COURT OF APPEAL FOR ONTARIO

CITATION: Toronto (City) v. Ontario (Attorney General), 2019 ONCA 732
DATE: 20190919
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MacPherson, Tulloch, Miller, Nordheimer and Harvison Young JJ.A.

BETWEEN

City of Toronto

Applicant (Respondent)

and

Attorney General of Ontario

Respondent (Appellant)

Robin K. Basu, Yashoda Ranganathan and Aud Ranalli, for the appellant

Diana W. Dimmer, Glenn K.L. Chu, Philip Chan and Fred Fischer, for the respondent

Adam Goldenberg and Amanda D. Iarusso, for the intervenor Canadian Constitution Foundation

Derek Bell, for the intervenor Canadian Taxpayers Federation

Alexi N. Wood, for the intervenor David Asper Centre for Constitutional Rights

Stéphane Émard-Chabot, Mary Eberts and William B. Henderson, for the intervenor Federation of Canadian Municipalities

Paul Koven, for the intervenor Toronto District School Board

Heard: June 10-11, 2019

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice dated September 10, 2018, with reasons reported at 2018 ONSC 5151.

Miller J.A.:

A. OVERVIEW

[1] The Toronto City Council is a creature of provincial legislation. Provincial legislation governs everything from its composition to the scope of its jurisdiction. Shortly before the 2018 municipal election, the Ontario Legislature enacted legislation that changed the composition of the City Council, reducing it from 47 to 25 councillors.

[2] This was a substantial change, and there is no question that it disrupted campaigning and the candidates' expectations. But the question before this court is not whether the legislation is good or bad policy, was fair or unfair; the question is whether it violates the *Charter* or is otherwise unconstitutional.

[3] Three applications were brought challenging the constitutionality of the *Better Local Government Act*, *2018*, S.O. 2018, c. 11 (the "*Act*"), and seeking to restore the *status quo ante* of 47 wards in time for the October 22, 2018 election. The applications were successful at first instance, the application judge holding that the *Act* violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

[4] Ontario appealed and brought a motion to stay (or suspend) the judgment pending appeal. Given the timing of the election, it was apparent that the stay motion would be the final word on the most significant aspect of the litigation – whether the October election would proceed on the basis of 47 or 25 wards.

Because of the finality of the order, the test for granting the stay was heavily weighted towards an assessment of the merits of the appeal. The most important question was whether there was a strong likelihood that the application judge had erred and would be reversed on appeal. A three-judge panel of this court 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.

[5] This court has now had the benefit of a full hearing on the merits. We have not been asked to make any order concerning the election, which no party seeks to overturn, but simply to declare the *Act* unconstitutional.

[6] As explained below, none of the arguments advanced by the City of Toronto can succeed. Although it is framed as a matter of protecting freedom of expression in the context of a municipal election, in reality the applicants' complaint concerns the timing of the legislature's decision to change the composition of City Council – a change that is undeniably within the legitimate authority of the legislature. The applicants' complaint has been clothed in the language of s. 2(b) of the *Charter* to invite judicial intervention in what is essentially a political matter. There is no legitimate basis for the court to accept this invitation.

[7] The application judge's interpretation of s. 2(b) of the *Charter*, guaranteeing freedom of expression, exceeded the bounds of legitimate interpretation and

amounted to a re-authoring of that provision. Additional arguments raised by the City of Toronto and supporting interveners – drawing on unwritten constitutional principles and jurisdictional limits inherent in the division of powers – are similarly erroneous and unsupported by constitutional jurisprudence.

[8] In short, the *Act* is constitutional, and the appeal must be allowed.

[9] In what follows, I will address the two arguments from freedom of expression accepted by the application judge, before turning to the arguments from unwritten constitutional principles and from jurisdictional limits said to be inherent in s. 92(8) of the *Constitution Act, 1867*. First, however, it will be helpful to canvass the background to the litigation, and address a preliminary question related to the City's standing to argue the appeal in this court.

B. BACKGROUND

[10] The *Constitution Act, 1867* assigns to the legislatures of each province exclusive jurisdiction over municipal institutions in the province. Unlike the federal Parliament and the Legislature for Ontario, municipal institutions such as city councils were not established by the *Constitution Act, 1867* and have no constitutional stature. They exercise powers granted to them by the provincial legislatures, and the legislation establishing their powers and composition can be amended from time to time, in the same manner as any other statute.

[11] One such legislative change occurred in 1997, when provincial legislation amalgamated the constituent municipalities of Metropolitan Toronto. That legislation organized the new City of Toronto into 28 wards and established a Council composed of one mayor and 56 councillors, two councillors per ward. In 2000, Ontario enacted the *Fewer Municipal Politicians Act*, S.O. 1999 c. 14, which reduced the City's wards to 22, aligning them with the 22 Federal Electoral Districts in existence at the time. However, the legislation authorized the Council to split each ward into two, which it did to create a total of 44 wards. This model was kept in place for the next five elections.

[12] By 2014, uneven population growth in the 44 wards resulted in some wards approaching or exceeding twice the population of others, undermining voter parity. The Council retained consultants to conduct a ward boundary review. Based on the recommendations from that review, the Council passed two by-laws in November 2016 to increase the number of wards from 44 to 47, and redraw the boundaries for all but six of the previous wards. Those by-laws were upheld by the Ontario Municipal Board, the administrative tribunal then responsible for adjudicating appeals from the City's electoral boundary by-laws.

[13] The City planned the 2018 municipal election on the basis of the new 47-ward model. The nomination period opened on May 1, 2018 and closed on July 27. The election was scheduled for October 22.

[14] On July 27, the closing date for nominations, the Government of Ontario announced that it intended to introduce legislation that would reduce the size of Council from 47 to 25 councillors. Three days later, Bill 5 was introduced into the Ontario Legislature. It proposed to redraw ward boundaries in line with current Federal Electoral Districts, and extended the nomination period to September 14.

[15] The Bill was passed and the *Act* came into force August 14, 2018. It provided for a municipal election based on 25 wards, with ward boundaries identical to the existing boundaries for both federal and provincial elections.

