Court of Appeal File No: C65861

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in appeal)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in appeal)

and

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

Respondents
(Appellants)

and

CITY OF TORONTO

Respondent
(Respondent in appeal)

(Title of Proceeding Continued on p. 2)

REPLY FACTUM OF THE APPELLANTS

AND BETWEEN:

CHRIS MOISE, ISH ADERONMU, and PRABHA KHOSLA, on her own 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, GEOFFREY KETTEL AND DYANOOSH YOUSSEFI

Interveners
(Respondents in appeal)

REPLY FACTUM OF THE APPELLANTS

May 31, 2019

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Fax: 416-326-4015

Robin K Basu (LSO# 32742K)
Tel: 416-326-4476
Email: robin.basu@ontario.ca

Yashoda Ranganathan (LSO# 57236E)
Tel: 416-326-4456
Email: yashoda.ranganathan@ontario.ca

Aud Ranalli (LSO# 72362U)
Tel: 416-326-4473
Email: aud.ranalli@ontario.ca

Of Counsel for the Respondents (Appellants),
The Attorney General of Ontario

AND TO: **THE CITY OF TORONTO**

City of Toronto Legal Services Metro Hall
55 John Street, 26th Floor
Toronto, Ontario M5V 3C6
Fax: (416) 397-5624

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

diana.dimmer@toronto.ca
glenn.chu@toronto.ca
fred.fischer@toronto.ca
philip.k.chan@toronto.ca

Counsel for the Respondent in appeal,
The City of Toronto

AND TO: **TORONTO DISTRICT SCHOOL BOARD LEGAL SERVICES**
5050 Yonge Street, 5th Floor
Toronto, ON M2N 5N8

Paul Koven

paul.koven@tdsb.on.ca

Counsel for the Toronto District School Board

AND TO: **MCCARTHY TETRAULT LLP**
66 Wellington St W
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg
Amanda D. Iarusso

agoldenberg@mccarthy.ca
aiarusso@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

AND TO: **DLA PIPER (CANADA) LLP**
1 First Canadian Place
100 King Street West, Suite 6000
Toronto, ON M5X 1E2

Derek Bell
Ashley Boyes

derek.bell@dlapiper.com
ashley.boyes@dlapiper.com

Counsel for the Intervener,
Canadian Taxpayers Federation

AND TO: **ST LAWRENCE BARRISTERS LLP**
144 King Street East
Toronto, ON M5C 1G8

Alexi N. Wood
Jennifer P. Saville

alexiwood@stlbarristers.ca
jsaville@stlbarristers.ca

Counsel for the Intervener,
David Asper Centre for Constitutional Rights

AND TO: **FEDERATION OF CANADIAN MUNICIPALITIES**
24 Clarence Street
Ottawa, ON K1N 5P3

Stephan Emard-Chabot
Mary Eberts
William B. Henderson

stephane@emard-chabot.ca
eberts@ebertslaw.onmicrosoft.com
lawyer@bloorstreet.com

Counsel for the Intervener,
Federation of Canadian Municipalities

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS USED IN TEXT AND CITATIONS

AB – Joint Appeal Book
aff – Affidavit
AG – Attorney General of Ontario
cr-x – Cross-examination transcript
exh – Exhibit
FEDs – Federal Electoral Districts
MR – Motion Record (Fresh evidence tendered by the Appellant)
OMB – Ontario Municipal Board
p – Page
SMR – Supplementary Motion Record (Fresh evidence tendered by the Appellant)
t –Tab
TWBR – Toronto Ward Boundary Review
v – Volume
¶ – Paragraph

PART I – OVERVIEW

1. On October 22, 2018, a 25-ward election was conducted in Toronto, electing the current City Council. The submissions of the David Asper Centre for Constitutional Rights (the "Asper Centre") and the Federation of Canadian Municipalities (the "FCM") focus on the integrity and legitimacy of the 2018 municipal election. They argue that the enactment of Bill 5 (after the campaign period in the 47-ward election had started) raises constitutional concerns – the Asper Centre focusing on *Charter* s 2(b) and the FCM arguing that a province's powers under s 92(8) over municipalities should be constrained during a municipal electoral campaign period on the basis of the unwritten constitutional principles of "democracy" and "the rule of law".

2. The issue of "mid-campaign interference" in the 2018 municipal election is moot – there is no longer any live controversy in respect of that issue as the 2018 Toronto municipal election is concluded, the City does not seek any remedy in relation to the 2018 election, and the individual respondents in appeal have settled and consented to the appeal.

3. In any event, the arguments of the Asper Centre and the FCM regarding the issue of "mid-campaign interference" are not supported by the case law or the record in this proceeding. Contrary to the submissions of the Asper Centre, this is not a case of "government interference" in the rules of an election or the democratic process. Rather, legislation amending electoral wards (and City Council composition) was duly enacted by the legislature and, pursuant to this Court's stay decision, applied for the 2018 election. Contrary to the submissions of the FCM, Bill 5 does not offend the principles of "democracy" or "the rule of law".

4. There is no basis to conclude that the resulting election was not free or fair (for candidates, their supporters, and voters), that it failed to reflect the will of a freely informed electorate, or that the elected City Council lacks a legitimate democratic mandate.

PART II – FACTS

5. The Appellants rely on the facts as set out in the Appellants' factum on the merits (at pp 4-16) and on the motion for fresh evidence (at pp 3-16). To the extent that the interveners or the City rely upon the factual findings of the Application Judge, any such findings should be considered in light of the significant procedural irregularities below (as set out in the Appellants' factum on the motion for fresh evidence at paras 3-40) which culminated in factual findings being made: (a) without a reasonable opportunity for the Appellants to respond to the voluminous records filed in the applications below; and (b) without any cross-examinations.

6. The evidence adduced on cross-examination (after the decision below) shows that candidates continued to freely campaign, fundraise and participate in events and debates dealing with the substantive issues in the election from the time Bill 5 was enacted up until October 22.[1]

7. The Asper Centre raises Bill 31 in its submissions and erroneously states that it passed second reading on September 17, 2018. It has not.[2] While Bill 31 was in issue on the stay motion as it was relevant to the balance of convenience analysis, it is immaterial on the appeal.

PART III – ISSUES AND THE LAW

A. The issue of "mid-campaign interference" in the 2018 election is now moot

8. An issue is moot where there is no live controversy between the parties, that is, where a decision on the merits would have no practical effect on the parties' rights or the question before the Court has been overtaken by events.[3] There is now no live controversy on the

---

[1] Padovani cr-x, qq 130-230, 260-62, SMR, v 3, t 10B; Youssefi cr-x, qq 145-179, 187-218, 248-50, SMR v 4, t 14B; Willson cr-x, qq 58-102, 176, 180-185, SMR, v 4, t 13A and B; Cheng cr-x, qq 320, 329-376, 469-72, 492-495, 508-513, SMR, v 1, t 2B.

