SCC File No. _____

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)

MEMORANDUM OF ARGUMENT OF THE APPLICANT CITY OF TORONTO

(Pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26, as amended, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

"This appeal raises important questions about how to interpret the Constitution, and in particular, how to interpret the fundamental freedoms guaranteed in s. 2 of the Charter."

- Justice B.W. Miller, for the Court of Appeal majority at para 30

"The 2018 Toronto municipal election concluded on October 22, 2018 with the election of a 25-member City Council. Yet the actions taken by Ontario to secure that result left a trail of devastation of basic democratic principles in its wake. By extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters. This infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history."

- Justice J.C. MacPherson, for the dissenting justices at para 136

1. This case raises important constitutional questions in the context of substantial interference with a democratic municipal election. The *City of Toronto Act, 2006* provides Torontonians with a democratically elected Council.[1] On May 1, 2018, anyone qualified to run for election to be a City of Toronto (the "City") Councillor in the 2018 Toronto Election (the "Election") could file nomination papers with the City Clerk (the "Clerk") for one of 47 electoral wards. Once they had filed their papers, the candidates could begin to seek donations for their election campaigns, could spend money on their election campaigns, and could begin campaigning.

2. On August 14, 2018, 105 days after campaigning had begun and 69 days before election day, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("Bill 5") received Royal Assent and became law. Bill 5, *inter alia*, reduced the number of electoral wards for the Election from 47 to 25 (the "Impugned Provisions"). This was a substantial change to the structure of the Council and the boundaries of all wards. The Ontario government ("Ontario" or the "Province") did this without notice to the City, candidates or electors. The result was widespread disruption and confusion.

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[1] *City of Toronto Act, 2006*, SO 2006, c 11, Sch A [COTA], s 1(1).

3. Candidates had campaigned in areas that were no longer part of their ward and had never campaigned in areas that were now part of their ward; ward sizes approximately doubled; electors were no longer sure what ward they were in or who was a candidate in their ward; endorsements that had been provided for candidates were rescinded; people who did not run when it was a 47-ward election decided to enter the race when it became a 25-ward election; the Clerk, who was preparing for months for a 47-ward election, had to suddenly begin preparing for a 25-ward election; candidates spent more time speaking to electors about the reduction in the number of wards than election issues.

4. Several applications were brought to challenge the constitutional validity of the Impugned Provisions. The application judge found that they infringed the freedom of expression rights of candidates and electors under s. 2(b) of the *Charter* and were not saved by s. 1. The Province appealed.

5. A rare five-person panel of the Ontario Court of Appeal ("ONCA") was constituted to hear the appeal, and, by a majority of three to two, it allowed the appeal.[2] The disagreement between the majority and minority decisions, as well as the application judge's reasons, demonstrate that lower courts still require guidance from this Court as to the proper scope and application of s. 2(b) in the context of electoral expression.

6. Furthermore, the ONCA dismissed categorically the ability of unwritten constitutional principles to independently strike down legislation, despite Supreme Court of Canada jurisprudence suggesting that this is possible. The normative force of unwritten constitutional principles continues to require clarification from this Court.

7. Finally, the effect of the ONCA's decision is that municipal electors who vote for elected representatives are not entitled to effective representation when they cast their vote. This issue has never been fully considered by this Court. Given the democratic nature of elections at the local level, this Court should clarify whether there are constitutional protections that guarantee effective representation at the municipal level, such as through s. 2(b) of the *Charter*, unwritten constitutional principles or a limit on the scope of s. 92(8) of the *Constitution Act, 1867*.

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[2] *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 [ONCA Reasons].

8. This appeal raises three issues of national and public importance relating to local democracy as well as broad, important constitutional interpretation issues that require further jurisprudential guidance from this Court.

9. ***First, does s. 2(b) of the Charter protect the expression of electoral participants from substantial mid-election changes to the election framework and rules? This case gives the Court an opportunity to provide needed guidance on the application and analysis of Baier and the characterization of a case as a positive or negative rights claim.*** Municipalities are an important level of government. They pass laws that bind their residents. While this Court has recognized that voting in a municipal election is an expressive activity *prima facie* protected by s. 2(b) of the *Charter*, it has never had occasion to determine whether that protection extends to protect the expression of electoral participants (candidates, voters and others) from substantial changes to the framework and rules in the middle of the election itself. After all, the framework of an election governs the electoral expressive activities that occur during an election. Interference with the framework in the middle of an election has the effect of disrupting the electoral expression of participants and upending the political discourse at the heart of an election. This case provides the Court with an opportunity to address this issue not only for the City, but for all municipalities across the country that are subject to democratic elections. Given the disagreement in the courts below, it is of public importance for this Court to provide clarity on this issue.