[16] The City and two groups of private individuals brought applications in Superior Court to challenge the constitutionality of the *Act*. They argued that it violated provisions of the *Charter of Rights and Freedoms* guaranteeing freedom of expression, freedom of association, and equality. They also argued that it was inconsistent with the unwritten constitutional principles of democracy and the rule of law.

[17] The application judge found that the *Act* breached s. 2(b) of the *Charter* in two respects. First, he concluded that changing the number and size of the electoral wards after campaigning had begun interfered with the candidates' ability to campaign. The application judge found this to be unfair to the candidates, who found themselves in a suddenly altered electoral landscape. In some cases, the redrawing of ward boundaries meant that some of their campaigning to date –

involving significant financial resources – had been misdirected towards voters who could not now vote for them. Additionally, they now needed to reach a new set of voters, who may not have shared the same concerns as the original target voters.

[18] Second, the application judge found that the *Act* limited the voters' freedom of expression by increasing ward population size from an average of 61,000 to 111,000, "effectively denying the voter's right to cast a vote that can result in effective representation". The application judge held that the limits on freedom of expression he identified were not reasonable and could not be justified under s. 1 of the *Charter*. In particular, he found that the *Act* could not pass even the first branch of the *Oakes* test: there was no evidence that the objectives of the *Act* were sufficiently pressing and substantial to justify taking effect in the middle of an election campaign.

[19] Having found a violation of the *Charter*, the application judge did not proceed to consider the other arguments advanced by the applicants.

[20] The application judge declared the provisions in the *Act* reducing the number of City wards from 47 to 25 to be of no force and effect. He ordered the municipal election to proceed on the basis of the former 47-ward model.

[21] On September 19, 2019, a three-judge panel of this court granted a stay of the application judge's order: *Toronto (City) v. Ontario (Attorney General)*, 2018

ONCA 761, 142 O.R. (3d) 481. The stay motion effectively decided the immediate controversy and the election proceeded on October 22 on the basis of 25 wards. Aware that granting the stay would determine whether the election would proceed on the basis of 47 or 25 wards, the court noted that "greater attention must be paid to the merits of the constitutional claim" and that it was required to determine "whether there is a strong likelihood that the … application judge erred in law and that the Attorney General's appeal to this court will succeed." The court concluded that the application judge's reasoning was unsupportable, and that there was a strong likelihood that the appeal would succeed.

[22] The Attorney General of Ontario appeals from the application judge's decision. For the reasons that follow, I would allow the appeal. The application judge erred in determining that the *Act* infringed s. 2(b) of the *Charter*, and the constitutionality of the *Act* cannot be impugned on any other basis advanced.

C. ISSUES

[23] The issues on this appeal are:

1) Does the City have standing to assert a breach of s. 2(b) *Charter* rights?
2) Did the application judge err by finding that the *Act* limited the respondents' s. 2(b) *Charter* rights as a result of:

    a) mid-election change in the number and size of wards, and

b) impairing voter parity and effective representation?

3) Did the application judge err by concluding that limits imposed by the *Act* on the exercise of freedom of expression were not justified?
4) Do unwritten constitutional principles provide courts with an independent basis to invalidate the *Act*?
5) Does s. 92(8) of the *Constitution Act, 1867* contain inherent jurisdictional limits that render the *Act* unconstitutional?

D. ANALYSIS

(1) Standing

[24] All of the original applicants, except the City, have now settled with Ontario.

[25] Those applicants had standing as either candidates or voters in Toronto, and in their absence, Ontario argues that the City has no standing to assert a breach of s. 2(b) of the *Charter*, on the grounds that the *Charter* does not confer rights on governments.

[26] The City argues that it has standing on the basis that it represents its residents and has an interest in ensuring effective representation for its residents: *Charlottetown (City) v. Prince Edward Island*, [1998] PEIJ No. 88 (PE SCAD). In the alternative, it argues that it should be granted public interest standing in accordance with the discretionary test outlined in *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2

S.C.R. 524, at para. 53: (1) whether the case raises a serious justiciable issue; (2) whether the party bringing the action has a real stake or genuine interest in its outcome; and (3) whether the proposed suit is a reasonable and effective means to bring the case to court.

[27] It is important to note that the basis of the City's participation in the application was not raised before the application judge or the stay panel. Neither was it raised in the Notice of Appeal. The individual applicants – candidates and electors – clearly had standing, and in the event the City's standing appears to have been overlooked. We have not been told why the individual applicants have settled, but there are obvious practical realities: the appeal, as far as these applicants are concerned, is moot. As a result of the stay granted by this court, the election has taken place. No one now asks that it be invalidated and rerun, assuming that such an order could be made.

[28] The City does not assert private interest standing on its own behalf. But the issues on appeal are serious, and given that the City's role in the litigation prior to the appeal was never challenged, allowing the City to step into the shoes of the settling parties and argue the appeal in their stead is in my view a reasonable means of ensuring that the decision below is properly reviewed in this court.

[29] I emphasize that this should not be taken as an expression of support for the City's standing to have brought the application in the first place.

(2) Freedom of Expression

[30] 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*.

Principles of Charter interpretation

[31] To interpret the *Charter* it is necessary to have regard to its basic structure, and to respect the decisions that were made to constitutionally guarantee some, but not all, possible rights, using particular formulations rather than others. These constraints on constitutional interpretation have been emphasized by the Supreme Court since the earliest years of the *Charter*:

> The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, para. 151.

[32] The Supreme Court has further explained that understanding the scope of a *Charter* right or freedom requires an understanding of its purpose, which is a matter of considering the human interests it is intended to protect:

> [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the

> meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be … a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. [emphasis added.]

[33] The text of s. 2(b) was drafted using intentionally vague and open-ended language, leaving much of its meaning to be shaped through future legislative choices and judicial decisions. But as *Big M* noted, it was enacted within particular linguistic, philosophic and historical contexts that provide boundaries on its construction. That is, the freedom of expression provision is the product of a particular context and history and is not so open ended as to be capable of supporting every conceivable rationale related to the exercise of expression. As with other *Charter* rights, and as the Supreme Court emphasized in *Big M*, it is necessary to identify the actual purpose underlying this particular specification of the right, and not to impose others. The underlying purpose constrains and guides interpretation of the text of the *Charter*; it cannot be used to set the text aside.

