S.C.C. File No.: 38921

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

BETWEEN:

CITY OF TORONTO

Appellant

- and-

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

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Section 92(8) of the *Constitution Act, 1867* grants the provinces a plenary power over municipal institutions. Municipal governments and special purpose municipal institutions are creatures of provincial governments with no constitutional status. Subject to s. 93 of the *Constitution Act, 1867*, these institutions have no independent autonomy and the province has "absolute and unfettered legal power to do with them as it wills."[1]

2. The novel constitutional theories advanced by the appellant City of Toronto ("appellant") on this appeal would, if accepted, undermine this foundational tenet of Canada's constitutional structure and encroach upon the provinces' s. 92(8) power. These invitations should be declined. The *Constitution Act, 1867* does not provide for constitutional rights in respect of a third order of government.

3. The Attorney General of British Columbia ("AGBC") intervenes to make three main submissions.

4. First, the *Baier* test serves a vital purpose by restricting positive rights claims, such as the one advanced by the appellant, to access or preserve municipal vehicles for expression. The appellant's suggestion of applying the low *Irwin Toy*[2] threshold to such claims would likely generate constitutional protection for municipal structures that is discordant with Canadian constitutional law. The broad s. 2(b) freedom should not be permitted to operate as a constitutional Trojan horse, extending constitutional scaffolding across provincial delegates that are inevitably infused, to some extent, with expressive activities.

5. Second, the appellant's argument that s. 2(b) should protect not only expression but also the electoral framework in which it takes place should be understood as an argument for a

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[1] *Baier v. Alberta*, 2007 SCC 31 ("*Baier*"), para. 38.

[2] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The court must first ask whether the activity falls within a sphere protected by freedom of expression, and if the answer is yes, it must then inquire into the purpose or effect of the government action in issue so as to determine whether freedom of expression has been restricted (pp. 967 and 971). *See, also, Canadian Broadcasting Corp. v. Canada (Attorney General),* 2011 SCC 2, paras. 33-34, 38.

"derivative" s. 2(b) right. This Court has recognized derivative rights only in rare circumstances where failure to do so would "effectively preclude" the exercise of a fundamental right or freedom.[3] This high threshold should govern in this case no matter the line of s. 2(b) jurisprudence followed.

6. Third, the appellant's plea for constitutional protection for a specific municipal structure reflects a distinctly 'structuralist' approach to democratic rights that emphasizes institutional and policy issues over individual rights. Structural rights theory fits awkwardly with the broad and negatively oriented s. 2(b) freedom and would, if adopted, risk plunging this Court into the 'political thicket' by inviting judicial intervention on a broader range of contested democratic issues than provided for under s. 3 of the *Charter*.

7. The AGBC submits that, to the extent this Court is inclined to address structural democratic concerns, it should do so within the rubric of an individual rights analysis. The AGBC further submits that such individual rights analyses should be conducted under the more tailored and positively oriented democratic rights prescribed in s. 3—rights that do not apply to municipal elections.[4]

8. The AGBC does not take a position on whether the appellant satisfies the *Baier* test or on the disposition of this appeal.

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[3] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, ("*Criminal Lawyer Association"),* para. 33; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 ("*Health Services"),* paras. 11, 20, 95. *See, also, Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59, ("*Trial Lawyers*"), para. 46 ("effectively preventing access to the courts"); *Ontario v. Fraser*, 2011 SCC 20, ("*Fraser*"), paras. 46-48 ("impossible to meaningfully exercise the right to associate due to substantial interference by a law").

[4] *Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995 ("*Haig"),* p. 1033. "The wording of the section, as is immediately apparent, is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. As Professor Peter Hogg notes in *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2, the right does not extend to municipal elections or referenda."; *Baier,* para. 39.

B. Statement of Facts

9. The AGBC takes no position on the facts underlying the appeal.

PART II – QUESTIONS IN ISSUE

10. There are four main issues on this appeal:[5]

i. Whether s. 2(b) of the *Charter* protects the framework and rules governing municipal elections from changes after the election period has commenced;

ii. Whether unwritten constitutional principles can be used as a basis for striking down the *Better Local Government Act* ("Bill 5");

iii. Whether the provincial head of power over municipal institutions is limited by a right to "effective representation" grounded in unwritten constitutional principles or s. 3 of the *Charter*; and

iv. If proved, whether any *Charter* infringements are justified under s. 1.