[2] See https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-31/status.

[3] *Borowski v Canada*, [1989 1 SCR 342 at 353, 359-63 [*Borowski*]; *Maystar General Contractors Inc v International Union of Painters and Allied Trades, Local 1819* (2008), 90 OR (3d) 451 at ¶¶ 28-31 (CA); *Greenspace Alliance of Canada's Capital v Ottawa (City)*, [2008] OJ No 3942 at ¶9 (Div Ct).

constitutionality of the timing of Bill 5: (1) the 2018 election is concluded; (2) the City now no longer seeks a remedy in relation to the 2018 election;[4] and (3) the individual respondents have consented to the appeal and the dismissal of their underlying applications.

9. In determining whether to hear an issue that is moot, courts must consider the concerns raised by hearing moot cases: (a) that the parties will no longer be sufficiently adversarial to ensure a proper hearing of the issues; (b) that scarce judicial resources ought not be devoted to theoretical issues or matters which will have no practical effect; (c) that constitutional issues should be heard only when truly necessary;[5] and (d) the importance of maintaining the court's role in the political framework as adjudicative rather than legislative in nature.[6] These factors favour declining to hear the issue of "mid-campaign interference" in this case. The remaining issues on appeal, e.g., the s 2(b) claim related to "effective representation", are not moot because they can have an impact on future municipal elections.

10. With respect to the adversarial context, there is no party with standing to assert the purported s 2(b) right not to be subject to mid-campaign legislative changes. An intervener cannot supply the adversarial context.[7] Judicial economy is served by declining to hear the moot issue of "mid-campaign interference" as a decision will have no practical effect on the rights of the parties. The enactment of Bill 5 after the campaign period for the 47-ward election had begun is not a recurring state of affairs. Given that a decision on this issue would no longer have practical effect, it is also not necessary for the Court to consider the issue of whether the *timing* of an enactment can give rise to a *Charter* s 2(b) infringement or other constitutional infirmity.[8]

---

[4] Factum of the Respondent in appeal, the City of Toronto at ¶122.
[5] *Phillips v Nova Scotia (Comm. of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at ¶6: "The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen."
[6] *Borowski* at 362-363.
[7] 2003 FCA 233 at ¶4.
[8] *Borowski* at 360-361; *PC Ontario Fund v Essensa*, [2012] OJ No 2908 at ¶15 (CA).

11. Further, the "mid-campaign interference" argument calls into question the integrity, legitimacy and finality of the 2018 municipal election – a result that none of the parties to the appeal seeks and which is in fact contrary to the public interest. The Court noted in its stay decision that "[i]t is not in the public interest to permit the impending election to proceed on the basis" of a doubtful ruling that invalidated legislation "duly passed by the Legislature."[9] The interveners' arguments in this regard raise similar concern, but retrospectively, and could, if accepted, call into question the validity of an election that has already taken place and the legitimacy of the Council now governing the City.

B. In any event, no s 2(b) breach arising from enactment of Bill 5 after the campaign period for the 47-ward election had begun

12. The Asper Centre argues that the timing of Bill 5's enactment implicates a s 2(b) protected right: (1) to electoral rules that are clear and free from government interference, including as to their timing; (2) to meaningfully communicate; (3) to a rational connection between electoral district boundaries and the interests of the electorate; and (4) to fair, accountable and equitable electoral finance rules. There is no s 2(b) *Charter* right to a mid-campaign status quo (see Appellants' factum on the merits at paras 61-70). Further, the Asper Centre's arguments regarding "mid-campaign interference" and the integrity of the electoral process are not applicable on the evidence before this Court.

13. Moreover, the Asper Centre's arguments assume that rules relating to the structure of a ward system for municipal elections implicate freedom of expression. While freedom of expression is essential to a free and fair election, it does not follow that a change in electoral rules, particularly relating to ward structure, somehow engages freedom of expression.

[9] *Toronto (City) v Ontario (AG)*, 2018 ONCA 761 at ¶20, AB, v 1, t 8 [Stay Decision].

1) No lack of clarity in or "government interference" with electoral rules

14. Bill 5 did not prevent any candidate from conveying, or any elector from receiving, information regarding the 2018 municipal election. Contrary to the suggestion by the Asper Centre, there is no evidence before this Court of any interference with candidates and voters' "right to know" the rules of the 2018 election or to receive any information concerning the election or any candidates' campaign. The City's website was updated as of August 14 with detailed information on the transition to 25 wards and answers to questions about any alleged confusion regarding the new rules (Appellants' factum on the merits at paras 43-44).[10] If there was any uncertainty after Bill 5 was enacted, it was not caused by Bill 5 or the timing of its enactment, but by the subsequent litigation.[11] Belobaba J himself observed: "There was uncertainty flowing from the court challenge, the possibility that the court challenge might succeed and the consequences for all concerned if this were to happen."[12]

15. This is not a case of "government interference" with the rules or timing of an election. This is a situation where the newly elected provincial legislature, in pursuit of a stated public policy agenda, modified the ward system and Council composition of its delegate, the City, well prior to the fixed election date. One can imagine a case where a government actor behaves in a manner contrary to statutory or regulatory rules of an election, including as to the conduct or timing of the election, for partisan advantage.[13] The domestic and international authorities cited by the Asper Centre caution against such behaviour, which calls into question the integrity of the democratic process. That is not this case, and no purpose is served by making *Charter* s 2(b)

[10] Aff of Adam Kanji (Affirmed August 27, 2018) at ¶¶ 11, 14, AB, v 5, t 47; Carbone cr-x, qq 310-311, SMR, v 1, t 1A.
[11] Asper Centre factum at ¶26.
[12] *City of Toronto et al v Ontario et al*, 2018 ONSC 5151 at ¶30, AB, v 1, t 6 [Reasons of Belobaba J].
[13] It is noteworthy that the Westminster parliamentary system in fact allows the government of the day to determine the timing of elections in a manner that advantages the governing party.

pronouncements in this case with a view to addressing such hypothetical concerns. Exploring these concerns will not contribute to the determination of the *Charter* issues on appeal.

