SCC Court File No.: 38921

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

B E T W E E N:

CITY OF TORONTO

APPELLANT
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO

RESPONDENT
(Appellant)

- and -

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The CityPlace Residents' Association (CPRA) intervenes in this appeal in order to highlight the role of the voting public in the municipal democratic process. It is, after all, the will of the voters that is the animating force of democracy and the source of the law's legitimacy.[1]

2. The CPRA agrees with the submissions of the Appellant City of Toronto ("the City"). As the City rightly argues, democracy and free democratic expression must be constitutionally protected in the municipal electoral process.[2] Most fundamentally, the CPRA agrees that freedom of expression in the electoral context exists within what the City calls "a complex ecosystem of expression dependent on the very stability of the electoral framework" – an ecosystem thrown into chaos by Bill 5.[3]

3. The CPRA invites this Court to embrace a framework for electoral expression and municipal democracy that recognizes voters' pivotal role throughout the electoral process. Central to this framework is recognition of the expressive value of voters' information-gathering and the democratic significance of processes like the Toronto Ward Boundary Review ("the Review").[4]

Statement of Facts

4. The CPRA substantially accepts the City's submissions regarding the facts of the case, but would like to highlight facts regarding the involvement of city residents and residents' associations in the lead-up to the 2018 municipal election.

5. Torontonians' role in the 2018 municipal election did not begin on election day. To the contrary, the Toronto public was engaged at least as far back as 2014, when residents and residents' associations like the CPRA became aware of the Toronto Ward Boundary Review.[5] The Review involved extensive public consultations including 24 public hearings and many meetings with stakeholder groups including residents' associations.[6]

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[1] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 31.
[2] Appellant's Factum at paras. 7-8.
[3] Appellant's Factum at para. 53.
[4] See "Toronto Ward Boundary Review – Final Report", being Exhibit 3 to the Affidavit of Jennifer Hollett (Aug 21, 2028), Record of the Appellant, City of Toronto [AR], Vol XII, Tab 46.
[5] Affidavit of Susan Dexter (Aug 21, 2018) [Dexter Aff], AR Vol XIII, Tab 48 at para. 7.
[6] Affidavit of Gary Davidson (Aug 27, 2018), AR Vol IX, Tab 31, paras. 9-10. Dexter Aff, AR Vol XIII, Tab 48 at paras. 12-14.

6. Residents and residents' associations played an active and central role in the Review process. They attended meetings, discussed proposals and raised concerns.[7] They reviewed the extensive written materials put out by the Review, completed questionnaires and made written submissions to the Executive Committee of City Council. Residents' associations corresponded with residents, councillors, and one another to discuss the review process and advocate for community involvement. The residents' associations' involvement became instrumental in the Review, which responded to concerns by changing the proposed boundaries.[8]

7. When the nomination period opened on May 1, 2018 and the campaigns launched in earnest, City residents began the process of choosing their representatives at City Council. They read brochures, listened to ads, promoted causes, spoke to candidates over the phone and in person, put signs on their lawns, donated money and volunteered for campaigns.[9]

8. Then came Bill 5. Suddenly, the election process that had been underway for months screeched to a halt and restarted under a cloud of confusion. The 47-Ward boundary structure, carefully designed through years of planning and community consultation, was out the window. As campaigns were upended, the voters had to go back to square one in choosing a candidate, now facing an entirely new set of options in much larger wards, with many previous candidates dropping out and many now running for their vote who had not been before. [10] All discussion of the election in media, community meetings, and in the community at large had to begin again practically from scratch with just two short, chaotic months until election day.[11] In the end, Torontonians found themselves lumped into much larger, more populous wards with overburdened councillors and diminished confidence in the municipal democratic process.