10. ***Second, can the unwritten constitutional principles of democracy or rule of law be used as a basis for striking down the Impugned Provisions? This case gives the Court an opportunity to provide needed guidance and clarity on the reach of unwritten constitutional principles, as the Court of Appeal's definitive position that they cannot invalidate legislation appears to be inconsistent with the jurisprudence from this Court.*** This Court has previously indicated that unwritten constitutional principles may constitute “substantive limitations” upon government action. However, the exact nature and scope of such limitations continue to require clarity. There is continued debate among judges and scholars as to whether an unwritten constitutional principle on its own should and could invalidate legislation. The Ontario Court of Appeal's strict view appears to be in conflict with this Court's jurisprudence and a decision of another provincial appellate court. It is of public importance that the Court clarify whether, and

under what circumstances, unwritten constitutional principles can independently strike down laws. As well, although the Court has confirmed that democracy is an unwritten constitutional principle, until now, it has not had the opportunity to clarify its scope in the context of what is arguably the cornerstone of democracy: an election.

11. ***Third, are municipal electors who are given a vote in a democratic election entitled to effective representation?*** This Court has had occasion to confirm that the right to vote in s. 3 of the *Charter* provides for a right to effective representation. However, given that s. 3 applies only to the federal or provincial elections, this Court has not had occasion to opine on whether a voter in a democratic election at the municipal level is also entitled to effective representation either by s. 2(b) of the *Charter*, by the unwritten constitutional principle of democracy, or as a limit to a province's powers under s. 92(8) of the *Constitution Act, 1867*. Given the importance of municipalities in the everyday lives of Canadians, it is of public importance for the Court to clarify whether voters in municipal democratic elections to elect their local representatives are also entitled to effective representation.

Statement of Facts

A. Background

12. The City of Toronto Council is a democratically elected government which is responsible and accountable.[3] The City as the local government is the closest to its residents and is responsible for a broad range of municipal services that residents rely upon on a daily basis.

13. With the adoption of COTA, City Council was given the power, *inter alia*, to divide or redivide the City into wards, to dissolve wards, and to change the composition of Council.

14. As a result of these powers, in 2013, City Council initiated an extensive independent review of the City's ward boundaries and council composition over several years, the Toronto Ward Boundary Review ("TWBR"). The TWBR ultimately recommended the adoption of a 47-ward structure. At its November 2016 meeting, Council adopted the 47-ward structure. An

[3] COTA, s 1(1).

appeal of Council's decision to the Ontario Municipal Board was dismissed in December 2017, and a further motion for leave to appeal to the Divisional Court was dismissed in March 2018.[4]

B. 2018 Election Based on 47-Ward Structure

15. With these proceedings completed, the City proceeded with the 2018 Election based on a 47-ward structure. The municipal election day was fixed for the whole province under the *Municipal Elections Act, 1996* to be October 22, 2018.[5]

16. The Clerk was charged with administering the Election. Since as early as January 2018, the Clerk and her staff began preparing to conduct an election for 47 Councillor positions and 39 school board trustees, all based on the new 47-ward structure, including communicating information to candidates.[6]

17. From May 1, 2018, once a candidate was nominated, she or he could begin campaigning, which included spending money on their campaigns and receiving donations in accordance with the provisions of the MEA.

18. There was significant evidence put together in a truncated timeframe for the court applications below from candidates and others that:

a) Candidates made their decisions to run for Councillor in the Election because of the 47-ward structure;

b) Candidates chose a ward to run in based on their involvement and connection to the ward;

c) Candidates had already conducted extensive campaigning and communications to residents based on the 47-ward model at the time Bill 5 was enacted;

d) Candidates raised campaign funds based upon the 47-ward structure; and

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[4] *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 [Reasons of Belobaba J], para 54.

[5] *Municipal Elections Act, 1996*, SO 1996, c 32 [MEA], s 5.

[6] Reasons of Belobaba J, para 5; ONCA Reasons, para 125.

e) Campaign materials were prepared in reliance upon the 47-ward structure.[7]

C. Bill 5

19. On July 27, 2018, the government of Ontario announced for the first time its intention to reduce the number of City of Toronto Councillors from 47 to 25 for the Election. This was the same day that the Clerk certified nominations of the 509 candidates qualified to run in the Election.[8] On July 30, 2018, Bill 5 was introduced in the Ontario Legislature. It came into force on August 14, the day it passed third reading and received Royal Assent.[9] Bill 5 redivided the City into 25 wards and declared that this ward structure would be used for the Election.[10] The City's power to set its own ward boundaries and council composition was eliminated.

