

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

CITY OF TORONTO

Applicant  
(Respondent in Appeal)

and

ATTORNEY GENERAL OF ONTARIO

Respondent  
(Appellant)

**FACTUM OF THE INTERVENER,  
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

May 24, 2019

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*[Title of Proceedings continued on p. 2]*

*[Title of Proceedings, continued]*

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and

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(ATTORNEY GENERAL)

Respondents  
(Appellants)

and

CITY OF TORONTO

Respondent  
(Respondent in Appeal)

AND BETWEEN:

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behalf and on behalf of all members of Women Win TO

Applicants  
(Respondents in Appeal)

and

ATTORNEY GENERAL OF ONTARIO

Respondent  
(Appellant)

and

JENNIFER HOLLET, LILY CHENG, SUSAN DEXTER, GEOFF KETTEL and  
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## **PART I - OVERVIEW**

1. 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.<sup>1</sup> 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. The issues on appeal implicate principles, conventions and rights that go beyond the parties. The full and deep meaning of the right to freedom of expression is present and indispensable to the resolution of this case.

2. The David Asper Centre for Constitutional Rights (the “Asper Centre”) intervenes in this appeal to advance the position that for an election process to be fair, impartial and legitimate, free expression must be protected. For that to occur, the election process must conform to deeply rooted principles drawn from well established constitutional convention, common law and statutory precepts, international law and the *Charter's* guarantee of freedom of expression. A review of these inter-locking principles reveals that the rights protected in an election go beyond simply casting a ballot. They require a stable and protected electoral process, set up in advance, to support the full exercise of freedom of political expression by all actors engaged in electoral politics.

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<sup>1</sup> Yasmin Dawood, “Electoral Fairness and the Law of Democracy: a Structural Rights Approach to Judicial Review”, 62 U Toronto LJ 499 at 503.

## **PART II - SUMMARY OF FACTS**

3. The Asper Centre takes no position on the facts. For the purpose of these submissions, the Asper Centre adopts the facts as set out in the Record before this Court and the findings made by Justice Belobaba in the Court below.

4. The Asper Centre takes no position on the outcome of this appeal.

## **PART III - ISSUES AND THE LAW**

5. It overly simplifies and narrows this case to state that it is only about a guarantee of a certain number of wards, the ability to run for office, or the ability to cast a ballot. This case is about much more. This case is about the role that s. 2(b) of the *Charter* plays in ensuring a stable and protected election framework which is necessary to foster full engagement in the democratic process.

### **A. FREEDOM OF EXPRESSION IS AN INTEGRAL PART OF DEMOCRACY**

#### **(i) *Freedom of expression stands at the heart of the democratic process***

6. The constitutional principle of freedom of expression predates the entrenchment of the *Charter* as “one of the most fundamental values of our society.”<sup>2</sup> Pre-*Charter* jurisprudence characterized freedom of expression as the pre-condition for democratic government.<sup>3</sup> In *Alberta Press Case*<sup>4</sup> and *Saumur v The City of Quebec*<sup>5</sup>, the Supreme Court of Canada determined that

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<sup>2</sup> [Libman v QC AG](#), [1997] 3 SCR 569, 1997 CanLII 326 at para 28.

<sup>3</sup> Richard Moon, “The Scope of Freedom of Expression” (1985) *Osgoode Hall Law Journal* 23 2 at 332. See also Keith Dubick, “The Theoretical Foundation for Protecting Freedom of Expression” (2001) 13 *Nat’l J Const L* 1 at p 1.

<sup>4</sup> [Reference re Alberta Statutes](#), [1938] SCR 100, 1938 CanLII 1.

