Court of Appeal File No: C65861

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CITY OF TORONTO

Applicant
(Respondent in appeal)

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

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)

FACTUM OF THE INTERVENER, THE CANADIAN TAXPAYERS FEDERATION

(Title of Proceeding Continued on p. 2)

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

Respondents
(Appellants)

-and-

JENNIFER HOLLET, LILY CHENG, SUSAN DEXTER, GEOFFREY KETTEL AND DYANOOSH YOUSSEFI

Interveners
(Respondent in appeal)

FACTUM OF THE INTERVENER, THE CANADIAN TAXPAYERS FEDERATION

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FACTUM OF THE INTERVENOR,
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> [T]he 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 courts give effect to the Constitution's text**, and apply, by whatever its terms, legislation that conforms to that text.
>
> *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 ("*Imperial Tobacco*") at paras 66-67 (emphasis added)

PART I - OVERVIEW

1. The Canadian Taxpayers' Federation (the "**CTF**") is intervening in this appeal on the single issue of the application of "unwritten constitutional principles" to Bill 5, *The Better Local Government Act* (the "***Act***"), a statute passed by a democratically elected, constitutionally-recognized level of government. The CTF — a nonpartisan organization focused on fiscal restraint, government transparency and democratic accountability — makes no submissions on any other issues, and accepts the facts as stated by the Attorney General of Ontario.

2. Justice Belobaba, in his reasons from the decision below, did not engage on the question of unwritten constitutional principles, even though they were fully argued by the City of Toronto (the "**City**") and the other applicants. Nonetheless, the City continues to advance the argument,

asserting that the unwritten constitutional principle of "democracy" should be used to strike down legislation passed by a recently elected and constitutionally recognized level of government.

3. Unwritten constitutional principles do not, and cannot, apply to strike down legislation. This has been the consistent direction of the Supreme Court of Canada and appellate courts throughout this country. As a result, every effort to invalidate legislation using unwritten constitutional principles, whether the rule of law or otherwise, has been consistently rejected by courts of all levels across Canada.

4. The City relies heavily on certain "judicial independence" caselaw which, it is acknowledged, has been used to invalidate legislation. But the operative constitutional mechanisms used to do so were written constitutional provisions, including section 96 of the *Constitution Act, 1867*. The unwritten principle of rule of law helped to inform the written constitutional provisions — but the Supreme Court of Canada has never invited the weaponization of judicially-created "unwritten constitutional principles" that could be used to strike down laws.

5. If the unwritten constitutional principle of "democracy" means anything, it must mean that the democratically-elected and constitutionally-recognized Parliament and the legislatures are allowed to pass laws except to the extent they are: (a) *ultra vires* the legislative competency of that level of government; or (b) contrary to the (written) *Charter*. Allowing the courts to augment the constitutional bargain struck by the governments of Canada in 1867 and 1982 would lead Canada away from a constitutional democracy and into a judicial autocracy. To the extent that any case has suggested that is desirable or even possible, those cases should not be followed. And the overwhelming majority of cases that have considered the application of unwritten constitutional principles to striking down laws have rightly rejected the proposition.

6. Part of the reason to resist deploying unwritten constitutional principles is because of the likelihood that doing so would do violence to the written text. The drafters of the *Constitution Act, 1982* wrote, in section 3, that every provincial and federal government will be elected. And tellingly, the caselaw that the City relies upon to inform the principle of "democracy" in the context of elections are section 3 cases. The City acknowledges that section 3 does not extend to municipalities. But the City fails to acknowledge the consequences of that fact: by employing unwritten constitutional principles as it urges, the Court would in effect be rewriting section 3 to add "and municipalities".

7. The City thus pivots, saying that "where Ontario has established a democratic election for a municipality ... it must do so in a manner that respects democracy..." But Ontario has created *many* organizations where leadership is chosen by elections. There is nothing special about municipalities from a constitutional standpoint: they were deliberately not given constitutional status in the *Constitution Act, 1982*. If the mere fact of legislatively mandating an election for a subordinate body carries with it concomitant constitutional obligations flowing from unwritten principles, there should be no reason to not take a greater look at how elections for the Ontario Potato Marketing Board — whose board members are also required by statute to be elected — are being conducted.[1] Section 3 would thus be extended to "and any subordinate body whose leadership has been elected".

