SCC 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)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent/
(Appellant)

- and -

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(Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PAGE

PART I - THE FACTS 1

PART II - ISSUES AND THE LAW 1

PART III - ARGUMENT 1

Freedom of Expression and the Municipal Context 1

The Mid-Stream Change to the Election Framework 3

Effective Representation 4

A New Constitutional Appreciation for Municipalities 7

PART IV – TABLE OF AUTHORITIES AND STATUTORY PROVISIONS 11

PART I - THE FACTS

1. The interveners Art Eggleton, Barbara Hall, David Miller and John Sewell (the "Mayors") accept and adopt the facts as stated by the appellants.

PART II - ISSUES AND THE LAW

2. The Mayors address i) s. 2(b) in the context of municipal democracy and elected officials, and ii) a contemporary approach to the status of cities in matters of constitutional interpretation.

PART III - ARGUMENT

<u>Freedom of Expression and the Municipal Context</u>

3. An appreciation for the democratic ecosystem of municipal governance and the growing importance of cities in the day-to-day lives of Canadians must inform the approach to this case. The Supreme Court has emphasized the "social and political importance of local governments."[1] Municipalities are a recognized order of government,[2] and the City of Toronto is responsible for broad city wide issues like public health, public transit, water supply and treatment, social services like shelters and public housing, childcare, the built and natural environment and city wide planning; together with highly local services like bicycle lanes, local planning and development, building permits and speed bumps among a vast array of services.[3]

4. As Prof. Valverde has observed, local governments "do different things, and do them in a

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[1] *R. v. Guignard*, 2002 SCC 14 (CanLII), [2002] 1 SCR 472 [*Guignard*], para 17

[2] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40 (CanLII), [2001] 2 SCR 241[*Spraytech*]

[3] Reasons of Belobaba J, AR Vol I, Tab 2, para 56. See also Affidavit of Giuliana Carbone (Aug 22, 2018) [Carbone 1st Aff], AR Vol IV, Tab 30, para 4 & Ex A

different manner."[4] Municipal governance is achieved at the legislative level, where councillors are the key actors and the nature of a city's functions requires closeness between residents and their government, on a different temporal and spatial scale from the other orders of government. Prof. Valverde expressed, "the work of governance is far more dependent on the local knowledge and community expertise of councillors".[5]

5. The expressive interests at issue must be understood with reference to the unique "conduit" role of elected officials in municipalities, as recognized by this Court in *Prud'homme*:[6]

> "Elected municipal officials are, in a way, conduits for the voices of their constituents: they convey their grievances to municipal government and they also inform them about the state of that government… Their right to speak cannot be limited without negative impact on the vitality of municipal democracy…"

6. Consistent with *Prud'homme,* and the evidence of Prof. Valverde, the role of the elected municipal official depends on free and fair elections, and requires close engagement with constituents on issues that are inherently and intimately local in nature.[7] This is of particular

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[4] Affidavit of Mariana Valverde (August 20, 2018), AR Vol X, Tab 38 [Valverde Aff], para 6. See also Cross-Examination of Mariana Valverde, held on March 7, 2019 (Fresh Evidence Admitted by this Court, Order dated August 28, 2020) [Valverde Cross-Examination], Q242

[5] Valverde Aff, AR Vol X, Tab 38 paras 14-16. See also Affidavit of Gary Davidson (Aug 27, 2018) [Davidson Aff] AR Vol IX, Tab 31, para 41

[6] *Prud'homme v. Prud'homme*, 2002 SCC 85 (CanLII), [2002] 4 SCR 663, paras 42 and 53 [*Prud'homm*]; see also *Nanaimo (City) v. Rascal Trucking Ltd.,* 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342 [*Nanaimo*], at para. 35. See also Davidson Aff, AR Vol IX, Tab 31, paras. 32(b), 36, 38, 45-47.

[7] See Valverde Aff, AR Vol X, Tab 38, paras 23 and 26. While Ontario has characterized the councillor's role as being marred by dysfunction and parochialism, it was Prof. Valverde's evidence that the concerns cited by Ontario were a feature at all levels of government [Valverde Cross-Examination, Q349, 504], and that all political systems had both advantages and disadvantages [Valverde Cross-Examination, Q13, 259]. She maintained on cross-examination that the ombudsman role can have "good effects" and that councillors play a "key role" and "hugely important role" brokering the relationship between residents and City staff, as well as

import in a mega-city such as Toronto, where the size and complexity of the city and its wards necessarily requires detailed and direct local constituency knowledge and engagement.