16. Nor does the timing of Bill 5 raise "rule of law" concerns as both the FCM and the Asper Centre contend. As discussed below at paras 41-45, the legislature is "constrained" by the rule of law only in that it must comply with legislated requirements as to manner and form.[14]

17. Bill 5 changed the number of wards and Council seats available in the 2018 election. It did not prevent any candidate from running or any elector from voting in the election. There is no basis for the suggestion that the timing of Bill 5 may have "subvert[ed] the democratic character of the election" or "undermine[d] the legitimacy of those who are elected to office".[15] Further, the references in the Asper Centre's submissions to political interests being seen to motivate electoral changes[16] are inapplicable where, as here, Council seats have no political affiliation and the changes were wrought, for reasons of public policy, by a higher level of government for its delegate. There is no evidence as to a partisan motivation for the changes made by Bill 5. If anything, Bill 5 *removes* the risk that the City will adopt electoral changes to benefit the incumbent Council (Appellants' factum on the merits at paras 24 and 99).[17]

2) Bill 5 did not impair campaigning

18. Section 2(b) protects a right to meaningful freedom of expression, not a guarantee that all expression will be "meaningful" or effective (see Appellants' factum on the merits at paras 62-68). The Asper Centre relies upon the minority reasons in *Harper* to suggest that s 2(b) protects a right to "effectively" communicate. However, as noted by this Court in its stay decision:

> The application judge found that because Bill 5 made the messages the candidates sought

[14] *British Columbia v Imperial Tobacco*, 2005 SCC 49 at ¶¶ 59-60 [*Imperial Tobacco*].
[15] See Asper Centre factum at ¶25.
[16] See Asper Centre factum at ¶25.
[17] Appellants' factum at ¶¶ 23-24, 99; Sancton aff at ¶¶ 28-30, 44 and 59; Davidson cr-x, qq 226-35, 247.

> to convey less effective, it infringed their s. 2(b) rights. This proposition is not supported by the jurisprudence interpreting s. 2(b). *Baier* and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 hold that legislation that has the effect of diminishing the effectiveness of a message, but does not prevent the communication of that message, does not violate s. 2(b): *Delisle*, at paras. 40-41; *Baier*, at para. 48.[18]

19. In any event, as the Asper Centre itself notes: "Electoral campaigns mature as election day approach[es]; the issues ripen and fully register in terms of importance and priority."[19] Bill 5 was announced more than twelve weeks before the October 22 election; it was introduced exactly twelve weeks, and enacted just under ten weeks, prior to the election. To permit candidates to make necessary adjustments, it substituted the July 27, 2018 deadline for nominations with a new deadline of September 14, 2018, a date more than five weeks prior to the election[20] and one similar to the deadline in the municipal electoral regime in place prior to 2016.[21] The nomination day was ultimately extended to September 21 by Order of this Court on the stay motion because the Bill 5 deadline expired at a time when the Order under appeal was in effect.[22] In the run-up to the 2018 election, voters and candidates had all necessary information on everyone who was running in each ward.

20. The record demonstrates that the candidates continued to engage in meaningful public discussion with respect to the election after Bill 5's enactment.[23] In any event, s 2(b) does not protect against the rendering of one's prior or planned expression "meaningless" or "wasted" as a result of a change in public policy effected by the legislature.

---

[18] Stay Decision at ¶16.
[19] Asper Centre factum at ¶32.
[20] Stay Decision at ¶14.
[21] The municipal elections in 2010 and 2014 were governed by rules that prescribed the nomination deadline as the second Friday of the September prior to the election. The elections in 2003 and 2006 prescribed a nomination deadline that was 45 days prior to voting day: see Appellants' factum at ¶70, FN 86.
[22] Order of the Ontario Court of Appeal (dated September 19, 2018), AB, v 1, t 7.
[23] Padovani cr-x, qq 130-32, 229, 260-62, SMR, v 3, t 10A and B; Youssefi cr-x, qq 137-38, 143, 148-64, 171-218, 248-50, SMR, v 4, t 14A and B; Willson cr-x, qq 58-70, 80-84, 88-117, 142, 149, SMR, v 4, t 13A and B; Cheng cr-x, qq 329-78, 407-08, 419-20, 469-72, SMR, v 1, t 2A and B.

3) Electoral districts created under Bill 5 are not arbitrary

21. The Asper Centre suggests that because Bill 5 changed the ward boundaries that had been put in place by the City, the boundaries under Bill 5 were not rationally connected to constituent interests – and that this somehow raises s 2(b) concerns.[24] There is no s 2(b) right to effective representation, a maximum constitutent to councillor ratio or a particular ward structure (see Appellants' factum on the merits at paras 71-80). In any event, the evidence before this Court does not support the Asper Centre's contention that the wards created under Bill 5 were arbitrary.

22. Bill 5 adopted the Federal Electoral Boundaries within the City of Toronto, which were set by the Federal Electoral Boundaries Commission, the independent body responsible for readjusting Ontario's federal electoral boundaries (applicable for both Parliament and the provincial legislature) (see paras 30-32 of the Appellants' factum on the merits). The Commission considers communities of interest when setting boundaries and the expert evidence is that consideration of communities of interest would not differ at the federal versus municipal level.[25] "Constituent interests" have not been "fractured" by the boundaries under Bill 5. There is, in any event, nothing which links this contention to any breach of s. 2(b).

4) No evidentiary basis for electoral finance arguments

23. As observed by this Court in denying leave to intervene to Rowan Caister in this appeal, there is no evidentiary foundation for this Court to address a s 2(b) challenge with respect to electoral finances.[26] Specifically, to advance a claim that Bill 5 or its timing differentially impacted the ability of candidates that registered to run at different times would require detailed

---

[24] Asper Centre factum at ¶¶ 33-37.
[25] Aff of Andrew Sancton, MR, v 3, t 4 at ¶¶ 20, 32; Federal Electoral Boundaries Commission Report at 2532-33, 2554-55; Davidson cr-x, qq 309-313, SM, v 1, t 3A; Siemiatycki cr-x, qq 281-85, SMR, v3 t 11A and B.
[26] *Toronto (City) v Ontario (AG)* (Reasons for Decision of Sharpe JA, dated May 22, 2019) at ¶10.

information on campaign fundraising and spending from a broad range of candidates who entered the race before or after Bill 5 was enacted, as well as expert evidence analyzing such data.[27] The Asper Centre's submissions regarding campaign finances are not supported by the evidence. [28]

24. The Supreme Court has held that equalizing the playing field in electoral contests is a valid basis upon which governments may justify limiting campaign spending.[29] It does not follow that there is a s 2(b) right to equalization of campaign finances based on the timing of one's entry into an electoral contest. As the relevant campaign expense limits were calculated by reference to ward population, the larger ward structure under Bill 5 increased each candidate's expense limit proportionally to the increase in ward population.[30] Meanwhile, no donor has come before the Court complaining that their intended donations were limited because they had already contributed their maximum allowable donation prior to the enactment of Bill 5.

