File No.: 38921

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

BETWEEN:

CITY OF TORONTO

Appellant
(Respondent in the Court of Appeal)

- and-

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant in the Court of Appeal)

-and-

TORONTO DISTRICT SCHOOL BOARD, 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

Interveners

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ONTARIO, IN REPLY TO INTERVENERS

(Pursuant to Order of this Court dated December 17, 2020)

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Fax: 416-326-4015

Robin K Basu (LSO No.: 32742K)
Tel: 416-995-5249
Email: robin.basu@ontario.ca

Yashoda Ranganathan (LSO No.: 57236E)
Tel: 647-637-0883
Email: yashoda.ranganathan@ontario.ca

Karlson K Leung (LSO No.: 77051A)
Tel: 416-908-0738
Email: karlson.leung@ontario.ca

Of Counsel for the Respondent,
The Attorney General of Ontario

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

Maxine Vincelette
Tel: 613-702-5573
Email: mvincelette@powerlaw.ca

Agent for the Respondent,
The Attorney General of Ontario

TO:

THE CITY OF TORONTO
City of Toronto, Legal Services
Metro Hall, 55 John Street, 26th Floor
Toronto, Ontario M5V 3C6
Fax: 416-397-5624

Diana W Dimmer
Tel: 416-392-7229
Email: diana.dimmer@toronto.ca

Glenn KL Chu
Tel: 416-392-7224
Email: glenn.chu@toronto.ca

Fred Fischer
Tel: 416-397-5407
Email: fred.fischer@toronto.ca

Philip K Chan
Tel: 416-392-1650
Email: philip.k.chan@toronto.ca

Counsel for the Appellant,
The City of Toronto

BORDEN LADNER GERVAIS
World Exchange Plaza
1300-100 Queen Street
Ottawa, ON K1P 1J9
Fax: 613-230-8842

Nadia Effendi
Tel: 613-787-3562
Email: neffendi@blg.com

Agent for the Appellant,
City of Toronto

AND TO:

TORONTO DISTRICT SCHOOL BOARD LEGAL SERVICES
5050 Yonge Street, 5th Floor
Toronto, ON M2N 5N8
Fax: 416-393-8973
Tel: 416-397-3565

Paul D Koven
Email: paul.koven@tdsb.on.ca

Leola Pon
Email: leola.pon@tdsb.on.ca

Counsel for the Intervener,
Toronto District School Board

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

Marie-France Major
Tel: 613-695-8855 Ext: 102
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent 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
Fax: 604-660-6797

Mark Witten
Ashley Caron
Tel: 604-660-5476
Email: mark.witten@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

GIB VAN ERT LAW
148 Third Avenue
Ottawa, ON K1S 2K1
Fax: 613-651-0304

Gib van Ert
Tel: 613-408-4297
Email: gib@gibvanertlaw.com

Ottawa Agent 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
sarcher@goldblattpartners.com
gphilipupillai@goldblattpartners.com

Counsel for the Intervener, Canadian Civil Liberties Association

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

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

Glynnis Hawe
Tel: 416-646-6309
Email: glynnis.hawe@paliareroland.com

Counsel for the Intervener, Progress Toronto

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

Ottawa Agent 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
pgemson@blg.com

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

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

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

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

AND TO:

SELWYN A. PIETERS
Barrister & Sollicitor
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

Counsel to the Interveners,
CityPlace Residents' Association

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

Ottawa Agent for 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

Counsel for the Intervener,
Durham Community Legal Clinic

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

Ottawa Agent 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

Counsel for the Intervener,
Canadian Constitution Foundation

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

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

Counsel for the Intervener,
Federation of Canadian Municipalities

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

Ottawa Agent for the Intervener,
Federation of Canadian Municipalities

AND TO

ST. LAWRENCE BARRISTERS LLP
33 Britain St., 2nd Floor
Toronto, ON M5A 1R7
Fax: 647-245-8285

Alexi N Wood
Jennifer P Saville
Tel: 647-245-8283
Email: alexi.wood@stlbarristers.ca
jennifer.saville@stlbarristers.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor St., Suite 1500
Ottawa, ON K1P 1A4
Fax: 613-230-5459

