Court of Appeal File No.: C65861

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Appellant

- and -

CANADIAN CONSTITUTION FOUNDATION, CANADIAN TAXPAYERS FEDERATION, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, and FEDERATION OF CANADIAN MUNICIPALITIES

Interveners

FACTUM OF THE INTERVENER, CANADIAN CONSTITUTION FOUNDATION

May 24, 2019

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[Title of Proceedings, continued]

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- and -

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Appellants

- and -

CITY OF TORONTO

Respondent

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Respondents

- and -

ATTORNEY GENERAL OF ONTARIO

Appellant

- and -

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PART I—OVERVIEW

1. Judges resolve disputes about the scope of *Charter* guarantees. To do so, they must first consider whether an asserted *Charter* right is extensive enough for the impugned state action to have limited it. If it is, then they must decide whether the limit is prescribed by law, and whether it is reasonably and demonstrably justified.

2. The purpose of each inquiry is ultimately the same: to identify the "outer boundaries" of constitutional protection: *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 120, per Côté and Brown JJ. (dissenting), citing B.W. Miller, "Justification and Rights Limitations", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008), at p. 96. Yet, the judicial method involved differs substantially. Scoping a *Charter* right on its own terms necessarily involves constitutional interpretation; the court must consider what the provision protects, and what it does not. Assessing the reasonableness of a limit prescribed by law, by contrast, requires a fact-specific determination of whether a particular limit is justified.

3. Courts often give the first, interpretative step short shrift. This is particularly so when the text of the *Charter* provision at issue lacks a patent qualification that simplifies the task, such as "unreasonable" (ss. 8 and 11(*a*)), "reasonable" (ss. 11(*b*) and 11(*e*)), "arbitrarily" (s. 9), "cruel and unusual" (s. 12), or "except in accordance with the principles of fundamental justice" (s. 7). The default with facially unrestricted rights — the "fundamental freedoms" in s. 2, for example — has become to invoke the right's "purpose", read the constitutional guarantee as broadly as its language allows, and leave the bulk of the work to s. 1. Faced with a choice between using constitutional interpretation to reckon with the extent of a *Charter* right and using the test in *R. v. Oakes*, [1986] 1 S.C.R. 103, at paras. 69-71, to reach a case-specific conclusion, many judges understandably prefer the latter.

4. But constitutional interpretation is not optional in constitutional cases. Every *Charter* right — including those guaranteed in s. 2 — is subject not only to "reasonable limits prescribed by law" under s. 1, but also to the scope of the right itself. When courts pay insufficient attention to the latter, they undermine the Constitution in the name of upholding it.

5. This is a case in point. The application judge concluded that the freedom of expression, guaranteed in s. 2(*b*) of the *Charter*, protects rights of "effective[] communicat[ion]" and "effective representation" in municipal elections: *City of Toronto v. Ontario (Attorney General)*, 2018 ONSC 5151, 142 O.R. (3d) 336 ["**Application Reasons**"], at paras. 32 and 47. He did so by interpreting s. 2(*b*) of the *Charter* as being of nearly unlimited scope; "any activity or communication that conveys or attempts to convey meaning (and does not involve violence) is covered by the guarantee": *ibid.*, at para. 24. Thus, "every participant in a political election campaign … would have a genuine s. 2(*b*) issue with" the impugned legislation, *i.e.*, the *Better Local Government Act, 2018*, S.O. 2018, c. 11: Application Reasons, at para. 25.

6. Careful attention to the text and context of s. 2(*b*) would have obliged the application judge to reason differently, if not to reach a different conclusion. That he did not bespeaks the unmooring of asserted constitutional purpose from express constitutional structure — a jurisprudential trend that, left unchecked, will increasingly endanger Canadians' constitutional rights and freedoms by consigning their protection to the relative subjectivity of s. 1, and by enlarging the judicial role beyond what the Constitution contemplates.

7. Appellate guidance is warranted. Here, this court has an opportunity to provide it. The Canadian Constitution Foundation (the "**CCF**") intervenes to propose that it do so, and how.