[34] The application judge departed from the text and its underlying purpose and misconstrued the meaning of s. 2(b) in two ways: (1) extending s. 2(b) to guarantee that government action will not render anyone’s expression less effective; and (2)

by subsuming a separate *Charter* right – the right to vote (s.3) – within the freedom of expression. I will address each of these errors below.

Argument 1: Legislative timing and its impact on campaign effectiveness

[35] The application judge characterized the impact of the *Act* on the candidates as follows. In the interval between the start of the campaign on May 1 and when the *Act* took effect on August 14, most candidates had already produced campaign materials, such as websites and pamphlets, that were tied specifically to the particular wards in which they were running, based on the old 47-ward structure. Both time and money had been invested in campaigning within particular wards, addressing particular voters with ward-specific messaging. When the wards were effectively doubled in size, this created challenges for the candidates: "[t]here was confusion about where to run, how to best refashion one's political message and reorganize one's campaign, how to attract additional financial support, and what to do about all the wasted campaign literature and other material." Going forward, "[t]he candidates' efforts to convey their political message about the issues in their particular ward were severely frustrated and disrupted" as "the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues."

[36] Some of the candidates' communication for the purpose of getting elected had been directed to voters who were now in other wards and could no longer vote

for that candidate. In other cases, time and energy spent earning support from voters was lost when those voters' allegiance shifted to new candidates who would previously have run in other wards. In the period after Ontario had announced its intention to change the legislation, the complaint was that voters' priorities had changed. They were said to be no longer as receptive to substantive political messages; they were instead preoccupied with understanding the impact of the *Act* and the court challenges to it.

[37] The application judge concluded that the effect of the *Act* was to substantially interfere with the candidates' political expression.

[38] There are two related legal errors in this branch of the application judge's analysis, as I will explain below.

[39] First, the application judge's analysis expanded the purpose of s. 2(b) from a guarantee of freedom from government interference with expression to a guarantee that government action would not impact the *effectiveness* of that expression in achieving its intended purpose.

[40] Second, the application judge conflated the concepts of positive and negative rights, failed to consider the framework for analysing a positive rights claim, and thereby impermissibly extended the scope s. 2(b).

(a) Section 2(b) does not guarantee effective expression

[41] The freedom to communicate with others is an important component of freedom of expression; it allows the dissemination of opinions and ideas. It is essential to any joint enterprise that requires individuals to coordinate their efforts with others. Section 2(b) of the *Charter* protects against government interference with most (but not all) such communication. But s. 2(b) protects against interference with the expressive activity itself, not its intended result. Put another way, freedom of expression does not guarantee that government action will not have the side-effect of reducing the likelihood of success of the projects or joint enterprises that any person is working to achieve. Accordingly, legislation that changes some state of affairs (such as the number of electoral wards), such that a person's past communications lose their relevance and no longer contribute to the desired project (election to public office), is not, on that basis, a limitation of anyone's rights under s. 2(b): *Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989, at paras. 39-41; *Baier v. Alberta,* 2007 SCC 31, [2007] 2 S.C.R. 673.

[42] Freedom of expression has an essentially negative orientation, an orientation that is especially important in the context of political expression. Freedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it.

[43] Not that this requires governments to remain silent and passive. As Ontario argued, governments may, for example, enter the marketplace of ideas to offer messages that counter expression: consumer health warnings on various products are an obvious example. Governments may also respond to criticism of their policies. These responses, to the extent they are persuasive and effectively conveyed, may undermine the messages conveyed by others and diminish their intended effects. It is not part of a government's constitutional duty to promote, enhance, or even preserve the effectiveness of anyone's political expression: *Longley v. Canada (Attorney General),* 2007 ONCA 852, 88 O.R. (3d) 408, at para. 110.

[44] The *Act*, however, did not counter anyone's message. Rather, it altered the composition of the Toronto City Council, reducing the number of wards and councillors and changing electoral boundaries accordingly. It is clear that the legislature is free to add or subtract as many council seats as it considers appropriate. It can, for that matter, restructure the City of Toronto itself, making it bigger or breaking it up into smaller cities should it choose to do so. It is uncontested that it could do so after an election, even the very next day.

[45] All that is in issue here is the *timing* of such legislative changes. But the alleged impact on freedom of expression itself – as distinct from any other impact on a candidate – would be the same, regardless of whether the change was made during or after an election. If expression is "wasted" due to diminished campaign

effectiveness when ward composition changes, it would be much more thoroughly wasted after campaigning is carried to fruition, an election took place, and Council were then restructured. All expressive efforts would not simply have been diminished in their effect, but would have been entirely for nought; after all, the purpose of campaigning is not just to secure election, but to govern.

[46] Expression is one thing. Its impact is another. Section 2(b) does not guarantee that expression will retain its value.

(b) Positive and negative rights

[47] As I have noted, s. 2(b) case law emphasizes the negative dimension of the freedom of expression: that the purpose of s. 2(b) is to prevent interference by government with expression. Government is not required to take any positive steps to provide or maintain particular platforms to enable anyone's expression.

[48] To the extent that a positive dimension to s. 2(b) has been recognized by the Supreme Court, it is exceptional and narrow, focussing on the central case of under-inclusion: where a platform is made available to some, but not all. In *Baier*, the Supreme Court articulated a set of criteria that need to be satisfied before such an exceptional claim can succeed. The application judge did not, however, refer to this framework or the cases applying it, and instead applied the *Irwin Toy* analysis intended for negative rights claims: *Irwin Toy Ltd. v. Quebec (Attorney General),*

[1989] 1 S.C.R. 927. He erred in doing so. The appropriate framework for analysis is set out below.

The Baier framework

[49] In *Baier* at para. 30, the Supreme Court summarized the governing framework for resolving a positive rights claim, which it provided in the context of a claim of underinclusion:

> In cases where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(b), a court must proceed in the following way. First it must consider whether the activity for which the claimant seeks s. 2(*b*) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered. As indicated above, these three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(*b*) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(*b*); and (3) that the government is responsible for the inability to exercise the fundamental freedom. If the claimant cannot satisfy these criteria then the s. 2(*b*) claim will fail. If the three factors are satisfied then s. 2(*b*) has been infringed and the analysis will shift to s. 1.

The following analysis applies the *Baier* framework.

i. Is the activity a form of expression?