11. The AGBC intervenes on the question of whether s. 2(b) is engaged (Issue 1) and the question of whether the provinces' jurisdiction under s. 92(8) can be narrowed by reference to democratic rights enshrined in s. 3 of the *Charter* or unwritten principles (Issue 3). The AGBC takes no position on Issue 2 (whether unwritten constitutional principles can invalidate legislation) or Issue 4 (s. 1 of the *Charter*.)

PART III – STATEMENT OF ARGUMENT

Accepting the appellant's s. 2(b) argument would grant constitutional status to a provincial creature of statute and impair the provinces' plenary s. 92(8) power

Positive and negative rights

12. Before addressing the importance of the *Baier* test, it is first worth recounting the distinction between positive and negative rights and the nature and orientation of s. 2 of the *Charter*. Section 2 of the *Charter* protects the "fundamental freedoms" of conscience, religion, thought, belief, opinion, expression, peaceful assembly, and association.[6] Due to the nature of a

[5] Appellant's Factum ("AF") at para 32.

[6] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK),* 1982, c. 11, s. 2.

freedom, it is understood that s. 2 generally imposes a negative obligation on government rather than a positive obligation of assistance, access, or preservation.[7]

13. This basic distinction between positive and negative rights is premised on the idea that negative rights ground negative duties of non-interference, that is, a right that something not be done or that some particular imposition be withheld.[8] Conversely, a positive right is a claim *to something*.[9] The majority in *Baier* explained that "the distinction between positive and negative rights [rests] on whether what is sought is positive government legislation or action as opposed to freedom from government restrictions on activity in which people could otherwise freely engage without government enablement."[10]

14. Positive rights claims may invite courts to allocate scarce resources, fashion policies, or mandate a specific form of legislation. To accept the invitation places the judiciary in an uncomfortable, and often untenable, position that risks interference with the role of the legislative branch. On numerous occasions this Court has prudently rejected arguments in favour of the existence of positive *Charter* obligations on government.[11]

15. Section 2(b) of the *Charter* is no exception. This Court has appropriately confined positive entitlements under s. 2(b) to rare and exceptional circumstances where a failure to act effectively precludes the exercise of the fundamental freedom. Such narrowly circumscribed rights are genuinely derivative of the freedom in that they are necessary to allow individuals to exercise their freedom.[12]

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[7] *Baier*, para. *20; Haig*, p. 1035; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, para. 26.
[8] Charles Fried, "*Right and Wrong*" (Cambridge, Mass.: Harvard University Press, 1978), p. 110, 264.
[9] *Ibid.* p. 110.
[10] *Baier*, para. 35.
[11] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78.
[12] *Criminal Lawyers' Association,* para. 33; *Health Services*, paras. 11, 20, 94-95. *See, also, Trial Lawyers*, para. 46 ("effectively preventing access to the courts"); *Fraser*, paras. 46-48

16. The appellant's s. 2(b) claim is a positive one. As explained in *Baier*, claims to "preserve the legislative *status quo ante*" are positive.[13] They are a claim *to something.* The fact the appellant previously had access to the 47-ward electoral structure, or that it alleges interference with political speech, does not transform its positive claim into a negative one. An argument that government must expand or preserve a specific statutory platform for expression is a quintessential positive rights claim.

The *Baier* framework guards against constitutionalizing municipal arrangements

17. The critical importance of the restriction on positive entitlements under s. 2(b) is illustrated by this Court's "statutory platform" jurisprudence—cases such as *Haig*, *Baier*, and *Native Women's Assoc. of Canada*[14] where litigants sought s. 2(b) protection not for expression itself but for a particular mode of expression.

18. In *Haig*, Justice L'Heureux-Dubé contemplated the possibility of positive s. 2(b) rights in order to "make a fundamental freedom meaningful".[15] However, she had no difficulty concluding that s. 2(b) could not protect an individual's access to a specific "statutorily created platform for expression".[16] One specific *means* of expression (participating in a referendum on constitutional reform) was not to be conflated with the fundamental freedom *itself* (expression on constitutional reform).