25. In any event, the remedy for such a complaint (if one lies) would not be invalidation of Bill 5, but rather specific relief against the donor limits in s 88.9 of the *Municipal Elections Act* ("*MEA*"). No party challenged the limits in the *MEA*. The contribution limit per candidate prior

---

[27] Asper Centre factum at ¶¶ 27-28.

[28] At ¶¶27-28 of its factum, the Asper Centre states that Bill 5 resulted in candidates losing their donors, and "[t]hose who tapped out or lost their donors because of ward changes were seriously disadvantaged." They cite to the reasons of the Application Judge and the Respondent's factum for these propositions. The Respondent, in turn, cites to para 26 of the affidavit of Lily Cheng for this point. This is a misstatement of Ms Cheng's evidence. Ms Cheng states that: "It is possible that a donor contributed the maximum amount to a candidate who used to be running in their ward, but is now running in another ward due to Bill 5." There is no evidence that any candidate "tapped out" their donors, nor did the Application judge make any findings in this respect.

[29] *Harper v Canada*, [2004] 1 SCR 827 at ¶¶ 23-25.

[30] Campaign spending limits were based on the number of voters (electors) in each ward: *Municipal Elections Act, 1996*, SO 1996, c 32, s 88.20 (6) [*MEA*] along with O Reg 101/97, s 5 (spending limit). With larger wards, spending limits are correspondingly increased: *MEA*, s 88.9.1(1) (self-funding limit). Both the spending and self-funding limits are based on the number of electors in the ward. Note that campaign contributions can come from anyone in Ontario (subject to s. 88.8 of the *MEA*) and are not limited to electors in the ward in which the candidate is running. See Cheng cr-x, qq 468-469, SMR, v 2, t 2B; Padovani cr-x, qq 259-261, SMR, v 3, t 10B; Youssefi cr-x, qq 246-248, SMR, v 4, t 14B.

to May 30, 2017 was $750 per candidate; it was subsequently increased to $1,200. The total limit for any one election in a given jurisdiction is $5,000 (unchanged from before May 30, 2017).[31]

C. Unwritten constitutional principles do not abrogate or limit the province's power over municipalities under s 92(8)

26. The legislature has the power to delegate to municipalities any authority which it possesses under s 92. Municipalities can therefore exercise any s 92 power delegated to them, such as the power to change their electoral boundaries, as was delegated to Toronto in 2006.

27. Under the fundamental principles of parliamentary sovereignty, however, the authority of the legislature to delegate always implies the authority to take back or amend the delegated power at any time.[32] Any impairment of or timing restriction on the power would be an impairment of parliamentary sovereignty, which the Constitution precludes.[33]

28. The FCM argues that during municipal electoral campaigns, municipal electoral frameworks are effectively constitutionalized and cannot be altered by the legislature. To accept the argument that the legislature may be prevented from acting during certain periods of time (e.g., that a revocation of delegated power cannot be made during a municipal electoral campaign) this Court would have to treat as wrongly decided the entire body of Supreme Court and Privy Council authority on the constitutionality of parliament's power to delegate, including:

- *Re Pan-Canadian Securities Regulation*, 2018 SCC 48: The Supreme Court reversed the Quebec Court of Appeal which had held that the provinces participating in the pan-Canadian securities regulatory scheme would unconstitutionally fetter their parliamentary

[31] *MEA*, s 88.9(1) and (5) (current); *MEA*, s 88.9(1) and (5) (June 9, 2016-May 29, 2017 version).
[32] *Hodge v The Queen sub nom Re Liquor License Act (Ont)*, 9 App Cas 177 at ¶37 (PC), *Re Regulations in Relation to Chemicals*, [1943] SCR 1 at 18 per Rinfret J and at 26 per Davis J [*Chemicals Reference*]; *R v Furtney*, [1991] 3 SCR 89 at 104 [*Furtney*]; *Re Gray*, [1918] 57 SCR 150 at 157.
[33] *Re Pan-Canadian Securities Regulation*, 2018 SCC 48 at ¶¶ 53-54, 62 [*Pan-Canadian Securities*], reversing the QCCA; *Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at ¶36 [*CAP Reference*].

sovereignty by delegating authority to the regulatory body overseen by a Council of Ministers in a manner than would be practically difficult to withdraw and that this was tantamount to an abdication of legislative authority, which would be unconstitutional. The Supreme Court held that the delegation of authority was compatible with the fundamental principles of parliamentary sovereignty because the provinces retained "the complete authority to revoke any such delegated power." (para 74)

- *Public School Boards' Assn of Alberta v Alberta (AG)*, [2000] 2 SCR 409: The Supreme Court held that despite their existence being alluded to throughout the *Constitution Act, 1867*, all municipal institutions, including school boards, are merely delegates of provincial jurisdiction without constitutional status.
- *R v Furtney*, [1991] 3 SCR 89: The Supreme Court held that Parliament may delegate powers to a subordinate body (in this case, the Lieutenant Governor in Council), and that this delegation can be circumscribed and withdrawn.
- *Coughlin v Ontario (Highway Transport Board)*, [1968] SCR 569: The Supreme Court held that a delegation of authority to provide licenses for inter-provincial transportation of goods to the Highway Traffic Board was lawful and could be terminated at any time.
- *Re Regulations in Relation to Chemicals*, [1943] SCR 1: The Supreme Court held that delegation by the Governor in Council to subordinate agencies under the *War Measures Act, 1914* was legislative in nature and depends on the will of parliament for the continuance of its official existence. Parliament did not unconstitutionally "efface itself" by the delegation because it retained full power to amend, repeal or alter the *War Measures Act* or orders passed thereunder.

- *Re Liquor License Act of 1877 (Ont.)*, 9 App Cas 177 (PC) (*Hodge v The Queen)*: Ontario delegated authority to License Commissioners which allowed them to make rules for establishments serving alcohol. The Privy Council stated that, despite this delegation of powers, the province always maintains the ability to destroy the agency it created and set up another agency, or take the matter into its own hands.
- *AG of Nova Scotia v AG of Canada*, [1951] SCR 31 (the *Nova Scotia Inter-delegation Case*): The Supreme Court stated that Parliament and a Legislative Assembly cannot delegate their respective legislative powers to each other. However, they may delegate powers to subordinate bodies and always retain the jurisdiction to revoke the authority granted. The implication of the argument advanced by the FCM (and the City) is that the provincial legislature's delegation of authority over the electoral and Council structure in the *City of Toronto Act, 2006* was a delegation of authority to a legislative body (City Council) that is temporally (the FCM argues) or permanently (the City argues) immune from having its authority revoked by the provincial legislature. This would be an unconstitutional impairment of parliamentary sovereignty under the principles of the *Nova Scotia Inter-delegation Case* as the provincial legislature would have unconstitutionally abdicated its legislative authority to City Council.

