File No. 38921

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

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

- and -

TORONTO DISTRICT SCHOOL BOARD

Intervener
(Intervener)

REPLY OF THE APPLICANT, CITY OF TORONTO
TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
OF THE RESPONDENT, ATTORNEY GENERAL OF ONTARIO
(Rule 28 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW

1. In its Memorandum of Argument, the Respondent Attorney General of Ontario (the "Province") has failed to address why the issues raised by the Applicant City of Toronto (the "City") are not of sufficient national and public importance to warrant a decision by this Court.

2. The City raises a number of issues of national and public importance for determination by this Court. They include unjustified interference created by Bill 5 on the freedom of expression of candidates and voters in Toronto's 2018 municipal election, as well as the impact of the unwritten constitutional principle of democracy on municipal elections and whether there are any limits to provincial powers under s. 92(8) in relation to municipal elections.

3. Rather than address the import of those issues, the Province restates its legal position from before the courts below and focuses on factual submissions purporting to justify Bill 5, almost as if to address s. 1 of the *Charter*.[1] The Province fails to explain how the constitutional interpretation issues raised by the City do not require further jurisprudential guidance from this Court.

PART II – LEGAL ARGUMENT

A. THE CITY'S OBJECTION TO BILL 5 IS A LEGAL ONE

4. It is undisputed that this Court's role, where leave is granted, is to resolve constitutional and other legal questions of public importance. Furthermore, the Court has rejected the proposition that it should decline to decide constitutional questions simply because they may also involve political questions.[2]

5. In this case, the Court is being asked to determine the scope of protection under s. 2(b) of the *Charter* as it applies to a democratic municipal election. It is being asked to clarify the

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[1] Such justification was already rejected by the application judge and the dissent in the Court of Appeal. The majority of the Court of Appeal did not make a finding on the s. 1 issue.

[2] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 459, 471-72; see also *Dixon v British Columbia (Attorney General)* (1989), 35 BCLR (2d) 273 (SC), 1989 CarswellBC 43 (WL), para 164.

normative force of unwritten constitutional principles and, more specifically, what remedy is available in the event of a breach of the principle of democracy. It is being asked to determine whether there are limits to a province's power to legislate with respect to municipal elections under s. 92(8) of the *Constitution Act, 1867*.

6. The Court is not being asked to "restore intergovernmental harmony",[3] nor should it concern itself with the state of the relationship between parties. This is an irrelevant consideration in deciding whether leave to appeal should be granted.

7. Finally, despite the Province's invitation to do so, this Court should read nothing into the continuing efforts by the City and the Province to address important areas of mutual interest and concern. Contrary to the Province's suggestion that the parties have left "this controversy behind them",[4] City Council has instructed its lawyers to pursue its legal case to this Court, as evidenced by this Application for Leave to Appeal. In short, there remains a live legal controversy between the parties over important constitutional issues that warrant review by this Court.

B. *EAST YORK (BOROUGH) v ONTARIO (ATTORNEY GENERAL)* DID NOT RESOLVE THE ISSUES

8. The Province suggests that the issues submitted to the Court in this Application for Leave to Appeal have been resolved by the Court of Appeal for Ontario's decision in *East York (Borough) v Ontario (Attorney General)*.[5]

9. The City disagrees.

10. First, *East York* was a challenge to the amalgamation of seven municipalities into one. Ward boundaries were changed as a result of that amalgamation. But there was no active election that was disrupted by the legislation as there was with Bill 5. As such, it provides no precedent

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[3] Respondent's Memorandum of Argument, para 41.

[4] *Ibid*.

[5] (1997), 36 OR (3d) 733 (CA), [1997] OJ No 4100 (QL) [*East York*].

for the situation that arose here. Indeed, it could not, since, as the Province has acknowledged, "it was not aware of any similar law … enacted by any provincial legislature in Canadian history".[6]

11. Second, the Court of Appeal in *East York* considered, under s. 2(b) of the *Charter*, whether the increased ratio of voters to elected representatives diminished access to elected representatives and was therefore unconstitutional. While the Court of Appeal concluded that there was no precedent for that argument, it also conceded such ratios were theoretically relevant.