19. The direct link between the expression and the statutory platform also meant that s. 2(b) protection would not merely impose positive obligations on government but also effectively constitutionalize the claimant's preferred statutory arrangement. Access to a specific statutory platform was therefore deemed a positive entitlement that must fall outside the scope of s. 2(b). Justice L'Heureux Dubé explained:

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. In my view, though a referendum is

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("impossible to meaningfully exercise the right to associate due to substantial interference by a law").

[13] *Baier*, para. 33.
[14] *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627.
[15] *Haig*, p. 1039.
[16] *Haig*, para. 83.

> undoubtedly a platform for expression, s. 2 (*b*) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.[17]

20. The majority in *Baier* added nuance to the *Haig* statutory-platform analysis by grafting in the three-step *Dunmore* test for positive rights claims. The crux of the *Baier* framework is the requirement that a positive rights claim be "grounded in a fundamental freedom of expression rather than in access to a particular statutory regime" and, if so, that exclusion from the statutory regime "has the effect of a substantial interference with s. 2(b) freedom of expression" that results in an "inability to exercise the fundamental freedom".[18] Mere exclusion from a statutory platform, in *Baier* a form of municipal governance, did not substantially interfere with or render meaningless the fundamental freedom. Other avenues of expression on school issues remained available.

21. Critical to the present appeal, both of these decisions (*Haig* and *Baier*) are united in their recognition of a fundamental problem with protecting freedom of expression *through* a specific statutory platform: the inevitable constitutionalizing of the propounded statutory framework. In *Haig,* Justice L'Heureux Dubé astutely observed that:

> The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status.[19]

22. In *Baier,* the majority wrote that:

> The appellants are asking this Court in effect to constitutionalize the prior regime. Although school boards play an important role in educational governance by carrying out the mandatory and discretionary duties prescribed to them in Alberta by the *School Act*, they are creatures of the provincial government, and their existence is not constitutionally protected.[20]

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[17] *Haig*, p. 1041.
[18] *Baier*, para. 30.
[19] *Haig*, para. 83 (emphasis added).
[20] *Baier*, para. 38 (emphasis added).

23. The concerns undergirding *Haig* and *Baier* are directly apposite in this case. The appellant, a creature of Ontario, seeks to significantly expand the scope of s. 2(b) to protect "[the] structure [of a 47-ward electoral framework] as well as the expressive activities taking place within."[21] To do so would effectively constitutionalize, at least for a time, the statutory framework of a municipal body—a provincial creature of statute with delegated authority to whom the Framers deliberately declined to grant constitutional status.

24. To expand the scope of s. 2(b) in this way would impermissibly curtail the province's plenary power over municipal institutions. Because speech and expression are a ubiquitous lubricant for many electoral and statutory processes, expression will often be impacted when changes are made. As Justice Lebel observed in *Baier*, "[n]early everything people do creates opportunities for expression if 'expression' is viewed expansively enough".[22] Given the Court's "very expansive" definition of expression, it is imperative that s. 2(b) not be allowed to operate as a constitutional Trojan horse, extending constitutional scaffolding across provincial delegates wherever speech infuses the exercise of statutory duties.[23]

25. This Court's decision in *Public School Boards' Assn.*[24] is of assistance on this point. In that case, separate school boards protected by s. 93 of the *Constitution Act, 1867* claimed that a new school funding scheme interfered with an alleged principle of "reasonable autonomy from provincial control" based on ss. 92(8) and 93 of the *Constitution Act, 1867* and ss. 2(b) and 7 of the *Charter*. Although the Court accepted that separate school boards were unique in that they "represent the vehicles through which the constitutionally entrenched denominational rights of individuals are realized",[25] this did not impair Alberta's ability to (subject to s. 93) "exercise its plenary power with regard to education in whatever way it sees fit."[26] The Court dismissed the claim for reasonable autonomy on the basis that "municipal institutions do not have independent

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[21] AF, para. 55.
[22] *Baier*, para. 71 (Lebel J. concurring).
[23] *Baier*, paras. 73, 76.
[24] *Public School Boards' Assn. of Alberta v. Alberta (Attorney General),* 2000 SCC 45 ("*Public School Boards' Assn.").*
[25] *Public School Boards' Assn*, para. 34. Analogous to the way that a 47-ward election is a vehicle for expression in the present case.
[26] *Public School Boards' Assn.* para. 36 "…subject to the restrictions relating to separate schools imposed by s. 93(1)."

constitutional status" and were "subject to legislative reform even though they are unique vehicles through which denominational rights are realized".[27]

26. The time-limited s. 2(b) protection for a vehicle for expression envisioned by the appellant makes its argument no more palatable. If expression within a statutory framework is capable of grounding a positive s. 2(b) entitlement to access or maintain that framework for an election period, there would be no compelling reason why it could not apply to other statutory platforms and initiatives linked to political expression such as referendums, commissions, or municipal amalgamations.