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[7] Affidavit of Geoffrey Kettel (Aug 21, 2018), AR Vol XV, Tab 49, paras. 1-18.
[8] Dexter Aff, AR Vol XIII, Tab 48 at paras. 12-14.
[9] Reasons for Decision of Belobaba J, 2018 ONSC 5151 (Sept 10, 2018) [Reasons of Belobaba J], AR Vol I, Tab 2 at paras. 29-31. Reasons for Decision of the Court of Appeal, 2019 ONCA 732 (Sept 19, 2019) [ONCA Reasons], AR Vol I, Tab 4 at paras. 111, 122 (per Macpherson JA). Transcript of Cross-examination of Lily Cheng on her Affidavit affirmed Aug 21, 2018 (Feb 13, 2019), AR Vol XXXIII, Tab 71, p. 67, q. 345. Affidavit of Ish Aderonmu (Aug 20, 2018), AR Vol IX, Tab 34, para. 7. Affidavit of Moya Beall (Aug 21, 2018), AR Vol X, Tab 40, para. 12.
[10] Appellant's Factum at paras. 30-31. Reasons of Belobaba J, AR Vol I, Tab 2 at paras. 30-31.
[11] Appellant's Factum at paras. 30-31; Dexter Aff, AR, Vol XIII, Tab 48 at paras. 17-20.

PART II – QUESTIONS IN ISSUE

9. The CPRA`s position on the questions raised by the City are as follows:

ISSUE 1: Bill 5 infringed Torontonians' s. 2(b) rights throughout the electoral process.

ISSUE 2: The unwritten constitutional principle of democracy does provide a basis for invalidating Bill 5. This principle should protect the entire pre-election democratic process, including the Toronto Ward Boundary Review.

ISSUE 3: Municipal electors are entitled to effective representation, in keeping with their fundamental role in the electoral process.

ISSUE 4: Ontario's infringements of s. 2(b) cannot be justified under s. 1.

PART III – ARGUMENT

ISSUE 1: Bill 5 infringed Toronto electors' *Charter* section 2(b) rights at every stage of the electoral process

10. The CPRA accepts the City's general framing of the claim on appeal. As the City argues, while this is a negative rights claim, it nonetheless involves a kind of expressive activity that is inherently interrelated and dependent on an established electoral framework.[12] "Electoral expression" is distinctive in that individual expressive acts are never fully independent of one another, but must always be viewed as components of the electoral discourse as a whole.[13] When that discourse is substantially disrupted, the acts themselves lose their meaning and freedom of expression is constrained. Such was the effect of Bill 5.[14]

11. While the City is correct that Bill 5 violated Torontonians' freedom of expression by interfering with the process mid-election, the CPRA submits that Bill 5's infringement of voters' rights was even more pronounced than the City's submissions indicate. Voters, like candidates, engaged in expressive activity throughout the lead-up to the election. They promoted candidates, asked questions, and engaged in conversation, all as part of a larger discourse whose purpose was to select the next City Council.[15] All of this was disrupted when Bill 5 threw the "ecosystem" of electoral expression out of wack.[16]

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[12] Appellant's Factum at paras. 49, 53-55.
[13] Appellant's Factum at para. 54.
[14] Reasons of Belobaba J, AR Vol I, Tab 2 at paras. 27-38.
[15] ONCA Reasons, AR Vol I, Tab 4 at para. 122 (per Macpherson JA).
[16] Appellant's Factum at para. 53.

12. In particular, the CPRA submits that Bill 5's violation of voters' rights goes beyond what the City indicates in two crucial respects: first, by undermining the voters' ability to engage with candidates as *listeners* as well as speakers; and second, by interfering retroactively with the Toronto Ward Boundary Review, which was itself a forum for electoral expression. All of these infringements should factor into this Court's analysis of Bill 5's constitutionality.

a) Section 2(b) Protects "Electoral Listening" by the Voting Public

13. The CPRA submits that, in the electoral context, section 2(b) protects not only the *sharing* of information through assertive actions like speech and writing, but also the *gathering* of that information through listening and reading. "Electoral listening," as much as electoral speech, is a necessary and essential part of the electoral conversation, one which deserves the full protection of s. 2(b) of the *Charter*.

