File No. 38921

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

BETWEEN:

CITY OF TORONTO

Appellant
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

- and -

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

Interveners

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PART I – OVERVIEW

1. The City of Toronto's (the "City") reply will primarily address the factums submitted by the Attorneys General of Canada ("Canada") and British Columbia (the "AGBC").

2. The City submits that both Canada and the AGBC mischaracterize and try to reframe what this case is about. The effect of this is to insulate Ontario's unjustified actions from *Charter* scrutiny and proper review by this Court.

3. With respect, this is exactly the kind of case that is intended to fall within constitutional protection. There is nothing more fundamental to Canada's democracy than the principle of fair elections free from political interference.

4. To fully appreciate the City's position, it is not only helpful but necessary to analyze this case from the perspective of the Application Judge. The context and timing for both hearing the applications and issuing a decision need to be considered. At the time Justice Belobaba heard this case and issued his decision, the 2018 election had not been held, but was well underway.

5. Justice Belobaba carefully considered the significant evidence before him about the electoral expression connected with the 2018 municipal election, and how Bill 5 interfered with that expression. It was very clear at this stage of the proceedings that the case was not a demand that the government act or provide a platform, but about inappropriate government action that interfered with protected expression. Justice Belobaba correctly concluded that candidates' and voters' expression had been violated in multiple ways.[1] Having found a *Charter* breach that was not justified, the appropriate remedy was to strike down the legislation. Had matters ended there, the 2018 election could have continued based on a 47-ward structure without interference.

6. Because of the Court of Appeal's decision to stay the remedy ordered by Justice Belobaba, the election proceeded on the basis of a 25-ward model imposed by Bill 5. However, this Court should find that Justice Belobaba was correct in concluding that the mid-election interference caused by Bill 5 was a breach of s. 2(b) of the *Charter* that was not justified under s. 1.

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[1] Reasons for Decision of Belobaba J, 2018 ONSC 5151 (Sept 10, 2018) [Reasons of Belobaba J], AR Vol I, Tab 2, ¶ 29-32, 38, 81.

7. The City has an additional position that is directed to the impact of a 25-ward structure on the City's democratic municipal government. In making this argument, though, the City is not saying or demanding that Ontario must provide a platform of 47 wards, specifically.

8. Ontario has granted the City a democratic representative government. In doing so, Ontario needs to provide for effective representation, which is a recognized component of a democratic government in this country. This does not mean there must be 47 wards, but rather that the structure of the democratic municipal government must satisfy the principle of effective representation. On the facts and evidence of this case, the City submits that Bill 5's imposition of a 25-ward council does not achieve effective representation.

9. Canada and the AGBC seem to be cautioning this Court that a decision in favour of the City will create all kinds of issues and problems in the future for governments. Again, with respect, the City disagrees. This case is about an unprecedented and unjustified interference by a government with a democratic election. The kinds of cautions expressed by Canada and the AGBC should not result in s. 2(b) being stripped of any protection. Further, one must remember that our constitutional framework allows a government to breach or interfere in a *Charter* right if it can justify doing so under s. 1 of the *Charter*. This is a satisfactory response to the Attorneys General's "floodgates" arguments.

PART II – LEGAL ARGUMENT

10. The City's reply will address the following:

i) This is not a positive rights case.

ii) The *Baier* test only deals with underinclusive government action.

iii) Courts have an obligation to review election rules for constitutional compliance.

iv) Section 52(1) of the *Constitution Act, 1982*.

A. This is Not a Positive Rights Case

11. To use language in Canada's factum, this is a case of "protection from government

interference with expression".[2] Further, it is not just any expression, but electoral expression within a democratic political process. Such expression requires the greatest protection from government interference.

12. Unlike the various cases cited by Canada and the AGBC, there is no claim for *access* to a platform in this appeal.

13. The *City of Toronto Act, 2006* provides that the City is to be a democratically elected government.[3] This was so when Bill 5 came into force on August 14, 2018, and remains the case today.

14. When Bill 5 came into force:

i) no claimant indicated that they wanted access to the City of Toronto election;

ii) there was no request that the government provide funding to one group or another to assist in their expression; and

iii) no one challenged the eligibility requirements of the election, either to run or to vote.