27. There would be no principled rationale to extend constitutional protection to a municipal structure during an election focused on, for example, whether to ban non-electric vehicles within city limits, but not on the eve of a historic municipal council vote concerning the same issue. Nor would there be any principled reason to distinguish between municipalities and other forms of delegated government such as school, park, and police boards.[28] If the appellant's "complex ecosystem of expression"[29] is endowed with constitutional status, other municipal bodies will inevitably demand constitutional protection for their statutory arrangements as well.

28. The *Baier* test is therefore an essential mechanism for limiting positive rights claims to preserve or access statutory vehicles for expression. The AGBC respectfully submits that the *Baier* test should not be narrowed or abandoned. The broad *Irwin Toy* test would likely generate constitutional protection for a wide variety of provincial creatures of statute linked to expression and is therefore unworkable as a threshold for positive s. 2(b) rights. As the majority held in *Baier*, "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so."[30]

The *Baier* test is not limited to claims to access underinclusive statutory platforms

29. The appellant submits that the *Baier* framework is only intended to address claims "for access to underinclusive statutory platforms".[31] The dissenting justices of the Court of Appeal

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[27] *Public School Boards' Assn.,* p. 412 (emphasis added).
[28] *See, also, Taypotat v. Taypotat,* 2013 FCA 192, para. 29.
[29] AF, para. 53.
[30] *Baier*, para. 39.
[31] AF, para. 45.

similarly sought to distinguish *Baier* on the basis that it concerned "excluding a class of people from running in an election".[32]

30. The appellant's position gives short shrift to the *Baier* test. The purpose of the *Baier* framework is not merely to address claims for access to underinclusive statutory platforms. More broadly, the *Baier* test, on its face, offers a framework for addressing positive rights claims for "access to a particular statutory regime."[33] Cases concerning access to underinclusive statutory platforms are the most common type of claim to be "provided with a specific means of expression".[34] But they are not the only one. Any assertion of a positive entitlement to preserve or expand a statutory platform for expression must logically trigger *Baier*. The specific difference between the proferred legislative arrangement and the impugned legislative arrangement should be of little relevance as it will vary from case to case.

31. There is, ultimately, no principled basis to analyse a positive claim to preserve (or return to) an inclusive regime that allows employees to run for school trustee (*Baier*) differently than a positive claim to preserve (or return to) a 47-ward electoral structure. If either claim were successful, the *status quo ante* would be endowed with a constitutional status that is foreign to Canadian constitutional law.

32. If anything, the argument that a positive claim "is grounded in fundamental *Charter* freedoms" (*Baier* step 1) is stronger where underinclusive legislation wholly excludes an individual from a platform for expression, as with the "blanket restriction"[35] on employee participation in *Baier*. Where, as here, wholesale exclusion from the 47-ward election was accompanied by wholesale inclusion in the 25-ward structure, the claim for interference with the fundamental freedom is attenuated.

The threshold for "derivative" s. 2(b) protection is very high

33. The 47-ward structure is a vehicle for expression, not expression itself. The appellant's argument for s. 2(b) protection for "[the] structure [of a 47-ward electoral framework] as well as

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[32] *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732, para. 132.
[33] *Baier*, para. 30.
[34] *Haig*, paras. 67, 69.
[35] *Baier*, para. 7.

the expressive activities taking place within"[36] is therefore best understood as a claim for a "derivative" s. 2(b) right. This Court has recognized derivative rights previously, but only in rare circumstances where failure to do so would "effectively preclude" or "deny access" to a constitutional right or freedom.[37] This high standard should also apply to the appellant's s. 2(b) claim in the present case, no matter which line of s. 2(b) jurisprudence *(Baier* or *Irwin Toy*) is followed.