The Mid-Stream Change to the Election Framework

7. While this Court has previously addressed the role of elected officials in the municipal democracy, and the necessity of protecting their freedom of expression in governance and representation,[8] it has not yet had the opportunity to address the importance of expression and local engagement in the context of an ongoing municipal election campaign.

8. As recognized by Justice Macpherson in dissent at the Court of Appeal, elections involve a web of expression among candidates, voters, and others, all of which depend and which should be premised on a stable election platform.[9] This interconnected web has particular importance in the municipal context where the political expression of candidates must be understood not as a soliloquy by candidates to voters, but a collaborative engagement, consistent with the "conduit" role played by elected officials, who must intimately understand the concerns and grievances of citizens literally on a block-by-block basis. The destabilizing nature of Bill 5's changes to the election framework, mid-campaign, is therefore particularly destructive of free expression when considered in the context of the nature of municipal political campaigns and municipal governments.

9. The majority of the Court of Appeal erred by narrowly characterizing the political expression at issue as the "past" expression of candidates under the old rules and "expectations"

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with other local stakeholders [Valverde Cross-Examination, Q 172-174].

[8] *Prud'homme*, para 53
[9] ONCA Reasons, AR Vol I, Tab 4 paras 117-122

for future expression. The candidates' expression cannot be severed and analysed separately from their engagement with voters and the framework for that engagement. Seen in its proper context, the midstream upending of the election framework affected not only messages by candidates to voters, but rather their engagement with voters in the specific context of the wards. Candidates were precluded from engaging voters about local issues and were instead required to address the confusing state of affairs caused by the abrupt alteration of ward boundaries.[10] This impaired not only the candidate's own ability to develop and impart messages but also their ability to receive feedback from voters which is necessary for representation and governance and which clearly has a recognized expressive component.

10. Prof. Valverde's evidence reinforces the conclusion that Bill 5's timing could only impair the ability of candidates to develop the local knowledge necessary for municipal governance in the shortened timeframe and further that the timing could only impair the ability of constituents to cast a ballot on meaningfully informed basis.[11] She was not cross-examined on these points.

11. Ontario's submission that Bill 5 provided an "equally meaningful electoral forum" ignores the crucial impact of its timing in the midst of an ongoing election campaign. Contrary to Ontario's submission, such a framework had significant adverse effects on the expressive activities of candidates, donors and voters and could not be "equally meaningful" in the circumstances.

Effective Representation

12. In considering the expressive interests at stake, this Court should examine not only the

[10] Reasons of Belobaba J, AR Vol I, Tab 2, paras 30-32
[11] Valverde Aff, AR Vol X, Tab 38, paras 40-44

timing of Bill 5, but also its substance, in nearly doubling the size of the City wards. Recognizing interests of effective representation under s. 2(b) is a logical extension of this Court's case law addressing the unique role of elected officials and the importance of their expressive interests to the exercise of local democracy. Such an approach would also be consistent with the interests of substantive equality and political fairness which have been recognized elsewhere under the *Charter*.

13. The issue of effective representation must take into account the nature of cities and the unique "conduit" role of their elected officials. In this regard, the doubling of ward sizes would be expected to affect the ability of elected officials to carry out their role of hearing and presenting the uniquely local grievances of constituents, which is expressive in nature.[12] Ontario does not deny this and in fact takes the position that constraining the expressive role of councillors in dealing with their constituents regarding local concerns, which it maligns in its factum, is a laudable goal of public policy, intended to redirect their focus to city-wide issues. Ontario's position in this regard is inconsistent with the principles of effective representation and the well-recognized role played by municipal officials in local government decision-making.

14. Contrary to Ontario's submission, the Mayors do not contend that municipal representation must be "more effective" but that an appreciation for municipal issues and roles means that the need for representation is different, arising from the nature of local government, which not only does different things but does them differently. The federal government's commission on electoral boundaries did not consider the nature of local governance nor did it pronounce on the appropriateness of ward sizes in the local government context. Toronto's ward

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[12] Valverde Aff, AR Vol X, Tab 38, paras 40-44; Davidson Aff, AR Vol IX, Tab 31, para 52.

boundary review considered and rejected the federal approach, and was upheld on judicial review.[13] Determinations of communities of interest and the level of representation are themselves inherently local decisions that are deserving of respect and deference.

15. Ontario relies on evidence from Prof. Sancton supporting the application of the federal electoral districts to Toronto, but his opinion concerning these issues was also before the Board and the court in the judicial review application concerning Toronto's ward boundary review. It is worth noting as well that even Prof. Sancton concedes that federal election boundaries could not be fairly applied to any other city in Ontario, other than Toronto.[14] There is nothing inherently fair or effective about applying boundaries from the federal context to the municipal context.

