SCC File No. 38921

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

B E T W E E N :

CITY OF TORONTO

Appellant

- and -

THE ATTORNEY GENERAL OF ONTARIO

Respondent

- and –

TORONTO DISTRICT SCHOOL BOARD, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CITYPLACE RESIDENTS' ASSOCIATION, CANADIAN CONSTITUTION FOUNDATION, INTERNATIONAL COMMISSION OF JURISTS (CANADA), FEDERATION OF CANADIAN MUNICIPALITIES, DURHAM COMMUNITY LEGAL CLINIC, CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY, CANADIAN CIVIL LIBERTIES ASSOCIATION, ART EGGLETON, BARBARA HALL, DAVID MILLER AND JOHN SEWELL, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, PROGRESS TORONTO, MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA, AND FAIR VOTING BRITISH COLUMBIA

Interveners

FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Steven M. Barrett
Geetha Philipupillai
Tel: 416.977.6070
Fax: 416.591.7333
Email: sbarrett@goldblattpartners.com
gphilipupillai@goldblattpartners.com

Counsel for the Intervener,
Canadian Civil Liberties Association

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613.482.2463
Fax: 613.235.3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Intervener,
Canadian Civil Liberties Association

TO:

CITY SOLICITOR'S OFFICE
City of Toronto, Legal Services
Metro Hall, 55 John Street, 26th Floor
Toronto, ON M5V 3C6

Diana W. Dimmer | Glenn K.L. Chu
Fred Fischer | Philip Chan
Tel: 416.392.7229 | 416.397.5407
416.392.7224 | 416.392.1650
Fax: 416.397.5624
Email: diana.dimmer@toronto.ca
glenn.chu@toronto.ca
fred.fischer@toronto.ca
philip.k.chan@toronto.ca

Counsel for the Appellant, City of Toronto

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613.787.3562
Fax: 416.367.6749
Email: neffendi@blg.com

Ottawa Agent for the Appellant, City of Toronto

AND TO:

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Robin Basu
Yashoda Ranganathan
Tel: 416.326.4476 | 416.326.4456
416.326.4473
Fax: 416.326.4015
Email: robin.basu@ontario.ca
yashoda.ranganathan@ontario.ca

Counsel for the Respondent, Attorney General of Ontario

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613.702.5573
Email: mvincelette@powerlaw.ca

Agent for the Respondent, Attorney General of Ontario

AND TO:

TORONTO DISTRICT SCHOOL BOARD
Legal Services
5050 Yonge Street, 5th Floor
Toronto, ON M2N 5N8

Leola Pon
Paul Koven
Tel: 416.397.3565
Fax: 416.393.8973
Email: leola.pon@tdsb.on.ca
paul.koven@tdsb.on.ca

Counsel for the Intervener, Toronto District School Board

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Toronto District School Board

AND TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3

Mark Witten
Ashley Caron
Tel: 604.660.5476
604.660.6797
Fax: 416.393.8973
Email: mark.witten@gov.bc.ca
ashley.caron@gov.ba.ca

Counsel for the Intervener, Attorney General of British Columbia

GIB VAN ERT LAW
148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613.408.4297
Fax: 613.651.0304
Email: gib@gibvanertlaw.com

Agent for the Intervener, Attorney General of British Columbia

AND TO:

DEPARTMENT OF JUSTICE CANADA
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Michael H. Morris
Gail Sinclair
Tel: 647.256.7539
Fax: 416.973.0809
Email: michael.morris@justice.gc.ca
gail.sinclair@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

DEPARTMENT OF JUSTICE CANADA
Civil Litigation Branch, East Tower
234 Wellington Street
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 613.941.2351
Fax: 613.954.1920
Email: crupar@justice.gc.ca

Agent for the Intervener, Attorney General of Canada

AND TO:

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington St. W., 35th Floor
Toronto, ON M5V 3H1

Donald K Eady
Glynnis Hawe
Tel: 416.646.4321 | 416.646.6309
Fax: 416.646.4301
Email: don.eady@paliareroland.com
glynnis.hawe@paliareroland.com

Counsel for the Intervener, Progress Toronto

DENTONS CANADA LLP
99 Bank St., Suite 1420
Ottawa, On K1P 1H4

David R Elliot
Corey Villeneuve (Law Clerk)
Tel: 613.783.9699
Fax: 613.783.9690
Email: Corey.Villeneuve@dentons.com

