

**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  
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ASSOCIATION, ART EGGLETON, BARBARA HALL, DAVID MILLER AND JOHN  
SEWELL, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, PROGRESS  
TORONTO, MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA, AND  
FAIR VOTING BRITISH COLUMBIA**

Interveners

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**FACTUM OF THE INTERVENER,**  
**DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**  
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

---

**ST. LAWRENCE BARRISTERS LLP**  
33 Britain Street, 2nd Floor  
Toronto ON M5C 1G8

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

Lawyers for the Intervener,  
David Asper Centre for Constitutional Rights

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

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

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

**ORIGINAL TO:**

**TO: THE REGISTRAR**  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, ON K1A 0J1

**COPIES TO:**

**TO: CITY SOLICITOR'S OFFICE**  
City of Toronto,  
Legal Services Metro Hall,  
55 John Street, 26<sup>th</sup> Floor  
Toronto, ON M5V 3C6

**Diana W. Dimmer | Glenn K.L. Chu**  
**Fred Fischer | Philip Chan**  
Tel: 416 392 7229 | 416 397 5407  
416 392 7224 | 416 392 1650  
Fax: 416 397 5624  
Email: [diana.dimmer@toronto.ca](mailto:diana.dimmer@toronto.ca)  
[glenn.chu@toronto.ca](mailto:glenn.chu@toronto.ca)  
[fred.fischer@toronto.ca](mailto:fred.fischer@toronto.ca)  
[philip.k.chan@toronto.ca](mailto:philip.k.chan@toronto.ca)

**Counsel for the Appellant**

**AND TO: ATTORNEY GENERAL OF ONTARIO**  
Constitutional Law Branch  
McMurtry-Scott Building  
720 Bay Street, 4<sup>th</sup> Floor Toronto, ON  
M7A 2S9

**Robin Basu**  
**Yashoda Ranganathan**  
**Otto Ranalli**  
Tel: 416 326 4476  
416 326 4456  
416 326 4473  
Fax: 416 326 4015  
Email: [robin.basu@ontario.ca](mailto:robin.basu@ontario.ca)  
[yashoda.ranganathan@ontario.ca](mailto:yashoda.ranganathan@ontario.ca)  
[otto.ranalli@ontario.ca](mailto:otto.ranalli@ontario.ca)

**Counsel for the Respondent**

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

**Nadia Effendi**  
Tel: 613 787 3562  
Fax: 416 367 6749  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)

**Ottawa Agent for the Appellant**

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

**Maxine Vincelette**  
Tel: 613 702 5573  
Email: [mvincelette@powerlaw.ca](mailto:mvincelette@powerlaw.ca)

**Ottawa Agent for the Respondent**

**AND TO: TORONTO DISTRICT SCHOOL BOARD**

Legal Services  
5050 Yonge Street  
Toronto, ON M2N 5N8

**Leola Pon | Paul Koven**

Tel: 416 395 4932  
416 397 3565  
Fax: 416 393 8973  
Email: [leola.pon@tdsb.on.ca](mailto:leola.pon@tdsb.on.ca)  
[paul.koven@tdsb.on.ca](mailto:paul.koven@tdsb.on.ca)

**Counsel for the Intervener,  
Toronto District School Board**

**AND TO: ATTORNEY GENERAL OF BRITISH COLUMBIA**

Legal Services Branch  
1301 – 865 Hornby Street  
Vancouver, BC V6Z 2G3

**Mark Witten | Ashley Caron**

Tel: 604 660 5476  
604 660 6797  
Fax: 416 393 8973  
Email: [mark.witten@gov.bc.ca](mailto:mark.witten@gov.bc.ca)  
[ashley.caron@gov.bc.ca](mailto:ashley.caron@gov.bc.ca)

**Counsel for the Intervener, Attorney  
General Of British Columbia**

**AND TO: GOLDBLATT PARTNERS LLP**

20 Dundas St. W., Suite 1039  
Toronto, ON M5G 2C2  
Fax: 416-591-7333

**Steven M Barrett  
Simon Archer  
Geetha Philipupillai**

Tel: 416-977-6070  
Email: [sbarrett@goldblattpartners.com](mailto:sbarrett@goldblattpartners.com)  
[sarcher@goldblattpartners.com](mailto:sarcher@goldblattpartners.com)  
[gphilipupillai@goldblattpartners.com](mailto:gphilipupillai@goldblattpartners.com)