34. In support of its argument for application of the *Irwin Toy* test, the appellant contends that *Criminal Lawyers Association'* stands for the proposition that "the methodology of *Irwin Toy* is best suited to tackle the unfamiliar".[38] *Criminal Lawyers Association'* does not stand for this proposition. It was not "unfamiliarity" that caused the Court not to apply *Baier* but the nature of the constitutional question at issue. *Criminal Lawyers Association'* was not a case concerning exclusion from, or replacement of, an existing statutory platform for expression. The issue was whether s. 2(b) protects a right to access government information so that expression may then take place.

35. The analysis in *Criminal Lawyers Association'* was therefore concerned with whether s. 2(b) could protect a "derivative" or pre-cursor right to access government information in order to facilitate expression. This Court accepted that such a derivative right existed and prescribed a highly modified *Irwin Toy* analysis for its governance. Importantly, the test accounted for the positive nature of the right and established a high threshold for its engagement: "the scope of the s. 2 (*b*) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints."[39]

36. Translating this threshold to the first step of the *Irwin Toy* framework, the Court explained that:

> To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production

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[36] AF, para. 55.
[37] *Fraser*, para. 36*; Trial Lawyers*, para. 46.
[38] AF, para. 46.
[39] *Criminal Lawyers Association',* para. 31 (emphasis added).

> of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2 (*b*) protection … If the claim survives this second step, then the claimant establishes that s. 2 (*b*) is engaged. The only remaining question is whether the government action infringes that protection.[40]

37. Thus, in considering whether to recognize a positively oriented right of access to government documents, this Court did not employ a traditional *Irwin Toy* analysis. Rather, the Court used the same high threshold of "effectively precluding" or "rendering impossible" that it has used in other rare instances where this Court has found that a derivative constitutional right was necessary to allow individuals to exercise a fundamental freedom.[41]

38. Importantly, this threshold of "effectively precluding" the exercise of the fundamental freedom resembles the *Baier* test, where the Court considers whether the claimant has established a "substantial interference with activity protected under s. 2" (step 2) that results in an "inability to exercise the fundamental freedom" (step 3). Indeed, this Court has often used the language of "effectively precluding" or "rendering impossible" to describe the "substantial interference" threshold for positive s. 2 rights.[42]

39. Moreover, as this Court explained in *Criminal Lawyers Association'*, a mere enhancement of s. 2(b) expression (or conversely, a mere restriction) cannot satisfy the high threshold of "effectively precluding" the exercise of a fundamental freedom. The right of access "is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest."[43] Because some information concerning the murder in question was already publicly available, the high threshold was not met.[44]

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[40] *Criminal Lawyers Association',* para. 33 (emphasis added).
[41] *Fraser,* paras. 33, 46-48; *Health Services,* paras. 11, 94-95.
[42] *Ibid.*
[43] *Criminal Lawyers Association,* para. 58.
[44] *See, also, Baier,* para. 28 where Rothstein J. notes that the RCMP officers in *Delisle* were distinguishable from the agricultural workers in *Dunmore* on the basis "that inclusion in a statutory regime would serve to enhance rather than safeguard their exercise of a fundamental freedom" (emphasis added). The agricultural workers in *Dunmore*, by contrast, were found to be substantially incapable of exercising their fundamental freedom to organize without protective legislation, such that s. 2(d) was engaged.

40. Returning to the present case, and with these decisions in mind, it can safely be said that "diminished value of all past expression", "widespread confusion" or "wasted campaign literature"[45] do not "effectively preclude" the exercise of free expression. A wide spectre of legitimate government actions—ranging from major policy announcements to program terminations to municipal amalgamations—may conceivably generate such impacts. Where such actions are taken, claims to preserve the *status quo ante* should not, on account of inevitable links to expression, be a sufficient basis to require s. 1 justification.

41. More importantly, there is no need in the present case to use the modified *Irwin Toy* analysis from *Criminal Lawyers Association'*. The present case concerns a claim for a positive entitlement for expression within a specific statutory framework that is well-suited to *Baier*. However, in the event this Court were to employ *Irwin Toy*, the AGBC respectfully submits that this Court should use a modified analysis that recognizes the exceptional nature of a positively oriented, derivative s. 2(b) right and that incorporates the substance of the *Baier* test. As explained above, and consistent with this Court's decision in *Criminal Lawyers Association'*, the traditional *Irwin Toy* test is an unworkably low threshold for positive rights claims.