PART II – ISSUES AND THE LAW

8. The primary constitutional question on these appeals is whether participating in a municipal election is an "expressive activity" within the ambit of the freedom of expression guaranteed in s. 2(*b*) of the *Charter*. If it is, then the court must consider whether s. 2(*b*) secures a municipal candidate's right to effective communication and a municipal voter's right to effective representation, the latter of which s. 3 of the *Charter* mandates in federal and provincial elections: see *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 183. This court is also asked to consider whether, and in what circumstances, s. 52(1) of the *Constitution Act, 1982* empowers courts to strike down legislation for inconsistency with unwritten constitutional principles.

9. The route this court takes in answering these questions will be no less important than the answers it provides. The court has already concluded that there is "a strong likelihood that application judge erred in law": see *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761, 142 O.R. (3d) 481 ["**Stay Reasons**"], at paras. 11-13; see also *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 48; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at paras. 40-41. Yet, to dispose of the appeal merely on the basis of the s. 2(*b*) jurisprudence would treat the symptom, not the syndrome. The focus of the court's judgment would be the ends of constitutional method, not the means — whether the application judge erred, not how.

10. The court should go further. It should provide guidance on the interpretation not only of s. 2(*b*), but also of constitutional provisions generally, particularly in novel legal and factual circumstances like those that were before the application judge in this case. In doing so, it can begin to right the balance in the jurisprudence between the *Charter*'s operative provisions and

s. 1 — so that, in future cases, justification does not crowd out interpretation in assessing the constitutionality of state action.

11. If the court allows this appeal, then its judgment will confirm that the provincial legislature has the constitutional authority to disrupt an ongoing municipal election. It will also confirm that the remedy for such disruption is to be found in provincial politics, not the courts: see *British Columbia v. Imperial Tobacco*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66. It will follow from these conclusions that, by intervening as he did, the application judge usurped a legislative power to cause chaos, which exists for better or worse, and substituted a judicial power to do the same, which does not.

12. In this way, this case demonstrates the practical consequences that can flow from an approach to the *Charter* that: (i) is insufficiently constrained by the constitution's text and structure; and (ii) expands the role of justification at the expense of interpretation. Avoiding such consequences in future cases requires guidance in this one.

13. The court should thus affirm two propositions. First, courts must be attentive to the scope of *Charter* rights, including broadly drafted rights like the freedom of expression guaranteed in s. 2(*b*), and should rely primarily on constitutional interpretation to discern the ambit of *Charter* protections. Second, the same approach to constitutional interpretation should be applied to s. 52(1) of the *Constitution Act, 1982*, which does not empower courts to use unwritten constitutional principles in order to defy constitutional text by expanding the scope of *Charter* rights.

A. Courts must be attentive to the scope of *Charter* rights, including broadly drafted rights like the freedom of expression guaranteed in s. 2(*b*), and should rely primarily on constitutional interpretation to discern the ambit of *Charter* protections

14. To apply a *Charter* guarantee in a novel factual or legal context, a court must first determine its scope. This emerges primarily from the Constitution's text: see *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 16. As McIntyre J. put it, in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at para. 151:

> The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society. [Emphasis added.]

15. Concurring in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, Rowe J. observed that, while the Court "has from time to time favoured an approach to Charter rights that avoids delineation and relies instead on s. 1 to ensure that rights are exercised within proper bounds" (at para. 186), "an interpretive approach that blurs the distinction between infringement and justification ignores the architecture of the *Charter*": at para. 189. Justice Rowe cautioned that "[a] preference for reconciling competing rights and interests under s. 1 does not obviate the need for an initial determination of whether a *Charter* right has been infringed in the first place": *ibid.*; see also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 71; cf. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at pp. 383-85.

16. This court should endorse and apply that principle here. Specifically, the court should affirm that judges facing novel *Charter* claims err when they declare a *Charter* right to have been limited merely because an impugned state action has engaged the right's purpose.

i. The role of purposive interpretation is to identify the scope of *Charter* rights, not to provide a shortcut to s. 1 justification

17. Purpose, unmoored from constitutional text and context, cannot justify reading rights more broadly than the *Charter* itself allows: see L. Sirota & B. Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017), 50 U.B.C. L. Rev. 505, at pp. 539-40. Yet, courts too often take the Supreme Court of Canada's instruction to employ "a broad, purposive analysis, which interprets specific provisions of a constitutional document in light of its larger objects" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156) as a license to read *Charter* provisions so expansively as to render them practically boundless. Purpose, rather than being the object of interpretive method, becomes a means of concealing an absence of interpretive method: see S. Fish, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law" (2008), 39 Cardozo L. Rev. 1109, at pp. 1137-38. The application judge's reasoning in this case may be so described.