<sup>5</sup> [Saumur v The City of Quebec](#), [1953] 2 SCR 299, 1953 CanLII 3 at 7.

government action interfering with freedom of public debate or discussion undermined the proper functioning of democratic government by threatening the expression of the public will.<sup>6</sup>

7. *Charter* jurisprudence affirms this relationship.<sup>7</sup> Freedom to criticize old ideas and to express new ideas is the breath of life of public institutions. The free flow of expression enables individuals to form free and informed opinions, call their representatives to account and evaluate new policy proposals. Restrictions on the exercise of s. 2(b) rights are permissible only in the clearest of circumstances,<sup>8</sup> such as when the restrictions act to ensure the fairness of the democratic process.<sup>9</sup>

8. International law reinforces the point that freedom of expression, and access to information, “are at their most crucial during times of political change”.<sup>10</sup> Freedom of expression constitutes a “central pillar of democratic societies” and acts as “a guarantor of free and fair electoral processes, and meaningful and representative public and political discourse.”<sup>11</sup> It is during times of political change (including during an election) that the right to freedom of expression is most essential, ensuring that a well-informed and empowered public is free to exercise its civil and political rights. For these reasons, providing a stable and protected framework for free and open political communication is essential to a fair and democratic electoral process.<sup>12</sup>

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<sup>6</sup> Richard Moon, “The Scope of Freedom of Expression” (1985) *Osgoode Hall Law Journal* 23 2 at 332. See also Keith Dubick, “The Theoretical Foundation for Protecting Freedom of Expression” (2001) 13 *Nat’l J Const L* 1 at 334.

<sup>7</sup> See, for example, *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33.

<sup>8</sup> *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 at 1336.

<sup>9</sup> *Harper v Canada (Attorney General)*, *supra* note 7 at paras 86-87; *R v Bryan*, 2007 SCC 12 at paras 27, 47.

<sup>10</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*. Frank La Rue, Human Rights Council, Twenty-Sixth Session, 2 July 2014, A/HRC/26/30 [*Expression Report*] at para 50.

<sup>11</sup> *Expression Report*, *supra* note 10 at para 10.

<sup>12</sup> *Ibid.*



(ii) *Freedom of expression protects more than voting rights*

9. Electoral expression is a distinct form of expression and, as a result, the guarantee of freedom of expression protects a range of expressive conduct among all actors throughout the election process.<sup>13</sup> It is during the campaign period that voters and political actors are most attentive to one another and most engaged with the democratic process.<sup>14</sup> Citizens actively participate in self-government by identifying issues, testing policy positions, bringing incumbents to account, and assessing new candidates' skills, policies and positions.<sup>15</sup> For this reason, the full election period requires a stable and protected framework and the rules around the campaign period must be highly regulated and constitutionally protected.

10. Put plainly, s. 2(b) requires an electoral process to be fair. The Supreme Court has repeatedly emphasized the importance of fairness in the electoral context, and often refers to the findings of the 1991 Royal Commission on Electoral Reform and Party Financing, also known as the Lortie Commission. The Lortie Commission identified the promotion of fairness as the “preeminent value” of democracy.<sup>16</sup> It stated that “fairness is now regarded as fundamental” and that it is a “pressing, legitimate concern of the electoral process”.<sup>17</sup>

11. Fairness is the “central value that must inform electoral laws if they are to promote the desired outcome of the equality of citizens in the exercise of their democratic rights and

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<sup>13</sup> Saul Zipkin, “The Election Period and Regulation of the Democratic Process” (2010) 18 Wm Mary Bill Rts J [Zipkin] at 545.

<sup>14</sup> *Ibid* at 544.

<sup>15</sup> *Ibid* at 548-49.

<sup>16</sup> Royal Commission on Electoral Reform and Party Financing, *Final Report: Reforming Electoral Democracy* (Ottawa: The Commission, 1991), vol 1 [the “Lortie Commission Report”] at 321.