15. In short, no one demanded that Ontario do anything.

16. Rather, Torontonians, including those who were applicants and interveners before Justice Belobaba, were busily engaged in electoral expression within a 47-ward election pursuant to a known and assumed fixed set of rules, and had been since May 1, 2018. They only wanted to continue doing so without government interference. Unfortunately, Bill 5's impact on that expression was profound and devastating.[4]

17. It is telling that neither Canada nor the AGBC addresses the *impact* of Bill 5 on expression, something that actually happened and that Justice Belobaba was asked to analyze, but instead focus their submissions on alleged dangers and concerns in hypothetical scenarios not raised in this appeal.

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[2] Canada's Factum, ¶ 3.
[3] *City of Toronto Act, 2006*, SO 2006, c 11, Sch A, s 1(1).
[4] Reasons of Belobaba J, AR Vol I, Tab 2, ¶ 29-32, 38, 81.

18. Further, the City is not saying that the municipal framework of 47 wards is forever immutable. It is not making a claim, as suggested by the AGBC, to preserve the *status quo ante*. Instead, the City's position is that, to be meaningful, expression during an election period requires a stable framework, and substantial changes to that framework infringe s. 2(b) if they interfere with expression.

19. That there are rules governing elections is not surprising or problematic. Even elections guaranteed by s. 3 of the *Charter* occur within a set of statutory rules (see the various election acts of Canada and the Provinces). Similarly, municipal elections and referenda, to which s. 3 of the *Charter* does not apply, have rules that govern how these votes will take place.

20. However, where the statutory framework, or changes to it, interfere with expression, s. 2(b) can be used to strike down that aspect of the framework, even if the underlying platform is not protected by s. 3. For example, in *Libman v. Quebec (AG)*,[5] a referendum case, the impugned provisions were found to infringe s. 2(b) of the *Charter* and were not saved by s. 1. There was no concern that, because no one had the right to a referendum as a platform in the first place, such a result impermissibly intruded into the legislative sphere or somehow turned the case into a positive rights claim.

21. Similarly, in this case, s. 2(b) protects electoral participants from substantial mid-election changes to the rules, including to the ward structure, where such changes interfere with electoral expression, even if the election is a statutory one to which s. 3 does not apply.

22. Whatever the need for the continued *Baier* framework, it is inapplicable in this case, and the analysis in *Irwin Toy* is more than adequate to assess the s. 2(b) claim in this appeal.

23. To support their position that the distinction between positive and negative rights should be maintained, Canada and the AGBC raise scenarios in their factums that are simply not engaged in this appeal and cannot be used to support a finding that Bill 5 does not infringe s. 2(b) of the *Charter*.

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[5] *Libman v Quebec (AG)*, [1997] 3 SCR 569.

B. The *Baier* Test Only Deals with Underinclusive Government Action

24. Further, the *Baier* test was designed to deal with s. 2(b) claims based on underinclusive government action.

25. This test for so-called "positive claims" was adapted from the test originally set out by this Court in *Dunmore v. Ontario (AG)*[6] with respect to s. 2(d). It is important to go back and see exactly what the Court in *Dunmore* was trying to address when it developed its three-part test.

26. *Dunmore* was a case about underinclusive legislation. Ontario had passed an amendment to a labour relations law that (re)excluded the claimants from its application. The applicants claimed that their exclusion was contrary to, *inter alia*, s. 2(d) of the *Charter*.

27. The majority in *Dunmore* explained:

> Where a group is denied a statutory benefit accorded to others, as is the case in this appeal, the normal course is to review this denial under s. 15(1) of the *Charter*, not s. 2(d) … However, it seems to me that apart from any consideration of a claimant's dignity interest, exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right … This does not mean that there is a constitutional right to protective legislation *per se*; it means legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom. [Emphasis in original.][7]

28. Later on in the judgment, the majority again clarified:

> Before concluding on this point, I reiterate that the above doctrine does not, on its own, oblige the state to act where it has not already legislated in respect of a certain area. One must always guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place.[8]

29. Indeed, the test itself requires an existing "platform" because the second branch requires the claimant to demonstrate that exclusion from the regime amounts to substantial interference

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[6] *Dunmore v Ontario (AG)*, 2001 SCC 94 [*Dunmore*].
[7] *Dunmore*, ¶ 22.
[8] *Dunmore*, ¶ 29.

with the s. 2(b) freedom of expression,[9] as opposed to the *absence* of a regime.