12. As argued by the City on appeal, Abella J.A. (as she was then) also noted in *East York*:

> The issue clearly goes beyond a numerical analysis. As McLachlin J. stated in *Reference Re Electoral Boundaries Commission Act (Saskatchewan)*, [1991] 2 S.C.R. 158 … the issue is not "equality of voting power per se, but the right to 'effective representation'". …[7]

13. Ultimately, however, Abella J.A. questioned whether there was in fact a notable change in the ratios under the amalgamation legislation. She determined that "[t]his quantitative dispute, coupled with the absence of any evidence that the new structure will reduce democratic access to the municipal decision-making process, lead us to conclude that no breach of s. 2(b) has been demonstrated".[8]

14. In the case at bar, there is no dispute that the ratios were significantly changed; the ratio of voters to elected officials was almost doubled by Bill 5. As well, there is evidence of the impact of those changed ratios on the ability of voters to have effective representation, evidence that was relied on by the application judge.[9]

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[6] *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732, per MacPherson JA dissenting, para 109.

[7] *East York*, para 6.

[8] *East York*, para 8.

[9] *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151, paras 58-59.

15. Far from settling the issues in this case, the decision in *East York* supports the proposition that, on a proper record, a court might find that an infringement of s. 2(b) of the *Charter* has occurred based on reduced access to electors' municipal representatives.

C. THERE IS A PRACTICAL UTILITY TO THE COURT GRANTING LEAVE

16. Although the City does not seek to set aside the 2018 election, there remains a practical utility to a properly fashioned declaration because there remains a *lis* between the parties. There is a real and continuing dispute over the constitutional validity of existing legislation. Consistent with its position before the Court of Appeal, and in addition to other relief, the City seeks a remedy that will correct certain constitutional defects in time for the next municipal election in 2022.

17. That request for relief does not only arise from the City's "mid-election interference" claim. As noted above, the City also advances the argument that the wards created by Bill 5 do not provide for effective representation and that the Constitution requires effective representation in municipal elections.

18. The lack of effective representation in Bill 5 is not restricted to the 2018 City of Toronto municipal election. Left in place, Bill 5 will also result in electors in the 2022 (and all future) City of Toronto municipal elections lacking effective representation.

19. The Province suggests that this Court should deny leave because the 2018 election was held pursuant to Bill 5 and no relief is sought to invalidate that election. However, the Court should not block a review of Bill 5 simply because it was not possible for the Court to determine its validity before the election. To give effect to the Province's position on this point would be to shield Bill 5 from curial review by this Court, no matter how constitutionally infirm, as long as the City's application for leave did not also include relief that affected the 2018 election.

20. Furthermore, that argument incorrectly ignores the ability of this Court to fashion an appropriate remedy that would cure the constitutional deficiency with Bill 5 and avoid any injustice or breach of the rule of law.

21. Legislatures are expected to enact legislation that is constitutional at the time of its enactment. It is the role of the Court to pronounce on the constitutionality of legislation even though the legislature may have the power to enact new legislation that is constitutional. This is nothing new and courts, including this Court, routinely make and suspend declarations of invalidity in appropriate cases.

22. This Court has held that s. 52(1) remedies for *Charter* breaches can be applied prospectively,[10] and it is submitted that one can be fashioned that would recognize that Bill 5 was unconstitutional without working an injustice or violating the rule of law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of February 2020.

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

Counsel for the Applicant, City of Toronto

[10] *Canada (Attorney General) v Hislop*, 2007 SCC 10, para 88; *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1998] 1 SCR 3, para 18.

PART III – TABLE OF AUTHORITIES

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