16. Bill 5 results in Toronto having significantly greater representation ratios than other Ontario cities.[15] It is not appropriate to compare Toronto to other municipalities in other provinces with different systems of governance or to look at the number of local representatives in isolation of the larger governance model.[16] Bill 5 changed nothing about Toronto's governance other than to cut the number of councillors in half. As explained by Prof. Valverde, this would be like saying to the healthcare system that doctors have too much power and then cutting the number of doctors in half, an action that will predictably lead to chaos.[17]

17. Bill 5, enacted arbitrarily without consultation or study, does not ensure effective

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[13] *Natale v. City of Toronto*, 2018 ONSC 1475 (CanLII); *Di Ciano v Toronto (City),* 2017 CanLII 85757 (ON LPAT)

[14] Affidavit of Andrew Sancton (October 30, 2018) (Fresh Evidence Admitted by this Court, Order dated August 28, 2020) [Sancton Aff], SR, Vol II, Tab 27, para 21-22

[15] Affidavit of Myer Siemiatycki (Aug 21 2018) [Siemiatycki Aff], AR Vol IX, Tab 36, para 18

[16] E.g. Vancouver councillors sit "at large" their role is more comparable to provincial and federal politics where parties or slates play a role. See Valverde Aff, para 18.

[17] Valverde Cross-Examination, Q579. Even Prof. Sancton acknowledges that ratios cannot be assessed without consideration of systemic factors such as parties and resources, see Sancton Aff, SR, Vol II, Tab 27, para 21.

representation, indeed compromises such representation, significantly diminishes the voice of the electorate, and constitutes a breach of the expressive interests related to municipal governance and effective representation. Of further concern is the detrimental impact on diverse communities.[18] An approach recognizing these concerns would be consistent with other *Charter* interests of substantive equality and political fairness.

A New Constitutional Appreciation for Municipalities

18. A modern constitutional approach to municipalities and the 2(b) interests inherent in municipal elections is needed that reflects the significant role municipalities now play in the day-to-day lives of Canadians. Such an approach flows naturally from this Court's jurisprudence recognizing the social and political importance of local governments,[19] as well as the principle of subsidiarity, in which decisions are best made by the order of government closest to those affected.[20]

19. The approach of Justice McLachlin in *Shell*, subsequently endorsed by a majority of this Court, approached the issue of interpretation of municipal powers from the premise of a "modern conception of cities and municipalities".[21] Justice McLachlin emphasized the "growing sophistication and stature of a contemporary city," the vitality of local democracy, and importance of civic pride.[22] These themes have since been adopted by majorities of this Court, recognizing an "emerging consensus that courts must respect the responsibility of elected

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[18] Siemiatycki Aff, para 52; Affidavit of Ish Aderonmu (Aug 20, 2018) [Aderonmu Aff], AR Vol IX, Tab 34, para 13
[19] *Guignard*, para 17
[20] *Spraytech,* para 3. See also *Horton v. Greater Sudbury (City of)*, 2003 CanLII 34162 (ON SC), para 26, upheld 2004 CanLII 14158 (ON CA);
[21] *Shell Canada Products Ltd. v. Vancouver (City),* [1994] 1 SCR 231, p. 238
[22] *Ibid.,* p. 252-254

municipal bodies to serve the people who elected them" in adopting a "generosity of interpretation" to the interpretation of municipal powers.[23] Such an approach is founded on an understanding of the democratic character of municipal decisions.[24] This Court has also elsewhere expressed reservations with characterizing the provinces as the "principals" of municipalities, and has observed that municipalities have distinct political mandates.[25]

20. The time has come for this Court to build on these principles and recognize that cities must be protected from outside meddling in their democracies which is fundamentally inconsistent with their recognized importance to Canadians and their status as independent and important orders of government. Contemporary cities, particularly large cities such as Toronto, are not subservient. Cities perform important functions, with significant impact on major aspects of public life, utilizing large budgets as well as significant staff resources.[26] To put things in perspective, Toronto has populations and budgets that exceed many provinces, with a major impact on the economic, social, and cultural life of this country. The constitutional approach to cities and the expressive interests inherent in municipal elections must reflect their close relationship to the members of the public who live and work within their boundaries and their need to respond effectively to the problems experienced by those individuals. Further, the consultation requirement under the *City of Toronto Act* must be applied meaningfully and in a manner reflective of the modern independent role of a mega-city, and the need for mutual respect vis-à-vis other orders of government.[27]

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[23] *Nanaimo*, paras 36-37; *Spraytech*, para 23 and 26
[24] *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 (CanLII), [2007] 2 SCR 588, para 38
[25] *Godbout v. Longueuil (City),* 1997 CanLII 335 (SCC), [1997] 3 SCR 844, para 52; *Spraytech*, para 39
[26] Carbone 1st Aff, AR Vol IV, Tab 30, paras 2-4
[27] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 1(2) and (3)

21. The majority of the Court of Appeal emphasized Toronto's status as a "creature of provincial legislation",[28] and Ontario advances the same approach in its factum. Ontario's attempt to analogize municipalities to various "subordinate bodies" including condominiums, regulatory bodies, and corporations, vividly demonstrates the need for this Court to clearly address the importance and status of cities under the constitution, and their autonomy vis-à-vis the provinces.