Ottawa Agent to Counsel for the Intervener, Progress Toronto

AND TO:

BORDEN LADNER GERVAIS LLP
3400 – 22 Adelaide St. W.
Toronto, ON M5H 4E3

Christopher D Bredt
Pierre N Gemson
Tel: 416.367.6165
Fax: 416.367.6749
Email: cbredt@blg.com
pgemson@blg.com

BORDEN LADNER GERVAIS LLP
1300 – 100 Queen St.
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Centre for Free Expression at Ryerson University

OSGOODE HALL LAW SCHOOL
York University
4700 Keele St.
North York, ON M3J 1P3

Jamie Cameron, Professor Emeritus
Tel: 416.294.1512
Email: jcameron@osgoode.yorku.ca

Counsel for the Intervener, Centre for Free Expression at Ryerson University

AND TO:

SELWYN A. PIETERS
Barrister & Solicitor
P.O. Box 518, 31 Adelaide St. E.
Toronto, ON M5C 2J6

Selwyn A Pieters
Tel: 416.787.5928
Fax: 416.787.6145
Email: selwyn@selwynpieters.com

Counsel to the Interveners, CityPlace Residents' Association

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, CityPlace Residents' Association

AND TO:

DURHAM COMMUNITY LEGAL CLINIC
200 John St. W., Unit B1
Oshawa, ON L1J 2B4

Omar Ha-Redeye
Tel: 905.728.7321
Fax: 905.728.6362
Email: omar@durhamcommunitylegalclinic.ca

Counsel for the Intervener,
Durham Community Legal Clinic

SUPREME ADVOCACY LLP
340 Gilmour St.
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Durham Community Legal Clinic

AND TO:

MCCARTHY TÈTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg
Jacob Klugsberg
Tel: 416.601.8357
Fax: 416.868.0673
Email: agoldenberg@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

JURISTES POWER LAW
130 Albert St., Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613.702.5566
Fax: 613.702.5566
Email: DBosse@juristespower.ca

Ottawa Agent for Counsel for the
Proposed Intervener, Canadian
Constitution Foundation

AND TO:

Stephane Émard-Chabot
Mary Eberts
William B Henderson
24 Clarence St.
Ottawa, ON K1N 5P3

Tel: 613.241.5221
Email: stephane@emard-chabot.ca

Counsel for the Intervener,
Federation of Canadian Municipalities

SUPREME ADVOCACY LLP
100 – 340 Gilmour St.
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613.695.8855, ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Federation of Canadian Municipalities

AND TO:

ST. LAWRENCE BARRISTERS LLP
33 Britain St., 2nd Floor
Toronto, ON M5A 1R7

Alexi N Wood
Jennifer P Saville
Tel: 647.245.8283
Fax: 647.245.8285
Email: alexi.wood@stlbarristers.ca
jennifer.saville@stlbarristers.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor St., Suite 1500
Ottawa, ON K1P 1A4

Matthew J Haplin
Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Ottawa Agent for the Intervener, David Asper Centre for Constitutional Rights

AND TO:

PAPE SALTER TEILLET LLP
546 Euclid Ave.
Toronto, ON M6G 2T2

Jason T Madden
Marc E Gibson
Tel: 416.916.3853 | 416.855.2649
Fax: 416.916.3726
Email: jmadden@pstlaw.ca
mgibson@pstlaw.ca

Counsel for the Intervener, Métis Nation of Ontario and Métis Nation of Alberta

GOWLING WLG
160 Elgin St., Suite 2600
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: 613.786.0211
Fax: 613.788.3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for the Intervener, Métis Nation of Ontario and Métis Nation of Alberta

AND TO:

GOLDBLATT PARTNERS LLP
20 Dundas St. W., Suite 1039
Toronto, ON M5G 2C2

Howard Goldblatt
Christine Davies
Tel: 416.977.6070
Fax: 416.591.7333
Email: hgoldblatt@goldblattpartners.com
cdavies@goldblattpartners.com

GOLDBLATT PARTNERS LLP
30 Metcalfe St., Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613.482.2463
Fax: 613.235.3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Interveners, Art Eggleton, Barbara Hall, David Miller, and John Sewell

Counsel for the Interveners, Art Eggleton, Barbara Hall, David Miller, and John Sewell