[50] What is the activity with which the *Act* is said to have interfered, and is that activity a form of expression? The *Act* changed the composition of the Toronto City Council by reducing the number of wards in the City of Toronto, reducing the number of councillors, and changing the ward boundaries. It did so in the midst of an election.

[51] The claimants are not required at this stage to establish that there has been a limitation on their freedom of expression, but simply that the activity for which they claim the protection of the freedom is a form of expression. Electoral campaigning – presenting prospective voters with messages intended to convince them to vote for the candidate – is undeniably expression for the purposes of s. 2(b): *Harper v. Canada (Attorney General),* 2004 SCC 33, [2004] 1 S.C.R. 827. The claimants satisfy the first stage of the test.

ii. Positive entitlement to government action or the right to be free from interference

[52] At the second stage, the question is whether restoring the *status quo ante* of ward composition during an election campaign is a matter of protecting expression.

[53] The City argues that this is not a positive rights case. It argues that the candidates did not seek the creation of a new platform, but rather sought freedom

from government interference with their use of an existing platform – defined as the specifically 47-ward election. In response to L'Heureux-Dubé J.'s dictum in *Delisle* that s. 2(b) does not compel the distribution of megaphones, the City responds that Ontario already provided the candidates with a megaphone – an election for a 47-member Council – and then "smashed it". The City argues that once Ontario had provided an electoral platform, and the election had begun, s. 2(b) prevents Ontario from changing that platform.

[54] This is not a positive rights claim of the sort that the Court had in mind in *Baier*. It is, fundamentally, a claim to a particular platform and not a claim that government desist with interference in the conveyance of any message. A claim for the restoration of access to a specific platform is as much a positive rights claim as a demand for a new platform: *Baier*, para. 36. The only difference from *Baier* is that in *Baier* the applicants lost access to a platform that remained available to everyone else. In this case, the applicants lost access to a platform to which no one retained access, but gained access to another.

[55] The claim to restore an old platform is a positive claim. It is irrelevant that the applicants were seeking to restore the *status quo* that was changed by the new legislation: *Dunmore v. Ontario (Attorney General),* 2001 SCC 94, [2001] 3 SCR 1016, *Baier*. The hallmark of a negative rights claim is that it is a matter of stopping government from interfering with expression that the claimant would otherwise be free to engage in. By contrast, the hallmark of a positive rights claim is that it

requires government to take some step to facilitate expression. Here, there can be no participation in a municipal election – no electoral expression – without legislation establishing the platform of the election. A challenge to legislation that modifies a platform for expression is an assertion of a positive right, and must be assessed on the *Baier* framework.

iii. Are the *Dunmore* factors met?

[56] Having determined that the candidates advanced a positive claim that Ontario maintain a 47-ward election once the election period began, the question is whether the City can meet the exceptional criteria required to advance a positive rights claim. As set out below, I have concluded that the claim cannot meet any of the three criteria and it must therefore fail.

a. Is the claim grounded in freedom of expression rather than access to a particular statutory regime?

[57] First, the claimants must establish that the subject of their claim is interference with expression, rather than access to the desired election platform. As explained below, the claimants have framed their claim in terms of interference with expression.

[58] The *Act* did not, and could not, erase the messages that had already been communicated. Nor did it prescribe or proscribe any future messaging. However, the City objects that the *meaning* of the candidates' expression was effectively

destroyed. The argument is that the changes to the composition of the City Council made during the election made prior messages irrelevant to the voters, and subsequent messages inaudible.

[59] This is, as I explained above, not a claim that any candidate was prevented by government from saying anything he or she wished to say on any subject. It is a claim that prior expressive activity by the candidates would not in fact contribute to the project of securing their election, and that additional, different campaigning would now be required.

[60] Again, the efficacy of expression – let alone prior expression – is not guaranteed by s. 2(b), and the claim is not grounded in s. 2(b).

[61] The claim therefore fails to satisfy the first *Dunmore* factor. That is sufficient to dispose of the positive rights argument, however, I will briefly address the remaining *Dunmore* factors, which the claim also fails to satisfy.

b. Does exclusion from the platform have the effect of a substantial interference with the activity protected under s. 2(b)?

[62] The second *Dunmore* inquiry can be stated, on the facts of this case, as whether the *Act*'s reduction of the size of the City Council had the effect of substantially interfering with the activity protected under s. 2(b). This is the same

question that the application judge addressed under the *Irwin Toy* test. He concluded there was substantial interference. This was an error.

[63] The frustration of candidates in facing altered electoral circumstances – unanticipated rivals, losing allies, and needing to reach new voters – did not prevent them from saying anything they wished to say about matters in issue in the election or in promoting their candidacies. The submissions of the City and some of the intervenors make the error of implausibly characterizing every negative impact on the candidates as an interference with expression.

[64] The candidates remained free to seek election on such bases as they chose and to campaign as they saw fit. The application judge found that because the *Act* reduced the effectiveness of the candidates' messages, it therefore limited their s. 2(b) rights. As stated above, this was in error and overlooked contrary binding authority *Baier*; *Delisle*; *Longley*, at para. 109.

[65] The intervener the David Asper Centre for Constitutional Rights argues that s. 2(b) "requires an electoral process to be fair". It requires "a stable and protective framework and the rules around the campaign period must be highly regulated and constitutionally protected." It proposes a list of principles that, in its view, should be satisfied in order for a democratic process to be in good health, and asserts that the court's role is to ensure that these principles are met.

[66] These proposed principles of political morality are sound and relevant to guiding legislative and executive decision-making concerning elections. They may also be relevant to claims adjudicated under s. 3 of the *Charter*. But they are not grounded in s. 2(b) of the *Charter* and do not bear on the interpretation of s. 2(b). Freedom of expression and democracy are, of course, mutually supportive concepts. Freedom of expression enables democracy, and a healthy democratic political culture protects freedom of expression. They are, however, distinct concepts. It does not follow that every change to a governing institution that might bear scrutiny under s. 3 or some other part of the Constitution therefore also impacts freedom of expression.

[67] The claim of substantial interference with expression is not established.

c. Is the government responsible for the claimants' inability to exercise freedom of expression?

[68] Having concluded that the first two criteria have not been satisfied, the third must fail as well. The claimants were not prevented from exercising their freedom of expression.