22. In enacting Bill 5, the province acted unilaterally, without consultation or campaigning, in violation of democratic norms, targeting Toronto, in a manner unprecedented in Canadian history.[29] Ontario's position, emphasizing cities as completely subservient to the province, subject to the whims of provincial governments acting arbitrarily and discriminatorily, is out of step with the trend in this Court's jurisprudence. This factual context calls for close scrutiny of the province's actions in connection with the disruption to expressive interests in the midst of an ongoing election, rather than a deferential approach to the exercise of provincial powers.

23. The spheres of authority provided by s. 92 of the *Constitution Act, 1867* are not limitless. This Court has, in other contexts, recognized that the grants of authority under s. 92 must be informed by a reading of the constitution as a whole and by constitutional principles[30]. In the context of this case, the nature, scope, and exercise of provincial powers must be informed by the interests, principles and values set out in the *Charter*, i.e. interests of expression, effective representation and substantive equality that are engaged in democratic elections and issues of

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[28] ONCA Reasons, AR Vol I, Tab 4, para 1
[29] Indeed, this was conceded before the Court of Appeal, see ONCA Reasons, AR Vol I, Tab 4, para 108-109
[30] *Ref re Remuneration of Judges of the Prov. Court of P.E.I* 1997 CanLII 317 (SCC), [1997] 3 SCR 3 [*Remuneration Reference*] para 108; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59 (CanLII), [2014] 3 SCR 31

governance/representation. This does not mean that one area of the constitution is used to limit another area, but rather that this Court should strive to interpret the entire constitution in a manner that is harmonious and attentive to its underlying values and principles.

24. The special, independent status of cities as a recognized order of government is not dissimilar from this Court's recognition of the special status of courts under provincial jurisdiction, which must have a right of independence consistent with the principles underlying our constitution.[31] In keeping with these principles, the court should recognize that cities are an independent order of government with effective autonomy over decisions of a local nature.

25. Fundamentally, it is the position of the Mayors that Bill 5 was not within the authority of the Province. Ontario's actions, both procedurally (by acting mid-election and without any campaigning or consultation) and substantively (by overriding decisions about local governance and imposing a system inconsistent with principles of free expression and effective representation) were inconsistent with the Province's authority when assessed in light of the contemporary constitutional approach to cities and their governance as proposed by the Mayors.

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

Howard Goldblatt / Christine Davies
Goldblatt Partners LLP

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

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[31] *Remuneration Reference*, para 108

PART IV – TABLE OF AUTHORITIES

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114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40 (CanLII), [2001] 2 SCR 241	3, 19
Di Ciano v Toronto (City), 2017 CanLII 85757 (ON LPAT)	14
Godbout v. Longueuil (City), 1997 CanLII 335 (SCC), [1997] 3 SCR 844	19
Horton v. Greater Sudbury (City of), 2003 CanLII 34162 (ON SC), upheld 2004 CanLII 14158 (ON CA)	18
London (City) v. RSJ Holdings Inc., 2007 SCC 29 (CanLII), [2007] 2 SCR 588	19
Nanaimo (City) v. Rascal Trucking Ltd., 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342	5, 19
Natale v. City of Toronto, 2018 ONSC 1475 (CanLII)	14
Prud'homme v. Prud'homme, 2002 SCC 85 (CanLII), [2002] 4 SCR 663	5, 6, 7
R. v. Guignard, 2002 SCC 14 (CanLII), [2002] 1 SCR 472	3, 18
Ref re Remuneration of Judges of the Prov. Court of P.E.I 1997 CanLII 317 (SCC), [1997] 3 SCR 3	23, 24
Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 SCR 231	19
Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [2014] 3 SCR 31	23

Statutory Provisions

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Sch B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], s 2(b)	12, 17, 23
Charte canadienne des droits et libertés, Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, art. 2(b)	
City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A, s. 1(2) and (3)	20
Cité de Toronto (Loi de 2006 sur la), L.O. 2006, chap. 11, annexe A, art. 1(2) et (3)	

Constitution Act, 1867, s 92 23

Lois constitutionnelles de 1867, art. 92