**Counsel for the Intervener,  
Canadian Civil Liberties Association**

**SUPREME ADVOCACY LLP**

100-340 Gilmour Street  
Ottawa, ON K2P 0R3

**Marie-France Major**

Tel: 613 695 8855  
Fax: 613 695 8580  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for the Intervener,  
Toronto District School Board**

**GIB VAN ERT LAW**

148 Third Avenue  
Ottawa, ON K1S 2K1

**Gib van Ert**

Tel: 613 408 4297  
Fax: 613 651 0304  
Email: [gib@gibvanertlaw.com](mailto:gib@gibvanertlaw.com)

**Ottawa Agent for the Intervener,  
Attorney General of British Columbia**

**GOLDBLATT PARTNERS LLP**

30 Metcalfe St., Suite 500  
Ottawa, ON K1P 5L4  
Fax: 613-235-3041

**Colleen Bauman**

Tel: 613-482-2463  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

**Ottawa Agent for the Intervener,  
Canadian Civil Liberties Association**

**AND TO: PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**  
155 Wellington St. W., 35th Floor  
Toronto, ON M5V 3H1  
Fax: 416-646-4301

**Donald K Eady**  
Tel: 416-646-4321  
Email: [don.eady@paliareroland.com](mailto:don.eady@paliareroland.com)

**Glynnis Hawe**  
Tel: 416-646-6309  
Email: [glynnis.hawe@paliareroland.com](mailto:glynnis.hawe@paliareroland.com)

**Counsel for the Intervener,  
Progress Toronto**

**AND TO: BORDEN LADNER GERVAIS LLP**  
3400 – 22 Adelaide St. W.  
Toronto, ON M5H 4E3  
Fax: 416-367-6749

**Christopher D Bredt**  
**Pierre N Gemson**  
Tel: 416-367-6165  
Email: [cbredt@blg.com](mailto:cbredt@blg.com)  
[pgemson@blg.com](mailto:pgemson@blg.com)

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

**Jamie Cameron, Professor Emeritus**  
Tel: 416-294-1512  
Email: [jcameron@osgoode.yorku.ca](mailto:jcameron@osgoode.yorku.ca)

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

**DENTONS CANADA LLP**  
99 Bank St., Suite 1420  
Ottawa, ON K1P 1H4  
Fax: 613-783-9690

**David R Elliot**  
**Corey Villeneuve (Law Clerk)**  
Tel: 613-783-9699  
Email: [corey.villeneuve@dentons.com](mailto:corey.villeneuve@dentons.com)

**Ottawa Agent the Intervener,  
Progress Toronto**

**BORDEN LADNER GERVAIS LLP**  
1300 – 100 Queen St.  
Ottawa, ON K1P 1J9  
Fax: 613-230-8842

**Nadia Effendi**  
Tel: 613-787-3562  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)

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

**AND TO: SELWYN A. PIETERS**  
Barrister & Solicitor  
P.O. Box 518, 31 Adelaide St. E.  
Toronto, ON M5C 2J6  
Fax: 416-787-6145

**Selwyn A Pieters**  
Tel: 416-787-5928  
Email: [selwyn@selwynpieters.com](mailto:selwyn@selwynpieters.com)

**Counsel to the Intervener,  
CityPlace Residents' Association**

**AND TO: DURHAM COMMUNITY LEGAL  
CLINIC**  
200 John St. W., Unit B1  
Oshawa, ON L1J 2B4  
Fax: 905-728-6362

**Omar Ha-Redeye**  
Tel: 905-728-7321  
Email:  
[omar@durhamcommunitylegalclinic.ca](mailto:omar@durhamcommunitylegalclinic.ca)

**Counsel for the Intervener,  
Durham Community Legal Clinic**

**AND TO: MCCARTHY TÈTRAULT LLP**  
Suite 5300, Toronto Dominion Bank  
Tower  
Toronto, ON M5K 1E6  
Fax: 416-868-0673

**Adam Goldenberg**  
**Jacob Klugsberg**  
Tel: 416-601-8357  
Email: [agoldenberg@mccarthy.ca](mailto:agoldenberg@mccarthy.ca)