8. It is respectfully submitted that the City's arguments relating to unwritten constitutional principles, should be rejected.

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[1] *Farm Products Marketing Act*, RSO 1990, c F 9, Potatoes - Plan, Reg 413, s 10.

PART II - ARGUMENT

A. Unwritten Constitutional Principles, Generally

9. The written constitution has primacy in Canada. While there are other unwritten constitutional concepts that exist—such as constitutional conventions (unenforceable in law)[2], Charter values,[3] and "unwritten constitutional principles"—it is the written Constitution that is supreme:[4]

> [T]he constitutional history of Canada can be understood, in part, as a process of evolution "which [has] culminated in the supremacy of a definitive written constitution." There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review.

10. Courts give primacy to the written constitution because: (a) it promotes legal certainty and predictability;[5] (b) the written constitution would be rendered redundant if unwritten constitutional principles were given full effect as free-standing rights;[6] and (c) the court's appreciation of its proper role in the constitutional scheme.[7] As stated by this Court, unwritten principles "do not

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[2] *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at p 775-776.

[3] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 41.

[4] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 ("*Provincial Judges Reference*") at para 93; *Reference re Secession of Quebec*, [1998] 2 SCR 217 ("*Secession Reference*") at para 53; *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 66.

[5] *Secession Reference* at para 53.

[6] *Imperial Tobacco, supra* at para 65.

[7] *Secession Reference*, *supra* at para 98; *Imperial Tobacco, supra* at para 53 ("To accept their position on that adjudicative role would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance."); *R v Wagner*, 2015 ONCJ 66 at para 117 ("it is equally important that these principles not be used to create an anarchic judicial oligarchy that blithely undermines the principle of democratic government").

confer on the judiciary a mandate to rewrite the Constitution's text."[8]

11. "Unwritten constitutional principles" have been operationalized in law, but narrowly. Unwritten constitutional principles have been used as an aid to interpreting the Constitution's text or other legislation, without much controversy.[9] They have been used to challenge discretionary decisions of administrative bodies exercising delegated power.[10] But, as discussed below, they have *never* been used to invalidate legislation, on their own.

12. Courts are unwilling to use unwritten constitutional principles to strike down legislation because of the obvious dangers associated with that suggestion. When the Supreme Court of Canada first discussed unwritten constitutional principles at length, 25 years ago, the Court cautioned: [11]

> I share the concern of the Chief Justice that unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution. I note as well that there is eminent academic support for taking a cautious approach to the recognition of unwritten or unexpressed constitutional powers. Yet the matter is not susceptible to categoric exclusions [...]

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[8] *Lalonde v Ontario (Commission de restructuration des services de santé* (2001), 56 OR (3d) 505 (CA) ("*Lalonde v Ontario*") at para 121. Or as put more colourfully by Professor Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 Queen's LJ 389 at p 431:

> [A]lthough our Constitution is a living tree, it still grows from the same soil. The seed could have been sowed in a different field, but it was not. Courts have latitude in the interpretation of a constitution, but they must not appeal to unwritten constitutional principles with the intent of rewriting it.

[9] *Singh v Canada (Attorney General)*, [1999] 4 FC 583 at para 39, aff'd [2000] 3 FC 185 (FCA); *R v Comeau*, 2018 SCC 15, at para. 78.

[10] *Lalonde v Ontario, supra*.

[11] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319 at p 376.

B. Unwritten Constitutional Principles Do Not Invalidate Legislation

13. Unwritten constitutional principles have "normative force", but only in the narrowest sense as it relates to legislation. The leading case in this respect is *British Columbia v. Imperial Tobacco Canada Ltd.*, where Major J. said, in relation to the unwritten constitutional principle of "rule of law":[12]

> This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, "unwritten constitutional principles", including the rule of law, 'are capable of limiting government actions". See also *Reference re Secession of Quebec,* at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference Re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch can be constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).
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> [...]
>
> [T]he 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). [...]
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> 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.