20. When Bill 5 came into force on August 14, 2018, the City's election was past the halfway mark.[11] Bill 5 caused unprecedented disruption to candidates, voters and the City.[12] Several affected parties, including the City, gathered themselves with haste to challenge Bill 5 and restore the Election to its original structure. The applications were heard by Justice Belobaba of the Ontario Superior Court on August 31, 2018, less than two months before the Election.

D. Decision of Application Judge

21. Justice Belobaba allowed the applications and declared that the Impugned Provisions violated s. 2(b) of the *Charter* and that the violations were not saved by s. 1. He found that the Province had clearly crossed the line of what is acceptable in our democratic society. Based on the evidence, Justice Belobaba determined that Bill 5 infringed s. 2(b) of the *Charter* in two ways:

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[7] Reasons of Belobaba J, paras 29-31; ONCA Reasons, paras 126, 128.

[8] Reasons of Belobaba J, para 5.

[9] Reasons of Belobaba J, para 5.

[10] ONCA Reasons, para 127.

[11] ONCA Reasons, para 114.

[12] Reasons of Belobaba J, paras 29-32; ONCA Reasons, paras 2, 136.

a) Bill 5's enactment in the middle of the Election substantially interfered with candidates' freedom of expression (the "mid-election interference" aspect); and

b) Bill 5's reduction of City wards from 47 to 25 and the corresponding increase in ward-size population from an average of about 61,000 to 111,000 substantially interfered with voters' freedom of expression by denying them a vote that can result in effective representation (the "effective representation" aspect).[13]

22. Under section 1, Justice Belobaba found that the Province had not established that the Impugned Provisions had a pressing and substantial objective or that they were minimally impairing.[14]

23. As it was unnecessary to make his decision, Justice Belobaba made no findings with respect to the City's arguments regarding unwritten constitutional principles.[15]

24. Justice Belobaba declared the provisions of Bill 5 that reduced the number of City wards to be unconstitutional, and ordered the Election to proceed on the basis of 47 wards.

E. Stay Decision

25. The Province sought a stay pending appeal of Justice Belobaba's decision due to the upcoming Election. A three-judge panel of the Court of Appeal concluded there was a strong likelihood that the appeal would succeed. Accordingly, it granted the stay and the Election proceeded on the basis of 25 wards.[16]

F. Decision of the Court of Appeal

26. The Court of Appeal convened a five-judge panel to hear the Province's appeal. Four parties were granted intervenor status. Given its importance, the hearing was live-streamed online by the CBC. By a majority of three judges to two, the appeal was allowed.

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[13] Reasons of Belobaba J, paras 20, 60.

[14] Reasons of Belobaba J, paras 62-78.

[15] Reasons of Belobaba J, para 13.

[16] Toronto (City) v Ontario (Attorney General), 2018 ONCA 761.

1. Decision of the Majority

27. Three of the five judges of the ONCA held that the Impugned Provisions of Bill 5 were constitutional. The majority found that:

- Section 2(b) of the *Charter* did not guarantee effective expression or that government action would not reduce the effectiveness of expression;[17]
- The City was advancing a positive rights claim (i.e. the continued existence of a statutory platform – the 47-ward election), but did not meet the test for such a claim;[18]
- Section 2(b) of the *Charter* did not require that a vote in a municipal election must provide for effective representation, as this protection flowed from s. 3 of the *Charter*, a section that did not apply to municipal elections;[19]
- Unwritten constitutional principles could not be used as an independent basis to invalidate legislation;[20]
- Unwritten constitutional principles do not limit the Province's jurisdiction over municipal institutions pursuant to s. 92(8) of the *Constitution Act, 1867*.[21]

28. Given their finding on s. 2(b), the majority did not have to consider s. 1 of the *Charter*.

2. Decision of the Dissenting Justices

29. In a forceful dissent, Justice MacPherson (Nordheimer J.A. concurring) would have upheld the decision of Belobaba J. Although he agreed with the majority on all other issues, MacPherson J. found that Bill 5 should be invalidated under s. 2(b) because of its unwarranted mid-election interference.

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[17] ONCA Reasons, paras 41-46.

[18] ONCA Reasons, paras 52-69.

[19] ONCA Reasons, paras 70-77.

[20] ONCA Reasons, paras 81-89.

[21] ONCA Reasons, paras 90-95.