**Counsel for the Intervener,  
Canadian Constitution Foundation**

**SUPREME ADVOCACY LLP**  
340 Gilmour St., Suite 100  
Ottawa, ON K2P 0R3  
Fax: 613-695-8580  
**Marie-France Major**  
Tel: 613-695-8855  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for the Intervener,  
CityPlace Residents' Association**

**SUPREME ADVOCACY LLP**  
340 Gilmour St.  
Ottawa, ON K2P 0R3  
Fax: 613-695-8580

**Marie-France Major**  
Tel: 613-695-8855  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for the Intervener,  
Durham Community Legal Clinic**

**JURISTES POWER LAW**  
130 Albert St., Suite 1103  
Ottawa, ON K1P 5G4  
Fax: 613-702-5566

**Darius Bossé**  
Tel: 613-702-5566  
Email: [DBosse@juristespower.ca](mailto:DBosse@juristespower.ca)

**Ottawa Agent for the Intervener,  
Canadian Constitution Foundation**

**AND TO: STEPHANE ÉMARD-CHABOT  
MARY EBERTS  
WILLIAM B HENDERSON**  
24 Clarence St.  
Ottawa, ON K1N 5P3  
Tel: 613-241-5221  
Email [stephane@emard-chabot.ca](mailto:stephane@emard-chabot.ca)

**Counsel for the Intervener,  
Federation of Canadian Municipalities**

**AND TO: PAPE SALTER TEILLET LLP**  
546 Euclid Ave.  
Toronto, ON M6G 2T2  
Fax: 416-916-3726

**Jason T Madden**  
Tel: 416-916-3853  
Email: [jmadden@pstlaw.ca](mailto:jmadden@pstlaw.ca)

**Marc E Gibson**  
Tel: 416-855-2649  
Email: [mgibson@pstlaw.ca](mailto:m Gibson@pstlaw.ca)

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

**AND TO: GOLDBLATT PARTNERS LLP**  
20 Dundas St. W., Suite 1039  
Toronto, ON M5G 2C2  
Fax: 416-591-7333

**Howard Goldblatt  
Christine Davies**  
Tel: 416-977-6070  
Email: [hgoldblatt@goldblattpartners.com](mailto:hgoldblatt@goldblattpartners.com)  
[cdavies@goldblattpartners.com](mailto:cdavies@goldblattpartners.com)

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

**SUPREME ADVOCACY LLP**  
100 – 340 Gilmour St.  
Ottawa, ON K2P 0R3  
Fax: 613-695-8580

**Marie-France Major**  
Tel: 613-695-8855, ext. 102  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa Agent for the Intervener,  
Federation of Canadian Municipalities**

**GOWLING WLG**  
160 Elgin St., Suite 2600  
Ottawa, ON K1P 1C3  
Fax: 613-788-3573

**Matthew Estabrooks**  
Tel: 613-786-0211  
Email:  
[matthew.estabrooks@gowlingwlg.com](mailto:matthew.estabrooks@gowlingwlg.com)

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

**GOLDBLATT PARTNERS LLP**  
30 Metcalfe St., Suite 500  
Ottawa, ON K1P 5L4  
Fax: 613-235-3041

**Colleen Bauman**  
Tel: 613-482-2463  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

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

**AND TO: GOWLING WLG (CANADA) LLP**  
Barristers & Solicitors  
2600 – 160 Elgin St.  
Ottawa, ON K1P 1C3  
Fax: 613-563-9869

**Guy Régimbald**  
Tel: 613-786-0197  
Email: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

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

**AND TO: DEPARTMENT OF JUSTICE  
CANADA**  
120 Adelaide St. W., Suite 400  
Toronto, ON M5H 1T1  
Fax: 416-973-0809

**Michael H Morris**  
Tel: 647-256-7539  
Email: [michael.morris@justice.gc.ca](mailto:michael.morris@justice.gc.ca)

**Gail Sinclair**  
Tel: 647-256-7549  
Email: [gail.sinclair@justice.gc.ca](mailto:gail.sinclair@justice.gc.ca)

**Counsel for the Intervener, Attorney  
General of Canada**

**NICOLAS ROULEAU  
PROFESSIONAL CORPORATION**  
41 Burnside Drive  
Toronto, Ontario M6G 2M9

Tel: (416) 885-1361  
Fax: (888) 850-1306  
Email: [rouleau@gmail.com](mailto:rouleau@gmail.com)