14. Or as put much more succinctly by Justice Belobaba himself in 2017:[13]

> Unwritten constitutional principles, including the rule of law, may help in interpreting the text of the written constitution, but they do not provide an independent basis for striking down statutes.

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[12] *Imperial Tobacco, supra* at paras 60, 66-67 [emphasis added].

[13] *Campisi v Ontario*, 2017 ONSC 2884 ("*Campisi*") at para 55.

15. As a result, the Courts have consistently rejected attempts to use unwritten constitutional principles to invalidate legislation:

a. The "rule of law" principle could not be used to invalidate provisions of the B.C. *Securities Act*;[14]

b. "Protection of minorities" principle could not be used to invalidate legislation authorizing the amalgamation of cities;[15]

c. The "rule of law" principle could not be used to invalidate provisions of the *Income Tax Act*;[16]

d. The "rule of law" principle could not be used to invalidate retroactive legislation;[17]

e. The "rule of law" principle could not be used to invalidate legislation relating to government hail and crop insurance programs on the basis that the legislation was arbitrary;[18]

f. The "rule of law" principle could not be used to invalidate provisions of the *Canada Evidence Act*;[19]

g. The "rule of law" principle could not be used to invalidate Acts of the Legislature of Manitoba; [20]

h. The "rule of law" principle could not be used to invalidate a municipality's terms of tender for contracts;[21]

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[14] *Johnson v British Columbia (Securities Commission)* (1999), 67 BCLR (3d) 145 (SC), aff'd 2001 BCCA 597 at paras 24-27.

[15] *Baie d'Urfe (City) v Quebec (A.G.)*, [2001] RJQ 2520 (CA).

[16] *Mathew v Canada*, [2003] 1 CTC 2045 (TCC).

[17] *Shaw v Stein*, [2004] SKQB 194 at paras 46-47; *Tabingo v Canada (Citizenship and Immigration)*, 2014 FCA 191 at paras 71-74.

[18] *Bacon v Saskatchewan Crop Insurance Corp.*, [1999] SJ No 302 (CA), esp at para 30.

[19] *Singh v Canada (Attorney General)*, [2000] 3 FC 185 (FCA) at paras 36-37.

[20] *Public Service Alliance of Canada v. Her Majesty the Queen*, 2000 CarswellNat 1094 (FCTD) at para 20.

[21] *J. Cote and Son Excavating Ltd. v Burnaby (City)*, 2019 BCCA 168 ("*J. Cote*"). Note, this was an attack on terms of a tender imposed by a City, not legislation. The Court engaged in a lengthy analysis of the ability of unwritten principles to attack any governmental activity as a free-standing right, as discussed below.

i. The "rule of law" principle could not be used to invalidate provisions of the *Tobacco Damages and Health Care Costs Recovery Act* ;[22] and

j. Unwritten constitutional principles could not be used to invalidate the automobile accident provisions in the *Insurance Act*.[23]

C. Section 96 Caselaw Does Not Allow Unwritten Principles to Invalidate Legislation

16. The City relies on five cases in support of the proposition that unwritten constitutional principles can be used to strike down laws. It is notable that none of these cases purport to distinguish any of the caselaw cited above that stands for the proposition that unwritten principles cannot be used to strike down legislation. None of them overrule the Supreme Court of Canada's statement quoted at the beginning of this factum 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" (emphasis added). The constitutional muscle being flexed in most of these cases was found in the written text, not in the unwritten principles.

17. The proper interpretation of these and other similar cases was recently set out by the B.C. Court of Appeal in *J. Cote and Son Excavating Ltd. v. Burnaby (City)*.[24] There, the Court stated, at para. 22 and 29-30:

> The jurisprudence establishes the rule of law does not provide an independent, standalone protection of access to the civil courts. Instead, the rule of law supports the Charter and is inextricably linked to the judicial function in s. 96 of the *Constitution Act, 1867*. The rule of law cannot be an independent basis for invalidating the Clause as the appellant suggests.
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> [...]

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[22] *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312 at para 150.