Matthew J Haplin
Tel: 613-780-8654
Email:
matthew.halpin@nortonrosefulbright.com

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

AND TO:

PAPE SALTER TEILLETT LLP
546 Euclid Ave.
Toronto, ON M6G 2T2
Fax: 416-916-3726

Jason T Madden
Tel: 416-916-3853
Email: jmadden@pstlaw.ca

Marc E Gibson
Tel: 416-855-2649
Email: mgibson@pstlaw.ca

Counsel for the Interveners, Métis Nation of Ontario and Métis Nation of Alberta

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

Ottawa Agent for the Interveners, 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
cdavies@goldblattpartners.com

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

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

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

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

FACULTÉ DE DROIT, UNIVERSITÉ DE MONTRÉAL
Pavillon Maximilien-Caron Local A-7428
3101, chemin de la Tour
Montréal, QC H3C 3J7

Prof. D Stéphane Beaulac
Tel: 514-343-7211
Email: stephane.beaulac@umontreal.ca

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

Gail Sinclair
Tel: 647-256-7549
Email: gail.sinclair@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

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

Ottawa Agent for the Intervener, Attorney General of Canada

AND TO:

NICOLAS M ROULEAU PROFESSIONAL CORPORATION SOCIÉTÉ PROFESSIONNELLE
41 Burnside Dr.
Toronto, ON M6G 2M9

Nicolas M Rouleau
Tel: 416-885-1361
Fax: 1-888-850-1306
Email: RouleauN@gmail.com

Counsel for the Intervener, Fair Voting BC

BORDEN LADNER GERVAIS LLP
World Exchange Plaza 1300
100 Queen St.
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Fair Voting BC

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS USED IN TEXT AND CITATIONS

aff – Affidavit
AG – Attorney General of Ontario
AGBC – Attorney General of British Columbia
CCF – Canadian Constitution Foundation
CCLA – Canadian Civil Liberties Association
CPRA – CityPlace Residents' Association
cr-x – Cross-examination transcript
DCLC – Durham Community Legal Clinic
FCM – Federation of Canadian Municipalities
ICJC – International Commission of Jurists (Canada)
p – Page
SR – Short Record
t –Tab
v – Volume
¶ – Paragraph

FRESH EVIDENCE CITED IN THIS FACTUM
(Admitted by Order of this Court, dated August 28, 2020)

(*identified by italic script in the footnotes*)

Fowler aff – Affidavit of Professor Anthony Fowler, sworn October 30, 2018, and the exhibits thereto

Sancton aff – Affidavit of Professor Andrew Sancton, sworn October 30, 2018, and the exhibits thereto

Siemiatycki cr-x – Transcript of Cross-examination of Myer Siemiatycki, on his Affidavit sworn August 21, 2018, held on March 8, 2019, and the exhibits thereto

REPLY ARGUMENT

A. It is not for courts to create a third order of government

1. It is not for the judiciary to create a third order of government where the words of the Constitution read in context do not do so. The Constitution as a "living tree" is only "capable of growth and expansion within its natural limits";[1] the written text establishes limits.[2] With the termination of Imperial parliamentary authority over Canada, our Constitution now provides for two orders of government – provincial and federal – and expressly grants the provinces exclusive jurisdiction over municipal institutions. There is no gap to be filled by the courts.[3]

2. The intervening former Mayors assert that the "time has come for this Court […]" to place proper protection and emphasis on cities' status "as independent and important orders of government."[4] The Federation of Canadian Municipalities ("FCM") similarly argues that municipal governments' "electoral processes are constitutionally protected by the democratic principle and, in a free and democratic society, that principle must remain unassailable."[5] However, the appropriate democratic and constitutionally-prescribed mechanism to limit provincial power over municipalities, and thereby grant them electoral autonomy or some other independent power, would be constitutional amendment in accordance with the amending formula in Part V of the *Constitution Act, 1982*.[6]

3. FCM relies on cases holding that a delegation of provincial power to a municipality should be read in light of the elected municipal council's role in Canadian democratic self-government: *Shell Canada*; *Pacific National*; *Catalyst Paper*; *Spraytech*; *PHS Community Services Society;* and *Croplife Canada*.[7] These cases do not support an assertion that