**Counsel for the Intervener,  
Fair Voting British Columbia**

**AGENT FOR THE INTERVENER,  
ATTORNEY GENERAL OF CANADA**  
Civil Litigation Branch, East Tower  
234 Wellington St.  
Ottawa, ON K1A 0H8  
Fax: 613-954-1920

**Christopher M Rupar**  
Tel: 613-941-2351  
Email: [crupar@justice.gc.ca](mailto:crupar@justice.gc.ca)

**Ottawa Agent for the Intervener,  
Attorney General of Canada**

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

**Nadia Effendi**  
Tel: 613 787 3562  
Fax: 416 367 6749  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)

**Ottawa Agent for the Intervener,  
Fair Voting British Columbia**

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## **PART I - OVERVIEW**

1. The *Charter's* guarantee of freedom of expression is a key individual right that exists within and is essential to the broader institutional framework of our democracy.<sup>1</sup> In order to comply with constitutional and internationally accepted democratic principles, the statutory framework for the election of a democratic governing body must be established in advance of the campaign period, to ensure time for dissemination, deliberation and public debate as well as resolution of any legal or constitutional challenges. The enactment must be fair to voters and candidates. The legislation must be transparent, accessible, and intelligible, and free from partisan political motivation.

2. Section 2(b) of the *Charter* plays an indispensable role in fostering full engagement in the democratic process. Its guarantee ensures that candidates can discuss their policy positions and citizens can make informed choices. Electoral expression is a distinct form of expression which extends far beyond the right to cast a ballot. It encompasses a broad array of expressive activities that occur throughout the electoral process. All exercises of electoral expression must receive robust *Charter* protection.

3. Changes introduced after an election period has commenced undermine the basic participatory and communicative engagement that stands at the core of *Charter* protected political electoral activity. Mid-election changes disrupt or terminate expressive electoral activities; these changes risk suppressing constitutionally protected activity and undermine the faith in our democratic institutions.

## **PART II - POSITION ON THE ISSUES**

4. The Asper Centre takes no position on the facts or the outcome of this appeal.

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<sup>1</sup> Yasmin Dawood, [“Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review”](#), 62 U Toronto LJ 499 at 503.

## PART III - ARGUMENT

### A. FREEDOM OF EXPRESSION IS AN INTEGRAL PART OF DEMOCRACY

#### (i) *Freedom of expression stands at the heart of the democratic process*

5. The constitutional principle of freedom of expression predates the *Charter* as “one of the most fundamental values of our society.”<sup>2</sup> In *Keegstra*, Dickson CJ characterized “the connection between freedom of expression and the political process” as “perhaps the linchpin of the s. 2(b) guarantee.”<sup>3</sup> The *Charter*’s guarantee of freedom of expression is the mechanism through which democracy’s essence – collective expression of the citizenry’s will – is protected and realized.<sup>4</sup> Put plainly, freedom of expression is the pre-condition for democratic government.<sup>5</sup>

6. The right to freedom of expression must be interpreted expansively, and must include “any activity or communication that conveys or attempts to convey meaning,” other than violence.<sup>6</sup> Interpretation of *Charter* text must be “generous rather than legalistic”,<sup>7</sup> “large and liberal”<sup>8</sup>, “broad” and “purposive”<sup>9</sup> and must avoid “the austerity of tabulated legalism.”<sup>10</sup> The interpretation must “give to individuals the full measure of the fundamental rights and freedoms referred to.”<sup>11</sup> Purposive reasoning includes consideration of a broad array of sources,<sup>12</sup> including international law.<sup>13</sup> *Charter* jurisprudence confirms that the guarantee of freedom of expression

<sup>2</sup> *Libman v QC AG*, [1997] 3 SCR 569, 1997 CanLII 326 at para 28.

<sup>3</sup> *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC) at 763-764.

<sup>4</sup> *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, s 2(b) [*Charter*].