30. The City submits that the *Baier* analysis was intended only for situations where there is government action, but it is alleged to be incomplete or underinclusive, and the underinclusion infringes s. 2(b). It was not designed to determine whether the complete failure of the government to act in the first place infringed s. 2(b). In any event, neither scenario arises in this appeal because Bill 5 interfered with ongoing expression.

C. Courts Have an Obligation to Review Election Rules for Constitutional Compliance

31. The AGBC cautions this Court to be careful when confronted with "political" questions and, more specifically, argues that the separation of powers dictates judicial deference to the legislature in all such questions. The AGBC suggests that such deference is especially warranted for all "political" questions that might touch on the design of our democratic processes. In essence, it is the AGBC's position that the legislature is the proper branch of government to regulate democratic processes and that this Court should avoid accepting any novel approach to the interpretation of s. 2(b) that would "plunge" our courts into that particular "political thicket".

32. The AGBC's argument rests, however, on two false assertions. The first is that the City is asking this Court, directly or indirectly, to step into the "political thicket".[10] The second is that the City is asking this Court to constitutionalize a particular "democratic structure", namely a 47-ward structure for Toronto City Council.[11]

33. First, the City is not asking this Court to delve into the design of municipal democratic processes (what the AGBC calls "structures"). It is asking the Court to fulfil its judicial function and determine the scope and nature of a *Charter* right—one that has been engaged by state action. This Court has repeatedly affirmed its role in that respect.

34. In *Ontario (AG) v. Fraser*,[12] this Court confronted very similar cautions to those currently advanced by the AGBC. In that case, the Court was cautioned against undercutting the

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[9] *Baier v Alberta*, 2007 SCC 31, ¶ 30.
[10] AGBC's Factum, ¶ 6, 55.
[11] AGBC's Factum, ¶ 48.
[12] *Ontario (AG) v Fraser*, 2011 SCC 20 [*Fraser*].

deference owed by the judiciary to the legislature in respect of labour relations. The majority in that case responded to those warnings by reminding its cautioners of the judiciary's role in Canada as the final arbiters of constitutionality, and by re-affirming that the proper place for deference to the legislature was in the s. 1 analysis rather than in defining the nature and scope of *Charter* rights. It wrote:

> As stated in *Health Services*, "[i]t may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws" (para. 26). What *Health Services* rejected was a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters: creating such a *Charter*-free zone would "push deference too far" (*ibid.*). This Court reached a similar conclusion in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, 1999 CanLII 650 (SCC), [1999] 2 S.C.R. 1083, at paras. 62-63.
>
> The approach to deference advanced in *Health Services* is consistent with this Court's general jurisprudence. Deference should inform the determination of whether Parliament's scheme satisfies the requirements of the *Charter*, as articulated by the courts. See P. Macklem, "Developments in Employment Law: The 1990-91 Term" (1992), 3 *S.C.L.R.* (2d) 227, at pp. 239-41. Conversely, the courts should not rely on deference to narrow the meaning of *Charter* rights in the first place. Doing so would abdicate the courts' duty as the "final arbiters of constitutionality in Canada" (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 31). . . .
>
> … In *Dunmore*, Bastarache J. referred to McIntyre J.'s discussion of deference under s. 1, rather than in outlining the scope of s. 2(*d*): para. 57; see also *Delisle*, *per* Cory and Iacobucci JJ., dissenting; *KMart Canada Ltd.*, at paras. 62-63, in which Cory J. referred to this passage from McIntyre J.'s reasons under s. 1 in a freedom of expression case. Deference to legislatures properly plays a part, not in defining the nature and scope of a constitutional right, but within the margin of appreciation that the *Oakes* analytical process acknowledges, particularly at the minimal impairment stage.[13]

35. The roles of courts and legislatures in the design of political processes nonetheless remain distinct. The legislatures determine the rules for these processes. The courts review those rules for constitutional compliance.