AND TO:

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
2600 – 160 Elgin St.
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613.786.0197
Fax: 613.563.9869
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener,
The International Commission of Jurists (Canada)

FACULTÉ DE DROIT,
UNIVERSITÉ DE MONTRÉAL
Pavillon Maximilien-Caron Local A-7428
3101, chemin de la Tour
Montréal, QC H3C 3J7

Prof. D Stéphane Beaulac
Tel: 514.343.7211
Email: stephane.beaulac@umontreal.ca

Counsel for the Intervener,
The International Commission of Jurists (Canada)

AND TO:

NICOLAS M ROULEAU
PROFESSIONAL CORPORATION
SOCIÉTÉ PROFESSIONNELLE
41 Burnside Dr.
Toronto, ON M6G 2M9

Tel: 416.885.1361
Fax: 1.888.850.1306
Email: RouleauN@gmail.com

Counsel for the Intervener, Fair Voting British Columbia

BORDEN LADNER GERVAIS LLP
1300 – 100 Queen St.
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Fair Voting British Columbia

Table of Contents

Page

PART I - OVERVIEW

1. In *Haig*, this Court held that s. 2(b) "prohibits gags, but does not compel the distribution of megaphones."[1] This reflects the classical liberal conception of freedom of expression which prohibits the state from suppressing expressive activity, but not imposing any positive obligation on the state to enable any particular expressive activity. The CCLA contends, however, that, whatever the nature of the government action under challenge, where an interference with s. 2(b) is claimed, it is necessary and appropriate to inquire into whether the purpose or effect of the challenged government conduct (commission or omission), examined contextually and based on the evidence adduced, has interfered with the underlying values which freedom of expression is intended to promote. In the CCLA's submission, the *Irwin Toy* analysis can and should be applied to all s. 2(b) claims, particularly since the more stringent *Baier* test applicable to a so-called "positive right" claims has been inconsistently applied, recognized by this Court as inherently manipulable, and runs counter to the broad and inclusive purposes of the *Charter* s. 2(b) guarantee.

2. However, even if the *Baier* analysis continues to apply to claims of underinclusive access to an expressive forum, or to an alleged failure of government to act, there is no claim in this case that the Ontario government is required to provide access to a forum from which some individuals or groups have been excluded (i.e., a claim that government must distribute megaphones). Rather, the claim in this case is that legislation has directly interfered with constitutionally protected expressive activity, given the effect of fundamentally altering the rules of an election *in the middle* of that election. This is more akin to active interference than alleged exclusion/underinclusive access.

3. Based on the "rules of the game" established in advance of the 2018 Toronto municipal election, candidates decided whether and where to run for office, who to support, and how to organize. Based on these plans and strategies, they engaged in election campaigning, including raising funds, soliciting volunteers, and developing communications and literature. These individuals, and groups supporting them, were all actively engaged in this expressive process of campaigning when Ontario drastically, and without warning, altered the fundamental rules and

[1] *Haig v. Canada*, [1993] 2 SCR 995, at 1035.

structure for the election. As a result, the s. 2(b) issue raised before this Court is whether, in the midst of an ongoing election campaign, the state is restricted from interfering with and removing the home-made megaphones which candidates and electors have themselves built and established using their own resources. Put another way, the issue is whether such a fundamental alteration of the rules of the game had the effect of interfering with these expressive vehicles, used by candidates and electors alike to participate in a democratic electoral process for a critically important order of government.[2]

PART II - STATEMENT OF ARGUMENT

A. Broad Scope of Section 2(b) Protection for Core Political and Electoral Expression

4. When considering whether government action or legislation has the effect of interfering with ongoing political expression, this Court must be mindful of the extent to which it has steadfastly protected core political and electoral expression, particularly during election campaigns, recognizing it is a prerequisite for a free and democratic society.[3] As Chief Justice Dickson observed in *Keegstra*, "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."[4] Indeed, the three rationales for the protection of free expression under s. 2(b) of seeking and attaining the truth; participation in social and political decision-making; and fostering individual self-fulfillment, are all integrally

---

[2] For the classic treatment of this issue, see Berlin, I., 1969, 'Two Concepts of Liberty', in I. Berlin, Four Essays on Liberty, London: Oxford University Press, 2002, where Berlin observes that we use the negative concept of liberty in attempting to answer the question "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?"