[69] Accordingly, the City has not established on this argument that s. 2(b) has been limited.

Argument 2: Subsuming the right to vote into freedom of expression

[70] As outlined above, the application judge had two paths to finding that the *Act* limited freedom of expression. Having found that the first path was in error, it is necessary to consider the second argument: that s. 2(b) is informed by the right to vote guaranteed by s. 3 of the *Charter*. This argument extends the protections in s. 3 that apply to federal and provincial elections to municipal elections.

[71] Section 3 of the *Charter* guarantees citizens the right to vote and run for office in provincial and federal elections. It has been interpreted as securing for electors a right to "effective representation": *Reference re Provincial Electoral Boundaries (Sask),* [1991] 2 S.C.R. 158. Section 3, on its face, has no application to municipal elections. The application judge, however, created a workaround by concluding that because *Charter* rights are interrelated, the "value" of effective representation can be used to enlarge the scope of s. 2(b) to guarantee that municipal voters have a right to cast a vote that results in effective representation.

[72] The concern from the standpoint of effective representation is that with wards significantly increased in size – albeit matching the federal and provincial electoral ridings – city councillors would be spread too thin and be unable to provide effective representation to constituents.

[73] The argument begins with the sound propositions that: expressive activity is protected by s. 2(b), voting is expressive activity, and voting is therefore protected

expression under s. 2(b). However, it proceeds to the erroneous conclusion that freedom of expression guarantees that a vote – in whatever context – must therefore satisfy the requirements for meaningful and effective representation guaranteed by s. 3 for voting in federal and provincial elections.

[74] This argument must be rejected. Sections 2(b) and 3 guarantee distinct rights that must be given independent meaning: *Harper*, at para. 67, *Thomson Newspapers*, at paras. 79-80.

[75] Rights protections often overlap in protecting a single activity, because persons, even in carrying out a single act, can simultaneously participate in multiple human goods. For example, because expression is often the means by which persons engage in other activities, such as associational activity, conscientious objection, or religious activity, a single act can be protected by s. 2(b) alone, or in conjunction with other rights such as ss. 2(a) or 2(d). *Baier* holds that where a claim can be advanced under more than one *Charter* right, the fact that a claim under one right fails does not foreclose the possibility of success under another right: each right must be assessed independently and given effect: para. 59.

[76] But the basic structure of the *Charter* must be respected. Although the coverage of particular rights can overlap, the content of one right cannot be subsumed by another, or used to inflate its content. The application judge’s

analysis wrongly imports the content of s. 3 into s. 2(b) in order to circumvent the decision of the constitutional framers not to extend the protection of s. 3 to municipal elections.

[77] Instead of working from the text of the *Charter* and giving effect to the constitutional settlement it established, the application judge worked from the premise that, if he concluded that the *Act* was unfair to candidates and voters, it must therefore be unconstitutional. The Constitution does not work that way. No constitution does.

[78] In summary, neither of the bases upon which the application judge found an infringement of s. 2(b) can stand.

(3) Section 1

[79] As it was an error for the application judge to hold that the claimants had established that their exercise of freedom of expression had been limited by the *Act*, it is not necessary to consider the application judge's analysis as to whether any limit was nevertheless justified under s.1. This should not be read as an endorsement of the application judge's analysis.

[80] Additionally, there is no need to consider fresh evidence tendered by Ontario on the issue of whether any limit on s. 2(b) could be justified under s.1. I would dismiss the motion to admit the fresh evidence.

(4) Unwritten constitutional principles are not an independent basis to invalidate legislation

[81] The City and the Federation of Canadian Municipalities both advance arguments that unwritten constitutional principles – in particular, the principles of democracy and the rule of law – provide this court with authority to invalidate the *Act*. The first argument, which will be addressed in this section, is that unwritten constitutional principles provide the court with the authority to invalidate legislation on the basis that it is inconsistent with one or more of these principles, in the same manner as if there were an inconsistency with a provision of a written constitutional text. The second argument, which I will address in the next section, is that unwritten constitutional principles can be used to interpret the constitutional text, and that the *Act* is inconsistent with the text of s. 92(8), *Constitution Act, 1867*, so interpreted.

[82] Both of these arguments must be rejected.

[83] As the City rightly observes, the Constitution of Canada is partly written and partly unwritten. Constitutional texts, such as the *Constitution Act, 1867* and the *Constitution Act, 1982*, establish governing institutions, allocate executive, legislative, and judicial power, and establish limits on the scope of those powers. The unwritten parts of the Constitution include conventions and usages: *political rules* that are accepted as binding on the government actors to whom they apply,

but are enforceable only by the political branches of government and not the judiciary: *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217.

[84] The unwritten parts of the Constitution also include principles of political philosophy that have come to be known as “unwritten constitutional principles”. It is uncontroversial that unwritten constitutional principles, like all principles of political morality, can guide and constrain the decision-making of the executive and legislative branches of government: *British Columbia v. Imperial Tobacco,* 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52. But their role in adjudication by the courts is easily misunderstood and often overstated, because of the tendency to conflate legal and political unconstitutionality. There is thus significant debate both over the content of these principles and their relevance in adjudication: see for example, Mark Walters, “Written Constitutions and Unwritten Constitutionalism” and Jeffrey Goldsworthy, “Unwritten Constitutional Principles” in G. Huscroft, ed., *Expounding the Constitution: essays in constitutional theory* (New York: Cambridge University Press, 2008) 245-312.

[85] This appeal does not ask this court to identify any new constitutional principles. Regardless, the principles that the City relies on – democracy and the rule of law – are highly abstract and, in the language of *Imperial Tobacco*, at para. 66, “amorphous”. Unlike the rights enumerated in the *Charter* – rights whose textual formulations were debated, refined, and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making

authority – the concepts of democracy and rule of law have no canonical formulations. These concepts, particularly the rule of law, are complex and multifaceted, and have sustained debate from Aristotle's *Politics* to Aquinas's *Summa Theologiae* and Lon L. Fuller's *The Morality of Law*: (Newhaven: Yale University Press, 1964). As Rothstein J. emphasized, their constituent elements are not absolute, can only be realized to a degree, and often work at cross-purposes with each other: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 100 (dissenting).