30. MacPherson J.A. found the majority's description of candidates' activities—"a person's past communications"—far too narrow. In his view, the expression protected by s. 2(b) in the election context was better described by one of the intervenors:

> 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 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.[22]

31. In his view, the integrity of such a democratic ecosystem depends on political expression being free from mid-stream interference. Because candidates' and voters' expressive activities unfold and intersect within the established terms of an election, to upend these terms mid-stream does not merely render candidates' and voters' free expression less effective—it becomes meaningless.[23] MacPherson J.A. found that the possibility of such instability and risk of meddling was irreconcilable with genuine democratic deliberation.[24]

32. MacPherson J.A. also disagreed with the majority that the City's s. 2(b) argument was a positive rights claim.[25] He distinguished *Baier v Alberta*[26] because, in this case: (i) the issue is not exclusion from a platform, but protection from the mid-stream destruction and replacement of an electoral platform; (ii) there is no positive rights claim since the City's plea is for non-interference in an election that had already started; and (iii) in *Baier*, the impugned legislation was enacted two years before the election itself, not three months after the election started.[27]

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[22] ONCA Reasons, para 117.

[23] ONCA Reasons, paras 122-123.

[24] ONCA Reasons, para 123.

[25] ONCA Reasons, para 124.

[26] *Baier v Alberta*, 2007 SCC 31 [*Baier*].

[27] ONCA Reasons, para 132.

33. Having concluded that Bill 5 infringed s. 2(b) of the *Charter*, MacPherson J. also agreed with the application judge that the Impugned Provisions were not saved by s. 1 of the *Charter*.[28]

34. MacPherson J.A. concluded by summarizing the Province's actions in these terms:

> The 2018 Toronto municipal election concluded on October 22, 2018 with the election of a 25-member City Council. Yet the actions taken by Ontario to secure that result left a trail of devastation of basic democratic principles in its wake. By extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters. This infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history.[29]

PART II – QUESTIONS IN ISSUE

35. This Application for Leave to Appeal raises the following issues of national and public importance:

ISSUE 1: **Does s. 2(b) of the *Charter* protect the expression of electoral participants from substantial mid-election changes to the election framework and rules?**

ISSUE 2: **Can the unwritten constitutional principles of democracy or rule of law be used as a basis for striking down the Impugned Provisions?**

ISSUE 3: **Are municipal electors who are given a vote in a democratic election entitled to effective representation?**

PART III – ARGUMENT

ISSUE 1: Does s. 2(b) of the *Charter* protect the expression of electoral participants from substantial mid-election changes to the election framework and rules?

36. Many people express themselves in an election. Candidates campaign. Donors provide financial support to the campaigns of their preferred candidates. Third parties endorse candidates. Volunteers assist candidates. Electors listen, interact with candidates, and ultimately cast their vote. These expressive activities all take place within the context of an electoral

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[28] ONCA Reasons, para 135.

[29] ONCA Reasons, para 136.

framework made of pre-determined rules. Is this interconnected web of expression by electoral participants protected by s. 2(b) of the *Charter* from any material changes to the electoral framework that would adversely affect that expression?

37. The majority and the minority decisions in this case highlight the ongoing difficulty lower courts have with the interpretation of the scope of s. 2(b) protection in new and unfamiliar contexts, such as presented in this case. However, the confusion is by no means limited to this case and it is of public importance for this Court to provide further clarity on these issues.

A. The Application of *Dunmore* and *Baier*

38. This case presents this Court with an opportunity to clarify the proper application of *Baier* and whether the distinction between positive/negative rights remains useful in freedom of expression analysis.

39. In *Baier*, this Court adopted the *Dunmore*[30] framework for "positive rights claims" into s. 2(b) analysis. Ever since, courts and litigants have struggled to apply that framework.

40. In *Greater Vancouver Transportation Authority v Canadian Federation of Students*, this Court observed that *Baier* can be easily misconstrued to transform many freedom of expression cases into positive rights claims.[31] This misinterpretation can result in the application of the *Baier* test to freedom of expression cases that should otherwise be approached using the methodology outlined in *Irwin Toy*.[32]

41. This Court has questioned the utility of continued debate over the application of *Baier* in s. 2(b) claims. In *Ontario (Public Safety and Security) v Criminal Lawyers' Association*,[33] this Court considered whether s. 2(b) of the *Charter* required access to government documents. That case was centered on whether s. 2(b) extended to create a right to access documents in government hands. It was a case that examined the reach of s. 2(b), but also how to best

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[30] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 [*Dunmore*].

[31] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31, at para 34.

[32] *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 [*Irwin Toy*].