---

[1] *Edwards v Canada* (1930), 1 DLR 98 at 106-107 (PC).
[2] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at ¶53; *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at ¶9 [*9147-0732 Québéc inc*].
[3] See e.g. Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford: Oxford University Press, 2020) at 82: "Since the 1990s there has been a modest move in both the jurisprudential and the provincial legislative arenas toward granting municipalities more power, all while maintaining provincial constitutional supremacy […] with respect to cities."
[4] The Mayors' Factum at ¶20.
[5] FCM's Factum at ¶¶24-26.
[6] *Constitution Act, 1982*, ss 38-49.
[7] FCM's Factum at ¶22, citing *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR

municipalities have, by some evolution, acquired constitutional status. Subsidiarity helps elucidate the federal-provincial division of powers and may assist in the interpretation of an ambiguous statutory provision, but it is irrelevant when considering the unambiguous exercise of power by the provincial legislature over its delegate.[8] In fact, *Spraytech* involved the interaction between subordinate provincial legislation (enacted by the Town of Hudson as delegate of the province) and federal law. The same was true in *Canada Post*.[9]

4. Contrary to the assertion of the Mayors and FCM, as this Court stated in *Sharma*, released concurrently with *Greenbaum* in 1993, municipalities may only exercise powers "expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation."[10]

5. The Asper Centre says "[i]nternational instruments impose [a] requirement for a stable, formal and normative legal framework for elections."[11] As discussed below, there is no evidence that the election that ultimately proceeded under Bill 5 was unfair or suffered from an unstable framework. No party contests the validity of the results. The Asper Centre fails to account for the fact that in Canada, the power to determine the rules for municipal elections and governance is grounded in the enabling provincial statute, not international sources.[12]

6. The Asper Centre and other interveners[13] imply that municipal electoral rules should be immunized from legislative change either temporally or permanently, yet those rules have their origin in provincial statutes, the terms of which have changed over the years. There is no reason as to why the rules in place in Ontario as of May 1, 2018, acquire constitutional status; yet those

---

231; *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*]; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44; *Croplife Canada v Toronto* (2005), 75 OR (3d) 357 (Ont CA), leave to appeal to SCC refused, 2005 CanLII 44363 [*Croplife*].

[8] *Re Assisted Human Reproduction Act*, 2010 SCC 61 at ¶72.

[9] *Canada Post Corporation v Hamilton (City)*, 2016 ONCA 767, cited in FCM's Factum at ¶27.

[10] *R v Sharma*, [1993] 1 SCR 650 at 667-668, quoting Stanley M Makuch, *Canadian Municipal and Planning Law* (Carswell, 1983) at 115; *R v Greenbaum*, [1993] 1 SCR 674 at 687-689, 693-694.

[11] Asper Centre's Factum at ¶22.

[12] See e.g. *Croplife* at ¶¶70-71, echoing LeBel J (concurring) in *Spraytech* at ¶48.

[13] See e.g. Asper Centre's Factum at ¶¶18, 21; FCM's Factum at ¶¶7, 19; CPRA's Factum at ¶25.

of earlier or later points in time do not.

7. Moreover, there is no principled basis for a constitutional rule that only prevents the legislature from altering municipal electoral regulations where other bodies also have electoral or other democratic processes statutorily prescribed for their governance. If, for example, provincial legislation established elected governance for Metrolinx (which has authority over GTA public transit) or if Parliament prescribed elections for the National Capital Commission (which has governmental powers over the National Capital Region), would those bodies' electoral processes acquire constitutional status? The same question arises for school boards, regional government, conservation authorities, boards of health, and any other body that exercises law-making authority at the local level – including bodies established by municipalities, such as neighbourhood councils.

B. Freedom of expression does not protect an election timeline

8. Several of the interveners ask the Court to effectively constitutionalize an election timeline on the basis of the unwritten principles of democracy and rule of law. They argue that these principles place constraints upon the provinces' power over municipalities under s. 92(8) of the *Constitution Act, 1867*.[14] There is no basis in law for this Court to use unwritten principles or unwritten, implied limits in s. 92(8) to constitutionalize an election timeline. In fact, as outlined in the Respondent's Factum at paragraphs 105-107 and 115, to do so would be contrary to the principles of legislative sovereignty and the rule (subject, of course, to the *Charter*) against gaps, or hiatuses, in the authority granted under ss. 91 and 92.