<sup>5</sup> Richard Moon, “[The Scope of Freedom of Expression](#)” (1985) Osgoode Hall LJ 232 [Moon] at 332. See also Keith Dubick, “The Theoretical Foundation for Protecting Freedom of Expression” (2001) 13 Nat’l J Const L 1 [Dubick] at p 1.

<sup>6</sup> *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, 1998 CanLII 829 at para 81; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927.

<sup>7</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69 at para 117.

<sup>8</sup> *Ford v Quebec (AG)*, [1988] 2 SCR 712, 1988 CanLII 19 at para 59.

<sup>9</sup> *Hunter v Southam*, [1984] 2 SCR 145, 1984 CanLII 33 at 156; *R v Zundel*, [1992] 2 SCR 731, 1992 CanLII 75 at para 21.

<sup>10</sup> *Ministry of Home Affairs v Fisher*, [1980] AC 319, (PC, Bermuda) per Lord Wilberforce in reference to Bermuda’s bill of rights, cited in *Hunter v Southam*, *ibid*.

<sup>11</sup> *Fisher*, *ibid* at 156.

<sup>12</sup> *R v Big M Drug Mart Ltd*, *supra* note 7; *Hunter v Southam*, *supra* note 9.

<sup>13</sup> *R v Finta*, [1994] 1 SCR 701, 1994 CanLII 129; *Young v Young*, [1993] 4 SCR 3, 1993 CanLII 34.

enables individuals to receive and convey information, form opinions, call their representatives to account, and evaluate new policy proposals. Restrictions on this highly protected, fundamental freedom in the political context require a high standard of justification,<sup>14</sup> for example to ensure the fairness of the democratic process and to enhance participation of individuals and groups in society.<sup>15</sup>

**(ii) *Freedom of expression protects more than casting a ballot***

7. Electoral expression is a distinct form of expression.<sup>16</sup> It extends far beyond the right to cast a ballot. It encompasses a broad range of expressive activities engaged in by speakers, listeners, voters, and candidates alike that join together in pursuit of a democratic end.

8. The right to freedom of expression is indispensable during an election for it ensures that a well-informed and empowered citizenry is free to exercise its civil and political rights. Individual exercises of freedom of expression occur throughout the electoral process in a multitude of contexts. Election campaigns provide a special forum for voters and candidates to interact with each other.<sup>17</sup> Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions.<sup>18</sup> All exercises of expression, at each and every stage of the electoral process - not only the final act of voting - must receive consistent and robust *Charter* protection.

**B. ELECTORAL EXPRESSION AND THE INFRINGEMENT OF SECTION 2(B)**

9. A central issue in this case is whether Bill 5 infringed the freedom of expression by implementing a mid-election change to Toronto's electoral districts. There are three distinct approaches to considering whether Bill 5 and its accompanying regulations infringed s. 2(b): (1) whether it infringed the candidates' electoral expression; (2) whether it infringed two democratic

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<sup>14</sup> *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 at 1336.

<sup>15</sup> *Harper v Canada (Attorney General)*, [2004] 1 SCR 827 at paras 86-7; *R v Bryan*, [2007] 1 SCR 527 at paras 27, 47.

<sup>16</sup> Saul Zipkin, "[The Election Period and Regulation of the Democratic Process](#)" (2010) 18 Wm Mary Bill Rts J at 545.

<sup>17</sup> *Ibid* at 544.

<sup>18</sup> *Ibid* at 548-49.

principles—the candidates’ right to equal participation and the voters’ right to a free and informed vote—which are protected by s. 2(b); and (3) whether it infringed s. 2(b)’s protection of the deliberative exchange among all electoral participants.<sup>19</sup> These three approaches are independent of one another but are nonetheless complementary.