14. This court has already recognized that section 2(b) "protects listeners as well as speakers."[17] Section 2(b) protection for the act of listening, first acknowledged in commercial communication, was recognized in the political context by this court in *Edmonton Journal v Alberta (Attorney General)*, which dealt with a statute restricting publication of certain information from court proceedings. As the court stated in that case,

> [F]reedom of expression "protects listeners as well as speakers". That is to say, as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts…. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution.[18]

15. Protection for listeners as well as speakers is a necessary component of the freedom of expression guarantee. Without such protection, the right to speak and write freely is largely meaningless. After all, speech without a listener can hardly be said to *express* anything at all. Of course, the speaker her- or himself has no right *to be listened to*. Rather, listening is a free-standing right of the person on the other end of the conversation, be they an audience member at a play, a newspaper reader, or a city resident trying to choose what candidate to vote for. Listening itself is an expressive act under s. 2(b).

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[17] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at p. 767.
[18] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at para. 85.

16. In the electoral context particularly, the ability to listen freely is indispensable to meaningful communication. Voting, as an expressive act, is deeply dependent on the voter's ability to gather and consider information before hand, which in turn requires the voter to participate, as listener, in an electoral conversation that unfolds within an established legal framework.[19] As Justice MacPherson stated, quoting the David Asper Centre for Constitutional Rights, "In the election context, freedom of expression is not a soliloquy. It is not simply the right of candidates and the electorate to express views and cast ballots."[20]

17. To participate in a free democratic conversation, members of the public need, not only the ability to speak and vote freely, but also the right to gather information. Protection for listeners is therefore central to s. 2(b)'s purposes in facilitating the pursuit of truth and enabling participation in democratic decision making.[21] As this Court has stated, "The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public…"[22]

18. An analogy may be drawn in this respect between the role of the voting public in an election cycle and the role of newspapers: both engage in expressive acts recognized as fundamental to the s. 2(b) guarantee (voting on the one hand, press reporting on the other);[23] in both cases, that expressive act depends on the communicator's ability to gather information. In the case of the news media, this Court has recognized the need to protect information gathering under s. 2(b).[24] It should similarly be recognized that, for voters as for news publishers, (in Justice Abella's words), s. 2(b) "includes not only the right to transmit news and other information, but also the right to gather this information without 'undue governmental interference.'"[25]

19. If it is true that electoral listening is a separate, protected action under s. 2(b)'s freedom of expression guarantee, then it must be recognized that the protected expressive activities of

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[19] ONCA Reasons, AR Vol I, Tab 4 at paras. 118, 122 (per Macpherson JA). Appellant's Factum paras. 54-55.
[20] ONCA Reasons, AR Vol I, Tab 4 at para. 117.
[21] *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at p. 976. See also *R v Vice Media Canada Inc.,* 2018 SCC 53 [*Vice Media*] at para. 124 (per Abella J, concurring).
[22] *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 [*New Brunswick*] at para. 23.
[23] *New Brunswick* at para. 23.
[24] *New Brunswick* at para. 24.
[25] *Vice Media* at para. 127 (concurring).

Toronto's voting public go well beyond what has been acknowledged on this application, either at the Superior Court or Court of Appeal level. While there can be no question that voters engaged in expressive activity when they cast their ballots, their free expression did not begin there. In the months before the October 22, 2018 election, voters read campaign materials, attended debates, visited websites, and listened to candidates on television, the radio, and in person.[26] At no point in this process were the voters mere bystanders. Rather, they were actively engaged in the essential expressive act of listening at every stage.

20. All of this electoral listening occurred within, and depended upon, the established electoral framework and the ecosystem of electoral expression outlined in the City's factum.[27] The City has asked, "What would be the point of saying, 'Please vote for me as your candidate for Ward 47', when there was no longer a Ward 47?"[28] By the same logic, what would be the point of listening to the reasons one should vote in a ward that then ceases to exist? For the prospective voter, as much as the candidate, a key expressive action is rendered meaningless.