[33] 2010 SCC 23 [*Criminal Lawyers' Association*].

approach the question of its scope. This Court dismissed the focus on *Dunmore* and *Baier*. Specifically, the Court wrote:

> The courts below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*. In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)* and in *Montréal (City) v. 2952-1366 Québec Inc.* (citations omitted)[34]

42. Thus, the Court has itself suggested that a focus on the basic principles established in *Irwin Toy*, as clarified in *Montréal (City)*,[35] is best suited for s. 2(b) analysis.

43. In the present case, there is a similar debate over the application and utility of *Baier*. Specifically, the lower courts and litigants in this case disagree over whether *Baier* applies to resolve whether s. 2(b) protection extends to prevent material changes to the rules or framework of an ongoing election.

44. The five judge panel of the ONCA split 3-2 on the application of *Baier*. The majority characterized the claim as a positive rights claim and relied on *Baier* for its s. 2(b) analysis. By contrast, the minority did not characterize this as a positive rights claim and analyzed the claim using the *Irwin Toy* methodology.

45. The lack of consensus in this case, and more generally, invites further guidance from the Court on the proper application and utility of *Baier* in s. 2(b) cases.

B. Protection from Interference with the Rules of an Ongoing Election

46. This case also raises questions about the nature of expression during an election, the effect that changes to an electoral framework have on those expressive activities and the scope of s. 2(b) protection over those expressive activities.

47. As noted by this Court in *R v Keegstra*:

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[34] *Criminal Lawyers' Association*, para 31.

[35] *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 [*Montréal (City)*].

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.[36]

48. Expression during an election is unlike other speech. It takes place within a fixed framework over a finite period, all of which informs the content, meaning and means of speech. The compression of expression into a fixed framework and finite period of time creates a focused political discourse. That discourse necessarily encompasses a myriad of interrelated expressive activities—canvassing, lawn signs, websites, news reporting and more—by a diversity of participants—candidates, voters, donors, third parties and more—all interacting for the purpose of generating an informed vote.

49. The ability of electoral participants to engage in political speech during an election, and participate in the democratic political discourse it engenders, depends on the stability and unchanging nature of the electoral framework in which it takes place. Once an election begins, any material change to that framework interferes with the ability of electoral participants to express themselves and to engage in the political discourse that is central to any democratic election.

50. Borrowing from *Criminal Lawyers' Association*, s. 2(b) requires governments to refrain from making changes to the rules of an ongoing election where to do so would substantially impede meaningful public discourse in that election.[37]

51. The majority, however, took a much more narrow view in characterizing the expressive activity affected in this case, as well as the effect the changes to the Election had on that expression. It held that the only expression at issue was the “past communications” of candidates and, further, that Ontario's changes to the rules of the Election only reduced the "effectiveness" of the candidates’ expression. Relying on jurisprudence that denied protection to the effectiveness of speech, the majority in this case found s. 2(b) was not engaged.

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[36] *R v Keegstra*, [1990] 3 SCR 697 at 763-64.

[37] *Criminal Lawyers’ Association*, para 37.

52. The minority of the ONCA took a more expansive view of the protection afforded by s. 2(b). It found that the effect of the Impugned Provisions in this case was not simply an impact on the effectiveness of past electoral expression. The minority recognized that changes to the rules of an election adversely affect a wide myriad of expressive activities.[38] It recognized that those expressive activities are interconnected and depend on a steady unchanging electoral framework.[39] As such, the minority had no issues extending s. 2(b) protection to secure the rules of an ongoing election from material changes: "Free expression in this context would be meaningless if the terms of the election, as embodied in the legal framework, could be upended mid-stream".[40]

53. As the minority explained, the dependence of electoral expression on the framework of an election is what brings that framework within the scope of s. 2(b) protection.

54. It is of public importance for this Court to clarify the nature of free expression during an election, the implications for free expression of substantial interference in a municipal election mid-stream, and the protections that exist under s. 2(b) of the *Charter* to secure free expression in elections.

C. The Protection of Municipal Electoral Expression Protects Democracy

55. The protection of municipal electoral expression is of public importance, because its protection protects democracy.

56. This case involves substantial mid-election interference by a province in the electoral expression of participants in a municipal election. The decision of the ONCA sets a clear precedent. It permits the unjustifiable upending of ongoing municipal elections.

57. As Justice MacPherson noted in his dissent:

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[38] ONCA Reasons, para 128.

[39] ONCA Reasons, para. 128.

[40] ONCA Reasons, para 123.

> [T]he timing of the *Act* represented a substantial attack on the centrepiece of democracy in an established order of Canadian government – an active election in a major Canadian municipality.[41]

58. The democratic elections of our municipal government are underpinned by the same open democratic discourse and free political speech that are central to an election at any other level of government. While municipal elections do not necessarily share the same express protections as federal and provincial elections, the freedom of expression and free political discourse that underpin municipal elections are protected.