**(i) *The Irwin Toy standard for infringement applies***

10. The first two steps of the *Irwin Toy* standard are arguably met in this case: the activity in question—electoral expression—falls within the scope of s. 2(b) (step 1) and there is nothing about its method or location that would warrant exclusion (step 2).<sup>20</sup> The third step, asks whether Bill 5, in purpose or effect, infringed the freedom of expression. The positive rights *Baier/Dunmore* framework does not apply to this case.<sup>21</sup>

**(ii) *Electoral expression***

11. To demonstrate an infringement, *Irwin Toy* asks whether “the purpose or effect of the government action in question was to restrict freedom of expression,” which the Court alternatively described as an inquiry into whether “the purpose or effect of the impugned governmental action was to *control attempts to convey meaning* through that activity.”<sup>22</sup> To find an infringement of s. 2(b), it must be shown that the effects of Bill 5 restrict expression.<sup>23</sup>

12. A contextual approach to freedom of expression can be used to assess the effects of Bill 5.<sup>24</sup> Under this approach, “the fact that the expression is *electoral* is central to the analysis.”<sup>25</sup> As Professor Yasmin Dawood notes, “a contextual approach would place significant weight on the nature of electoral expression as speech which is taking place within and being constrained by the

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<sup>19</sup> Yasmin Dawood, “The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter” (2021) *Supreme Court Law Review* 2d 100 [Dawood] at 123-137.

<sup>20</sup> *Irwin Toy Ltd v Quebec*, *supra* note 6, at 967-977; *Canadian Broadcasting Corp v Canada (Attorney General)*, [2011] 1 SCR 19 at para 38; Dawood, *supra* note 19 at 126.

<sup>21</sup> For an explanation, see Dawood, *supra* note 19 at 137-139.

<sup>22</sup> *Irwin Toy Ltd v Quebec*, *supra* note 6 at 971-972. [emphasis added]

<sup>23</sup> While the purpose of Bill 5 does not restrict s. 2(b), Ontario enacted accompanying regulations, one of which (Reg 407/18) provides a number of new campaign finance rules that applied to the candidates. Reg 407/18 satisfies the *Irwin Toy* purpose prong. For a discussion, see Dawood *supra* note 19 at 127.

<sup>24</sup> For a more complete discussion of the contextual approach as it applies to determining the meaning and scope of a right, see Dawood, *supra* note 19 at 122-123.

<sup>25</sup> Dawood, *ibid*, at 122.

legal and institutional framework of an election.”<sup>26</sup> Electoral expression “amounts to a particular kind of expression that is heavily regulated in order to ensure the fairness of elections.”<sup>27</sup> Under a contextual approach, electoral expression is treated as “legally mediated speech,”<sup>28</sup> which is distinguishable from ordinary speech because it takes place within and is subject to a set of complex and stringent rules governing the election period.<sup>29</sup>

13. As Professor Dawood has noted, “[e]lectoral expression is, as a definitional matter, regulated campaign speech that takes place within and is constrained by the legal framework of an election.”<sup>30</sup> A change in the rules such that campaign materials no longer amount to “electoral expression” suggests the “control” of speech under the *Irwin Toy* standard.<sup>31</sup>

**(iii) Democratic rights and principles under s.2(b)**

14. This Honourable Supreme Court has identified two democratic principles—the right to equal participation and the right to a free and informed vote—that apply to electoral expression under s. 2(b).<sup>32</sup> The “right of equal participation in democratic government”<sup>33</sup> is concerned with an “equal dissemination of points of view,”<sup>34</sup> and hence, mandates rules that ensure the relative equality of speakers. The right to a free and informed vote is described by the Court as “the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties.”<sup>35</sup> These two democratic principles are not intended for exclusive use by the government to justify campaign finance limits; indeed, the Court has used these

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<sup>26</sup> Dawood, *ibid*, at 131.

<sup>27</sup> Dawood, *ibid*, at 129.

<sup>28</sup> Dawood, *ibid*, at 128.

<sup>29</sup> For further details on the legally mediated nature of electoral expression in the municipal election, see Dawood, *ibid*, at 128-129.

<sup>30</sup> *Ibid* at 132

<sup>31</sup> *Ibid* at 133. For an explanation of why this analysis does not amount to an argument about the effectiveness of speech, see 133-134.

<sup>32</sup> *Libman v Quebec (Attorney General)*, *supra* note 2 at para 47; *Harper v. Canada (Attorney General)*, *supra* note 15 at para 61. For a discussion of these two democratic rights, see Dawood, *supra* note 19 at 118-120.

<sup>33</sup> *Libman v Quebec (Attorney General)*, *supra* note 2 at para 47.

<sup>34</sup> *Harper v Canada (Attorney General)*, *supra* note 15 at para 61.