The appellant is advancing a novel structural approach to democratic rights

42. The asserted right to continued access to the 47-ward election framework is best understood a claim for a "derivative" *Charter* right. More specifically, the argument is for a specific type of derivative right—a "structural" democratic right that protects not only expression but the structure within which expression occurs. As the appellant argues: "the expressive activity at issue was actually a complex ecosystem of expression dependent on the very stability of the electoral framework itself".[46]

43. Democratic rights, like most other rights prescribed by the *Charter*, are held and exercised by individuals, and actions brought to enforce such rights must be brought by individuals. However, some legal scholars have advanced the argument that democratic rights should be understood as "structural rights." Structural rights theory envisions rights being defined in significant part by the institutional context in which they exist—extending beyond the individual-

[45] AF, para. 31.
[46] AF, para. 53 (emphasis added).

state relationship to address broader structural deficiencies and impose positive obligations upon government.[47] Those who view democratic rights as structural rights contend that the court's role in adjudicating such cases is akin to that of a regulator of the democratic process.[48]

44. The structural rights theory of election law has been well criticized in the academic literature, most notably by Prof. Richard Hasen, a leading American election law scholar. Prof. Hasen argues that the expansive role for the courts envisioned by structural theory glosses over the individual nature of democratic rights and places too much faith in the ability of judicial review to solve political problems.[49] Prof. Hasen contends that courts are poorly placed to determine the ideal type of democratic system and that structuralism fosters judicial involvement in politics in violation of the separation of powers.

45. Prof. Hasen advances the argument that election laws should be understood as engaging either "core" equality rights or "contested" equality rights.[50] On his view, core equality rights are those "few basic rights essential to a contemporary democracy," which are supported by a social consensus in their favour (i.e., the right to an equal vote or non-discrimination in voting). Contested rights are categorized as rights around which no social consensus exists (i.e., proportional representation of minorities in legislative bodies).[51]

46. Prof. Hasen argues that courts should uphold, or constitutionalize, only core equality rights and leave contested rights to be determined by legislatures and executives.[52] Judicial review should

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[47] *See* summary in Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore,* 1st ed. (New York: NYU Press, 2003), *("Hasen"),* p. 143-156. A rights approach takes the more traditional view that courts must apply constitutional law to redress individual harm to a particular voter. *See, also,* for an argument for a hybrid individual-structural approach to s. 3 of the *Charter,* Yasmine Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review", The University of Toronto Law Journal, Vol. 62, No. 4 (Fall 2012), pp. 499-561.

[48] *Hasen,* p. 138-156.

[49] *Hasen,* p. 139.

[50] *Hasen,* p. 7.

[51] *Hasen,* p. 81.

[52] *Hasen,* p. 102.

be more cautious, in his theory, when it strays beyond policing the "minimal requirement[s] for democratic government."[53] Prof. Hasen warns that if courts are empowered to reach too far into the political realm of contested democratic issues, their analysis becomes dependent upon shifting public views of what democracy requires and they expose themselves to problems of democratic legitimacy.[54] He observes that the US Supreme Court's two most prominent election law cases in recent years, *Bush* v. *Gore*[55] and *Citizens United*,[56] have been heavily criticized as unhelpful intrusions into the law of democracy.[57]

47. A related criticism of structural or process theory is that judgments about fair democratic structures are inherently substantive even though they may claim not to be. In their comparative study on Canadian and American election law, Profs. Christopher Manfredi and Mark Rush argue, for example, that structural or process-based theory is actually animated by a normative claim about the "right answer" in a given election law case.[58] In their reasoning, if process-based theories gain acceptance courts will be empowered by this normative vision to interfere with legislative decisions in breach of the separation of powers.[59]

48. The concern that substantive goals lie behind assertions of structural rights is squarely engaged in the present case. The appellant does not seek protection for a neutral "process" to

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[53] *Hasen*, p. 7, 144-151.