9. The announcement of Bill 5 on the last day for nominations under the 47-ward system may have overturned expectations regarding the ward structure and upset the reliance interests of some candidates and organizers. It does not follow that Bill 5 violates the rule of law or any unwritten principle. *Imperial Tobacco* noted that even though retroactive laws can "overturn settled expectations" they nonetheless do not offend the rule of law.[15] The Constitution cannot

---

[14] DCLC's Factum at ¶20; ICJC's Factum at ¶2; CCLA's Factum at ¶2; Asper Centre's Factum at ¶¶23-24; Fair Voting BC's Factum at ¶19; CPRA's Factum at ¶28 goes further and would constitutionalize the timeframe back to the beginning of the Toronto Ward Boundary Review.

[15] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at ¶¶69-71, 76 [*Imperial Tobacco*].

protect reliance interests, or expectations on the future state of the law, against changes in statutes: to do so would freeze in time the permissible content of statutes, undermining rather than furthering representative democracy.

10. With respect to the argument that the election calendar requires certainty, there is no principled reason to treat the May 1st opening of nominations – a date contingent on provincial law that has varied over time – as a "point of no return." The record shows (and the CityPlace Residents Association stresses) that prospective candidates began organizing long before May 1, 2018 in reliance on *proposed* new ward boundaries. Had the Municipal Board review of the new wards, and all litigation and appeal periods for review of the Board's ruling not concluded by May 1, 2018, even the City's own 47-ward system would have been susceptible to change after May 1st. And this is regardless of the risk (which in fact materialized) that the provincial election which started later that same May might yield a new government minded to enact changes at the outset of its fresh democratic mandate rather than waiting another four years.

11. Whatever the policy merits of certainty for the election calendar, the use of s. 2(b) to freeze election cycles stretches the protection of freedom of expression well beyond its purpose.[16] Even s. 3 of the Charter cannot go so far, since in the Westminster system, a federal or provincial election can be triggered despite a legislatively-fixed election date, and fixed election dates can be amended by statute. If the Asper Centre is correct, the Westminster system – the bedrock of our democratic order – is itself constitutionally suspect.

12. The interveners invite this Court to pass judgment on the timing of legislation where the constitutional text and doctrine provide no support for the Court's assumption of such a role.[17] Judicial scrutiny is allegedly triggered by the notion that there are periods during which the exercise of authority under s. 92(8) can proceed without justification, and other times ("mid-election") in which the legislature's action must be justified. This is alien to the jurisprudence.

13. The rule of law principle does not impose temporal constraints. As held in *Imperial Tobacco*, outside the penal context, there is no requirement of legislative prospectivity embodied

---

[16] *9147-0732 Québec inc* at ¶9; CCF's Factum at ¶¶8-17.
[17] *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at ¶148. See also *Reference re Firearms Act*, 2000 SCC 31 at ¶18; *Reference re Securities Act*, 2011 SCC 66 at ¶10; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at ¶¶130-131; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at ¶233.

in the rule of law or our Constitution.[18]

14. As explained in *Imperial Tobacco*, government action constrained by the rule of law principle is usually that of the executive and judicial branches. For the legislature, the rule of law principle means only compliance with legislated requirements as to manner and form, i.e., procedures by which legislation is enacted, amended and repealed.[19] The principle of democracy strongly favours the application of valid legislation that conforms to the Constitution's express terms. Duly enacted legislation is in fact an emanation of the rule of law and democracy.[20]

15. The Mayors say Bill 5 was "enacted arbitrarily without consultation or study, does not ensure effective representation, indeed compromises such representation…".[21] The legislature itself has no duty to consult or follow due process,[22] except its own rules, in respect of which it is the arbiter. In any event, the 25 wards under Bill 5 were independently established by the Federal Electoral Boundaries Commission, which considers "effective representation" and consulted with residents of Toronto on local communities of interest and concerns.[23] The evidence is that "effective representation" is not impacted by the level of government at issue.[24]

C. Bill 5 has a pressing and substantial objective

16. The submissions of Durham Community Legal Clinic ("DCLC") bear no relationship to the record.[25] There is no support whatsoever for the contention that the "true" objective here was political or personal animus. The legislative debates (supported by the subsequently filed expert evidence) demonstrate that Bill 5 has the pressing and substantial objectives of improving Council's functioning, effectiveness and efficiency, and achieving better voter parity for 2018.[26] *Charter* s. 33 is entirely irrelevant to the issues before this Court.

