S.C.C. 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

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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PART I – OVERVIEW AND STATEMENT OF FACTS

1. *Charter* decisions cannot be made in a factual vacuum.[1] The facts in this case are that a Premier has proclaimed absolute legislative supremacy.[2] Although the facts in this case have a political dimension, they are ultimately legal in nature demonstrating a breach of s. 2(b) of the *Charter*. The Court is required to constrain inappropriate legislative prerogative, and these issues are therefore properly justiciable.[3]

2. Any unwritten constitutional principles, including the rule of law and independence of the judiciary, can assist in the interpretation of constitutional text to reach this conclusion, and demonstrate that the *Better Local Government Act,* 2018, S.O. 2018, c. 11 ("Bill 5"), undermined these principles, specifically in a manner that harmed low-income and historically marginalized populations.

3. Low-income and historically marginalized populations have a greater reliance on municipal services than the general population, and also have a greater stake in the public education system as a key mechanism to move out of poverty and more actively engage in society. Conversely, they have less ability to engage in the political process, and are disproportionately impacted by changes in that process mid-way, as they may not be fully informed or aware of these changes, or how they may impact the services and education received by them or their families.

4. The Respondents did not even attempt to make a s. 1 justification on first instance, instead relying on the division of powers under ss. 91-92 of *The Constitution Act, 1982,* Schedule B to the Canada Act 1982 (UK), 1982, c 11. They responded to any *Charter* considerations by relying on the notwithstanding clause under s. 33, also indicating an intention to invoke this clause for any

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[1] *Mackay v. Manitoba*, [1989] 2 SCR 357 at 361-362; *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 762, 767-768.

[2] Legislative Assembly of Ontario, "Official Report of Debates (Hansard)," No. 23A-B, 1st Session, 42nd Parliament, Sept. 17, 2018, available at: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2018/2018-11/17-SEP-2018_L023A.pdf> and <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2018/2018-09/17-SEP-2018_L023B.pdf>.

[3] *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at 459, 471-472; *Dixon v. British Columbia (Attorney General)*, 1989 CanLII 248 (BC SC) at 48-53.

future legislation that violates the *Charter*. When combined with the personal interest in the impugned legislation, this approach towards legislating undermines the rule of law, diminishes public confidence in the judiciary, and is detrimental towards the goals of a free and democratic society.

5. The Durham Community Legal Clinic ("DCLC") provides free legal assistance to low-income and historically marginalized populations, including law reform and advocacy, and does so in a manner that is independent from the government it receives funding from. These submissions propose that the contextual analysis of actions of the Respondent suggest a violation of the *Charter*, and one which requires judicial intervention, especially if needed to restore intergovernmental harmony and constitutional pluralism.

6. Absent from the analysis of this case by the Ontario Court of Appeal are the facts that the Premier was a former councillor on the city council he attempted to transform through Bill 5. His brother was the mayor of this same council, the late Rob Ford. These changes were at least in part motivated by personal enmity and animus to this municipal body, and the experiences of these 47 councillors opposing him and his brother in many of their initiatives, including stripping the mayor of his powers entirely in 2013. The mayor and his brother's response to this was a "declaration of war."[4] The Respondent's reference to "dysfunction" can only be properly understood in this context, and this is the true rational connection claimed by the Respondent.

7. There was nothing pressing and substantial requiring Bill 5 to apply to the ongoing 2018 elections, as opposed to enacting legislative change that would apply to the subsequent municipal and school board elections in 2022. The unfortunate outcome was that the most vulnerable members of our society were further disenfranchised from the political process as a result of the unnecessarily sudden and confusing change mid-election. The active interference in an ongoing

[4] Rachel Mendleson, Peter Edwards, "Rob Ford stripped of power as mayor by Toronto council," Toronto Star, Nov. 18, 2013, available at: <https://www.thestar.com/news/city_hall/2013/11/18/rob_ford_stripped_of_power_as_mayor_by_toronto_council.html>.

election creates an unprecedented and unparalleled action before this Court, and distinguishes this case from a positive rights claim, as the expression interests involved were already under way.

PART II – QUESTIONS IN ISSUE

8. Does the Impugned Legislation render the right to freedom of expression as guaranteed by s. 2(b) meaningless in the 2018 municipal and school board elections, disproportionately impacting low-income and marginalized populations?

9. Can the unwritten constitutional principles of democracy or rule of law assist in striking down the Impugned Provisions?

PART III – STATEMENT OF ARGUMENT

ISSUE 1: Does the Impugned Legislation render the right to freedom of expression as guaranteed by s. 2(b) meaningless in the 2018 municipal and school board elections, disproportionately impacting low-income and marginalized populations?