[86] Even if this court were to conclude that the *Act* is in some way inconsistent with the principles of democracy or the rule of law – something that, I emphasize, the respondents have not established – there would be no legitimate basis for this court to invalidate the *Act* based on this inconsistency.

[87] There are, as the Supreme Court has said, "compelling reasons to insist upon the primacy of our written constitution": *Reference re Secession of Quebec*, at para. 54. Unlike constitutional text (and even conventions) unwritten constitutional principles cannot supply judges with the relatively determinate guidance provided by rules set down by other institutions in advance. To use such indeterminate, open-ended, and contested concepts as grounds to invalidate legislation would be, as the Supreme Court has observed, to devolve into "judicial governance": *Imperial Tobacco*, at para. 52-53. As La Forest J. wrote, "[t]he ability

to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution." He concluded that judicial review "is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument" and "[t]his legitimacy is imperiled … when courts attempt to limit the power of legislatures without recourse to express textual authority": *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, at paras. 314-16.

[88] To these concerns, we can add this: were a court to invoke unwritten constitutional principles to invalidate legislation, the consequences of judicial error – always a possibility – would be virtually irremediable. Where a court invalidates legislation using s. 2(b) of the *Charter*, s. 33 is available to enable the legislature to give effect to its disagreement with a court's interpretation or application of that right. Were a court instead to invoke unwritten constitutional principles, constitutional amendment – by design, something that is extremely difficult to achieve – would be the only option available.

[89] In short, unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation. They cannot be invoked to invalidate the *Act*.

(5) Unwritten constitutional principles do not limit the grant of jurisdiction in S. 92(8) of the *Constitution Act, 1867*

[90] Although unwritten constitutional principles cannot be used to invalidate legislation, they have other functions in judicial and legal reasoning. They have "powerful normative force, and are binding upon both courts and governments": *Reference re Secession of Quebec*, at para. 54. They serve to guide judicial reasoning as well as the deliberations of the executive and legislative branches of government.

[91] In judicial reasoning, unwritten constitutional principles can be used as an aid to resolve genuinely open questions of constitutional and statutory interpretation. However, the argument that the unwritten constitutional principle of democracy – or any other unwritten principle – can be used to inject a proviso into s. 92(8) of the *Constitution Act, 1867* to prevent the legislature from enacting legislation altering the ward structure during an election must be rejected.

[92] The argument, essentially, is that "the right to democratic municipal elections has been inherent in s. 92(8) from the time of Confederation" and that s. 92(8), which grants the provincial legislatures exclusive lawmaking authority over "municipal institutions in the province", provides authority to courts to invalidate legislation that infringes "the principle of fair and democratic elections of municipal councils" said to be immanent in this grant of legislative power.

[93] Section 92(8), it bears repeating, is simply a general grant of lawmaking authority to the provincial legislatures with respect to municipal institutions. It means that provincial legislatures, rather than the federal Parliament, has jurisdiction in relation to municipal institutions. Section 92 is a source of lawmaking authority. Section 92(8) does not constitutionalize any particular form of municipal governance. It neither mandates nor precludes particular municipal institutions, nor does it regulate any acts of law making related to municipal government.

[94] Courts have sometimes used unwritten constitutional principles to fill "gaps" in the Constitution – identifying requirements that "flow by necessary implication" from the other terms of the Constitution: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 26 and 91; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26. Such gaps are rare. No such gap exists here. Nor is this a case in which legislative power must be assigned to a new subject matter that was unknown at the time of Confederation. The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982*, creates a necessary implication that provincial lawmaking authority in s. 92(8) must be restricted in the manner proposed. Furthermore, this is not a case of constitutional framers having not addressed a social or technical development – like aeronautics or nuclear energy – because they simply could not have seen it coming. Municipal institutions, including municipal governing bodies, long pre-dated 1867, not only in what is now

Canada, but also in the United Kingdom. The decision was made not to constitutionalize these institutions, but rather to put them under the jurisdiction of provincial legislatures.

[95] There is no open question of constitutional interpretation here. Municipal institutions lack constitutional status. Section 3 democratic rights were not extended to candidates or electors with respect to municipal councils. These are not gaps in the Constitution – oversights or slips by the framers of the *Constitution Act, 1867* and the *Constitution Act, 1982* that can be addressed judicially. If the Constitution is to be amended, the *Constitution Act, 1982* provides the mechanism for amending it.

E. DISPOSITION

[96] I would allow the appeal and set aside the judgment of the application judge.

[97] I would not award costs against any party.

"B.W. Miller J.A."
"I agree. M. Tulloch J.A."
"I agree. A. Harvison Young J.A."

MacPherson J.A. (Dissenting):

A. INTRODUCTION

[98] I have had the advantage of reading the reasons in this appeal prepared by my colleague.

[99] I agree with my colleague on the following issues:

- The City of Toronto (the "City") should be allowed "to step into the shoes of the settling parties and argue the appeal in their stead … [as a] means of ensuring that the decision below is properly reviewed in this court."
- The application judge erred by concluding that the *Better Local Government Act, 2018*, S.O. 2018, c. 11 (the "*Act*") "substantially interfered with the voter's right to freedom of expression when it doubled the ward population size from a 61,000 average to a 111,000 average, effectively denying the voter's right to cast a vote that can result in effective representation."
- The *Act* cannot be invalidated on the basis of unwritten constitutional principles – democracy and the rule of law – alone.
- The *Act* cannot be invalidated by a combination of s. 92(8) of the *Constitution Act, 1867* and unwritten constitutional principles.

[100] I disagree with my colleague on only one issue. In my view, the *Act* should be invalidated under the freedom of expression component of s. 2 of the *Canadian Charter of Rights and Freedoms* because, by reducing the size of City Council from 47 to 25 wards and changing the boundaries of all city wards mid-election, the *Act*

interfered in an unwarranted fashion with the freedom of expression of candidates in a municipal election. I agree with the application judge on this issue.

[101] In light of this conclusion, it is necessary for me to consider whether the *Act* can be saved by s. 1 of the *Charter*. In my view, it cannot. I also agree with the application judge on this issue.

[102] Accordingly, I would dismiss the appeal.

B. FACTS

[103] I accept, at a general level, my colleague's summary of the relevant facts. However, I highlight four important facts.