---

[18] *Imperial Tobacco* at ¶69.
[19] *Imperial Tobacco* at ¶60.
[20] *Imperial Tobacco* at ¶¶66-67.
[21] The Mayors' Factum at ¶17.
[22] *Authorson v Canada (Attorney General)*, 2003 SCC 39 at ¶¶37-39, 41; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at ¶¶2, 32, 34-37; *East York (Borough) v Ontario (AG)* (1997), 153 DLR (4th) 299 at ¶¶12-13 (CA).
[23] Respondent's Factum at ¶¶42-43.
[24] Respondent's Factum at ¶¶133-139.
[25] *Mackay v Manitoba*, [1989] 2 SCR 357 at 361-362; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at ¶¶101, 119-120; DCLC's Factum at ¶6.
[26] Respondent's Factum at ¶¶47-48, 140.

17. DCLC argues that low-income and marginalized populations have a greater reliance on municipal services than the general population and a greater stake in public education. Bill 5 did not impact the delivery of City services or public education in any way. City services are delivered by City staff.[27] The public school system is not at issue.

D. It is paradoxical to say the unwritten principle of democracy can invalidate legislation

18. Progress Toronto asserts that "the democracy principle extends beyond legislative bodies at the federal and provincial levels to encompass political institutions generally."[28] This statement ignores the fact that the democracy principle favours the application of duly enacted legislation. Ontario agrees with the Canadian Constitution Foundation and the International Commission of Jurists ("ICJC") that unwritten constitutional principles do not provide an independent basis to invalidate legislation.[29] As noted by ICJC, using unwritten constitutional principles as an independent basis to strike down legislation would allow claimants to bypass the government's ability to justify a breach under s. 1.[30]

19. Progress Toronto cites *Lalonde* on this issue. However, *Lalonde* applied the unwritten principle of respect for minorities to quash a discretionary administrative decision. The Court observed that the validity of legislation was not at issue and cautioned that "the unwritten principles of the constitution do not confer on the judiciary a mandate to rewrite the Constitution's text."[31]

20. Progress Toronto argues that the "result of the decision below is that the Province could enact any legislation it desired in relation to municipal government and elections, including legislation that would explicitly disenfranchise a group otherwise protected under s. 15 of the *Charter*, or legislation that is insidiously discriminatory …".[32] This submission ignores the fact that in an appropriate case, supported by evidence, s. 15(1) of the *Charter* already precludes

---

[27] Respondent's Factum at ¶137.
[28] Progress Toronto's Factum at ¶¶3, 13, 17.
[29] ICJC's Factum at ¶3; CCF's Factum at ¶20. See also FCM's Factum at ¶20; AGBC's Factum at ¶¶57-62.
[30] ICJC's Factum at ¶32.
[31] *Lalonde v Ontario (Commission de restructuration des services de santé* (2001), 56 OR (3d) 505 (Ont CA) at ¶¶121, 124.
[32] Progress Toronto's Factum at ¶29.

unjustified discrimination in legislation and government action.

E. The *Baier* framework for positive and negative rights serves an important function

21. The CCLA argues that there is a danger in applying the *Baier* test because the distinction between positive and negative s. 2(b) rights can be "artificial." It argues that concepts such as "gags, megaphones and platforms" are "conclusory categories" that obscure rather than assist in "determining the impact of Government action on speech."[33] However, there is a greater danger in failing to recognize that what is being sought in this case is constitutionalization of a statutory *status quo*.