21. Recognizing Torontonians' electoral listening as expressive activity has important implications for this appeal. In effect, it means that, wherever and whenever Bill 5 undercut an expressive action by a candidate, it had an equal impact on the prospective voters being addressed, whose ability to gather information was undermined. For example, if a candidate gave a speech in front of an audience of 100 voters and that speech was subsequently rendered meaningless by Bill 5, then Ontario has violated the s. 2(b) rights, not only of the speaker, but of each of the 100 audience members. The same is true of written materials on websites, pamphlets and social media, and of campaign conversations in the street or on doorsteps

22. In other words, Bill 5's infringement of s. 2(b) was considerably more pronounced than has been recognized, even by Justice Belobaba, Justice MacPherson, or the City itself.[29] Beyond its effect on speech, voting, and effective representation, Bill 5 dropped a veritable atomic bomb on the network of free expression upon which the election cycle depended, disrupting important expressive activity by a vast number of Torontonians over a matter of months. This much more

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[26] ONCA Reasons, AR Vol I, Tab 4 at para. 111 (per Macpherson JA). Reasons of Belobaba J, AR Vol I, Tab 2 at paras. 29, 31.
[27] Appellant's Factum at paras. 53-55.
[28] Appellant's Factum at para. 61.
[29] Reasons of Belobaba J, AR Vol I, Tab 2 at paras. 40-61. ONCA Reasons, AR Vol I, Tab 4 at para. 100 (per Macpherson JA).

far-reaching and explosive violation of s. 2(b) has potentially profound implications for the s. 1 justification analysis, as will be discussed below.

b) The Ward Boundary Review was a Forum for Protected Electoral Expression

23. The CPRA submits that the Toronto Ward Boundary Review, like the campaign season itself, was also a forum for electoral expression. As such, it warranted the same kind of protection under s. 2(b) against substantial state interference with the underlying state-made framework. This protection was retroactively violated by the sudden arrival of Bill 5.

24. While it is of course true that the Review was not a part of the election proper, the CPRA submits that there is no principled reason to define electoral expression strictly within the timeframe of the official campaign season. To the contrary, a generous and purposive understanding of the s. 2(b) right in the democratic context, consistent with *Irwin Toy*, leads to the conclusion that electoral expression can occur between prospective voters and other democratic participants even before the campaigns themselves kick off.

25. Accordingly, the CPRA invites this Court to accept a flexible, pragmatic approach to electoral expression under s. 2(b) without artificial temporal constraints. Protection under such an approach will apply to all communication involving the voting public that occurs within a state-made framework toward the goal of democratic governance. Infringement occurs whenever there is substantial state interference, proactive or retroactive, with that state-made framework significantly undermining expression within the protected forum. S. 2(b) protection for such electoral expression attaches whether or not the process itself is mandated by law.

26. This broad conception of protection for electoral expression would include the Review. While the Review's purpose was not to select municipal representatives, it was nonetheless to engage the public in establishing the structure for municipal governance. There can be little doubt that this Review, in addressing the form and capacity of city governance with the goal of "effective representation", engaged a concern that is key to municipal democracy.[30] Moreover, while the Review was carried out by private third-party consultants, it was nonetheless initiated by the City and was therefore a state-made framework for democratic expressive activity.

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[30] Appellant's Factum at para. 16, citing City Council Decision (June 11-13, 2013), AR Vol VII, Tab 30, Ex J, pp 27-28, 32.

27. If it is true that the Review was a protected forum for electoral expression, analogous to the official campaign season, then it is clear that Bill 5 enacted a retroactive interference with the expressive activity that occurred in that context, infringing s. 2(b). When Ontario appropriated unilateral control over the election back to itself under Bill 5, it radically undermined the extensive consultation that had already occurred through the Review. This sudden intervention into the ongoing democratic discourse rendered the entire Review process meaningless.

28. In light of the above analysis, Bill 5 violated Torontonians' s. 2(b) rights, not just during the election campaigns, but retroactively going back to the beginning of the Review.