<sup>17</sup> *Ibid* at 13 and 16.

freedoms.”<sup>18</sup> The meaningful exercise of the right to vote “demands fair election laws and administrative mechanisms.”<sup>19</sup>

## **B. FREEDOM OF EXPRESSION DICTATES THE FRAMEWORK FOR DEMOCRATIC ELECTIONS**

12. In a constitutional democracy, elected governments wield legitimate power only to the extent that the rules framing the full election period conform to the fundamental interlocking principles of democracy and the rule of law. These principles infuse well established constitutional conventions, international law standards and, since 1982, the *Charter's* guarantee of freedom of expression. As will be discussed below, the following principles are necessary pre-conditions for a democratic process:

- (a) The right to information and the right to know, including that:
  - (i) Electoral rules must be clear from the beginning of the election period; and
  - (ii) The timing of the election must be clear and free from government interference.
- (b) The right to informational equality, which includes:
  - (i) The ability of candidates and the electorate to have meaningful discussions with each other;
  - (ii) Ensuring that electoral district boundaries are rationally connected to the interests of the electorate; and
  - (iii) Fair, accountable, equitable and transparent campaign finance and rules that apply to all persons affected in the same way.

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<sup>18</sup> *Ibid* at 14.

<sup>19</sup> *Ibid*.

13. Without these principles, an election period will not have the requisite hallmarks to ensure full participation and, as a result, will impede the freedom of expression central to our democratic process.

14. The Court's role in this democratic electoral context is to ensure that freedom of expression is given heightened protection and that these fundamental principles are met.

(i) ***The right to information and the right to know***

15. The democratic electoral process is, at its core, a complex, multi-faceted, ever maturing dialogue. In the electoral context, s. 2(b) protects more than a person's right to express herself or the right to cast a ballot. It also ensures a right to receive information or a "right to know".<sup>20</sup> This includes the right of the electorate to inform themselves, discuss and debate ideas with candidates and fellow voters in their ridings, to bring incumbents to account, to see incumbents and new candidates debate and take positions on issues local to the ward, and to determine the basis of their voting preferences. These are all necessary components of freedom of expression within the electoral period.<sup>21</sup>

16. The right to know necessarily includes the right to effectively receive information.<sup>22</sup> This right is not unique to Canada, and is enshrined in both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.<sup>23</sup> Canada is a signatory to both.

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<sup>20</sup> [\*Harper v Canada \(Attorney General\)\*](#), *supra* note 7 at para 18.

<sup>21</sup> *Ibid* at para 12.

<sup>22</sup> *Ibid* at para 17.

<sup>23</sup> *Ibid*; *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810, at Article 19 and the *International Covenant on Civil and Political Rights*, 999 UNTS 171, Can TS 1976 No 47 at Article 19(2).

(A) *Electoral rules must be clear from the beginning of the election period*

17. As Belobaba J. noted,<sup>24</sup> one of the questions before this Court is whether Ontario's introduction of Bill 5 mid-election, and the resulting restructuring of the electoral boundaries, and the rules for nominations and electoral finance, is consistent with the rule of law.

18. The rule of law is a basic tenant of any democracy and democratic election:

... 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. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle.<sup>25</sup>

19. The rule of law has three elements.<sup>26</sup> First, the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". Third, "the exercise of all public power must find its ultimate source in a legal rule".<sup>27</sup> Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance, which imposes standards on the structure and conduct of democratic elections.

<sup>24</sup> [City of Toronto et al v Ontario \(Attorney General\)](#), 2018 ONSC 5151 at para 27.

<sup>25</sup> [Reference re Secession of Quebec](#), [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at para 67.

<sup>26</sup> [Re Manitoba Language Rights](#), [1985] 1 SCR 721, 1985 CanLII 33 (SCC) at 747-52.

<sup>27</sup> [Reference re Remuneration of Provincial Court Judges](#), 1997 CanLII 317 (SCC), [1997] 3 SCR 3 at para 10.