22. The CCLA simply replaces what it says is one form of artifice with another, namely the constitutional privileging of a preferred statutory electoral framework. Dispensing with *Baier* means that s. 2(b) can confer constitutional protection against change to any given statutory regime that provides a means for, or even involves, expression, whether it be an electoral office, or a consultation or voting process, or any other channel of communication, such as administrative hearings and processes. Yet any statutory regime obtaining such protection is simply a product of prior legislative choices and is itself "artificial" in that sense. CCLA's argument begs the question of why one set of highly contingent prior legislative choices, and not others, should determine the content and application of a constitutional norm. The *Baier* framework protects against this very problem. That is the point of the first step of the framework, which requires that the activity for which s. 2(b) protection is sought must be grounded in the exercise of a fundamental right or freedom, not access to a preferred statutory regime.

23. Far from being "conclusory," this Court's jurisprudence appropriately categorizes different kinds of s. 2(b) claims so as not to overshoot the purpose of the constitutional guarantee:

(a) Claims where the state has <u>interfered</u> with or <u>suppressed</u> freedom of expression – where the liberty of the subject has been constrained – are appropriately analysed under the *Irwin Toy* framework, which offers the broadest protection for the conveying of meaning. In such cases, the state-imposed constraint is subject to s. 1 justification without further analysis.

---

[33] CCLA's Factum at ¶15.

(b) Meanwhile, where the location and method of expression (not the content) are at issue, as when a municipality regulates the permissible volume of a loudspeaker in a shared public space, the *City of Montreal* analysis is appropriate.

(c) Where the state prevented access to a state-supplied vehicle for expression due to the content of expression (as in *Greater Vancouver*), *Irwin Toy* applies and s. 1 justification is required, or (if, due to the content – such as obscenity – there are issues as to location) *City of Montreal* is applied. (In *Greater Vancouver*, after applying the *City of Montreal* test, the Court proceeded to s. 1).

(d) Where freedom of expression depends on the disclosure of information essential to its meaningful exercise, the derivative analysis in *Criminal Lawyers Association* is apt.

(e) Finally, as here, where the state has done nothing to stop, suppress or constrain the freedom of candidates, electors and others to express themselves or receive information on any subject, and where it has made no effort to regulate the content of expression, but rather has allegedly removed a state-supplied platform or "state-assistance" for expression, or (as here) taken one state-supplied platform and replaced it with another, the *Baier* framework is applicable.

24. To accept the CCLA's submission that wherever, in the context of a statutory scheme, expressive activity can be said to occur or is enabled, s. 2(b) is engaged and the *Irwin Toy* analysis is applicable, would be to subject wide swathes of legislation and governmental activity to judicial review for justification under s. 1. Ontario agrees with and adopts the submissions in British Columbia's factum regarding the importance of distinguishing positive from negative rights claims and imposing a sufficient threshold test where a positive entitlement is asserted. Failing to do so "places the judiciary in an uncomfortable, and often untenable, position that risks interference with the role of the legislative branch."[34]

25. The CCLA points out that this Court declined to apply *Baier* in *Criminal Lawyers' Association*. The CCLA's submission ignores the fact that the right of access to government information sought in that case was analyzed as a derivative right that only arose if the failure to recognize the right would "effectively preclude" expression on matters of public importance.

[34] AGBC's Factum at ¶14.

Even if the *Criminal Lawyers Association* test is applied here, it simply cannot be shown that the failure to provide a 47-ward electoral platform "effectively precluded" meaningful expression in the 2018 election. Bill 5 provided an equally effective platform in its stead. Candidates and electors continued to express themselves meaningfully on substantive issues.[35]

F. The recognition of a right to fair and legitimate elections protected under ss 2(b), 2(d), and 3 of the *Charter* falls outside the scope of this appeal

26. Fair Voting BC seeks to have this Court recognize a novel right to fair and legitimate elections protected under ss 2(b), 2(d), and 3 of the *Charter*. The Appellant does not raise an issue with the fairness or legitimacy of the 2018 election. In any event, existing constitutional provisions address electoral fairness, legitimacy and voting rights, and at the municipal level, such protection is afforded by provincial statutes. No one disagrees that elections should be conducted fairly and legitimately, and Ontario's *Municipal Elections Act* (*MEA*) is designed for that purpose. Bill 5's amendment to Toronto's ward boundaries and Council size did nothing to undermine the protections for free and fair elections under the *MEA*.