[54] *Hasen* p. 102. When considering a legislative act that purports to further a contested political equality right, Hasen suggests, the Court should engage in "careful balancing of interests." Hasen goes on to explain: In the case of a legislative body's voluntary imposition of a *contested* vision of political equality, the Court should be *deferential to (but not a rubber stamp of) the value judgments about the balance between equality and other interests* made by the legislative body while at the same time be *skeptical about the means by which the legislative body purports to enforce the contested equality right.*

[55] *Bush v. Gore*, 531 U.S. 98.

[56] *Citizens United v. FEC*, 558 U.S. 310.

[57] *Hasen* p. 41-46 (criticizing *Bush v. Gore*); R. L. Hasen, "Citizens United and the Illusion of Coherence" (2011) 109:4 *Michigan Law Review* 581.

[58] Christopher Manfredi and Mark Rush, *Judging Democracy*, (University of Toronto Press, 2008), ("*Judging Democracy"),* p. 125.

[59] *Judging Democracy*, p. 123.

support or facilitate expression, such as the derivative *Charter* protection for the procedural right to collectively bargain under s. 2(d).[60] The appellant seeks protection for a specific, contested democratic structure—a 47-ward election.

49. The majority in the Ontario Court of Appeal correctly perceived this problem, writing that: "The applicants' complaint has been clothed in the language of s. 2(b) of the *Charter* to invite judicial intervention in what is essentially a political matter."[61] As the Majority cautioned in *Harper*, "the electoral system, which regulates many aspects of an election … reflects a political choice, the details of which are better left to Parliament."[62]

50. To date this Court has wisely refrained from adopting an overtly structuralist approach to democratic rights under s. 3 and, in particular, s. 2(b). This Court has, instead, accounted for structural concerns within the rubric of an individual rights analysis under s. 3. In *Figueroa*, the Court emphasized that "the purpose of s. 3 is to protect the right of each citizen to play a meaningful role in the electoral process" but accepted that this individuated analysis may account for the "broader social or political context" in order to determine whether a citizen's s. 3 rights have been interfered with.[63]

51. More broadly, this Court has given wider life and meaning to s. 3 by articulating minimum democratic principles needed to safeguard the right to vote including effective representation[64] and a meaningful right to participate.[65] By diversifying the right to vote so that it includes additional

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[60] *Health Services*, para. 19; *Fraser*, para. 33. *See, also,* P. Hogg, *Constitutional Law of Canada,* 5th ed. (Toronto, ON: Thomson Reuters, 2007), at 44.3(c). Prof. Hogg criticizes *Health Services* and comments on the difficulty of constitutionalizing a process without constitutionalizing the fruits of that process ("But they immediately ignored this distinction, granting constitutional protection to the collective agreements precisely because they were the fruits of the bargaining process.").

[61] *Toronto (City) v. Ontario (Attorney General),* 2019 ONCA 732, para. 6.

[62] *Harper v. Canada (Attorney General),* 2004 SCC 33, para. 87.

[63] *Figueroa v. Canada (Attorney General),* 2003 SCC 37, ("*Figueroa"),* para. 33.

[64] *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 SCR 158.

[65] *See*, *Figueroa,* para. 33.

democratic rights, the Court has developed a set of jurisprudential tools to adjudicate s. 3 challenges to election laws.

52. The AGBC respectfully submits that, to the extent this Court is inclined to address structural democratic issues, it should generally confine such developments to s. 3. Unlike the negatively oriented s. 2(b) freedom, the democratic rights guaranteed in s. 3 of the *Charter* are "positive ones".[66] Section 3 is also specifically intended to govern democratic processes and has been used, to some extent, to address structural democratic concerns previously.[67]

53. Section 2(b) is a problematic vehicle for addressing structural democratic issues that has, presumably, been invoked by the appellant largely because municipalities fall outside the scope of s. 3. Notably, the appellant's challenge to Bill 5 appears to be animated predominantly by s. 3 issues concerning 'meaningful participation' and 'effective representation'. If structural democratic rights addressing such concerns were recognized under the expansive s. 2(b) freedom, this would risk overwhelming the carefully crafted democratic principles developed under s. 3.

54. More problematically, the injection of structural democratic rights into the s. 2(b) framework would subvert the Framers' deliberate exclusion of municipal bodies from the scope of ss. 3, 4, and 5 of the *Charter* and constitutionalize a third order of government. Although this Court has held that *Charter* rights should not be "pigeon holed",[68] this cannot mean that s. 3 principles can be transposed to s. 2(b) in circumstances where s. 3 plainly does not apply. The square peg of s. 3 democratic norms should not be forced into the round hole of s. 2(b).