59. Any interference with the political expression and democratic discourse during a municipal election is as destructive to our democracy as it would be in an election at any other level of government. Absent express constitutional protection of democratic municipal elections, the protection of expression and discourse during such elections is all the more central to protecting the democratic integrity of those elections.

ISSUE 2: Can the unwritten constitutional principles of democracy or rule of law be used as a basis for striking down the Impugned Provisions?

60. This Court has recognized several unwritten constitutional principles, such as federalism, democracy, protection of minorities, the rule of law[42] and judicial independence.[43]

61. Furthermore, in the seminal *Quebec Secession Reference* case, the Court had this to say about the effect of unwritten constitutional principles:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference* ...), which constitute substantive limitations upon government action. ... The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.[44]

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[41] ONCA Reasons, para 116.

[42] *Reference re Secession of Quebe*c, [1998] 2 SCR 217 [*Quebec Secession Reference*].

[43] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*Provincial Court Judges Reference*].

[44] *Quebec Secession Reference*, para 54.

62. However, the exact scope of what is meant by these words and the reach of unwritten constitutional principles have not been fully developed by this Court.

63. In this case, the majority of the ONCA unequivocally held that "unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation. They cannot be invoked to invalidate [Bill 5]".[45] The dissenting judges agreed that Bill 5 could not be "invalidated on the basis of unwritten constitutional principles – democracy and the rule of law – alone".[46]

64. However, such a definitive position belies the debate that continues both among courts and academics as to the normative force of unwritten constitutional principles. This case presents an opportunity for this Court to clarify the law on whether unwritten constitutional principles can in certain circumstances independently invalidate legislation and, if so, under what circumstances.

65. For example, the British Columbia Court of Appeal did not come to the same conclusion as the ONCA with respect to the normative force of unwritten constitutional principles. In *Christie v British Columbia*,[47] the majority (3-2) held that the unwritten principle of the rule of law could be used to strike down the legislation at issue, a 7% tax on legal services. The majority stated that "to the extent that the Act purports to tax legal services related to the determination of rights and obligations by courts of law or independent administrative tribunals, it is unconstitutional as offending the principle of access to justice, one of the elements of the rule of law".[48]

66. The decision was appealed to this Court. This Court left open the issue of whether the majority of the B.C. Court of Appeal was correct in its conclusion that the unwritten principle of the rule of law could be used to invalidate legislation. Instead, the Court held that general access

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[45] ONCA Reasons, para 89.

[46] ONCA Reasons, para 99.

[47] 2005 BCCA 631 [*Christie (BCCA)*], reversed *British Columbia v Christie*, 2007 SCC 21 [*Christie*].

[48] *Christie (BCCA)*, para 76.

to legal services was not a legally recognized "aspect" of the rule of law.[49] In doing so, it clarified that the decision of this Court in *British Columbia v Imperial Tobacco Canada Ltd*[50] left open the possibility that the rule of law may encompass previously unrecognized principles.[51] It also commented on the lack of a sufficient evidentiary foundation to show that the 7% tax negatively affected access to justice.[52]

67. Importantly, this Court did not indicate, as the ONCA does in this case, that the unwritten constitutional principle of the rule of law, whatever was alleged to be a component of it, could *never* be used to strike down legislation. Rather, its conclusion suggests that the rule of law could have had that effect, if the evidence had been sufficient and the correct aspect of the rule of law had been identified. The ONCA in this case does not comment on *Christie*.

68. This difference in result between the B.C. Court of Appeal in *Christie* and the Ontario Court of Appeal Court in this case arose despite this Court's earlier discussion of the unwritten constitutional principle of judicial independence.

69. In *Ell v Alberta*,[53] Major, J., for the Court, confirmed that judicial independence is an unwritten constitutional principle.[54] The Court also clarified that, although the principle found explicit constitutional reference in ss. 96-100 of the *Constitution Act, 1867* and s. 11(d) of the *Charter*, these provisions did not apply to the respondents in that case.[55] Accordingly, the Court proceeded to determine whether the impugned legislation in that case contravened the unwritten constitutional principle of judicial independence.[56] Although the Court ultimately found that the principle was not infringed, the judgment strongly confirms the *ability to use the unwritten constitutional principle of judicial independence independently to strike down legislation*.

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[49] *Christie*, paras 23, 27.

[50] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49.

[51] *Christie*, para 21.

[52] *Christie*, paras 28-29.

[53] *Ell v Alberta*, 2003 SCC 35 [*Ell*].

