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)

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)

and

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

Interveners

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PART I – OVERVIEW

1. Could Bill 5[1] be validly enacted to disrupt a municipal election in progress? The answer lies in the limits inherent in the text of section 92(8) of the *Constitution Act, 1867*.[2]

2. The phrase "Municipal Institutions in the Province" at s. 92(8)[3] encompasses a range of boards and administrative bodies. Only one of them, the elected municipal council, has a distinctive democratic history which must figure in the interpretation of 92(8). The broad powers conferred with respect to the "architecture" of municipal corporations do not permit interfering with a municipal election under way within a duly enacted legal framework.

3. FCM does not address the policy choice of establishing a 25-member Council for the City of Toronto. In this case of first impression,[4] it is the timing of Bill 5, the unprecedented upheaval of an active electoral process, and the resulting constitutional violation that call out for judicial scrutiny and justification by Ontario. To quote the Supreme Court of Canada on the rule of law: "courts will not permit the Constitution to be used to cause chaos and disorder."[5]

PART II – THE FACTS

4. The facts in this appeal are set out in Part II of the Factums filed by the Parties.

PART III – ISSUES

5. FCM will address the following issues:

I. The Status of Municipal Institutions and Municipal Elections in Our Constitution

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[1] Enacted as the *Better Local Government Act, 2018*, SO 2018, c 11 [Bill 5] (given Royal Assent August 14, 2018, 104 days after the municipal election in the City of Toronto had commenced, and 68 days before Election Day, October 22, 2018). Nominations closed on July 27, 2018; Bill 5 was introduced in the Legislature on July 30. See generally *Toronto (City) v Ontario (AG)*, 2018 ONCA 761 at paras 3, 10.
[2] (UK), 30 & 31 Vict, c 3, s 92(8), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].
[3] *Ibid* [92(8)].
[4] This appeal raises issues distinct from other decided cases such as *East York (Borough) v Ontario* (1997), 36 OR (3d) 733, 153 DLR (4th) 299 (CA), sustaining *Ontario Public School Boards' Assn v Ontario (AG)* (1997), 151 DLR (4th) 346, 1997 CanLII 12352 (ON SC) [*Megacity*].
[5] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 766, 19 DLR (4th) 1 [*Manitoba Language Rights*].

II. Interpreting 92(8) of the *Constitution Act, 1867*

III. Applying the Meaning of 92(8)

PART IV – ARGUMENT

I. The Status of Municipal Institutions and Municipal Elections in Our Constitution

a) Municipal Institutions and the *Constitution Act, 1867*

6. Unlike its revolutionary American neighbour, Canada was built on an established model: "a Constitution similar in Principle to that of the United Kingdom."[6] As a result, many elements vital to the constitutional order were so obvious, so embedded in the collective psyche, that they were left out of the text of the *Constitution Act, 1867* altogether. Even the representative nature of our democratic institutions was simply assumed, reflected mainly in the country's unwritten constitutional principles. Despite the absence of these foundational principles from the text, "it would be impossible to conceive of our constitutional structure without them."[7]

7. Prior to Confederation, two tiers of established democratic institutions exercised legislative powers: provincial assemblies and municipal councils. Other institutions such as Courts, and provincial and local administrative bodies, completed the governmental structure. The challenge in 1867, to use the words of this Court in *Lalonde*, was how the vast diversity of Canada was to be reconciled with the imperative of creating unity under a single state.[8]

8. Federal institutions were to be the unifying force for the new nation. To respect the country's inherent diversity, provinces – and their own institutions – maintained responsibility for specific matters of regional importance. Though the heads of power in section 92 are

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[6] See *Constitution Act, 1867*, *supra* note 2, Preamble; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 43–44, 161 DLR (4th) 385 [*Secession Reference*] (where the Supreme Court states that this reference to the British Constitution emphasizes the continuity of constitutional principles like democracy and constitutionalism and the rule of law).

[7] *Secession Reference*, *supra* note 6 at para 51.

[8] *Lalonde v Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505 at para 105, 208 DLR (4th) 577 (CA) [*Lalonde*].

exclusive, this jurisdictional exclusivity does not equate to an unfettered, absolute discretion.