55. Last, the expansive nature of the freedom of expression makes it an unwieldly tool for addressing structural democratic issues. Unlike the more tailored s. 3 right to "vote" or "participate", expression infuses every electoral process and may be impacted by a wide array of provincial amendments to municipal structures. Permitting litigants to raise structural concerns through s. 2(b) would risk plunging the court into the "political thicket", inviting judicial intervention on a much broader range of contested democratic issues than is possible under s. 3.

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[66] *Haig*, para. 64.
[67] *Figueroa*, para. 33.
[68] *Baier*, paras. 58, 77.

56. In sum, the appellant's invitation to extend s. 3 principles to s. 2(b), towards the end of protecting a specific municipal electoral structure, is deeply problematic. In the context of a provincial or federal election, adoption of such an overtly structuralist approach to s. 3 would itself represent a significant evolution in the case law. To do so for s. 2(b), in the context of a municipality with no constitutional status, on the low *Irwin Toy* standard, would be an enormous and unjustified constitutional leap.

Unwritten constitutional principles cannot limit the provinces' jurisdiction under s. 92(8)

57. The unwritten constitutional principle of democracy cannot limit the jurisdiction granted to the provinces under s. 92(8) of the *Constitution Act, 1867*. The notion that unwritten constitutional principles can narrow the scope of a plenary legislative power is not a theory this Court has endorsed.

58. Drawing upon *Remuneration Reference*[69] and *Trial Lawyers*,[70] the appellant submits that there is an implied limitation on the scope of s. 92(8) of the *Constitution Act, 1867*, such that a province may not create a statutory democratic election that does not provide effective representation for its residents.

59. This is not the case. Neither *Remuneration Reference* nor *Trial Lawyers* articulated restrictions on the legislative competence of provincial legislatures in s. 92 vis-à-vis unwritten constitutional principles.

60. This Court's analysis of judicial independence (*Remuneration Reference)* and access to justice (*Trial Lawyers)* was, rather, anchored in s. 96 of the *Constitution Act, 1867*. Both cases emphasize the "basic structure" of the Canadian Constitution—the three branches of government—and specifically, the central place superior courts hold within the Canadian system of government, enshrined under s. 96. Critically, unlike unwritten principles, s. 96 is a jurisdiction conferring provision and a "subtraction from the power of the provinces"[71], the core of which provincial legislation cannot encroach upon.

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[69] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 S.C.R. 3 ("*Remuneration Reference*").
[70] *Trial Lawyers*, *supra.*
[71] *Remuneration Reference,* paras. 84, 88.

61. It was towards the goal of protecting this "basic structure of our Constitution"[72] that this Court relied upon unwritten principles in *Remuneration Reference* and *Trial Lawyers*. Building on the language of Beetz J. in *OPSEU*, the Court in *Remuneration Reference* confirmed that through a process of judicial interpretation, s. 96 has come to include a guarantee of the core jurisdiction of the courts by "reference to a deeper set of unwritten understandings".[73]

62. Similarly, in *Trial Lawyers*, this Court utilized s. 96, "supported by considerations relating to the rule of law"[74], to ground a limited right to access that jurisdiction—a right not to be subject to court hearing fees that cause "undue hardship". Importantly, the rule of law and access to justice principles arose by necessary implication from the s. 96 judicial function, not as an independent basis to narrow a provincial power.[75] Unwritten principles were used to support the basic structure of the Constitution, not to undermine it.

PART IV – SUBMISSIONS CONCERNING COSTS

63. The AGBC requests that no costs be awarded either for or against him.

PART V – ORDER SOUGHT

64. The AGBC takes no position with respect to the disposition of the appeal.

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

Mark Witten and Ashley Caron
Counsel for the AGBC

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[72] *Remuneration Reference*, para. 108, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 SCR 2 at p. 57 ("*OPSEU*").
[73] *Remuneration Reference*, para. 69 (emphasis in original).
[74] *Trial Lawyers*, para. 38.
[75] *Trial Lawyers*, para. 39.

PART VI - TABLE OF AUTHORITIES

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