[3] *Re Alberta Statutes*, [1938] SCR 100; *Switzman v. Ebling*, [1957] SCR 285; *R. v. Keegstra*, [1990] 3 SCR 697; *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 SCR 877; *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827.

[4] *Keegstra*, *supra*, at 763-64.

implicated in the expressive activities of candidates and electors during an election campaign, reflecting the recognition that political electoral speech is the very basis of a democratic society.[5]

5. The expressive activity at issue in this appeal involves all form and manner of social and political expression during an election by candidates and electors alike, from participating in political campaigns to providing financial support and soliciting and organizing for candidates.[6] There is much more at stake than expression aimed at conveying meaning by way of a particular advertisement, or in a particular location, or indeed, on a particular or ordinary platform. Rather, at stake is the right of candidates and electors alike to convey meaning within a democratic process which depends upon their participation, on behalf of various (and in many cases marginalized) communities of interest, on issues and problems affecting these same communities, for the purpose of influencing electoral outcomes, and indeed (in some cases) for the purpose of correcting the historic inequality and underrepresentation of racialized communities and women in the City of Toronto's municipal government.[7]

6. This Court has recognized the crucial role of the s. 2(b) guarantee in ensuring "an equal voice to each citizen"[8] and "that participation in the political process is open to all persons."[9] The CCLA submits that the protections afforded to electoral speech and their connection to free and democratic governance are particularly important in this case, where the claim advanced is that impacted expression includes expressive activity by groups protected by s. 15 of the *Charter* by virtue of their historical and ongoing disadvantage, underrepresentation in local government, and limited financial resources. The evidence led by the Applicants was aimed at establishing the intersectional adverse impact of gender, race, socioeconomic status and caregiving responsibilities on the ability of candidates and their campaigns to pivot in the production and distribution of new campaign materials after Bill 5 rendered original materials useless by re-drawing ward boundaries,

---

[5] *Thomson Newspapers*, *supra*; *Harper*, *supra*; *Libman v. Quebec (AG)*, [1997] 3 SCR 569, ¶ 28-29, 60.
[6] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, at 971.
[7] Affidavit of P. Khosla, Record of the Appellant [AR] Vol IX, Tab 35, ¶ 19-23, 32-45; Affidavit of M. Beall, AR Vol X, Tab 40, ¶ 15-21.
[8] *Harper*, *supra*, ¶ 13.
[9] *Keegstra*, *supra*, at 763-64.

and requiring them to reach a much larger number of constituents in a more abbreviated timeline.[10] Beyond the impact on individual candidates, the evidence was also aimed at establishing the disparate effects of Bill 5 on distinct communities of interest, such as racialized communities, women, and LGBTQ candidates and electors who had conducted strategic planning and coordination, relying explicitly and profoundly upon the geographic boundaries reflected in the 47-ward structure, in order to ensure allied candidates were not running against each other, and that financial and community resources were allocated in a coordinated fashion. This evidence serves to demonstrate the extent to which altering the rules of an election mid-campaign had a heightened impact on the ability of disadvantaged and marginalized groups to collectively organize, engage in core political electoral expression, and to pursue their goal of equal representation in democratic institutions.

B. Revisiting the *Baier* positive right/underinclusiveness approach to s. 2(b)

7. In *Baier*, a s. 2(b) claim by schoolteachers challenging Alberta legislation which excluded them from running for election as school trustees, this Court extended the *Dunmore* s. 2(d) underinclusive analysis to freedom of expression claims of exclusion from an expressive forum or platform, despite the well-established *Irwin Toy* approach to s. 2(b) claims, and the fact that *Irwin Toy* had been applied to previous underinclusive s. 2(b) claims such as those in *Haig* and *NWAC*.

8. In this respect, prior to *Baier*, this Court had no difficulty applying the *Irwin Toy* framework to claims of legislative or governmental underinclusion, including in *NWAC*, *Haig* and *Siemens*. For example, in *NWAC*, this Court held that the question of participation in a government consultation process involved expressive activity within the scope of s. 2(b), but that that neither the purpose nor the effect of the government's consultation with four male-led Aboriginal organizations instead of NWAC stifled expression. Instead, the state action was held to have "facilitated and enhanced the expression of Aboriginal groups."[11]

---

[10] For a general description of the impact on candidates see ONCA Reasons, AR Vol 1, Tab 4, ¶ 128. See also Affidavit of I. Aderonmu, AR, Vol IX, Tab 34, ¶ 10-14; Affidavit of M. Siemiatycki, AR Vol X, Tab 36, ¶ 31-35; Affidavit of C. Padovani, AR Vol XI, Tab 42, ¶ 14-23.