[23] *Campisi, supra* at para 55.

[24] *J. Cote, supra* at paras 22, 29-30.

> As stated, *Imperial Tobacco* affirmed the rule of law cannot, as a freestanding principle, be used to invalidate legislation: paras. 59 — 60. Although *B.C.G.E.U. v. British Columbia (Attorney General),* [1988] 2 S.C.R. 214 was argued in Trial Lawyers for the proposition that access to the courts is essential to the rule of law, the Court chose to anchor its reasoning in s. 96 of the *Constitution Act, 1867.* Section 96 on its own grounded the right. The Court held it followed from the express terms of s. 96 that the province did not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts: para. 37. While that conclusion sufficed to resolve that appeal, the Court added that the connection between s. 96 and access to justice was further supported by considerations relating to the rule of law: para. 38. The rule of law did not operate alone.
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> Cases subsequent to *Trial Lawyers* concerning access to the courts have analyzed the question under s. 96 and not used the rule of law as a stand-alone principle grounding such a right. [...]

18. The various cases relied upon by the City make clear that the actual constitutional protection that operationalizes the principle of judicial independence is section 11(d) of the *Charter,* the preamble to the *Charter,* and section 96 of the *Constitution Act, 1867.* To the extent that any of the older cases (*Mackin,* 2002; *Ell,* 2003) suggested that judicial independence could be a standalone basis to invalidate laws, such decisions have been superseded by *Imperial Tobacco* and *Trial Lawyers*, as noted by the B.C. Court of Appeal in *J. Cote.* One notes that the constitutional questions stated in both *Mackin* and *Ell* refer only to the principle of judicial independence "guaranteed by (a) the preamble of the *Constitution Act, 1867*, or (b) section 11(d) of the *Canadian Charter of Rights and Freedoms*".[25] In *Masters Association,* this Court referred to "the principle of judicial independence found in the common law and Constitution, namely, ss. 96, 99 and 100 of the *Constitution Act, 1867* and s. 11(b) of the [Charter]"[26] The unwritten principle may exist, but the operational force comes from the written constitution.

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[25] *Mackin v New Brunswick*, 2002 SCC 13 at paras 33-34; *Ell v Alberta*, 2003 SCC 35 at para 16.

[26] *Masters Association of Ontario v Ontario*, 2011 ONCA 243 at para 25.

D. "Democracy"

19. From a constitutional perspective, the federal and provincial governments occupy the field when it comes to the principle of democracy. Put another way, democracy relates to the exercise of the democratic will by the two levels of government recognized by the constitution. Municipalities do not enjoy constitutional status, and rights to elect councillors or the mayor are not captured by the *Charter* or anything else in the constitution. It may make good policy to have city councillors elected, and elected in a particular way, but there are no constitutional elements of that public policy.

20. Section 3 of the *Charter* confers voting rights only in respect of Parliament and the legislatures: "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."[27]

21. Municipalities, school board trustees, aboriginal governments, and other entities are *not* included. This was not an oversight. Municipalities asked for constitutional status in submissions to the Special Joint Committee on the Constitution, specifically asking for constitutional recognition of municipalities.[28] And more generic voter participation rights at any level other than Parliament and the legislatures was resisted, in part because of a concern advanced by aboriginal groups that non-aboriginals could have a right to vote in aboriginal elections.[29] Constitutional recognition was not given to the municipalities, and the language was made sufficiently precise so as to assuage concerns of aboriginal groups.

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[27] *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, s 3.

[28] Members of the Resource Task Force, *Municipal Government in a New Canadian Federal System: Report of the Resource Task Force on Constitutional Reform - Federation of Canadian Municipalities - Ottawa*, (1980), p 121-127.

[29] A. Dodek, *The Charter Debates* (2018), p 149.