10. The threshold for expression under s. 2(b) is necessarily a low one, as many forms of verbal and non-verbal means of communication fall under the ambit of this *Charter* protection.[5] The analysis for a s. 2(b) breach therefore largely falls under the justification of the government for infringing on this fundamental freedom.

11. At the core of the values under s. 2(b) is political expression.[6] Therefore, all forms of communication around the 2018 municipal and school board election, including signs, ads, brochures, and conversations between candidates and residents, would be encompassed under this protection, and protects speakers and listeners.[7] This is the type of expression that is most closely

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[5] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 ["*Irwin* Toy"] at 976; *Ford v. Quebec*, [1988] 2 SCR 712 at 765-766; *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 SCR. 877 ["*Thomson Newspapers*"].

[6] *R. v. Keegstra*, [1990] 3 SCR 697 ["*Keegstra*"]; *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827 ["*Harper*"]; *Thomson Newspapers Co., ibid.*

[7] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 132; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; *Rocket v. Royal College of Dental Surgeons of*

protected by the *Charter*, and requires the most stringent justifications by the government for their interference.

12. Given that the purpose and the effect of Bill 5 was to effectively restrict the content of the expression in question, namely changing the discourse about a particular Ward while that expression is ongoing, and making it about a different Ward with different boundaries, inherently infringes on s. 2(b).[8] The expression related to municipal and school board representation is directly connected to the values of participation in social and political decision making, the search for truth and individual self-fulfillment.[9]

13. This appeal can be differentiated from a positive-rights claim, in that the Appellants are not seeking for the Court to affirm a right to provide a particular form of expression, but rather that when certain forms of political expression are already underway, as in ongoing municipal and school board elections, that the government refrain from active interference. Section 2(b) prohibits gags, but does not compel distribution of megaphones.[10]

14. Because the Respondent, under a previous government, chose to create the specific form of expression for municipal elections in Toronto, with special consideration for the diverse communities and minority interests across the city, the Respondent cannot interfere in this expression in a manner that violates the *Charter*, including the equality provisions in section 15.[11]

15. Given the broad scope of s. 2(b), and in particular where it implicates s. 15 interests, any attempt to restrict this expression must be subjected to the most careful scrutiny under s. 1.[12] Limits on political speech, even if that political speech is not connected to elections protected under s. 3,

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Ontario, [1990] 2 SCR. 232; *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 SCR 713 .

[8] *Irwin Toy*, *supra* note 5 at para 42; *Keegstra*, *supra* note 6 at para 33.

[9] *Irwin Toy*, *ibid* at paras 44; *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084 at paras 34-35

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

[11] *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *Siemens v. Manitoba (Attorney General)*, [2003] 1 SCR 6 at paras 41-43; *NWAC v. Canada*, [1994] 3 SCR 627

[12] *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 SCR 45 at para 22.

will be the most difficult to justify.[13] The exclusion of municipal political expression from s. 3 makes its protection under s. 2(b) that much more important.

16. Having concluded that Bill 5 infringed s. 2(b) of the *Charter*, MacPherson J. agreed with the application judge that the Impugned Provisions were not saved by s.1 of the *Charter.*[14] He recognized that the Respondents "*blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates"* by cutting the city's existing wards in half midway through an active election.[15] Chris Moise, was one such candidate whose hopes and aspirations were crushed, as he has attested to in his Affidavit in these proceedings.[16] Many other candidates, whose information is not before the Court, were also affected, especially candidates from low-income and historically marginalized populations.

17. The nature of political expression is weighed with the governmental objective,[17] which in this case was purported to be economic savings. However, these savings never materialized, and the Respondent was aware that they were unlikely to materialize.[18] The Respondent was aware that individual councillors that were part of a smaller council would still require greater resources to do their job, especially for support staff.[19] Reducing councillors in this way therefore reduces