[11] *Native Women's Assn v. Canada*, [1994] 3 SCR 627, ¶ 47. It should also be noted that, unlike the non-binding referendum at issue in *Haig*, or the plebiscite in *Siemens*, municipal elections serve

9. While the *Baier* analysis was ostensibly adopted to deal with a situation where there is a claim of exclusion, in particular where the claimant is seeking access to a particular statutory regime or platform from which she has been excluded, these cases can and should be decided under the longstanding *Irwin Toy* analysis and, respectfully, this Court should re-consider the use of the *Baier* test for such s. 2(b) claims.

10. In the CCLA's submission, there is a danger in applying the *Baier* approach to s. 2(b) claims. This is because the distinction between a positive and negative s. 2(b) claim can be manipulable and artificial, elevating form over substance and dependent on casting the claim at different levels of generality or specificity in order to attract a different test. Many s. 2(b) claims can be characterized or recast as seeking access to a platform or forum, and therefore framed as requiring a "positive right" claim analysis under *Baier*. Indeed, the manipulability of the *Baier* test when applied to s. 2(b) claims was reflected in Justice LeBel's concurrence in *Baier* where he noted that there is a "delicate distinction" between positive and negative rights."[12]

11. As this Court recognized and cautioned in *Greater Vancouver Transportation*, applying the *Baier* test risks transforming many freedom of expression cases into positive rights claims, and inappropriately imposing a significantly higher threshold for establishing a s. 2(b) infringement.[13] In considering Rothstein J.'s statement in *Baier* that, "[t]o determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity,"[14] this Court recognized this risk in the following terms:

> Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park

---

a far more significant and meaningful purpose than simply gathering public opinion, determining representation for electors with binding results and impacts on local governance (including the representation of marginalized communities) for at least 4 years.

[12] *Baier v. Alberta*, [2007] 2 SCR 673, ¶ 76.
[13] Appellant's Factum, ¶ 40.
[14] *Baier*, *supra*, ¶ 35.

> should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.[15]

12. Indeed, in the CCLA's submission, even the seminal *Irwin Toy* case could be recast as a positive right claim for access to the government regulated platform of commercial advertising. Other examples that come readily to mind include claims for access to telecommunications or internet platforms which are regulated or operated by the state. Indeed, it is difficult to conceive of how an election can take place without extensive government regulation, resources and support. However, to extend the higher *Baier* threshold where government can be characterized as being involved in establishing, regulating or supporting a platform would supplant the application of the more robust and appropriate *Irwin Toy* analysis.

13. As it turns out, this Court has not applied the *Baier* test since *Greater Vancouver Transportation*, and has explicitly refused to apply *Baier* in s. 2(b) and s. 2(d) cases, even those involving classic claims of underinclusion. For example, in *Ontario v. Criminal Lawyers' Association*, which post-dates both *Dunmore* and *Baier*, and which involved a claim that s. 2(b) placed a positive obligation on government to provide access to certain information and records, this Court expressly declined to apply the *Baier* analysis, and instead proceeded on the basis of the *Irwin Toy* approach and methodology.[16]

14. In addition, while the *Baier* s. 2(b) analysis was rooted in this Court's earlier decision in *Dunmore*[17] (a s. 2(d) challenge to underinclusive labour legislation excluding agricultural workers from collective bargaining), it is also notable that more recently, in the *Mounted Police Association of Ontario* decision, this Court did not apply the positive right *Dunmore* test to the very same claim

---

[15] *Greater Vancouver Transp. Auth. v. Canadian Federation of Students*, [2009] 2 SCR 295, ¶ 34.
[16] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, ¶ 31-32. In this case, the courts below were divided on applying the *Dunmore/Baier* framework. The Supreme Court held, "In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd*…" (¶ 31).
[17] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016.

that the exclusion of RCMP members from collective bargaining legislation infringed s. 2(d) of the *Charter*.[18]

15. Finally, while the concepts of gags, megaphones and platforms may provide seductive metaphors, these can amount to conclusory categories which tend to obscure rather than assist in assessing the impact of Government action on speech. Distinguishing between claims of positive and negative rights in the area of expressive activity, as is the case with many other rights and freedoms, is notoriously difficult. By taking affirmative steps to assist some and not others, or by deliberately deciding not to act, government may just as effectively interfere with expression as when it takes action which directly restricts speech. In order to give effect to the text and purpose of s. 2(b), what is critical is that courts examine and assess, in a pragmatic and contextual manner, the effect of the government's actions, having regard to the purposes which the s. 2(b) guarantee serves.