22. As a result, both the Supreme Court of Canada and the Court of Appeal have held that section 3 of the *Charter* does not apply to municipalities.[30] As noted by the Supreme Court of Canada:

> Municipal governments and special purpose municipal institutions such as school boards are creatures of the provincial government. Subject to the constitutional limits in s. 93 of the *Constitution Act, 1867* these institutions have no constitutional status or independent autonomy and the province has absolute and unfettered legal power to do with them as it wills.[31]

23. Having expressly considered, and declining to give, constitutional status to municipalities, and having expressly turned their minds to elections and voting rights and only conferring such rights in relation to federal and provincial legislatures, it cannot be said that constitutional principles can "fill the gap": there is no gap. This issue was recently addressed in a challenge to certain regulations passed by a First Nation with respect to its band council election. The Court found that section 3 of the *Charter* did not apply to the band election:

> while the Supreme Court in *Reference re Secession of Quebec* found that the preamble to the Constitution invited the courts to turn to the unwritten underlying principles, including democracy, as a basis for filling gaps in the express terms of the constitutional text, this line of authorities also demonstrates that this is not a circumstance where such an analysis is necessary. To use the words of that Court, s 3 is clear and unambiguous and it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so.[32]

What the City seeks is for the court to "rewrite" the *Charter*. That is not what unwritten constitutional principles are supposed to do.

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[30] *Haig v* Canada, [1993] 2 SCR 995; *Jones v Ontario (Attorney General)* (1992), 7 OR (3d) 22 (CA); *Nunziata v Toronto (City) (Clerk)* (2000), 50 OR (3d) 295 (CA).

[31] *Baier v Alberta*, 2007 SCC 31 at para 38 [citing *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, [2001] 1 SCR 470 at paras 57-58].

[32] *Orr v Peerless Trout First Nation*, 2015 FC 1053 at para 72.

24. It should be remembered that there are institutions in Canada's parliamentary democracy that wield significant power, and that are *entirely* unelected. Canada's Senate -— which has the power to introduce, revise, and block federal legislation -— is the obvious example. More locally, the recently revived Ontario Municipal Board wielded significant power over how communities developed, and its members were unelected. So, while the CTF acknowledges that there is value in enhancing the democratic character of local government institutions, at the same time:

> the legislated mandates and privileges of these institutions remain subject to the ultimate control of Parliament or of the legislatures. Thus, municipalities may be reorganized, school boards abolished, Crown corporations redefined, and their privileges and authorities may wax and wane over time in accordance with the will of Parliament and of the legislatures to which they owe their existence. Save in circumstances where a constitutional constraint can be established, such legislative changes do not require the consent of the institutions affected or of their electors.[33]

25. Moreover, a fundamental aspect of the "democracy" principle is Canada's well-established principle of parliamentary sovereignty. As stated by the Supreme Court of Canada in *Babcock v. Canada (Attorney General)*, "the unwritten principles must be balanced against the principle of Parliamentary sovereignty."[34]

26. The City asks this Court to find that the *Act* is unconstitutional with respect to the *timing* of the introduction of the legislation and because of the *lack of consultation*. Doing so would bring the courts into the sphere of the legislature, where the courts have no role. As noted recently by the Federal Court, "once people have been validly elected... courts cannot intervene

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[33] *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2012 FCA 183 at para 63.

[34] *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 55.

to tell elected officials how to exercise their powers or what policy to adopt. Those are purely political questions."[35]

27. In Canada's constitutional democracy, citizens have no rights in respect to how legislation is made. They have a remedy, of course, at the ballot box. But until the writ is dropped, the individuals do not have standing to complain about the timing of the legislation, or the consultation that preceded it:

> The respondent claimed a right to notice and hearing to contest the passage of s. 5.1(4) of the Department of Veteran Affairs Act. However, in 1960, and today, no such right exists. Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent.[36]

E. Logical Extensions of the City's Claim

28. The City claims that "where the Province has chosen to give residents the right to a democratic vote to elect their representatives in government (as here), that right entails the right to a vote that provides for effective representation." In other words, although there is no constitutional right for city council to be elected, if that right is conferred by legislation, the (unwritten) constitution grafts onto those electoral rights constitutional content.

29. Obviously, if electoral rights were conferred in a manner that violated the *Charter* itself, of course that legislation would be subject to judicial challenge. So, if the government only gave men the right to vote in the election for city council, of course section 15 would be engaged.[37] That flows from the requirement of section 52 of the *Charter,* which states that any law that is

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[35] *Gadwa v Joly*, 2018 FC 568 at para 33.