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[13] *Thomson Newspapers Co*., *supra* note 5 at paras 91; *Harper*, *supra* note 6 at paras 11-13
[14] *Toronto (City) v. Ontario (Attorney General)* 2019 ONCA 732 ["*Toronto v. Ontario*"]; Short Record of the Respondent (Volume I), AR, Exhibit Q AR, Tab 4.
[15] *Toronto v. Ontario*, *ibid* at para 136; AR, Vol.1, Tab 4
[16] Short Record of the Respondent (Volume I), AR, Tab 16, at paras 22-30.
[17] *Thomson Newspapers Co., supra* note 5at para 91; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 SCR 610 at paras 131-132; *R. v. Lucas*, [1998] 1 SCR 439 at paras 116, 121; *Sharpe*, *supra* note 12 at para 181; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 at paras 147-148; *R. v. Butler*, [1992] 1 SCR 452 at 150.
[18] *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (ON LPAT); City of Toronto, "Draw the Line: Toronto Ward Boundary Review project Work Plan, Civic Engagement and Public Consultation Strategy," Short Record of the Respondent (Volume I), AR, Tab 10; Jean-Phillipe Meloche, Patrick Kilfoil, "A sizeable effect? Municipal council size and the cost of local government in Canada," Canadian Public Administration, Vol 60, No 2, pg 241, 2017.
[19] Ben Eisen, Josef Filipowicz, "Will shrinking city council actually save Torontonians money?," Fraser Institute, 2018, available at: <https://www.fraserinstitute.org/article/will-shrinking-city-council-actually-save-torontonians-money>.

effective representation, without any of the cost savings, undermining any rational connection to the supposed goals and undermining the linchpin of the s. 2(b) guarantee.[20]

18. The Respondent failed to undertake any exercise or consideration of effective representation, or communities of interest and minority representation, though they were aware these were important considerations in the existing system.[21] This exercise of power therefore violated the *Charter*, in a manner that only considered and protected majoritarian interests.[22] Many of these minority communities were affiliated with the political adversaries of the Premier, underpinning the true motivation for this hasty and expedited change, during an ongoing election.

19. These changes have a direct impact on the voices and the policies created in the City of Toronto, which is *sui generis* among the municipalities in Canada. Its demographic composition is unique, and the legislation governing its elections were developed to reflect these differences, including issues of poverty and services connected to poverty. Racialized and historically marginalized populations bear a bigger part of the burden of the growing income inequality in Ontario.[23] This disparity is creating an increasing divide between Canadians who fear the system is failing them, and those who are more trusting of the traditional institutions and more optimistic about the future, for themselves and their families.[24] The role of education in moving people out

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[20] *Keegstra*, *supra* note 6 at 763-64; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815 at paras 35-37; *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732 at para 116.

[21] *Di Ciano*, *ibid*; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 SCR 158.

[22] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 96; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772 at para 28; *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3 at para 68; *Loyola High School v. Quebec (Attorney General)*, [2015] 1 SCR 613 at para 58; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293 at para 256.

[23] United Way, "Rebalancing the Opportunity Occasion", (2019), available at: <https://www.unitedwaygt.org/file/2019_OE_fullreport_FINAL.pdf>.

[24] Lisa Kimmel, "Canada's unprecedented trust gap: Who will build the bridge for a country divided?", The Globe and Mail, February 24, 2019, available at: <https://www.theglobeandmail.com/business/commentary/article-canadas-unprecedented-trust-gap-who-will-build-the-bridge-for-a/>.

of poverty,[25] and the political choices informing these services, takes a greater priority for these minority interests in society.

20. While the Province had the right to change the electoral boundaries of the City, the timing and manner in which the Province brought these changes into force undermined the confidence and faith of voters in the democratic process and further, breached the ongoing and active freedom of expression of participants and recipients in the election. The enactment of Bill 5 further undermined the confidence in the system of low-income and historically marginalized populations, by creating a chaotic and confusing situation midway through the elections. The Respondent did not even attempt to employ any proportionality in this process, and considered no alternatives under minimal impairment, as they treated the issue as a legislative prerogative entirely immune from judicial scrutiny. This is an entirely unjustifiable approach towards *Charter* breaches in a free and democratic society.

21. This Court has yet to scrutinize the assumptions around the marketplace of ideas employed in s. 2(b) analyses, in particular the differential or limited access that low-income or historically marginalized populations have in this exchange.[26] This case provides the ideal circumstances to do so, and will enrich the discourse of s. 2(b) in future *Charter* jurisprudence.

ISSUE 2: Can the unwritten constitutional principles of democracy or rule of law assist in striking down the Impugned Provisions?

22. The Respondent and various interveners propose that unwritten constitutional principles, on their own, cannot strike down legislation. DCLC takes no position on this issue, and instead adopts a position shared by all parties before the Court and the majority at the ONCA, that

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[25] Bryan May, "Breaking the Cycle: A Study on Poverty Reduction," Report of the Standing Committee on
Human Resources, Skills and Social Development and the Status of Persons with Disabilities, May 2017, 42nd Parliament, 1st Session, at 27-47, available at: <https://www.ourcommons.ca/Content/Committee/421/HUMA/Reports/RP8982185/humarp07/humarp07-e.pdf>.