20. International instruments impose the same requirement for a stable, formal and normative legal framework for elections.”<sup>28</sup> The *International Covenant on Civil and Political Rights* requires that State Parties, including Canada, provide the requisite constitutional protections for “genuine, free and periodic elections”,<sup>29</sup> including: (i) sufficient legal certainty, stability and predictability to avoid arbitrariness; (ii) enough transparency to provide accountability; and (iii) the necessary independence and separation of powers to avoid unwarranted interference, coercion and pressure.

21. In Canada, and specifically at the federal level, the rule of law is implemented and monitored in the electoral context by removing the administration and organization of elections from partisan political control and intervention. The federal electoral system is now administered by impartial and independent election officials, including the Chief Electoral Officer at Elections Canada.<sup>30</sup> This independence ensures that the rule of law is respected.

22. The rule of law is essential to preserving the integrity of the electoral system. Where the rule of law is not followed, there is no public confidence in the electoral system. If there is no public confidence in the electoral system, there will be less participation and political expression will suffer. Faith in social and political institutions, which enhances the participation of individuals and groups in society, is of central importance in a free and democratic society.<sup>31</sup>

23. Belobaba J. recognized the paramount importance of political expression during election periods.<sup>32</sup> Citizens who have the opportunity to *meaningfully* participate in a legitimate election

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<sup>28</sup> [Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections](#), Professional Training Series No 2, UN Centre for Human Rights, 1994, H/P/PT/2 [*Election Handbook*] at para 78.

<sup>29</sup> [General Comment 25: The right to participate in public affairs, voting rights and the right to equal access to public service](#), UN Human Rights Committee, Fifty-Seventh Session, 12 July 1996, CCPR/C/21/Rev.1/Add.7 [*General Comment 25*] at para 22.

<sup>30</sup> [The Canadian Electoral System](#), Background Paper, Library of Parliament, publication no. 2013-81-E issue 15 September 2008, revised 22 October 2015.

<sup>31</sup> *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at 136.

<sup>32</sup> *City of Toronto et al v Ontario (Attorney General)*, *supra* note 24 at para 23.

process are more willing to accept government decisions that do not reflect their own preferences. In this way, freedom of expression maintains the necessary balance between social order and social change, and leads to a stable social community.<sup>33</sup>

**(B) *The timing of the election must be clear and free from government interference***

24. The electoral calendar is inherently related to the rule of law and the guarantee in s. 2(b). Stability of the law is crucial to the credibility of the electoral process, which is itself vital to consolidating democracy.<sup>34</sup> The timing of an election must be set prior to the start of the election. There must be sufficient, and pre-set, time to successfully implement all aspects of the election, including sufficient time for candidates to campaign and sufficient time for the electorate to be properly informed about their choices.<sup>35</sup>

25. International law also recognizes that the timing of any changes to the electoral process must be carefully considered and weighed: “It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.”<sup>36</sup> The issue is that legislative changes mid-election may subvert the democratic character of the election and undermine the legitimacy of those who are elected to office.

26. In the matter on appeal, this Court must consider whether the timeline for the enactment of Bill 5, as set out in the chart below, allowed for electoral integrity and fairness:

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<sup>33</sup> Richard Moon, “The Constitutional Protection of Freedom of Expression” Toronto: University of Toronto Press, 2000 at 8.

<sup>34</sup> Council of Europe (European Commission for Democracy through Law), [\*Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report\*](#), II.2.63 at para 63.

<sup>35</sup> *Election Handbook*, *supra* note 28 at paras 75 and 108.

<sup>36</sup> [\*Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report\*](#), *supra* note 34 at para 65.