18. In delineating the scope of a *Charter* right, courts should instead consider how the right's purpose — *i.e.*, "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 116) — constrains the constitutional guarantee. Purposiveness properly operates not as permission to expand a *Charter* guarantee, but rather as a tool to identify its ambit. This requires courts to begin with the language and context of the applicable provision itself (that is, the constitutional text that Parliament has enacted), rather than with "judicial elaborations" found in the jurisprudence (that is, the constitutional law that judges have made): see P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987), 21 U.B.C. L. Rev. 87, at p. 122.

19. If purposive interpretation is to remain "realistic and defensible" (*ibid.*, at p. 126), then "[t]he language, structure, and history of the constitutional text" must "constrain[]" the scope of the protected right, before s. 1 is engaged: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at para. 151. As Dickson J. put it in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344:

> [T]he purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore … be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added; citation omitted.]

20. In this way, purposive interpretation works as "a *solution* to textual underdeterminacy"; it is the means by which a court "takes language that might plausibly support a range of possible meanings and picks from among them through an investigation into the purposes underlying the guarantees": B. Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the *Canadian Charter of Rights and Freedoms*" (2015), 65 U.T.L.J. 239 [**Oliphant, "Taking Purposes Seriously"**], at pp. 248-49 (emphasis in original). Thus, "[p]urposes do not eclipse or supersede the language chosen; they are used to delimit the meaning of the text in a way that ensures the achievement of the purpose of the right or freedom but within the reasonable bounds of the language as written": *ibid.*, at p. 262; see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at paras. 36-38; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 40; *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 499; *British Columbia (Attorney General) v. Canada (Attorney General)*; *An Act respecting the Vancouver Island Railway*

(Re), [1994] 2 S.C.R. 41, at p. 88; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, at paras. 314-19, per La Forest J. (dissenting).

21. When it is grounded in the *Charter*'s text and structure, purposive interpretation ensures that the judicial enforcement of *Charter* protections reflects Canada's constitutional settlement. It reflects "the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts": *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 132 (emphasis added). That "interpretive role" is to ensure the protection of the particular interests — and only those particular interests — that it was each provision's "original purpose" to guarantee: *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 37, quoting *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 40. This obliges courts to take seriously the scope of *Charter* rights, and the role of purpose in constraining that scope.

ii. Overreliance on s. 1 justification endangers constitutional rights and freedoms and improperly expands the judicial role

22. When courts are insufficiently attentive to the scope of *Charter* rights and instead err on the side of inclusion, the real work is left to the inherently more subjective justification analysis under s. 1. This is a familiar — and longstanding — trend in our constitutional law.

23. It is not consistent with the scheme of the *Charter*, however. Shifting the analytical burden to s. 1 denies Canadians the power to decide what is constitutionally protected, whether through those who drafted and enacted the *Charter*, or through those empowered to amend it. Instead, judges who resort too readily on s. 1 assign that power to themselves.

24. Section 1 is a problematic guardian of Canadians' rights and freedoms. Unlike the *Charter*'s operative provisions, s. 1 entrusts the ultimate protection of constitutional rights to judicial discretion: see J.B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of

Liberal Constitutionalism in Canada, 1982-1997" (1999), 37 Osgoode Hall L.J. 625, at pp. 661-62. Its outsized role makes it harder for governments to resist the conclusion that a *Charter* right has been limited, but easier to establish that the limitation is or was justified: see P.W. Hogg, "Interpreting the *Charter of Rights*: Generosity and Justification" (1990), 28 Osgoode Hall L.J. 817, at p. 819. As Professor Huscroft (as he then was) observed in "Proportionality and the Relevance of Interpretation", in G. Huscroft et al., eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) [**Huscroft, "Proportionality and the Rule of Law"**], at pp. 188-89, courts that broadly circumscribe constitutional rights, and then rely on justification to police limitations on those rights, make rights and freedoms less certain, not more:

> If rights are interpreted broadly, the real protection they afford turns out to be dependent on how difficult or easy the court makes it to justify the establishment of limits on the right.… Thus, the adoption of broad interpretations of rights does not necessarily result in greater rights protection…. Courts adopting expansive conceptions of rights are likely to speak in romantic terms about the importance of respecting rights even as they approve the establishment of significant limits on them. The consequences of broad interpretations of rights — a broadening of the range of state action subject to judicial review and an increase in judicial power in the constitutional order — is seldom acknowledged…. [Emphasis added; footnote omitted.]

25. When the ultimate extent of the *Charter*'s protection is in issue, interpretation is a more objective (and therefore superior) safeguard than justification. Constitutional interpretation ties Canadians' rights and freedoms to law that can be "ascertained … through a process of legal reasoning": Oliphant, "Taking Purposes Seriously", at p. 246. It ensures that "it is the Constitution, … [as] interpreted by the courts, that limits the legislatures" (*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 105), and that the courts "merely expound[] the limits that the *Constitution* imposes on Parliament": B. McLachlin, "Charter Myths" (2000), 33 U.B.C. L. Rev. 23, at p. 31 (emphasis in original). Justification, by contrast, "is by its very nature a fact-specific inquiry": *RJR—MacDonald Inc. v. Canada (Attorney*

General), [1995] 3 S.C.R. 199, at para. 133, per McLachlin J.; see also *R. v. Michaud*, 2015 ONCA 585, 127 O.R. (3d) 81, at para. 85. It ties Canadians' rights and freedoms to the facts of a particular case, as a particular court has found and weighed them.

26. Enhanced reliance on s. 1 justification, and the fact-specific proportionality inquiry that it entails, thus expands the judicial role at the expense of the legislative choice to enumerate certain protections (but not others) as *Charter* rights. As Professor Huscroft put it in "Proportionality and the Rule of Law", at p. 188:

> In order to respect the community's decision to adopt a bill of rights, courts employing proportionality analysis must respect … the nature of the *particular* rights the community has committed to protect. That is so … because the decision to adopt a bill of rights is a decision to give heightened legal status to *particular* rights, rather than to rights in general. Whether a particular right is protected by a bill of rights, and what its protection entails, are questions prior to the authority of courts to engage in proportionality analysis. [Underlining added; italics in original.]

27. Canadians' rights and freedoms should primarily depend on whether the community has decided to enshrine them in the *Charter*. Exceptionally — and only exceptionally — a court may conclude that a state-imposed limitation is reasonable and demonstrably justified: see *R. v. Oakes*, [1986] 1 S.C.R. 103, at para. 66. "[A]n approach to Charter rights that avoids delineation and relies instead on s. 1 … ignores the architecture of the *Charter*": *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at paras. 186 and 189, per Rowe J. Such an approach should not be the norm. This court should confirm as much.

iii. Courts have used purposive interpretation to constrain s. 2(*b*)'s scope — and the application judge should have done so here

28. No *Charter* right is more broadly drafted than the freedom of expression in s. 2(*b*). As Cory J. put it in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336:

> [T]he framers of the *Charter* set forth s. 2(*b*) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be

> secure from unreasonable search. It seems that the rights enshrined in s. 2(*b*) should therefore only be restricted in the clearest of circumstances.

29. Though it lacks an internal qualification like reasonableness or arbitrariness, s. 2(*b*) is not unlimited in scope. Neither violence nor threats of violence are protected: *Dolphin Delivery Ltd v. RWDSU, Local 580*, [1986] 2 S.C.R. 573, at para. 20. Neither is access to all government documents: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paras. 30-31. Nor is the sale, or display for sale, of goods or services: *Rosen v. Ontario (Attorney General)* (1996), 87 O.A.C. 280, 131 D.L.R. (4th) 708 (C.A.), at pp. 713-14 D.L.R.; *R. v. Sharma* (1991), 44 O.A.C. 355, 77 D.L.R. (4th) 334 (C.A.), at para. 20. Or the misrepresentation of one's professional qualifications to the public: *R. v. Baig* (1992), 21 B.C.A.C. 59, 78 C.C.C. (3d) 260 (C.A.), at paras. 49-52. Or the confidentiality of journalistic sources : *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at paras. 38 and 41.