[36] *Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 37.

[37] See, e.g., *Corbière v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 at paras 55-56.

inconsistent with the "provisions" of the Constitution is, to the extent of the inconsistency, of no force or effect.

30. But it does not follow that the unwritten principle of democracy now accompanies every legislative grant of electoral rights. The "right to vote" is conferred to many subordinate bodies in Ontario. In fact, there are at least 30 statutes currently in operation in Ontario that confer rights to vote on the subordinate body's leadership, including the *Farm Products Marketing Act*, *Art Gallery of Ontario Act*, and *Dietetics Act*.[38]

31. One might think it absurd to discuss whether potato farmers have constitutionally-mandated "effective representation" at their marketing board. But in the constitutional order of Canada, the City of Toronto has no greater status than the potato marketing board. The legislature is not required to confer any electoral rights relating to the City or the marketing board. And

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[38] *Algoma University Act, 2008*, 2008, SO 2008, c 13; *Ontario College of Art & Design University Act*, 2002, SO 2002, c 8, Sch E; *Farm Products Marketing Act*, RSO 1990, c F 9 (which includes regulations that confer electoral rights on marketing boards for grapes, potatoes, eggs, beans etc.); *Waste Diversion Act*, 2002, SO 2002, c 6, O Reg 33/08; *Professional Engineers Act*, RRO 1990, c P 28, Reg 941; *Milk Act*, RRO 1990, c M 12; *Architects Act*, RRO 1990, c A 26, Reg 27; *Statute Labour Act*, RSO 1990, c S 20; *Northern Services Boards Act*, RRO 1990, c L 28, Reg 737; *Ontario Colleges of Applied Arts and Technology Act*, 2002, SO 2002, c 8, Sch F, O Reg 34/03; *Royal Ontario Museum Act*, RSO 1990, c R 35; *Law Society Act*, RSO 1990, c L 8; *Art Gallery of Ontario Act*, RSO 1990, c A 28; *Local Roads Boards Act*, RSO 1990, c L 27; *Water Opportunities Act*, 2010, SO 2010, c 19, Sch 1, Reg 40/11; *Investment Management Corporation of Ontario Act*, 2015, SO 2015, c 20, Sch 19; *Opticianry Act*, 1991, SO 1991, c 34; *Dietetics Act*, 1991, SO 1991, c 26; *Occupational Therapy Act*, 1991, SO 1991, c 33; *Early Childhood Educators Act*, 2007, SO 2007, c 7, Sch 8; *Métis Nation of Ontario Secretariat Act*, 2015, SO 2015, c 39; *Condominium Act*, 1998, SO 1998, c 19; *Chiropody Act*, 1991, SO 1991, c 20, Reg 829/93; *Education Act*, RSO 1990, c E 2, Reg 412/00; *Drug and Pharmacies Regulation Act*, RSO 1990, C H 4, Reg 547; *Pharmacy Act*, 1991, SO 1991, c 36; *Massage Therapy Act*, 1991, SO 1991, c 27; *Hummingbird Performing Arts Centre Corporation Act*, 1998, SO 1998, c 37; *Denturism Act*, 1991, SO 1991, c 25; *Psychotherapy Act*, 2007, SO 2007, c 10, Sch R; *Surveyors Act*, RSO 1990, c 29; *Medical Laboratory Technology Act*, 1991, SO 1991, c 28; *Research Foundation Act*, RSO 1990, c 27.

having conferred election rights in a manner never required by the constitution in the first place, the legislature is not subject to unwritten constitutional principles that subsequently regulate the manner in which those rights are conferred.