Date	Activity	Number of Wards
1 May 2018 Week 1	Candidate registration opens	47
27 July 2018 Week 13	Initial candidate registration deadline	47
27 July 2018 Week 13	Ontario announces Bill 5	47
30 July 2018 Week 14	Bill 5 First Reading	47
18 August 2018 Week 16	Bill 5 comes into force	25
20 August 2018 Week 17	City initiates legal action	25
31 August 2018 Week 18	Application hearing date	25
10 September 2018 Week 20	Judgment released	47
10 September 2018 Week 20	Mr. Ford announces intended reliance on s. 33 of the Charter	47
12 September 2018 Week 20	Bill 31 introduced, including s. 33 override	47
13 September 2018 Week 20	Candidate registration deadline	47
14 September 2018 Week 20	Extended nominee deadline	25
17 September 2018 Week 21	Bill 31 passed second reading	47
19 September 2018 Week 21	Ontario Court of Appeal issues stay	25
10 October 2018	Advanced polling	25

Date	Activity	Number of Wards
Week 24		
22 October 2018	Election day	25
Week 26		

27. As Belobaba J. noted below, this situation resulted in the reality that candidates could not identify their voters and voters could not identify their candidates.<sup>37</sup> The situation of two elections hanging in suspension at the same time meant that election campaigns lost their focus, their promotional material, and, in some instances, their donors.<sup>38</sup> The possibility of a reduced number of seats meant that candidates found themselves contending against allies and incumbents.<sup>39</sup> The disruption turned attention away from the election *per se* and turned to the political drama of enactment of the new electoral system under the protection of the *Charter*'s override clause. There was no space for the engaged deliberation on municipal issues that is constitutionally required. This amounted to a significant interference with freedom of expression during the election period.

(ii) *Informational equality*

28. Equality in political discourse promotes full political debate and is important in maintaining both the integrity of the electoral process and the fairness of election outcomes.<sup>40</sup> Section 2(b) of the *Charter* aims “not just to guarantee a voice to registered political parties, but an equal voice to each citizen.”<sup>41</sup> This is a pressing and substantial concern “in any society that purports to operate in accordance with the tenets of a free and democratic society”.<sup>42</sup> The displacement of the 47 ward arrangements in favour of 25 wards produced differential rules for

<sup>37</sup> *City of Toronto et al v Ontario (Attorney General)*, *supra* note 24 at paras 30-34.

<sup>38</sup> Respondent's Factum at para 66 and Reasons of Belobaba J, *City of Toronto et al v Ontario (Attorney General)*, *supra* note 24 at paras 29-31.

<sup>39</sup> Respondent's Factum at para 67.

<sup>40</sup> *Libman v Quebec (Attorney General)*, *supra* note 2 at para 47.

<sup>41</sup> *Harper v Canada (Attorney General)*, *supra* note 7 at para 13 (emphasis in original).

<sup>42</sup> *Ibid* at paras 38, 101.



campaign funding at the end of the election period when the 25 ward framework was finalized. Those who had campaigned throughout the election had spent their resources on campaign material that was useless when the ward numbers and sizes were suddenly changed.<sup>43</sup> In contrast, new candidates had the full amount to spend. Those who had tapped out or lost their donors because of the ward changes were seriously disadvantaged.<sup>44</sup>

**(A) *The electorate and candidates must be able to meaningfully communicate with each other***

29. Section 2(b) guarantees individuals the right to “effectively” communicate their messages.<sup>45</sup> The right to participate in political discourse is a right to “effective participation — for each citizen to play a “meaningful” role in the democratic process.”<sup>46</sup> The ability to engage in effective speech means nothing if it does not include the ability to attempt to persuade one’s fellow citizens through debate and discussion.<sup>47</sup>

30. In the context of a democratic election, effective communication requires that candidates and the electorate know with whom to communicate and how that communication is to occur. Any disruption in this communication interferes with the s. 2(b) right to effective dissemination of an individual’s message.

31. The Supreme Court has recognized that, in our modern democracy, “we cannot speak personally with each of our fellow citizens.”<sup>48</sup> During an election, the capacity of candidates to engage in mass communication is crucial. Where a candidate’s efforts to engage in mass

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<sup>43</sup> *City of Toronto et al v Ontario (Attorney General)*, *supra* note 24 at para 29.

<sup>44</sup> Respondent’s Factum at paras 31, 68-69.