ISSUE 2: The constitutional principle of democracy protects the entire pre-election democratic process

29. The CPRA agrees with the City's submissions regarding the constitutional principle of democracy.[31] In addition, the CPRA submits that the Review, as much as the election proper, warrants protection under this constitutional principle. After all, as this Court stated in the *Secession Reference*, democracy "means more than simple majority rule."[32] Rather, democracy is a principle that includes "the process of representative and responsible government" in its many forms.[33] This principle includes, but is not limited to, the right to vote. In Elections Canada's words, "Democracy is much more than holding elections."[34]

30. Accordingly, the CPRA invites this Court to recognize that the democracy principle implies the right to participate in pre-election democratic processes like the Review once underway. Specifically, this requirement would be included in the right to "'meaningful participation' in the process," one of the aspects of the principle set out by the City.[35] If the Review process was protected by the principle of democracy, then it follows that Ontario's total subversion of that process after the fact constitutes yet another constitutional violation by Ontario through Bill 5, which disregarded the consultations entirely after their completion and rendered the entire process meaningless.[36]

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[31] Appellant's Factum at paras. 69-106, 113.
[32] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 149 [*Secession Reference*].
[33] *Secession Reference* at para. 65.
[34] Elections Canada, "Pillars of Electoral Democracy".
[35] Appellant's Factum at para. 103, point 'v'.
[36] Dexter Aff, AR Vol XIII, Tab 48 at paras. 7-20.

ISSUE 3: Municipal electors rights include, but are not limited to, effective representation

31. The CPRA fully accepts the City's position that effective representation is a necessary corollary to the right of freedom of expression and the principle of democracy in the electoral context.[37] The CPRA submits that the ability to vote for effective representation includes and implies voters' key role throughout the democratic process.

ISSUE 4: Ontario's infringements of Torontonians' section 2(b) rights cannot be justified under s. 1 of the *Charter*

32. The CPRA agrees with the City that Bill 5 fails at every stage of the *Oakes* analysis.[38] In addition, it is important to note the ways in which the justification analysis changes if the Court accepts the generous and purposive approach to electoral expression outlined under "Issue 1" of this factum. If protected electoral expression includes pre-electoral discourse like the Review and/or the right to engage in electoral listening during the campaign period, then Bill 5's infringement goes considerably further than the City has asserted. This deeper and more expansive rights violation impacts the *Oakes* proportionality assessment.

33. The key difference is at the "minimal impairment" and "proportionality" stages. Regarding the former, Bill 5's impact on free expression cannot possibly be called a minimal impairment, particularly in light of the approach to s. 2(b) outlined above. Bill 5 impaired the ability of every Torontonian to engage as listeners and information-gatherers with the candidates, and obliterated the Review consultations altogether. No assistance was provided to Torontonians to mitigate the impact on their search for the appropriate candidates, and no legislative alternatives appear to have been considered that would have afforded the public greater freedom to continue engaging in the electoral discourse.[39] The Province simply ran roughshod over the ongoing democratic conversation as if it warranted no special consideration whatsoever.

34. At the final "proportionality" stage, too, the more far-reaching infringement outlined above makes Bill 5 even harder to justify than the City suggests. The salutary effects of Bill 5, if any, pale in comparison to the bill's profound and expansive infringement of the s. 2(b) rights of all Torontonians. If the court accepts the CPRA's framework for electoral expression, it follows that this more radical infringement must be weighed against Bill 5 in the final balancing.

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[37] Appellant's Factum at paras. 107-121.
[38] Appellant's Factum at paras. 130-150, following *R v Oakes*, [1986] 1 SCR 103.
[39] Respondent's Factum at paras. 44-58, 140-150.

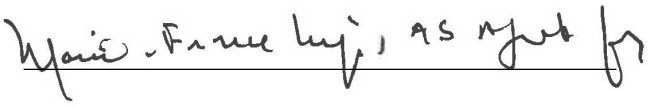
PART IV – SUBMISSIONS ON COSTS

35. The CPRA does not seek costs, as per the agreement between the parties.

PART V – SUBMISSIONS ON ORAL ARGUMENT

36. The Court has granted the CPRA permission to present oral arguments not exceeding five minutes at the hearing of this appeal.

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



PIETERS LAW OFFICE

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CityPlace Residents' Association

PART VI – TABLE OF AUTHORITIES

Cases	**Paragraph(s) in Factum where cited**
Canadian Broadcasting Corp v New Brunswick (Attorney General), [1996] 3 SCR 480	17, 18
City of Toronto et al v Ontario (Attorney General), 2018 ONSC 5151	7, 8, 10, 19, 22
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Other Authorities	**Paragraph(s) in Factum where cited**
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