C. The *Baier* Analysis does not apply to this case

16. Alternatively, to the extent the *Baier* analysis continues to apply in some cases, this Court should be cautious about extending a test developed to respond to claims of platform exclusion to circumstances where, as in the case at bar, there is, in substance, no such claim. While the majority in the Court of Appeal equated the Toronto municipal election with the school board election platform at issue in *Baier*, the claim in *Baier* was manifestly one of underinclusion, i.e., the exclusion from eligibility for public office of a discrete group of candidates based on their occupation in the school system. By contrast, there is simply no claim in this case that Bill 5 was somehow underinclusive or involved legislative exclusion from a platform. This appeal concerns legislative restrictions imposed in the middle of an election, altering pre-existing election boundaries and rules that applied to and were relied upon by all participants in the political process (candidates and electors alike).

17. Thus, even if the *Baier* analysis is not revisited by this Court, CCLA cautions against applying the *Baier* approach to a s. 2(b) claim which does not involve a challenge to legislation as

---

[18] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3.

underinclusive, as was the case in *Dunmore* and *Baier*. At most, the "positive right" framework set out in *Baier* should only apply where a class of claimants is excluded from a specific government-created platform of expression, as teachers were in Alberta school trustee elections. However, the "positive right" framework should not apply where the claim is that state interference – in this case at the eleventh hour of a planned and ongoing election campaign – has upended the rules and framework of the election in a fundamental and unprecedented manner, with a profound impact on expressive electoral activity.

18. Indeed, as this Court's decision in *Libman* establishes, where a democratic platform is provided (in that case a referendum), expressive activity in connection with that platform is protected against legislative interference under the traditional *Irwin Toy* analysis.[19] As a result, in the case at bar, the s. 2(b) freedom of expression challenge to Bill 5 is not properly analyzed or understood as a claim that Bill 5 is somehow underinclusive (i.e. as a case in which the applicants seek to impose a constitutional obligation on government to provide a platform or otherwise act to support or enable expressive activity). Rather, the claim is the polar opposite: that Bill 5 has directly interfered with the expressive freedom of both candidates and voters during an election, all of whom were otherwise free to participate in expressive electoral activity and who had been doing so until the state interfered and upended a fair and free election.

19. Furthermore, simply because s. 3 of the *Charter* may not apply to a municipal election does not mean that the municipal election process is, for the purposes of s. 2(b) protections, a platform created by provincial government which can be restricted as much as the provincial government chooses, whenever the provincial government chooses, on whatever terms the provincial government chooses. Rather, the provincial government is constrained by s. 2(b) against enacting legislation which interferes with the expressive activity that is inherent in the right of candidates and electors to engage in electoral activities under rules and boundaries established in advance of and at the outset of an election campaign and based on any such pre-established electoral rules set by the municipality or by the province. Where those rules and boundaries are altered for all candidates and electors in the midst of an election campaign, there is simply no issue of

[19] *Libman*, *supra*, ¶ 28-37.

underinclusion or exclusion of some but not others from an expressive forum. Rather, the constitutional issue is whether the provincial government's mid-election legislation has, in purpose or effect, interfered with the ability of municipal candidates and electors to meaningfully or effectively engage in constitutionally protected expressive freedom.