27. There is no evidence that the 2018 election under Bill 5 was anything other than free, fair, democratic and legitimate. There is no basis to conclude that it failed to reflect the will of a freely informed electorate, or that the elected City Council lacks a legitimate democratic mandate. The City Clerk certified the election in accordance with the *MEA* and the Appellant does not challenge the fairness or legitimacy of the 2018 election, nor does it seek to invalidate it.[36] The remedy sought by the Appellant is a declaration of invalidity suspended until 2022 so that the City can maintain its Council elected under Bill 5 in the meantime. Moreover, there is no evidence that the Council elected in 2018 has had any governance challenges.

G. There is no evidence that Bill 5 reduced representation of disadvantaged groups

28. Several interveners suggest that Bill 5 adversely impacted underrepresented groups.[37] These interveners make this argument in support of the s. 2(b) claim (and do not assert a separate claim under s. 15 of the *Charter*, which is beyond the scope of this appeal). Whether considered under s. 2(b) or s. 15 of the *Charter*, these assertions are unsupported by the evidence. Ontario's

---

[35] Respondent's Factum at ¶¶63, 75, 90. See also Respondent's Factum at ¶¶59-64.
[36] Appellant's Factum at ¶152.
[37] CCLA's Factum at ¶6; DCLC's Factum at ¶¶2, 16-20, 29; Progress Toronto's Factum at ¶16.

unchallenged expert evidence[38] shows that claims that a smaller council would reduce the proportionate representation of disadvantaged groups were not only speculative, they were not borne out once the election occurred. The evidence shows that in the 2018 election under Bill 5:

- The proportionate representation of historically underrepresented groups increased from 11 to 16 percent;
- Thirty-two percent of councillors are now women; in the four previous elections, the proportion was 23 to 34 percent; and
- Before, only one councillor among 44 was openly LGBTQ+; it is now one among 25.[39]

29. In theory, a dramatically larger City Council could provide more opportunities for representation, but the value of each seat on Council would also diminish proportionately to the increase in Council size. Meanwhile, the impairment of governance functions by having an unwieldy Council can adversely impact groups who depend more on effective municipal government. The evidence shows that the difference between a 25 and 47-councillor body does not adversely impact diversity of representation but should improve its functioning.[40]

H. Any judgment on this appeal need not address the Honour of the Crown principle

30. The Métis Nations of Ontario and Alberta note that the Honour of the Crown is distinct from other unwritten principles and caution against a ruling by this Court on this principle, which relates to the Crown's *sui generis* relationship with Indigenous Peoples and is not engaged in this case. Ontario agrees. The principle should be expounded in cases with the relevant record.

All of which is respectfully submitted this 10th day of February 2021.

Robin K Basu Yashoda Ranganathan Karlson K Leung

[38] The City declined to cross-examine Ontario's expert, Professor Anthony Fowler, and did not serve responding expert evidence. Professor Fowler is a political scientist specializing in elections, political representation, and quantitative methods with specific interests in the causes and consequences of unequal voter turnout, explanations for incumbent success in elections, the politics of policymaking in legislatures, and the credibility of empirical research.

[39] *Fowler aff, SR, v III, t 28, p 73 at ¶48*; *Siemiatycki cr-x, SR, v IV, t 40, qq 417-441*.

[40] *Sancton aff, SR, v II, t 27, pp 69-70, 88 at ¶¶42-43, 87*.

TABLE OF AUTHORITIES

18.	*R v Sharma*, [1993] 1 SCR 650	4
19.	*Reference re Assisted Human Reproduction Act*, 2010 SCC 61	3
20.	*Reference re Firearms Act*, 2000 SCC 31	12
21.	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40	12
22.	*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48	12
23.	*Reference re Secession of Quebec*, [1998] 2 SCR 217	1
24.	*Reference re Securities Act*, 2011 SCC 66	12
25.	*Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231	3

No.	Legislation and Regulations	Paragraph Reference in Factum
1.	*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 *Loi constitutionelle de 1982*, édictée comme l'annexe B de la Loi de 1982 sur le Canada, 1982, ch 11 (R-U) (English): ss 38-49 (Français): arts 38-49	2