29. The argument that the unwritten principles of "democracy" and "rule of law" have changed this state of affairs is unsustainable. The supremacy of the legislature is itself an expression of the principles of democracy and rule of law. It is the Legislative Assembly, not City Council, which is the relevant elected body under the Constitution that exercises the will of our representative democracy in respect of its assigned powers.[34]

[34] *Imperial Tobacco* at ¶¶ 66-67.

1) The "living tree" cannot grow beyond its "natural limits"

30. The FCM contends that "the historical context in which s 92(8) was adopted, as well as the growing importance of local government in the lives of Canadians buttress the status of municipal councils as a protected democratic institution."[35] The FCM relies on the "living tree" principle to argue that the evolution of the powers of municipalities through the principles of subsidiarity and cooperative federalism have allowed municipalities to evolve and the law to "develop its appreciation of municipal government."[36] To support this, the FCM cites cases that stand for the proposition that a delegation of power from a province to a municipality should be read broadly: *Spraytech*;[37] *Nanaimo (City) v Rascal Trucking Ltd*;[38] *R v Greenbaum*.[39] These cases do not support the assertion that municipalities have evolved to attain constitutional status. The development of the concept of subsidiarity in constitutional law by the Supreme Court helps to elucidate the division of powers between the two orders of government established under the Constitution and is irrelevant when considering the power of the province over its delegate, the City.[40] Indeed, in the *Spraytech* case the federalism issue involved the interaction between subordinate provincial legislation (enacted by the Town of Hudson as delegate of the Quebec legislature) and federal law. The same was true in *Canada Post*, also cited by the FCM.

31. As the Federal Court of Appeal has recognized in the context of determining that the Canadian territories do not have any status other than as a delegate of the federal government, the mere fact that a territory's authority may increase over the years does not mean that it will

[35] FCM factum at ¶35.
[36] FCM factum at ¶21.
[37] *114957 Canada Lteé (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.
[38] *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13.
[39] *R v Greenbaum*, [1993] 1 SCR 674.
[40] *Re Assisted Human Reproduction Act*, 2010 SCC 61 at ¶72.

eventually attain constitutional status.[41] Likewise, no matter how much power a province delegates to a municipality, it cannot abdicate its sovereignty or limit its authority under s 92(8).

32. The Constitution as a "living tree" is only "capable of growth and expansion within its natural limits";[42] the written text establishes limits.[43] The written Constitution refers to two orders of government: provincial and federal. The FCM suggests there is a third order of municipal government (recognized in the unwritten constitution) that acquires constitutionally protected status during a municipal election campaign and shifts out of constitutional status after the election. The FCM's submission pushes the living tree analogy beyond its natural limits.

2) There is no "third order of government" in the constitutional architecture

33. The FCM argues that the right to democratic municipal elections has been inherent in s 92(8) since Confederation. The FCM relies on the following passage from *OPSEU v Ontario* (as quoted in the *Secession Reference*): "the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels."[44] The FCM asserts that the broad reference to "certain political institutions" includes municipalities by implication.[45]

34. The FCM's reliance on the "constitutional architecture" to support constitutional protection for municipal electoral campaign periods is undermined by the following:

- the "political institutions" referred to in *OPSEU* that the constitutional architecture contemplates (beyond the "freely elected legislative bodies at the federal and provincial

[41] *Commissioner of the Northwest Territories v Canada*, [2001] FC No 1093 at ¶¶ 20-43 (FCA).
[42] *Edwards v Canada*, [1929] JCJ No 2 at ¶44 (PC).
[43] *Re Secession of Quebec*, [1998] 2 SCR 217 at ¶53 [*Secession Reference*]: "[…] there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review."
[44] *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at 57 [*OPSEU*]; FCM factum at ¶25.
[45] See FCM factum at ¶26.

levels") are an appointed Senate to represent the regions of the country[46] and the executives of each government (federal and provincial), not municipalities, which like school boards, boards, agencies and commissions, are mere delegates of the legislatures;

- the Supreme Court has held that "all municipal institutions are delegates of provincial jurisdiction under s 92(8)" and "do not have an independent constitutional status";[47] and
- the "constitutional architecture" includes the amending formula, that refers only to the federal and provincial levels of government; and the "Democratic Rights" set out in *Charter* ss 3, 4 and 5 only refer to federal and provincial elections and legislatures.[48]

35. The exclusion of municipalities from s 3 of the *Charter* was not an oversight. The submissions to the Special Joint Committee on the Constitution specifically asking for constitutional recognition of municipalities in 1980 were not adopted.[49]

36. Where the framers of the *Constitution Act, 1982* intended to modify the division of powers they did so expressly[50] as they could have done if they had wished to limit the plenary provincial jurisdiction over municipal institutions under s 92(8).[51]

---

[46] *Re Senate Reform*, 2014 SCC 32 at ¶1.
[47] *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, 2000 SCC 45 at ¶¶ 33-34; also see *Saint-Rosse-du-Nord v Quebec* (1994), 119 DLR (4th) 723 at 739 (Que CA) ("The "Exclusive" powers accorded to the provincial legislatures by s 92(8) of the *Constitution Act, 1867* are not limited in this way. A discretion that is solely within the jurisdiction of a class of municipalities […] is constitutionally inconceivable"), leave to appeal to the SCC ref'd (1995), 119 DLR (4th) viii.
[48] The amending formula is in ss 38-47 of the *Constitution Act, 1982*; *Charter* s 3 protects the right to vote and stand for election in federal and provincial elections; s 4 prescribes the maximum term for the House of Commons and provincial legislative assemblies and requires elections at least every five years; s 5 requires at least annual sittings of the federal and provincial legislatures. Municipalities are not mentioned.
[49] See CTF factum at ¶21, FN 28.
[50] Sections 50 and 51, found in Part VI of the *Constitution Act 1982* entitled "Amendment to the *Constitution Act, 1867*, modifying the division of powers with respect to non-renewable natural resources.
[51] At para 30 of its factum, FCM accepts that municipal institutions are excluded from *Charter* s 3, but then argues based on a single sentence from the *Carter* decision that the exclusion of municipalities was not intentional: ("The circumstances leading to the adoption of the *Charter* negate any intention to reject existing democratic institutions"). Read in context, it is clear that Justice McLachlin's meaning was that the framers did not intend to reject the existing system of electoral districts in favour of strict voter parity. See *Ref re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 185 [*Carter*].