PART III - RELIEF REQUESTED

32. The CTF requests that the decision of Justice Belobaba not be upheld on the grounds of unwritten constitutional principles, as submitted by the City.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED this 24th day of May, 2019

Derek J. Bell
Ashley Boyes

DLA Piper (Canada) LLP

Lawyers for the Intervener,
The Canadian Taxpayers Federation

Schedule "A"

Tab	Cases
1.	*Authorson v Canada (Attorney General),* 2003 SCC 39.
2.	*Babcock v Canada (Attorney General),* 2002 SCC 57.
3.	*Bacon v Saskatchewan Crop Insurance Corp,* [1999] SJ No 302 (CA).
4.	*Baie d'Urfe (City) v Quebec (A.G.),* [2001] RJQ 2520 (CA).
5.	*Baier v Alberta,* 2007 SCC 31.
6.	*British Columbia v Imperial Tobacco Canada Ltd.,* 2005 SCC 49.
7.	*Campisi v Ontario,* 2017 ONSC 2884.
8.	*Corbière v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203.
9.	*Ell v Alberta*, 2003 SCC 35.
10.	*Eurig Estate (Re),* [1998] 2 SCR 565.
11.	*Friends of the Canadian Wheat Board v Canada (Attorney General),* 2012 FCA 183.
12.	*Gadwa v Joly,* 2018 FC 568.
13.	*Haig v Canada,* [1993] 2 SCR 995.
14.	*J Cote and Son Excavating Ltd. V Burnaby (City)*, 2019 BCCA 168.
15.	*Johnson v British Columbia (Securities Commission)* (1999), 67 BCLR (3d) 145 (SC).
16.	*Jones v Ontario (Attorney General)* (1992), 7 OR (3d) 22 (CA).
17.	*JTI-Macdonald Corp v British Columbia (Attorney General),* 2000 BCSC 312.
18.	*Lalonde v Ontario (Commission de restructuration des services de santé* (2001), 56 OR (3d) 505 (CA).
19.	*Law Society of British Columbia v Trinity Western University,* 2018 SCC 32.
20.	*Mackin v New Brunswick,* 2002 SCC 13.
21.	*Masters Association of Ontario v Ontario*, 2011 ONCA 243.
22.	*Mathew v Canada,* [2003] 1 CTC 2045 (TCC).
23.	*New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319.
24.	*Nunziata v Toronto (City) (Clerk)* (2000), 50 OR (3d) 295 (CA).

25. *Orr v Peerless Trout First Nation,* 2015 FC 1053.

26. *Public Service Alliance of Canada v Her Majesty the Queen,* 2000 CarswellNat 1094 (FCTD).

27. *Reference re Remuneration of Judges of the Provincial Court (PEI),* [1997] 3 SCR 3.

28. *Reference re Secession of Quebec,* [1998] 2 SCR 217.

29. *Re Resolution to Amend the Constitution,* [1981] 1 SCR 753.

30. *R v Comeau* [2018] 1 SCR 342.

31. *R v Wagner,* 2015 ONCJ 66.

32. *Shaw v Stein,* [2004] SKQB 194.

33. *Singh v Canada (Attorney General),* [1999] 4 FC 583.

34. *Singh v Canada (Attorney General),* [2000] 3 FC 185 (FCA).

35. *Tabingo v Canada (Citizenship and Immigration),* 2014 FCA 191.

36. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59.

Secondary Sources

37. Adam Dodek, *The Charter Debates* (Toronto: University of Toronto Press, 2018).

38. Professor Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's LJ 389.

39. Members of the Resource Task Force, *Municipal Government in a New Canadian Federal System: Report of the Resource Task Force on Constitutional Reform - Federation of Canadian Municipalities - Ottawa*, (1980).

Schedule "B" – RELEVANT STATUTES

1. *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, s 3

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.

2. *Farm Products Marketing Act*, RRO 1990, REGULATION 413

POTATOES — PLAN

10. (1) On or before December 15 in each year, the members of the Fresh Council shall elect from among themselves a chair and two vice-chairs of the Council.

(2) On or before December 15 in each year, the members of the Processing Council shall elect from among themselves a chair and two vice-chairs of the Council.

(3) The persons elected under subsections (1) and (2) are the members of the local board.

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 et al. Respondents (Appellants)Respondent	and CITY OF TORONTO (Respondent in Appeal)
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 File No. C65861

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENER, THE CANADIAN TAXPAYERS FEDERATION

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