D. CCLA's Proposed Approach to the Resolution of this Appeal

20. In assessing whether in purpose or effect, Ontario interfered with the freedom of expression of municipal candidates and electors, the CCLA submits this Court's determination should include consideration of the following factors:

a) an election must be viewed as taking place over a space and time continuum in which potential candidates decide whether to run, based in large measure on the geographical boundaries of wards which determine the key election issues in the ward, and strategizing and honing messaging aimed at the specific voters within those ward boundaries.[20]

b) given that elections exist on a continuum, and inherently involve the exercise of expressive activities, abolishing constituencies and changing the boundaries of wards and other rules in the middle of an election has the impact of interfering in a non-trivial way with the prior expressive activity of candidates and electors. The manifest unfairness of mid-election boundary and rules changes should properly be seen at one and the same time as giving rise to interference with the constitutionally protected expressive activity of candidates and electors. This is because the expressive activity that permeates and lies at the essence of an election campaign of necessity requires clear, stable and consistent rules and boundaries known at the outset of the election, so that voters and candidates alike can know the rules and engage in their election-related expressive activities - including campaigning and messaging and advertising and canvassing - in relation to the electorate in those fixed boundaries.

---

[20] In the case at bar, there was evidence from both candidates and organizations about the strategic choices they made about whether and where to run based on ward boundaries, and how to craft their messaging and spend their financial resources based on those boundaries. See for example ONCA Reasons, AR Vol I, Tab 4, ¶ 128; Affidavit of C. Moise, Vol IX, Tab 33, ¶ 12-17.

c) in analyzing the impact of government action or inaction, it is critical to include a focus on the impact on disadvantaged groups, particularly since the underlying purposes of freedom of expression include a right of equal participation in social and political decision-making and encouraging diversity in individual self-fulfillment and human flourishing.[21]

d) diminishing effectiveness or meaningfulness of expressive activity is relevant to the s. 2(b) analysis (contrary to the view taken by the majority of the Court of Appeal). In *Harper* and *Libman*, this Court recognized that when individuals are participating in election activity, it is precisely because restrictions on financing reduce the effectiveness of their messaging that s. 2(b) is infringed.[22] Indeed in *Harper*, those judges concurring in finding a s. 2(b) infringement considered legislation limiting third party election expenditures to breach s. 2(b) precisely because these limits made messages less meaningful or effective.[23]

e) contrary to the Respondent's submission at para. 104 of its factum, whether or not the provincial government could upend the results of a municipal election and/or abolish municipal government altogether raises very different constitutional and s. 2(b) considerations than the question before this court, namely whether, assuming that a provincial government is going to respect the results of a municipal election, its alteration of the electoral boundaries and election rules in the midst of an election has had the effect of interfering with constitutionally protected expressive activity.

PART III - COSTS AND ORDER SOUGHT

21. The CCLA does not seek costs and asks that no costs be ordered against it, and requests that it be granted leave to make oral argument at the hearing of the appeal.

---

[21] As the record in this case amply demonstrates, the mid-election re-drawing of ward boundaries was all the more onerous for historically disadvantaged groups, including candidates and groups representing women, racialized people and LGBTQ groups, who were already facing limited financial and campaign resources prior to the province's intrusion. See also, *Irwin Toy*, *supra*, 971, *Libman*, *supra*, ¶ 47, 61.

[22] *Libman*, *supra*, ¶ 28 to 37

[23] *Harper*, *supra*, ¶ 1, 2, 9, 15-20, per McLachlin C.J. and Major J. (concurring on s. 2(b) and dissenting on s. 1).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 28, 2021

Steven M. Barrett
Geetha Philipupillai
Counsel for the Intervener, CCCLA

PART IV - TABLE OF AUTHORITIES

Case Law	**Paragraph Reference**
Baier v. Alberta, [2007] 2 SCR 673	10, 11, 13
Dunmore v. Ontario (Attorney General), [2001] 3 SCR 1016	13, 14
Greater Vancouver Transportation Authority v. Canadian Federation of Students, [2009] 2 SCR 295	11, 13
Haig v. Canada, [1993] 2 SCR 995	1, 7, 8
Harper v. Canada (Attorney General), [2004] 1 SCR 827	4, 6, 20
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927	5, 13, 20
Libman v. Quebec (AG), [1997] 3 SCR 569	4, 18, 20
Mounted Police Association of Ontario v. Canada (Attorney General), [2015] 1 SCR 3	14
Native Women's Assn v. Canada, [1994] 3 SCR 627	7, 8
Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR 815	13
R. v. Keegstra, [1990] 3 SCR 697	4, 6
Re Alberta Statutes, [1938] SCR 100	4
Switzman v. Ebling, [1957] SCR 285	4
Thomson Newspapers Co. v. Canada (A.G.), [1998] 1 SCR 877	4

Legislation	
N/A	N/A