37. While unwritten constitutional principles can be used as an interpretative aid to assist the Court to fill a gap in the written text of the Constitution, where there is no gap unwritten principles cannot be used to re-write the Constitution.[52] It is not for the courts to create a third order of government within the constitutional architecture "where the words of the Constitution read in context do not do so."[53] Limiting the provincial legislatures' power over their municipal delegates can only be done by a constitutional amendment passed by at least seven of those legislatures with at least 50% of the aggregate provincial population.[54]

3) Unwritten principles are not a stand-alone basis to strike down legislation

38. The FCM cites various cases discussing "unwritten constitutional principles" which it argues support interpreting s 92(8) as being limited by a constitutional protection of municipal electoral campaigns. However, each case cited is distinguishable on the basis that either the decision to strike down legislation was grounded in express constitutional provisions or did not involve a challenge to legislation. None of the cases cited by the FCM detract from the fundamental principle that unwritten constitutional principles cannot be used as an independent basis upon which to strike down a statute: [55]

- In *Trial Lawyers*, British Columbia's power to impose hearing fees was limited by an explicit provision in the Constitution: s 96, the constitutional entrenchment of the core or inherent jurisdiction of the provincial superior courts. The unwritten principle of the rule

[52] *Secession Reference* at ¶53; *Imperial Tobacco* at ¶¶ 59-60, 66-67 and 76; *Norton McMullen Consulting Inc v Boreham*, 2015 ONSC 5862 at ¶¶ 90-91, aff'd 2016 ONCA 778 [*Norton*]; *Campisi v Ontario*, 2017 ONSC 2884 at ¶55 [*Campisi* (ONSC)], aff'd 2018 ONCA 869 (on other grounds). Unwritten constitutional principles have been used to fill "true gaps" in the constitutional text only in the judicial compensation context: see *Re Remuneration of Judges of the Prov Court of PEI; Re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3.
[53] *Baier v Alberta*, 2007 SCC 31 at ¶39; see also CTF factum at ¶23.
[54] *Constitution Act, 1982*, s 38.
[55] *Imperial Tobacco* at ¶¶ 60, 64-67; *Campisi* (ONSC) at ¶55; *Secession Reference* at ¶53; *Norton* at ¶¶ 90-91; *Lalonde v Ontario* (2001), 208 DLR (4th) 577 at ¶123 (Ont CA) [*Lalonde*].

of law did not provide an independent basis to strike down the provisions setting hearing fees. The principle simply supported an interpretation already arrived at under s 96.

- *Lalonde* did not concern a challenge to legislation, but rather was a judicial review of a discretionary administrative decision on the basis that it contravened the unwritten principle of respect for minorities. It was explicitly recognized in *Lalonde* that "the constitutional validity or invalidity of a piece of legislation [was] not at issue".[56] This Court was careful to caution against using unwritten principles as an independent basis to impugn the validity of legislation or effectively re-write the constitutional text.[57]
- At para 29 of its factum, the FCM takes Rand J's holding in *Switzman v Elbing* out of context. Rand J in that case held that authority granted pursuant to a validly passed provincial statute could not be exercised in a way that invaded an area of exclusive federal jurisdiction.[58] There is no discussion of unwritten constitutional principles.

4) In any event, Bill 5 does not offend the principles of "democracy" or "rule of law"

39. The FCM argues that "…Bill 5 offends the safeguards for ordered democracy in municipal elections that are immanent in s 92(8) by reason of the rule of law and the democratic principle."[59] The Appellants do not agree that municipal elections are constitutionalized in s 92(8), for the reasons set out in paras 27-39 above. However, neither Bill 5 nor the timing of its enactment deprived the City of Toronto of an "ordered democratic election." It simply changed the ward structure of the election that took place.

40. The principle of democracy strongly favours the application of valid legislation that conforms to the Constitution's express terms. Duly enacted legislation is in fact an emanation of

[56] *Lalonde* at ¶124.
[57] *Lalonde* at ¶¶ 118, 121.
[58] *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 at 302-303.
[59] See FCM factum at ¶45.

the rule of law (and democracy). As stated in *Imperial Tobacco*:

> […] the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court – most notably democracy and constitutionalism – very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. […]
>
> The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that the courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.[60] [emphasis added]

41. As explained in *Imperial Tobacco*, government action constrained by the rule of law principle is usually that of the executive and judicial branches.[61] The rule of law as applicable to the legislative branch means only that the legislature must comply with legislated requirements as to manner and form, i.e., procedures by which legislation is enacted, amended and repealed.[62]

42. The only procedure due to the public in relation to parliamentary process is that legislation receive three readings and Royal Assent. Procedure in the legislature is not subject to judicial review: courts assess the content of legislation once enacted.[63] There is no obligation on government to consult before it introduces legislation for consideration and enactment.[64] The

---

[60] *Imperial Tobacco* at ¶¶66-67.
[61] *Imperial Tobacco* at ¶60.
[62] *Imperial Tobacco* at ¶60.
[63] *Authorson v Canada (AG)*, 2003 SCC 39 at ¶¶ 37-39, 41 [*Authorson*].
[64] *CAP Reference* at ¶60: "[…] rules governing procedural fairness do not apply to a body exercising purely legislative functions"; *Authorson* at ¶¶ 37-39. *Ontario (AG) v Fraser*, [2011] 2 SCR 3 at ¶¶ 47, 85; *East York Borough v Ontario (AG)*, [1997] OJ No 3064 at ¶11 (Gen Div): "Bill 103 simply appeared on the government's legislative agenda with little, or no, public notice and without any attempt to enter into any meaningful consultation with those people who would be most affected by it – the more than 2,000,000 inhabitants of Metro Toronto. Such, however, is the prerogative of government. The court has made it clear that there is no obligation on government to consult the electorate before it introduces legislation."

legislature itself has no duty to consult or follow due process,[65] except its own rules, in respect of which it is the arbiter. Nor does the timing of Bill 5 offend the rule of law. The principle of the rule of law does not impose temporal constraints on the legislature. As the Supreme Court held in *Imperial Tobacco*, outside of the criminal law, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution.

43. The announcement of Bill 5 on the last day for nominations under the 47-ward election, and its enactment about two weeks later, may have overturned prior expectations regarding the ward structure for the election. However, it does not follow that Bill 5 violates the principle of the rule of law. The Court in *Imperial Tobacco* noted that even though retroactive laws "overturn settled expectations" they nonetheless do not offend the rule of law.[66]

44. The Asper Centre and the FCM mistake the feeling that arises from expectations being overturned, with concerns regarding unfair elections. Bill 5 did not change the fundamental nature of the election as democratic and based on fair, pre-determined rules. There is no evidence that the 2018 election was not a free and fair democratic election.