<sup>45</sup> *Harper v Canada (Attorney General)*, *supra* note 7 at para 15, citing *Committee for the Commonwealth of Canada*, [1991] 1 SCR 139, 1991 CanLII 119 (SCC) at 250.

<sup>46</sup> *Ibid* at para 15 (emphasis in original).

<sup>47</sup> *Ibid* at para 16.

<sup>48</sup> *Ibid* at para 20.

communication, such as by printing campaign materials, are rendered effectively useless by a mid-stream legislative change in target audience, this interferes with freedom of expression.

32. Electoral campaigns mature as election day approach; the issues ripen and fully register in terms of importance and priority. Voters watch closely as the candidates spar with each other over time on various issues. They also have a fuller basis on which to prioritize the issues and candidate strengths and weaknesses in ways that determine voter preference.<sup>49</sup> The timing of Bill 5 must therefore be carefully considered in determining whether individuals' right to effective communication was infringed.

**(B) *Electoral district boundaries must be rationally connected to the interests of the electorate***

33. Electoral boundaries must be delimited by an independent electoral authority, must be clear and non-discriminatory, and must ensure, to the extent possible, the equal weight of each elector's vote.

34. Regular and mandatory ward boundary reviews are common practice in cities in other commonwealth countries (including the UK and Australia). These reviews are attentive to communities of interest when drawing ward boundaries. By contrast, it is also common in those cities for party politics to be reflected at the local level.<sup>50</sup>

35. Given Toronto's size, complexity, and diversity, the adequacy with which City Council represents communities of interests is of primary importance.<sup>51</sup> Municipal by-laws which redraw ward boundaries have been successfully appealed to the Ontario Municipal Board ("OMB") on the

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<sup>49</sup> [\*Canada AG v Somerville\*](#), 1996 ABCA 217 at para 29.

<sup>50</sup> *Toronto Ward Boundary Review: Background Research Report* (Toronto: Toronto City Council, 2014) at 42 [Background Report] at 43.

<sup>51</sup> *Ibid* at 12, 18.

basis that effective representation was not achieved as the new wards failed to recognize communities of interest.<sup>52</sup>

36. Indeed, the Toronto Ward Boundary Review (“TWBR”) conducted a comprehensive review that included analyzing the interests and needs of communities of interest within the City of Toronto. The TWBR recommended redistricting, which would result in an increase in wards. The TWBR also stressed that the population size of a ward does not merely affect representation at election time, but rather every time Council votes.<sup>53</sup> Ward population size influences the efficacy with which Councillors may represent their constituents and shapes the relationship between locals and their government.<sup>54</sup>

37. The importance of ward boundaries goes beyond mere population size; ward boundaries affect expression as well. The Asper Centre submits that ward boundaries, and therefore demographics, affect constituents’ right to expression. When constituents’ interests are fractured into different wards, those interests lose power and representation. Only when ward boundaries reflect constituents’ interests are those constituents able to fully express their collective interest.

**(C) *Fair, accountable, equitable and transparent campaign finance rules must be predetermined and stable***

38. In the backdrop of communication between candidates and voters is the regulation of financing and expenditures. Canada has adopted an egalitarian model of elections as an essential component of our democracy, which has in turn been endorsed by the Supreme Court of Canada.<sup>55</sup>

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<sup>52</sup> A City of Kingston by-law was successfully appealed on the basis that effective representation had not been achieved because the review had (1) used the projected number of electors instead of total population in its calculations, (2) excluded post-secondary students in determining electoral districts, and (3) *failed to recognize communities of interest by splitting a neighbourhood association area*. See Background Report, *supra* note 50 at 24-25 [emphasis added].

<sup>53</sup> *Ibid* at 4.

<sup>54</sup> *Ibid*.

<sup>55</sup> [\*Harper v Canada \(Attorney General\)\*](#), *supra* note 7 at para 62.