30. These are not reasonable limits on the s. 2(*b*) right; they are exclusions from its protection. They reflect purposive interpretation of the freedom's scope, not fact-specific justification of state-imposed limits: see, *e.g.*, *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 41; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 64 and 79. They suggest what might have emerged here had the application judge used constitutional interpretation to ascertain s. 2(*b*)'s ambit, not merely its purpose.

31. The application judge should have begun with the text and scheme of the *Charter* itself. Section 2(*b*) guarantees the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". Section 3, meanwhile, provides that "[e]very 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".

32. Since "the scope of one *Charter* right does not circumscribe the scope of another", a court cannot "us[e] s. 3 to read down the scope of s. 2(*b*)": *Baier v. Alberta*, [2007] 2 S.C.R. 673, 2007 SCC 31, at paras. 58-59. But neither can s. 3 expand the protection of s. 2(*b*) beyond its natural limits, or *vice versa*: see *R. v. Cornell*, [1988] 1 S.C.R. 461, at paras. 24-25; Stay Reasons, at paras. 12 and 17. The constitutional choice to protect participation in federal, provincial, but not municipal elections in s. 3 must inform the interpretation of s. 2(*b*); one *Charter* guarantee cannot legitimately be used as a vehicle to cloak in constitutional protection that which another *Charter* guarantee has expressly excluded: see *Transpacific Tours Ltd. v. Director of Investigation & Research* (1985), 68 B.C.L.R. 32, 25 D.L.R. (4th) 202 (B.C. S.C.), at para. 20 (WL); see also *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at pp. 520 and 533; *R. v. Therens*, [1985] 1 S.C.R. 613, at para. 64; *Curr v. The Queen*, [1972] S.C.R. 889, at p. 896.

33. This is not to say that *Charter* protections do not overlap; only that specificity should prevail over generality where such overlap exists: see *R. v. K.M.*, 2011 ONCA 252, 276 O.A.C. 200, at para. 72, citing *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 23. Constitutional provisions must be read together, and in light of one another, "so that the Constitution operates as an internally consistent harmonious whole": *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 25. "[T]he manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text": *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26. And, where the *Charter* is concerned, courts must be attentive to the distinct and necessarily limited interests that each right or freedom protects, and so "the rights themselves must be interpreted in accordance with their individual terms": *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 203, per Basatrache J.

(dissenting); see also G. Huscroft, "A Constitutional 'Work in Progress'? The *Charter* and the Limits of Progressive Interpretation" (2004), 23 S.C.L.R. (2d) 413, at p. 425.

34. Sections 2(*b*) and 3 guarantee different rights and protect different interests: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 67; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80. One cannot expand the other.

35. The foregoing represents one way in which a purposive interpretation of s. 2(*b*), informed by the textual adjacency of s. 3, could have informed the application judge's interpretation of the *Charter* provision invoked here. This approach would likely have led to the conclusion that a purpose of s. 2(*b*) cannot be to do for municipal elections what s. 3 does for federal and provincial ones. If so, it also would have avoided the fact-specific justification exercise on which the application judge's decision ultimately turned.

36. Yet, the analytical path to that conclusion ultimately matters more for Canadian constitutional law than does the outcome of this appeal. If this court wishes to avoid future "dubious ruling[s] that invalidate[] legislation duly passed by the Legislature" (Stay Reasons, at para. 20), then it should provide guidance on constitutional interpretation — to ensure that the scheme of the Constitution is duly respected, and that situations like this one do not recur.

B. Unwritten constitutional principles cannot expand the scope of *Charter* rights

37. The application judge declined to make any "actual finding" with respect to unwritten constitutional principles: Application Reasons, at para. 13. Still, the Respondent invokes them as a possible route to upholding the application judge's decision on appeal. Should the court accept that invitation, it should affirm that here, too, a disciplined approach to constitutional interpretation is necessary.