[26] *Ontario Public Service Employees Union v. National Citizens' Coalition Inc. (C.A.)*, 1990 CanLII 6959 (ON CA).

established unwritten principles can support or bolster existing violations of the constitution.[27] DCLC advances this position specifically in regards to s. 2(b) of the *Charter*, which is also part of the constitution, and with established unwritten constitutional principles such as the rule of law and judicial independence.[28]

23. Provincial legislatures are at the core of our system of representative government, but the notion of absolute legislative supremacy is repugnant to the notion of the rule of law in a free and democratic society. All democratic institutions must still require compromise, negotiation, and deliberation, rather than reliance on majority rule alone, without any consideration of constitutional values.[29] There is no such thing as absolute and untrammelled exercise of executive power in Canada. No law can provide unlimited and arbitrary power for any purpose, as administrative discretion still requires good faith in discharging a public duty.[30]

24. The Respondent's approach to Bill 5, which explicitly expressed disregard for any constitutional values, and was disinterested and hostile towards dissenting voices, undermines the legitimacy of representative government, and the rule of law. These unwritten constitutional principles bolster and assist in finding a violation of s. 2(b) of the *Charter*, which cannot be saved by s. 1.

25. Although the use or threatened use of the notwithstanding clause is obviously not itself unconstitutional, this approach towards s. 2(b) *Charter* rights is relevant for assessing the justification provided by the Respondent under s. 1. The first instance of this clause being used in Ontario since the advent of the *Charter* would presumably be accompanied by facts that are inherently pressing and substantial in nature. More directly, the justification for Bill 5 would necessarily have to demonstrate a need to interfere with an active and ongoing election, rather than

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[27] Factum of the Intervener, Canadian Constitution Foundation, at paras 22-24.
[28] *Reference re Secession of Quebec*, [1998] 2 SCR 217 ["*Que Ref*"]; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 ["*Remuneration Ref*"].
[29] *Que Ref*, *ibid* at paras 65-68
[30] *Roncarelli v. Duplessis*, [1959] SCR 121 at 140.

statutory modifications following the election for the subsequent municipal and school board elections.

26. The manner in which the Respondent invoked this notwithstanding clause, by declaring that it would be used for any future legislation on any other issue found unconstitutional, and expressly referring to its use during legal proceedings, also undermines judicial independence, or at least the perception of judicial independence by members of the public. This approach towards implementing Bill 5 is relevant for any purported rational connection, and attempts to justifying the s. 2(b) breach under s. 1.

27. In the *Quebec Secession Reference*, this Court explained that "democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation".[31] This is no less true of municipal councils, the members of which have been elected democratically by their residents and who enact by-laws that bind those residents.

28. The lack of constitutional status for municipalities and school boards is not determinative as to whether the rule of law applies to their ongoing elections. The creation of a statutory representative government selected by a democratic election is sufficient to apply these democratic principles. Municipal councils are a third level of government in Canada, who provide government services to their residents, have the legislative power to enact laws that affect the general population, and can enforce laws by fine, or, in some cases, even imprisonment.[32] Municipal residents bring their grievances to their councillors' attention. Most importantly, COTA explicitly provides that City Council is a democratically elected government which is responsible and accountable.[33] The process of modifying its democratic elections should therefore still be governed by the rule of law.

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[31] *Que Ref*, *supra* note 28 at para 67.
[32] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40. See also, for example, Toronto Municipal Code, Chapter 545, Licensing, s 545-8.5(D).
[33] *City of Toronto Act, 2006*, SO 2006, c 11, Sch A , s 1(1).

29. Marginalized segments of the population are disproportionately impacted by decisions that change the number of representatives, and it impacts their views of the importance and legitimacy of municipal government and school boards. These perspectives directly impact if they seek public service roles in these positions, or interact with representatives and systems that provides these services. Interfering in the rule of law, and doing so in a manner that undermines the judiciary, eliminates these voices from democratic discourse, and disenfranchises these individuals and communities from society at large.

30. Unwritten constitutional principles have important normative effects, and can be used to interpret written constitutional principles, including the *Charter*, including interpreting parliamentary democracy, democratic governance, and political expression, and the central place of the courts within the Canadian system of government.[34] They can be used in this case to help conclude a breach of s. 2(b), which cannot be saved by s. 1, as in this case.

PART IV – STATEMENT ON COSTS

31. DCLC requests that no costs be awarded either for or against it given the public interest nature of this case.

PART V – ORDER SOUGHT

32. DCLC makes no submissions in respect to the order to be granted in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 1st day of February, 2021.

Counsel for the Intervener

[34] *Remuneration Ref*, *supra* note 28, at paras 95, 101-102, 108.

PART VI – TABLE OF AUTHORITIES

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