[54] *Ell*, paras 19-20.

[55] *Ell*, paras 18, 24.

[56] *Ell*, para 27.

70. In *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*,[57] the majority of the Court clarified that its ruling in *Christie* resulted from a lack of evidence that litigants with legitimate disputes would be barred from the courts.

71. In *Trial Lawyers*, the Court also had occasion to comment on the normative force of the rule of law. In that case, the B.C. Supreme Court Rules imposed hearing fees and the majority of the Court held that such a hearing fee scheme was unconstitutional. It used the rule of law to support its finding of unconstitutionality. It is unclear whether the rule of law provided an alternative means of striking down the hearing fees at issue or whether they simply were an aid to interpretation. The lone dissenting judge, Justice Rothstein, criticized the majority for striking down the hearing fees in part because "the fees are inconsistent with the *unwritten* principle of the rule of law" (emphasis in original),[58] stating that there were no textual gaps at issue.[59] In other words, in his view, the majority was not using the rule of law as an interpretative aid to fill in gaps in the constitutional text of s. 92(14).

72. In the *Quebec Secession Reference*, this Court explained that "democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation".[60] This is no less true of municipal councils, the members of which have been elected democratically by their residents and who enact by-laws that bind those residents.

73. In addition, academics continue to debate whether unwritten constitutional principles can or should be used to independently strike down legislation.[61]

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[57] 2014 SCC 59 [*Trial Lawyers*].

[58] *Trial Lawyers*, para 98.

[59] *Trial Lawyers*, para 91.

[60] *Quebec Secession Reference*, para 67.

[61] (Alyn) James Johnson, "The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019) 56:4 Alta L Rev 1077; Justice Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79 Sask L Rev 1; Christian Morey, "A Matter of Integrity: Rule of Law, the Remuneration Reference, and Access to Justice" (2016) 49 UBC L Rev 275;

74. It is of public importance for the Court to clarify the law on the normative force of unwritten constitutional principles. Lower courts need guidance on whether unwritten constitutional principles can be used to independently invalidate legislation, and if so, under what circumstances. Furthermore, the Court has not had occasion to fully develop the content of the unwritten constitutional principle of democracy, such as whether it requires democratic elections to have a stable set of rules during the election period.

ISSUE 3: Are municipal electors who are given a vote in a democratic election entitled to effective representation?

75. While the provincial powers provided by s. 92 of the *Constitution Act, 1867* do not always have express limitations in their text, this does not necessarily mean that those powers are limitless. This Court has held that Canada's Constitution has an internal architecture that must be respected.[62]

76. Specifically, this Court found in *Trial Lawyers* that s. 92(14), which gives provinces the power to legislate over the administration of justice in the province, was not limitless. The Court held that s. 92(14) must be interpreted in a manner that is not only consistent with the other *express* terms of the Constitution, but also with the requirements that "flow by necessary implication from those terms".[63] The assumptions underlying the text must also inform the interpretation of the text.[64]

Grant Huscroft, "Romance, Realism, and the Legitimacy of Implied Rights" (2011) 30:1 University of Queensland Law Journal 35; Grant Huscroft, ed., *Expounding the Constitution, Essays in Constitutional Theory* (New York: Cambridge University Press, 2008); principally "Constitutional Justice and the Concept of Law" by T.R.S. Allan, "Written Constitutions and Unwritten Constitutionalism" by Mark D. Walters and "Unwritten Constitutional Principles" by Jeffrey Goldsworthy; Chief Justice Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 42 New Zealand on Public and International Law 147; David Mullan, "The Role for Underlying Constitutional Principles in a Bill of Rights World" (2004) 2004:1 *New Zealand Law Review* 9; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389.

[62] *Reference re Senate Reform*, 2014 SCC 32.

[63] *Trial Lawyers*, para 26.

[64] *Ibid*.

77. As noted above, the particular requirement that "flowed by necessary implication from the text" in *Trial Lawyers* was access to justice in the superior courts as required by the rule of law.

78. This Court has not had an opportunity to provide guidance to courts below on whether the unwritten constitutional principle of democracy can also be such a limitation on the interpretation of s. 92(8) in the context of a statutory democratic municipal election.

79. Section 3 of the *Charter* guarantees citizens the right to vote in federal and provincial elections. While this Court has indicated that s. 3 does not apply to municipal institutions, it has not clarified whether there are nonetheless some limits on the provinces' s. 92(8) powers in circumstances where citizens of a municipality have been given the statutory right to elect their municipal representatives by democratic election. In other words, does s. 92(8) allow the Province to create a democratic election for municipalities yet, at the same time, not respect the democratic nature of the election so created (such as imposing a substantial mid-election change in the rules or creating an election that does not provide for effective representation)?