<sup>35</sup> *Libman v Quebec (Attorney General)*, *supra* note 2 at para 47.

principles outside the campaign finance context, which suggests that they have a broad application to electoral expression.<sup>36</sup>

15. Bill 5 and its accompanying regulations required candidates who had registered prior to the enactment of Bill 5 to carry over their campaign finance expenses.<sup>37</sup> These amounts were counted against the new expense limits imposed by Bill 5.<sup>38</sup> By contrast, candidates who registered after Bill 5 came into effect had the benefit of the full expense limit.<sup>39</sup> The regulatory difference in available electoral expression between re-registered candidates and new candidates in competition for the same electoral seat in the same electoral district undermines the right to equal participation as recognized by the Court's s. 2(b) cases.<sup>40</sup>

16. Bill 5 also impacted the right to a free and informed vote. Due to Bill 5, candidates “spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing the relevant political issues.”<sup>41</sup> The candidates’ efforts “to convey their political message about the issues in their particular ward were severely frustrated and disrupted.”<sup>42</sup> Because the candidates were unable to convey their campaign messages, the voters’ right to be adequately informed was undermined.<sup>43</sup>

**(iv) *Deliberative engagement in the electoral context***

17. MacPherson J.A. in his minority opinion at the Ontario Court of Appeal, citing the Asper Centre’s factum, stated:

The *Charter’s* guarantee of freedom of expression is a key individual right that exists within and is essential to the broader institutional framework of our democracy. 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. It expands to

<sup>36</sup> Dawood, *supra* note 19 at 135.

<sup>37</sup> *2018 and 2022 Regular Elections – Special Rules*, O Reg 407/18; *Better Local Government Act*, 2018, SO 2018, c 11, Sch 3, s 10.1(6).

<sup>38</sup> Toronto City Hall, “Bulletin for Candidates: Changes to Municipal Election Legislation” (August 2018), at 1, online: <https://www.toronto.ca/wp-content/uploads/2018/08/9775-Bulletin-for-Candidates-August-16.pdf>.

<sup>39</sup> *2018 and 2022 Regular Elections – Special Rules*, O Reg 407/18, s 10.

<sup>40</sup> Dawood, *supra* note 19 at 135.

<sup>41</sup> *Toronto (City) v Ontario (Attorney General)*, [2018 ONSC 5151 \(CanLII\)](#), at para 31.

<sup>42</sup> *Ibid.*

<sup>43</sup> Dawood, *supra* note 19 at 136.

encompass a framework for the full deliberative engagement of voters, incumbents, new candidates, volunteers, donors, campaign organizers and staff, and the media, throughout a pre-determined, stable election period.<sup>44</sup>

He continued that the expressive activities of multiple electoral participants “unfold and intersect within a legal framework.”<sup>45</sup> For this reason, he found that Bill 5 “substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun”,<sup>46</sup> thus infringing s. 2(b).

### C. ELECTORAL EXPRESSION AND DEMOCRATIC ELECTIONS

18. Elections and electoral expression are key components of a broader democratic system. While this broader democratic framework does not fall, and should not be treated as falling, within the scope of s. 2(b), it is nonetheless relevant when assessing the constitutional harm caused by mid-election changes to the rules governing electoral expression. In keeping with international standards, as described below, “mid-election changes to election rules should be discouraged in order to safeguard electoral fairness.”<sup>47</sup> Consequently, there should be a commensurately heavy burden on the state to justify a mid-election change to electoral rules.<sup>48</sup>

#### (i) *Electoral expression is protected by a stable framework for elections*

19. For an election process to be fair, impartial and legitimate, free expression must be protected. For this to occur, the election process must conform to deeply rooted principles drawn from well established constitutional convention, common law and statutory precepts, international law and the *Charter’s* guarantee of freedom of expression. These inter-locking principles require a stable and protected electoral process, set up in advance, to support the full exercise of freedom of political expression by all actors engaged in electoral politics.

20. Democratic elections “are the vehicle through which the people of a country freely express their will, on a basis established by law, as to who shall have the legitimacy to govern in their

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<sup>44</sup> *Toronto (City) v Ontario (Attorney General)*, [2019 ONCA 732 \(CanLII\)](#), at para 117.