38. The inquiry must begin with the constitutional text. Section 52(1) of the *Constitution Act, 1982*, does not contemplate the invalidation of duly enacted legislation except to the extent that it is consistent with a "provision" of the Constitution. Unwritten constitutional principles are not constitutional provisions. Even if the word "includes" in s. 52(2) suggests that the list of constitutional components is not closed (see *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378) a law may nonetheless only be struck down on the basis of an inconsistency with a "provision", not a "principle": see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 60; *Campisi v. Ontario*, 2017 ONSC 2884, at para. 55, aff'd 2018 ONCA 869.

39. The more difficult question is the extent to which unwritten principles inform the interpretation of written constitutional provisions, described above. As the parties' submissions make plain, it is possible to read the Supreme Court of Canada's pronouncements on this question as being in conflict with one another. Yet, the common thread through the cases is that, even if unwritten principles may inform the interpretation and application of constitutional text (see *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 36-40), and even if they can fill gaps in the constitutional scheme (see *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, at para. 104), they cannot alter or "undermine the delimitation of those rights chosen by our constitutional framers": *British Columbia v. Imperial Tobacco*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 65; see also *ibid.*, at para. 67; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at paras. 23-24. As much as unwritten constitutional principles "are … invested with a powerful normative force, and are binding upon both courts and governments",

there remain "compelling reasons to insist upon the primacy of our written constitution": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 53-54.

40. This court should so insist here. It should confirm that, when an application judge is asked to invalidate duly enacted legislation on the basis of both written constitutional provisions and unwritten constitutional principles, the judge should not consider these to be separate requests; the one must be part and parcel of the other. Recall McIntyre J.'s description of purposive interpretation in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313: "The interpretation of … all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society" at para. 151 (emphasis added). The unwritten principles emanate from Canada's constitutional tradition. Like the Constitution's structure and history, they help courts to interpret the constitutional text.

41. But they cannot change it. Invalidation pursuant to s. 52(1) of the *Constitution Act, 1982* requires inconsistency with a constitutional provision. Those provisions — including every section of the *Charter* — reflect deliberate choices of inclusion and exclusion, which unwritten constitutional principles are powerless to disturb.

42. If a law does not limit a *Charter* right, scoped as it should be, and if it is otherwise within the enacting legislature's jurisdiction, then it must remain impervious to attack, including on the basis of unwritten constitutional principles and s. 52(1). This court should say so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2019.

Adam Goldenberg / Amanda D. Iarusso

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315
2. *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673
3. *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41
4. *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873
5. *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473
6. *Campisi v Ontario*, 2017 ONSC 2884, aff'd 2018 ONCA 869
7. *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511
8. *City of Toronto et al. v. Ontario (Attorney General)*, 2018 ONSC 5151, 142 O.R. (3d) 336
9. *ClubLink Corporation ULC v. Oakville (Town)*, 2019 ONCA 358
10. *Curr v. The Queen*, [1972] S.C.R. 889
11. *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989
12. *Dolphin Delivery Ltd v. RWDSU, Local 580*, [1986] 2 S.C.R. 573
13. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326
14. *Frank v. Canada (Attorney General)*, 2019 SCC 1
15. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429
16. *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827
17. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145
18. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386
19. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293
20. *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141

Secondary Sources

SCHEDULE "B"
RELEVANT STATUTES

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

PART I — CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Rights and Freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

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.

[…]

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.

[…]

PART VII — GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

> **(a)** the Canada Act 1982, including this Act;
>
> **(b)** the Acts and orders referred to in the schedule; and
>
> **(c)** any amendment to any Act or order referred to in paragraph (a) or (b).

ROCCO ACHAMPONG Respondent	and	**ONTARIO** Appellant	and	**CITY OF TORONTO** Respondent	**Court of Appeal File No. C65861** Superior Court File No: CV-18-00602497-0000
THE CITY OF TORONTO Respondent	and	**ATTORNEY GENERAL OF ONTARIO** Appellant			Superior Court File No: CV-18-00603797-0000
CHRIS MOISE *et al.* Respondents	and	**ATTORNEY GENERAL OF ONTARIO** Appellant	and	**CITY OF TORONTO** Respondent	Superior Court File No: CV-18-00603633-0000

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENER, CANADIAN CONSTITUTION FOUNDATION

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