36. The fact that the subject matter of the rules is a democratic election does not render this Court's review an intrusion into the political sphere. In fact, given that the purpose of such rules is to enhance free expression and protect democracy, it would be antithetical or an absurd result

[13] *Fraser*, ¶ 78-79, 81.

if rules that ultimately destroyed free expression were immune from review under s. 2(b) by the courts. After all, "the connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee".[14]

37. This Court's review of Bill 5's constitutionality would in no way mandate a specific design. Rather, it would indicate certain constitutional limits which the legislature must respect when designing a municipal election framework. Such a task lies squarely within this Court's jurisdiction.

38. Second, contrary to the AGBC's submissions, the City does not seek to constitutionalize a specific contested set of rules for its democratic election, whether the 47-ward model or any other, nor does this appeal seek to undermine provincial autonomy under s. 92(8) of the *Constitution Act, 1867*. The City is instead asserting that the scope of s. 2(b) extends to include: (i) protecting a stable municipal election period, which is necessary for any meaningful exercise of electoral expression; and (ii) protecting the effective representation of Toronto's residents in their democratic municipal elections.

39. Answering those questions affirmatively in *this case* might compel a remedy that results in reverting to the 47-ward model, but only because that was the structure in place prior to the impugned state interference and is one that provides for effective representation. Otherwise, nothing about the City's position or its s. 2(b) submissions would require a legislature to come up with a specific set of rules for municipal elections.

40. Further, as in other cases where impugned legislation is found to be constitutionally infirm, nothing would prevent Ontario from responding by enacting constitutionally compliant legislation that sets out a different ward structure.

41. In other words, if this Court recognizes that s. 2(b) extends to protect a stable election and to confer effective representation for participants in a democratic municipal election, it would not constitutionalize any particular set of rules for Toronto's election, but would instead identify the basic parameters of the protections afforded by s. 2(b) for participants in democratic municipal elections.

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[14] *R v Keegstra*, [1990] 3 SCR 697, p 763.

42. The Court would simply be providing guidance to the legislature for constitutionally compliant municipal elections. Such guidance would be no different than other rulings this Court has made in s. 2(b) arising from the regulation of elections, including in the areas of election financing and information blackouts. Those decisions do not dictate any particular democratic rules for the processes at issue, but serve instead as constitutional parameters for any legislature to consider when creating *Charter*-compliant election processes.

D. Section 52(1) of the *Constitution Act, 1982*

43. The intervener, Canadian Constitution Foundation, raises the issue that unwritten constitutional principles cannot be used to independently strike down legislation because s. 52(1) of the *Constitution Act, 1982* provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" and unwritten constitutional principles are not "provisions of the Constitution".[15]

44. The City submits that the equally authoritative French text of the same section provides guidance. It reads:

> La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.[16]

45. "Elle" in the French text refers to "La Constitution" and there is no language similar to the English "provision" when referring to the Constitution.

46. As such, the City submits that s. 52(1) is broad enough to support its use to strike down legislation that is contrary to unwritten constitutional principles, which are part of "La Constitution du Canada".

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[15] Canadian Constitution Foundation's Factum, ¶ 19-20.

[16] *Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada*, 1982, ch 11 (R-U), par 52(1).

PART III – CONCLUSION

47. Canada and the AGBC attempt to wedge the facts of this case into the rubric of positive rights, and claim that a judgment in favour of the City would strip provincial legislatures of their plenary jurisdiction under s. 92(8) and require courts to impermissibly enter the political realm and constitutionalize a particular structure of municipal government that would be immune to repeal.

48. The City submits that these arguments are not supported by the facts in this case, ignore the role of the courts as the guardians of the Constitution, especially when it comes to the intersection of free expression and democracy, and attribute positions to the City that have not been raised in this appeal.

49. This case is, at its heart, a very simple one. Did Bill 5 interfere with the electoral expression of candidates and voters when it came into force more than halfway through an ongoing municipal election? The Application Judge, who was closest to the situation as it was happening, found that it did. This Court should, too.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 10th day of February, 2021.

Diana W. Dimmer | Glenn K.L. Chu | Fred Fischer | Philip Chan

Counsel for the Appellant, City of Toronto

PART IV – TABLE OF AUTHORITIES

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