5) Judicial scrutiny of the wisdom of legislation cannot proceed except under s 1 of the *Charter* or under s 35 of the *Constitution Act, 1982*

45. FCM states that the timing and circumstances of Bill 5 "calls out for judicial scrutiny" and suggests (by analogy to *Charter* s 1 and s 35 cases on the rights of Indigenous peoples) that this Court may wish to devise a test for justification of the timing of the legislation.[67]

46. The FCM is inviting this Court to impose on the government a policy justification requirement under s 92(8). This runs directly counter to the entire body of federalism

---

[65] *Authorson* at ¶¶ 37-39, 41; *Mikisew Cree First Nation v Canada*, 2018 SCC 40 at ¶¶ 2, 32, 34-37; *East York Borough v Ontario (AG)*, 153 DLR (4th) 299 at ¶¶ 12-13 (CA).
[66] *Imperial Tobacco* at ¶¶ 69-71, 76.
[67] FCM factum at ¶¶41, 53.

jurisprudence since Confederation.[68] Moreover, the FCM suggests that this judicial power is triggered by temporal circumstances: according to the FCM, there are certain periods during which the legislature's exercise of authority under s 92(8) can proceed without justification, and other times (i.e. "mid-election") in which the legislature's exercise of authority must be justified. This proposition is entirely alien to the jurisprudence interpreting ss 91 and 92 of the *Constitution Act, 1867* and places the Court in the invidious position of passing judgment on the wisdom of legislation where the constitutional text and doctrine provide no support for the Court's assumption of such a role. As noted in *OPSEU*:

> [T]his line of argument is tantamount to one based on the *Canadian Charter of Rights and Freedoms*. It constitutes a valiant attempt to go to the validity of the impugned provisions without the help of the *Charter*. I have never heard the overbreadth argument being made in a distribution of powers case except perhaps where colourability was alleged. As for the test relating to the balancing of conflicting values, it is of course highly relevant under s. 1 of the *Charter* or in a common law or administrative law context such as the *Fraser* case. But in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.[69] [emphasis added]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31ST DAY OF MAY 2019.

Robin K Basu Yashoda Ranganathan Aud Ranalli

[68] *Re Firearms Act (Can),* 2000 SCC 31 at ¶18.
[69] *OPSEU* at 56. See also: *Firearms Reference* at ¶18; *Re Securities Act,* 2011 SCC 66 at ¶10; *Pan-Canadian Securities* at ¶¶ 130-131; *Re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40 at ¶233.

SCHEDULE A

1 *Borowski v Canada*, [1989] 1 SCR 342

2 *Maystar General Contractors Inc v International Union of Painters and Allied Trades, Local 1819* (2008), 90 OR (3d) 451 (CA)

3 *Greenspace Alliance of Canada's Capital v Ottawa (City)*, [2008] OJ No 3942 (Div Ct)

4 *Phillips v Nova Scotia (Comm. of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97

5 *Dragan v Canada*, 2003 FCA 233

6 *PC Ontario Fund v Essensa*, [2012] OJ No 2908 (CA)

7 *British Columbia v Imperial Tobacco*, 2005 SCC 49

8 *Harper v Canada*, [2004] 1 SCR 827

9 *City of Toronto et al v Ontario et al* (Reasons for Decision of Sharpe JA on the Motions for Leave to Intervene, dated May 22, 2019)

10 *Hodge v The Queen sub nom Re Liquor License Act (Ont)*, 9 App Cas 177 (PC)

11 *Re Regulations in Relation to Chemicals*, [1943] SCR 1

12 *R v Furtney*, [1991] 3 SCR 89

13 *Re Gray*, [1918] 57 SCR 150

14 *Re Pan-Canadian Securities Regulation*, 2018 SCC 48

15 *Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525

16 *Public School Boards' Assn of Alberta v Alberta (AG)*, [2000] 2 SCR 409

17 *Coughlin v Ontario (Highway Transport Board)*, [1968] SCR 569

18 *AG of Nova Scotia v AG of Canada*, [1951] SCR 31

19 *114957 Canada Lteé (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40

20 *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13

21 *R v Greenbaum*, [1993] 1 SCR 674

22 *Re Assisted Human Reproduction Act*, 2010 SCC 61

23 *Commissioner of the Northwest Territories v Canada*, [2001] FC No 1093 (FCA)

24 *Edwards v Canada*, [1929] JCJ No 2 (PC)

25 *Re Secession of Quebec*, [1998] 2 SCR 217

26 *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 at 57

27 *Re Senate Reform*, 2014 SCC 32

28 *Saint-Rosse-du-Nord v Quebec*(1994), 119 DLR (4th) 723

29 *Norton McMullen Consulting Inc v Boreham*, 2015 ONSC 5862, aff'd 2016 ONCA 778

30 *Campisi v Ontario*, 2017 ONSC 2884

31 *Re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3

32 *Baier v Alberta*, 2007 SCC 31

33 *Lalonde v Ontario* (2001), 208 DLR (4th) (Ont CA)

34 *Switzman v Elbing and AG of Quebec*, [1957] SCR 285

35 *Authorson v Canada (AG)*, 2003 SCC 39

36 *Ontario (AG) v Fraser*, [2011] 2 SCR 3

37 *East York Borough v Ontario (AG)*, [1997] OJ No 3064 (Gen Div)

38 *Mikisew Cree First Nation v Canada*, 2018 SCC 40

39 *East York Borough v Ontario (AG)*, 153 DLR (4th) 299 (CA)

40 *Re Firearms Act (Can)*, 2000 SCC 31

41 *Re Securities Act*, 2011 SCC 66

42 *Re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40

SCHEDULE B

#

#
#

A. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[…]

8. Municipal Institutions in the Province.

B. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
(*a*) resolutions of the Senate and House of Commons; and
(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members
(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province

shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent
(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent
(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation
39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem
(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation
40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent
41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
(*c*) subject to section 43, the use of the English or the French language;
(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure
42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
(*b*) the powers of the Senate and the method of selecting Senators;
(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;
(*e*) the extension of existing provinces into the territories; and
(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception
(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces
43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
(*a*) any alteration to boundaries between provinces, and
(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,
may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament
44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures
45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures
46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization
(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution
47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period
(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

C. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.