[104] First, the *Act* applied only to the City of Toronto; although enacted by the provincial legislature, it did not apply to the electoral boundaries in any other municipality.

[105] Second, the *Act* was enacted in the middle of the Toronto municipal election. The election period for Toronto City Council began on May 1, 2018. The election took place on October 22. The *Act* was introduced into the legislature on July 30 and received Royal Assent on August 14. Accordingly, the *Act* became law 105 days after the election had started and 69 days before election day.

[106] Third, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A ("*COTA*"), a provincial law, provides for close cooperation between Ontario and the City, at s. 1:

> **Relationship with the Province**
>
> (2) The Province of Ontario endorses the principle that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation.
>
> **Consultation**
>
> (3) For the purposes of maintaining such a relationship, *it is in the best interests of the Province and the City to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City*. [Emphasis added.]

[107] The "agreement" referred to in s.1(3) of *COTA* is the *Toronto-Ontario Cooperation and Consultation Agreement* ("*TOCCA*"). The *TOCCA* is an agreement between the Province and the City that sets out their commitment to consult and cooperate on matters of mutual interest. Under the heading "Scope", the *TOCCA* provides:

> [T]he parties will cooperate in implementing this Agreement consistent with the above principles in the following matters:
>
> 6. The Province of Ontario *will consult* with the City on:
>
> > a. *Any proposed change in legislation or regulation that, in Ontario's opinion, will have a significant financial or policy impact on the City*. [Emphasis added.]

[108] At the appeal hearing, Ontario conceded that there was no consultation with the City before the *Act* was introduced and enacted.

[109] Fourth, at the appeal hearing, Ontario acknowledged that it was not aware of any similar law (changing the size of a municipal government and the boundaries of its electoral districts mid-election) enacted by any provincial legislature in Canadian history.

C. ANALYSIS

(1) *Charter* s. 2(b)

[110] The test to assess an alleged *Charter* s. 2(b) breach is well-established. The first step is to determine if the expressive activity in question falls within the scope of the s. 2(b) guarantee. If it does, the second step is to determine whether the purpose or effect of the impugned law is to restrict or substantially interfere with freedom of expression: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 978; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at p. 1037.

[111] There is no serious issue with respect to the first step in this test. Obviously, the speeches, election signs, flyers and television, radio and newspaper ads delivered by municipal candidates during an election – i.e., after May 1, 2018 – are expressive activities that fall within the scope of the s. 2(b) guarantee.

[112] My colleague rejects the City's position at the second step of the test. He says:

> The freedom to communicate with others is an important component of freedom of expression; it allows the dissemination of opinions and ideas. It is essential to any joint enterprise that requires individuals to coordinate their efforts with others. Section 2(b) of the *Charter* protects against government interference with most (but not all) such communication. But s. 2(b) protects against interference with the expressive activity itself, not its intended result. Put another way, freedom of expression does not guarantee that government action will not have the side-effect of reducing the likelihood of success of the projects or joint enterprises that any person is working to achieve. Accordingly, legislation that changes some state of affairs (such as the number of electoral wards) such that a person's past communications lose their relevance, and no longer contribute to the desired project (election to public office), is not, on that basis, a limitation of anyone's rights under s. 2(b) ….

[113] With respect, I disagree with his analysis and conclusion for several reasons.

[114] First, my colleague's reasons give insufficient weight to the crucial fact that the timing of the *Act* had a substantial impact on a municipal election that was well underway. Introducing the *Act* mid-election changed the entire landscape of that election. It drastically reduced the number of wards and also altered the boundaries of all the wards. It did this almost two-thirds of the way through the election.

[115] In Canada, elections are the centerpiece of our democracy at all three levels of government – federal, provincial and municipal. Democracy is one of the four unwritten constitutional principles in Canadian constitutional law: see *Reference re*

Secession of Quebec, [1998] 2 S.C.R. 217. The Supreme Court of Canada has elsewhere recognized elected municipal councils as a third level of government in Canada: see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at paras. 3-4. Further, as my colleague has noted, municipal institutions, including municipal governing bodies, long pre-dated Confederation.

[116] Accordingly, it follows that the 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.

[117] Second, my colleague's description of the activity affected by the *Act* – "a person's past communications"– is far too narrow. In my view, the activity that implicates s. 2(b) protection on this appeal is better described by the David Asper Centre for Constitutional Rights at para. 1 of its factum:

> 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. [Citations omitted.]

[118] In my view, the timing of the *Act*'s passage does not recognize and respect any of this thoughtful description of what is involved in a municipal election. While voting or candidacy rights in the context of municipal elections remain statutory in

nature and therefore subject to repeal by the legislature, political expression during an active municipal election consists of far more than the pursuit or casting of a ballot on voting day: *Haig* at pp. 1040-41. Adopting an interpretation of s. 2(b) that protects against mid-stream election interference would only be applicable when an election has commenced. In this respect, s. 2(b) safeguards the integrity and stability of the democratic foundation on which elections are based.

[119] Third, my colleague says that the application judge erred by "expand[ing] the purpose of s. 2(b) from a guarantee of freedom from government interference with expression to a guarantee that government action would not impact the *effectiveness* of that expression in achieving its intended purpose" (emphasis in original).

[120] In my view, the application judge is not guilty of this charge.

[121] Upon the opening of nominations, the fundamental rules of a municipal election are fixed in place. Ward boundaries, spending and donation limits, nomination criteria, and other key terms are established and no longer in flux. Candidates make decisions *within these terms* about whether and where to run, what to say, how to raise money, and how to publicize their views. Many candidates also begin campaigning. That is precisely what occurred in this case.

[122] As a corollary, voters, including potential volunteers and donors, learn about the candidates in their wards. They also receive information on ward-specific and

city-wide issues, and begin to formulate questions, opinions and preferences. News media and other lay commentators report on election developments, including the entry of new candidates, thereby facilitating the free flow of information and creating the conditions for democratic deliberation. Crucially, all these expressive activities unfold and intersect within a legal framework that operates on the opening of the nomination period in a municipal election.