80. It is of public importance for this Court to provide clarity on these issues for municipal voters in all provinces.

PART IV – SUBMISSIONS ON COSTS

81. Given the public nature of this case, the Applicant does not seek costs.

PART V – ORDER SOUGHT

82. The Applicant respectfully requests that leave to appeal the decision of the Ontario Court of Appeal dated September 19, 2019 be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14th day of November, 2019.

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

Counsel for the Applicant, City of Toronto

PART VI – TABLE OF AUTHORITIES

Cases	Paragraph(s)
Baier v Alberta, 2007 SCC 31	32
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Secondary Sources	Paragraph(s)
Grant Huscroft, "Romance, Realism, and the Legitimacy of Implied Rights" (2011) 30:1 University of Queensland Law Journal 35	73
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Christian Morey, "A Matter of Integrity: Rule of Law, the Remuneration Reference, and Access to Justice" (2016) 49 UBC L Rev 275	73
David Mullan, "The Role for Underlying Constitutional Principles in a Bill of Rights World" (2004) 2004:1 NZ L Rev 9	73
Justice Marshall Rothstein, "Checks and Balances in Constitutional Interpretation" (2016) 79 Sask L Rev 1	73

Statutory Provisions
Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, being Sch B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 2(b), 3 *Charte Canadienne des Droits et Libertés*, *Partie I, Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, par 1, 2(b), 3
City of Toronto Act, 2006, SO 2006, c 11, Sch A, ss 1(1) *cité de Toronto (Loi de 2006 sur la)*, LO 2006, chap 11, annexe A, par 1(1)
Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3, s 92(8) *Loi constitutionnelle de 1867* (R-U), 30 & 31 Victoria, ch 3, par 92(8)

Statutory Provisions
Municipal Elections Act, *1996*, SO 1996, c 32, Sch, s 5 *Loi de 1996 sur les élections municipales*, LO 1996, chap 32, annexe, par 5

PART VII – STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK), 1982, c 11, ss 1, 2(b), 3	**Charte Canadienne des Droits et Libertés, Partie I, Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, par 1, 2(b), 3**
CONSTITUTION ACT, 1982	**LOI CONSTITUTIONNELLE DE 1982**
PART I	PARTIE I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS	**CHARTE CANADIENNE DES DROITS ET LIBERTÉS**
Guarantee of Rights and Freedoms	**Garantie des droits et libertés**
Rights and freedoms in Canada	Droits et libertés au Canada
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
Fundamental Freedoms	**Libertés fondamentales**
Fundamental Freedoms	Libertés fondamentales
2. Everyone has the following fundamental freedoms: . . . **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	**2.** Chacun a les libertés fondamentales suivantes : . . . **b)** liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
Democratic Rights	**Droits démocratiques**
Democratic rights of citizens	Droits démocratiques des citoyens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

City of Toronto Act, 2006, SO 2006, c 11, Sch A, s 1(1)

cité de Toronto (Loi de 2006 sur la), L.O. 2006, chap. 11, annexe A, par 1(1)

PART I
INTERPRETATION

Governing principles

1 (1) The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and the city council is a democratically elected government which is responsible and accountable.

PARTIE I
INTERPRÉTATION

Principes directeurs

1 (1) La cité de Toronto existe afin d'assurer une bonne administration à l'égard des questions qui sont de son ressort, et son conseil est un gouvernement élu démocratiquement qui pratique une saine gestion assortie de l'obligation de rendre compte.

Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3, s 92(8)	**Loi constitutionnelle de 1867 (R-U), 30 & 31 Victoria, ch 3, par 92(8)**
VI. DISTRIBUTION OF LEGISLATIVE POWERS	**VI. DISTRIBUTION DES POUVOIRS LÉGISLATIFS**
Exclusive Powers of Provincial Legislatures	**Pouvoirs exclusifs des législatures provinciales**
Subjects of exclusive Provincial Legislation	Sujets soumis au contrôle exclusif de la législation provinciale
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . . 8. Municipal Institutions in the Province.	**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir : . . . 8. Les institutions municipales dans la province;

Municipal Elections Act, 1996, SO 1996, c 32, Sch, s 5	**Loi de 1996 sur les élections municipales, LO 1996, chap 32, annexe, par 5**
General	**Dispositions générales**
Voting day	Jour du scrutin
5 Voting day in a regular election is the fourth Monday in October, subject to section 10.	**5** Le jour du scrutin lors d'une élection ordinaire est le quatrième lundi d'octobre, sous réserve de l'article 10.