The overarching objective of the electoral financing regime is to promote electoral fairness by creating equality in the political discourse.<sup>56</sup> In Canada, electoral regulation has focussed on regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another.<sup>57</sup>

39. Where a campaign is interrupted mid-election, financial spending is inevitably impacted. Again, the timing of Bill 5 must be carefully considered in determining whether individuals' right to effective communication was infringed.

#### **PART IV - ORDER REQUESTED**

40. The Asper Centre takes no position on the outcome of this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of May, 2019.



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Alexi N. Wood / Jennifer P. Saville

**ST. LAWRENCE BARRISTERS LLP**

Lawyers for the Intervener,  
David Asper Centre for Constitutional Rights

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<sup>56</sup> *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37 at para 72.

<sup>57</sup> *Harper v Canada (Attorney General)*, *supra* note 7 at para 62.

## SCHEDULE “A”

### LIST OF AUTHORITIES

#### *Case Law*

1. *Canada AG v Somerville*, 1996 ABCA 217.
2. *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151.
3. *Committee for the Commonwealth of Canada*, [1991] 1 SCR 139, 1991 CanLII 119 (SCC).
4. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20.
5. *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37.
6. *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33.
7. *Libman v QC AG*, [1997] 3 SCR 569, 1997 CanLII 326.
8. *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC).
9. *Re Manitoba Language Rights*, [1985] 1 SCR 721, 1985 CanLII 33 (SCC).
10. *Reference re Alberta Statutes*, [1938] SCR 100, 1938 CanLII 1.
11. *Reference re Remuneration of Provincial Court Judges*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3.
12. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC).
13. *Saumur v The City of Quebec*, [1953] 2 SCR 299, 1953 CanLII 3.

#### *Secondary Sources*

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16. Keith Dubick, “The Theoretical Foundation for Protecting Freedom of Expression” (2001) 13 Nat’l J Const L 1.
17. *International Covenant on Civil and Political Rights*, 999 UNTS 171, Can TS 1976 No 47.

18. *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections*, Professional Training Series No 2, UN Centre for Human Rights, 1994, H/P/PT/2.
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20. *The Canadian Electoral System*, Background Paper, Library of Parliament, publication no. 2013-81-E issues 15 September 2008, revised 22 October 2015.
21. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, Human Rights Council, Twenty-Sixth Session, 2 July 2014, A/HRC/26/30.
22. Richard Moon, “The Scope of Freedom of Expression” (1985) Osgoode Hall Law Journal 23 2.
23. Richard Moon, “The Constitutional Protection of Freedom of Expression” Toronto: University of Toronto Press, 2000.
24. Royal Commission on Electoral Reform and Party Financing, *Final Report: Reforming Electoral Democracy* (Ottawa: The Commission, 1991), vol 1.
25. Saul Zipkin, “The Election Period and Regulation of the Democratic Process” (2010) 18 Wm Mary Bill Rts J.
26. *Toronto Ward Boundary Review: Background Research Report* (Toronto: Toronto City Council, 2014).
27. *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810.

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

*Canadian Charter of Rights and Freedoms*, Part I of the [Constitution Act, 1982 \(UK\), 1982 c 11](#)

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.

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;

...

**ATTORNEY GENERAL OF ONTARIO, ONTARIO  
(HON. DOUG FORD, PREMIER OF ONTARIO),  
ONTARIO (ATTORNEY GENERAL),  
Respondents (Appellants)**

and

**CITY OF TORONTO, ROCCO ACHAMPONG, CHRIS MOISE,  
ISH ADERONMU, and PRABHA KHOSLA, on her own behalf  
and on behalf of all members of Women Win TO, JENNIFER  
HOLLET, LILY CHENG, SUSAN DEXTER, GEOFFREY  
KETTEL AND DYANOOSH YOUSSEFI  
Applicants/Interveners (Respondents in Appeal)**

**Court File No: C65861**

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE INTERVENER, DAVID ASPER  
CENTRE FOR CONSTITUTIONAL RIGHTS**

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