DEMOCRATIC RIGHTS

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

Maximum duration of legislative bodies
4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances
(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond

five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies
5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

D. *Municipal Elections Act, 1996*, SO 1996, c 32

CURRENT VERSION

Contributions to candidates

88.8 (1) A contribution shall not be made to or accepted by a person or an individual acting under the person's direction unless the person is a candidate. 2016, c. 15, s. 51.
Only during election campaign

(2) A contribution shall not be made to or accepted by a candidate or an individual acting under the candidate's direction outside the candidate's election campaign period described in section 88.24. 2016, c. 15, s. 51.

Who may contribute
(3) Only the following persons may make contributions:
1. An individual who is normally resident in Ontario.
2. Subject to subsection (5), the candidate and his or her spouse. 2016, c. 15, s. 51.

Who cannot contribute
(4) For greater certainty, and without limiting the generality of subsection (3), the following persons and entities shall not make a contribution:

1. A federal political party registered under the *Canada Elections Act* (Canada) or any federal constituency association or registered candidate at a federal election endorsed by that party.
2. A provincial political party, constituency association, registered candidate or leadership contestant registered under the *Election Finances Act*.
3. A corporation that carries on business in Ontario.
4. A trade union that holds bargaining rights for employees in Ontario.
5. The Crown in right of Canada or Ontario, a municipality or a local board. 2016, c. 15, s. 51.
Non-resident candidate, spouse

(5) If not normally resident in Ontario, a candidate and his or her spouse may make contributions only to the candidate's election campaign. 2016, c. 15, s. 51.
Who may accept contribution

(6) A contribution may be accepted only by a candidate or an individual acting under the candidate's direction. 2016, c. 15, s. 51.

Contributors
(7) A contribution may be accepted only from a person or entity that is entitled to make a contribution. 2016, c. 15, s. 51.

Contributions exceeding $25
(8) A contribution of money that exceeds $25 shall not be contributed in the form of cash and shall be contributed in a manner that associates the contributor's name and account with the payment or by a money order signed by the contributor. 2016, c. 15, s. 51.
Exception re making information public
(9) For greater certainty, if a municipality or local board makes information available to the public on a website or in another electronic format, the provision of the information does not constitute a contribution to a candidate. 2016, c. 15, s. 51.

Same
(10) Without limiting the generality of subsection (9), the information referred to in that subsection includes the following:

1. The phone number and email address provided by the candidate in the nomination filed under section 33.
2. A hyperlink to the candidate's website. 2016, c. 15, s. 51.

Maximum contributions to candidates
88.9 (1) A contributor shall not make contributions exceeding a total of $1,200 to any one candidate in an election. 2016, c. 15, s. 51; 2017, c. 10, Sched. 4, s. 8 (8).
More than one office

(2) If a person is a candidate for more than one office, a contributor's total contributions to him or her in respect of all the offices shall not exceed "$1,200. 2016, c. 15, s. 51; 2017, c. 10, Sched. 4, s. 8 (9).

Exception, mayor of City of Toronto
(3) Despite subsections (1) and (2), for the purposes of those subsections the maximum total contribution that a contributor may make to a candidate for the office of mayor of the City of Toronto is $2,500. 2016, c. 15, s. 51.

Multiple candidates
(4) A contributor shall not make contributions exceeding a total of $5,000 to two or more candidates for office on the same council or local board. 2016, c. 15, s. 51.

Exception, candidates and spouses
(5) This section does not apply to contributions made to a candidate's own election campaign by the candidate or his or her spouse. 2016, c. 15, s. 51.

Maximum contributions to a candidate's own election campaign
88.9.1 (1) A candidate for an office on a council and his or her spouse shall not make contributions to the candidate's own election campaign that, combined, exceed an amount equal to the lesser of,
(a) the amount calculated by adding,
(i) in the case of a candidate for the office of head of council of a municipality, $7,500 plus 20 cents for each elector entitled to vote for the office, or
(ii) in the case of a candidate for an office on a council of a municipality other than the office of head of council, $5,000 plus 20 cents for each elector entitled to vote for the office; and
(b) $25,000. 2017, c. 10, Sched. 4, s. 8 (10).

Candidates' expenses
88.20 (1) An expense shall not be incurred by or under the direction of a person unless he or she is a candidate. 2016, c. 15, s. 58.
(6) During the period that begins on the day a candidate is nominated under section 33 and ends on voting day, his or her expenses shall not exceed an amount calculated in accordance with the prescribed formula. 2016, c. 15, s. 58.

HISTORICAL VERSION

Maximum contributions to candidates
88.9 (1) A contributor shall not make contributions exceeding a total of $750 to any one candidate in an election. 2016, c. 15, s. 51.

More than one office
(2) If a person is a candidate for more than one office, a contributor's total contributions to him or her in respect of all the offices shall not exceed $750. 2016, c. 15, s. 51.
Exception, mayor of City of Toronto

(3) Despite subsections (1) and (2), for the purposes of those subsections the maximum total contribution that a contributor may make to a candidate for the office of mayor of the City of Toronto is $2,500. 2016, c. 15, s. 51.

Multiple candidates
(4) A contributor shall not make contributions exceeding a total of $5,000 to two or more candidates for office on the same council or local board. 2016, c. 15, s. 51.
Exception, candidates and spouses

(5) This section does not apply to contributions made to a candidate's own election campaign by the candidate or his or her spouse. 2016, c. 15, s. 51.

E. O Reg 101/97

5. The following formulas are prescribed for the purpose of subsection 88.20 (6) of the Act (maximum amount):

1. In the case of a candidate for the office of head of council of a municipality, the amount shall be calculated by adding together $7,500 plus 85 cents for each elector entitled to vote for the office.
2. In the case of a candidate for another office, the amount shall be calculated by adding together $5,000 plus 85 cents for each elector entitled to vote for the office.
3. REVOKED: O. Reg. 326/16, s. 3 (2).

Court of Appeal File No.: **C65861**

ROCCO ACHAMPONG Applicant (Respondent in Appeal)	and	ONTARIO *et al.* Respondents (Appellants)	and	CITY OF TORONTO Respondent (Respondent in Appeal)
THE CITY OF TORONTO Applicant (Respondent in Appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellant)		
CHRIS MOISE *et al.* Applicants (Respondents in Appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellant)	and	CITY OF TORONTO Respondent (Respondent in Appeal)

COURT OF APPEAL FOR ONTARIO

REPLY FACTUM OF THE APPELLANTS

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Fax: (416) 326-4015

Robin K. Basu (LSO# 32742K)
Tel: (416) 326-4476
E: robin.basu@ontario.ca

Yashoda Ranganathan (LSO# 57236E)
Tel: (416) 326-4456
E: yashoda.ranganathan@ontario.ca

Aud Ranalli (LSO# 72362U)
Tel: (416) 326-4473
E: aud.ranalli@ontario.ca

Of Counsel for the Respondents (Appellants)