups in society. These values should be the foundations of the proportionality tests regarding *Charter* violations.[28]

3. Unwritten constitutional principles cannot independently invalidate legislation

[30] While the unwritten principles may have normative force and be binding on governments,[29] this Court has strongly suggested that the unwritten principles could not be used independently to strike statutes that comply with the express words of the Constitution, specifically because this would conflict with other unwritten principles: the rule of law and constitutionalism.[30]

[31] Moreover, while the unwritten principles breathe life into the constitutional text, many unwritten principles remain broader than the *Charter* protected rights. For example, the principle of the protection of minorities encapsulate the concepts of equality and minority education rights protected by ss. 15 and 23. A ruling suggesting that the unwritten principles, on their own, could

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[27] *R. v Oakes*, [1986] 1 SCR 103 at 136.
[28] Mendes E.P., "*Section 1 of the Charter after 30 years: The Soul or the Dagger at its Heart?*", in E. Mendes and S. Beaulac, eds, Canadian Charter of Rights and Freedoms, 5th ed., Markham: LexisNexis, 2015, 293 at 328.
[29] *Re Secession of Quebec* at paras 49-54; *British Columbia v Imperial Tobacco Canada Ltd.*, [2005] SCJ No 50, [2005] 2 SCR 473 at para 60; *Re Remuneration of Judges* at paras 93-95 [*Imperial Tobacco*].
[30] *Imperial Tobacco* at para 66.

lead to constitutional invalidity could have the effect of rendering the written Constitution, including the *Charter*, redundant. This cannot be so.

[32] Indeed, reliance on the unwritten principles to strike legislation would allow claimants to by-pass the government's ability, under the *Charter*, to justify a constitutional breach under s. 1. The unwritten principles should play their most important role as an interpretive framework for applying the balancing tasks in s. 1; especially in a situation such as this one that requires a proper understanding of how s. 92(8) interacts with s. 3 of the *Charter*, which then informs one of the most important democratic rights in the *Charter*, namely s. 2(b).

4. Section 33 of the *Charter* may not be applicable to this case

[33] At para 88, the majority opined that if unwritten principles could invalidate statutes, then s. 33 could not be available to give effect to the statute despite the Court's disagreement. With respect, properly interpreted and taking into account the unwritten principles of the rule of law, democracy and constitutionalism, s. 33 must be construed narrowly and may not be available in the circumstances of this case in any event. Properly interpreted, and given its limited application in time, s. 33 requires that the state demonstrate an emergency or an overwhelming public purpose to impose a provision despite its breach of a *Charter*-protected right.

[34] For example, a narrow interpretation of s. 33, one in compliance with the principle of democracy, suggests that s. 33 could not be used by Parliament during a majority government to completely prohibit any political contributions (a breach of s. 2(b)) on the basis that the majority party has already secured sufficient funds to participate in the next election. Such blatant dictatorial measure, while theoretical only, could not pass s. 33 muster.

[35] Indeed, s. 33 exists to allow Parliament or a legislature more leeway when, for example, they have not been able to demonstrate a minimal impairment, yet their objective was sufficiently important and there was a rational connection between the objective and the adopted measure. This interpretation is consistent with the unwritten principle of Parliamentary supremacy. However, that unwritten principle must be balanced with the other unwritten principles noted above in giving the proper scope to s. 33 of the *Charter*.

[36] For example, in *Ford*,[31] this Court held that in some respects, s. 33 was not without ambiguity and, applying rules of statutory interpretation, adopted a restrictive interpretation precluding any retrospective application.[32] Such narrow interpretation imposing a restriction on the use of s. 33 is also consistent with the unwritten principles.

[37] More restrictions apply to prevent abuses of s. 33. Indeed, it is trite to state that *Charter* rights exist to protect the minority from the tyranny of the majority.[33] Any interpretation of s. 33 must be sufficiently restrictive as to not completely annihilate the foundational principles of the Constitution and the content of the *Charter*.

[38] Indeed, in *Ford*, there was a justification for the use of s. 33 : the impugned legislation existed to protect the Francophone linguistic minority and evidence existed that the French language required additional legislative protection. The use of s. 33 protected a minority (within Canada and Northern America) and the *Ford* decision must be interpreted in that context.

[39] Finally, to the extent that *Ford* does not provide criteria on the use of s. 33, that case was decided in 1988 shortly after the adoption of the *Charter*. The social and legal evolution of human rights since then requires a different approach.[34] The ICJC submits that the exclusion of judicial review when governments use s. 33 to engage in profoundly anti-democratic actions, absent emergency or overriding justifiable public purpose, is incompatible with the foundational principles of the Constitution and would amount to an undermining of the rule of law and the basic purposes of human rights law. Indeed, the 5-year limit of s. 33 is an indication that intentional limitations on fundamental democratic and human rights ought to be of short duration, and only be imposed by governments in good faith and for an overwhelming public purpose.

PART IV – COSTS

[40] The ICJC seeks no order as to costs and asks that no costs be ordered against it.

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[31] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 742 [*Ford*].
[32] *Ford* at 744-745.
[33] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 at para 256.
[34] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at paras 38-44.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th day of January, 2021.

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Commission of Jurists (Canada)

PART VII – TABLE OF AUTHORITIES , STATUTES, REGULATIONS

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