[123] 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. The instability and risk of meddling this would create is irreconcilable with genuine democratic deliberation. This, in my view, is where s. 2(b) comes into play. As the Supreme Court of Canada stated in *Haig*, although a government is generally not required to provide platforms for expression, where it chooses to provide one, it must do so in a manner that complies with the *Charter:* at p. 1041. This entails an obligation on governments to respect the s. 2(b) right of all persons to freely express themselves *within the terms of a municipal election once that election has commenced*. The intersection of s. 2(b) of the *Charter* and the unwritten constitutional principle of democracy requires nothing less.

[124] Fourth, my colleague asserts that the application judge erred by "conflat[ing] the concepts of positive and negative rights, failed to consider the framework for analysing a positive rights claim, and thereby impermissibly extended the scope of s. 2(b)." In this portion of his reasons, my colleague relies heavily on *Baier v.*

Alberta, 2007 SCC 31, and concludes that the application judge's decision was offside the *Baier* "framework". With respect, I disagree.

[125] Prior to the *Act's* enactment, the 2018 Toronto municipal election was scheduled to proceed on a 47-ward basis. The City Clerk charged with administering the election began preparations with this understanding in mind as early as January 2018. No doubt many prospective candidates began preparations of their own.

[126] On May 1, 2018, the official nomination period for the election opened. As of that date, candidates were entitled to register their candidacy and begin soliciting donations from supporters. They were also entitled to begin spending the money they received on campaigning, including developing, printing and distributing campaign literature. The evidence on the record is that many candidates proceeded to do so. The deliberative engagement of candidates, volunteers, voters, financial donors and the media was thus well underway.

[127] By the close of the nomination period on July 27, 2018, a total of 509 candidates were registered to run in the election across the city's 47 wards. On this very day, the Government announced its intention to reduce the size of Toronto City Council from 47 to 25. Three days later, on July 30, the Government introduced the *Act* in the legislature. Upon being passed and proclaimed into force on August 14, the *Act* reconfigured the city into 25 wards, in most cases doubling

both their physical size and the number of potential voters. It also required the 2018 election to proceed on a 25-ward basis, cutting the number of available Council seats almost in half.

[128] By altering the 2018 ward structure in the middle of the election, the *Act* undermined expressive freedom in several ways. First, it diminished the value of all past expression that had been framed around a 47-ward election already underway. Candidates could no longer run in the wards where they had already spent considerable time, money and energy campaigning, which demoralized many and caused at least some to drop out of the race entirely. Second, the timing of the changes caused widespread confusion and uncertainty. It deflected attention away from important civic issues, triggered a flurry of foreseeable legal challenges, and jeopardized the viability of administering the election on schedule. Third, the *Act* restricted candidates, volunteers, voters, donors and commentators from continuing to express themselves within the established terms of an election then in progress. In my view, this effect in particular amounted to an infringement of s. 2(b) of the *Charter;* it substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun.

[129] Unlike my colleague, I do not think that the above analysis, or the similar one conducted by the application judge, is inconsistent with *Baier*.

[130] *Baier* involved a challenge to legislation that blocked teachers from running in school board elections. The teachers argued that the legislation restricted their candidacy in violation of their s. 2(b) rights. Alberta responded that s. 2(b) did not guarantee candidacy rights in a school board election to any particular class of persons, and was therefore not infringed: at paras. 43-44, 47.

[131] The majority of the Supreme Court of Canada agreed with Alberta. Rothstein J., writing for the majority, held that although the legislation deprived teachers of the right to run as candidates in the election, it did not prevent them from expressing themselves on education issues. The Court held that "diminished effectiveness in the conveyance of a message does not mean that s. 2(b) is violated. … [Teachers] may express themselves in many ways other than through running for election as, and serving as, a school trustee": at para. 48. In the result, the Court found that although s. 2(b) was engaged, there was no violation.

[132] In my view, this appeal is distinguishable from *Baier* in three major respects:

1) *Baier* addressed the constitutionality of excluding a class of people from running in an election. The issue in this case is not about exclusion from an electoral platform. Rather, it is about the mid-stream destruction of that platform, its replacement with something new, and the impact of that change on the free expression rights of all electoral participants.

2) *Baier* was adjudicated as a positive rights claim. In resisting legislation that blocked their candidacy, the teachers asserted a constitutional entitlement to run in school board elections. No such positive right is claimed here. The City's plea is for non-interference in an election that had already begun. Accordingly, my conclusion that the *Act* infringed s. 2(b) turns on the timing of the changes it imposed, not on the changes themselves.

3) In *Baier,* the legislation that blocked teachers from running in school board elections was enacted in 2002: *School Trustee Statutes Amendment Act, 2002,* S.A. 2002, c. 23, s. 1(2)(a). The school board elections themselves were scheduled for the autumn of 2004. The legislation therefore did not interfere in any active elections. In this case, the *Act* was enacted midway through the Toronto municipal election, more than three months after the opening of the nomination period.

[133] For all of these reasons, the application judge's conclusion that the *Act* infringed s. 2(b) of the *Charter* is consistent with the Supreme Court of Canada's decision in *Baier*. This conclusion is in fact mandated by a purposive interpretation of s. 2(b), as applied to a set of facts that engages the core ideal of open communication in a Canadian democratic election.

(2) *Charter* s. 1

[134] Ontario submits that if this court determines that the *Act* infringes s. 2(b) of the *Charter*, then it should nevertheless be upheld under s.1 of the *Charter*.

[135] Applying the framework in *R. v. Oakes*, [1986] 1 S.C.R. 103, I agree with the application judge that Ontario's argument fails at the first branch of the *Oakes* test. There was no "pressing and substantial" legislative objective to support the *Act*. Ontario was entitled to change the ward structure of municipal governments in the province, including the City of Toronto. However, in August 2018, there was no reason for Ontario to do this (1) for the City of Toronto only, (2) without any consultation as explicitly mandated by the *COTA* and the *TOCCA*, and (3) most importantly, after everybody in Toronto (candidates and voters alike) had completed almost two-thirds of a democratic municipal election.

D. CONCLUSION AND DISPOSITION

[136] 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.

[137] I would dismiss the appeal.

[138] The City does not seek costs. Accordingly, I would make no costs order.

Released: “JCM” SEP 19 2019

“J.C. MacPherson J.A.”
“I agree. I.V.B. Nordheimer J.A.”