<sup>45</sup> *Ibid* at para 122, MacPherson JA, dissenting

<sup>46</sup> *Ibid* at para 128, MacPherson JA, dissenting.

<sup>47</sup> Dawood, *supra* note 19 at 140.

<sup>48</sup> *Ibid*.

name and in their interests.”<sup>49</sup> In a constitutional democracy, elected governments wield legitimate power only to the extent that the rules framing the election period conform to the fundamental interlocking principles of democracy and the rule of law.

21. Democratic legitimacy is sorely tested when electoral rules are unstable, resulting in a loss of public confidence in the electoral system. If there is no public confidence in the electoral system, there will be less participation and political expression will suffer. Faith in social and political institutions, in turn, enhances the participation of individuals and groups in society. It makes real the *Charter’s* assurance that Canada is a free and democratic society.<sup>50</sup> In addition, citizens who meaningfully participate in a legitimate election process are more willing to accept government decisions that do not reflect their own preferences. Freedom of expression, when combined with the rule of law, ensures the necessary balance between social order and social change, and leads to a stable social community.<sup>51</sup>

22. International instruments impose the same requirement for a stable, formal and normative legal framework for elections.<sup>52</sup> Elections must be “subject only to the rule of law, and not to the whim of the existing Government or of any single party.”<sup>53</sup> The *International Covenant on Civil and Political Rights* requires that State Parties, including Canada, provide the requisite constitutional protections for “genuine, free and periodic elections”,<sup>54</sup> including sufficient legal certainty, stability and predictability to avoid arbitrariness.<sup>55</sup>

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<sup>49</sup> [Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers](#), United Nations Electoral Assistance Division, 27 October 2005 at 1.

<sup>50</sup> *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at 136.

<sup>51</sup> Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 8.

<sup>52</sup> [Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections](#), Professional Training Series No 2, UN Centre for Human Rights, 1994, H/P/PT/2 [Election Handbook].

<sup>53</sup> *Ibid* at para 78.

<sup>54</sup> [General Comment 25: The right to participate in public affairs, voting rights and the right to equal access to public service](#), UN Human Rights Committee, Fifty-Seventh Session, 12 July 1996, CCPR/C/21/Rev.1/Add.7 [General Comment 25] at para 22.

<sup>55</sup> *Ibid*.



(ii) *The duration of the election period must be clear and free from government interference*

23. Stability of the law is crucial to the credibility of the electoral process, which is itself vital to democratic governance.<sup>56</sup> The temporal stages of an election must be proscribed prior to the start of the election. The calendar must provide sufficient, and pre-set, time to successfully implement all aspects of the election, including sufficient time for candidates to campaign and sufficient time for the electorate to be properly informed about their choices.<sup>57</sup> This ensures that voters understand their choices and are able to refine their preferences.

24. International law also recognizes the paramount importance of the stability of the electoral calendar: “It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.”<sup>58</sup> The issue is that legislative changes mid-election may subvert the democratic character of the election and undermine the legitimacy of those who are elected to office.

#### D. CONCLUSION

24. In recent years, democratic nations around the world have experienced democratic decline.<sup>59</sup> This “erosion of democracy has been brought about, in part, by executive-driven, legislatively endorsed alterations to electoral structures, which while technically “legal”, have subverted the norms and spirit of constitutional democracy, not to mention its accountability and representativeness.”<sup>60</sup> A contextual approach to electoral expression, and its infringement, offers a possible defense against this dismantling of democratic rights and institutions.

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<sup>56</sup> Council of Europe (European Commission for Democracy through Law), [Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report](#), II.2.63 [*Code of Good Practice*] at para 63.

<sup>57</sup> *Election Handbook*, *supra* note 52 at paras 75 and 108.

<sup>58</sup> *Code of Good Practice*, *supra* note 56 at para 65.

<sup>59</sup> Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Broadway Books, 2018), at 1-10.

<sup>60</sup> Dawood, *supra* note 19 at 140.

**PART IV - SUBMISSIONS ON COSTS**

25. The Asper Centre does not seek costs and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of February, 2021.



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Alexi N. Wood



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Jennifer P. Saville

**ST. LAWRENCE BARRISTERS LLP**

Lawyers for the Intervener,  
David Asper Centre for Constitutional Rights

## PART VI - TABLE OF AUTHORITIES

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