9. In reading 92(8) specifically, FCM submits that it would be a mistake to lump all "Municipal Institutions in the Province" into a single aggregate. Just as we find a panoply of federal and provincial "institutions," any number of bodies could be qualified as "municipal institutions," such as library boards, police boards, and planning boards. By the same token, just as there is only one cardinal elected institution at the federal and at the provincial level, we find only a single cardinal democratic institution at the municipal level: the municipal council.

10. Local democracy is older than Canada. Immediately after the Norman Conquest,[9] William I granted a Charter to the City of London,[10] and the City won the right to choose its own Mayor on May 9, 1215.[11] A month later, the *Magna Carta* confirmed these rights and granted "that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs."[12]

11. Local government by an elected council was also central to the incorporation of the City of Toronto in 1834. Due to "the rapid increase of the population, commerce and wealth," a more efficient system of "municipal government … has become obviously necessary." This better system was the establishment of a democratically-elected 20-member council.[13]

12. The democratic history of the municipal council sets it apart from all other "Municipal Institutions in the Province" and this must be recognized when interpreting 92(8).

13. In 1867, municipal councils were not formally installed as a third order of government, deriving their shape and powers from the provincial level. This choice likely reflects a practical reality: not all communities have the critical mass – the size and economic strength – required to

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[9] Note that the SCC has traced the Rule of Law as the very basis of the English Constitution to the time of the Norman Conquest. See *Manitoba Language Rights*, *supra* note 5 at pp 749–50.
[10] *London Charter* (1067) (see Schedule B).
[11] *King John's Charter to London* (May 9, 1215) (see Schedule B).
[12] *Magna Carta* (June 15, 1215), clause numbered 13 for convenience (see Schedule B). In the *Secession Reference*, *supra* note 6 at para 63, the Court traced the democratic tradition in our Constitution to *Magna Carta*.
[13] *Incorporation of the City, 1834*, S Prov C 1834 (4 Will), c 23.

support a self-governing democratic structure. This was true in 1867, with barely14% of the population living in urban settings in 1861,[14] and it is still true today. Even in Ontario – the most populated province – only 18% of the land mass is administered by municipal councils.[15]

14. The fact that municipalities do not possess inherent powers does not detract from the constitutional imperative to protect municipal democracy. Once a community has been granted a democratic franchise, the democratic principle attaches and applies to its municipal council, endowing it with the same constitutional legitimacy as its counterparts: a democratically-mandated, representative institution integral to the governance structure envisioned in 1867.

15. The positive language of 92(8) confirms the place of the municipal council. By contrast with the provisions relating to another cornerstone institution, the Supreme Court of Canada, the existence of municipal governments was not a matter left for future determination. They existed, were part of the fabric of the nation, and were continued explicitly into the new governance order.

b) Municipal Councils as Governments

16. Democratically elected municipal governments are key to modern Canadian society. Municipalities are the economic, social, and cultural engines of the country. The six largest urban areas alone generate over half the country's Gross Domestic Product.[16] Municipalities are also the government closest to citizens and their daily needs. Municipal governments do more than provide essential services. From climate change to refugee settlement, the great issues of any era unfold within communities and municipal leaders are often the first called upon to provide

[14] "Census of 1861" (2 August 2013), online: *Library and Archives Canada* <www.bac-lac.gc.ca/offline.html>.
[15] See Ministry of Finance, "Provincial Land Tax Review: A Summary of Stakeholder Consultations – *Feedback Received to Date*" (December 2018) at 4, online (pdf): *Government of Ontario* <www.fin.gov.on.ca/en/consultations/landtaxreform/plt-review.pdf> (see Figure 1).
[16] See "Table 1: Gross domestic product of large census metropolitan areas, 2009 and 2013 (in current dollars)" (last modified 27 January 2017), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/170127/t001b-eng.htm>.

solutions.

17. The status of municipalities as governments has been acknowledged explicitly in the language used by the Courts,[17] and their role as democratic institutions has been at the centre of the renewed deference shown by the judiciary to the decisions of local elected officials:

> … a generous approach to municipal powers is arguably more in keeping with the true nature of modern municipalities. As McDonald asserts (*supra*, at p. 100), the municipal corporation "has come a long way from its origins in a rural age of simple government demands". She and other commentators (see Makuch and Arrowsmith) advocate that municipal councils should be free to define for themselves, as much as possible, the scope of their statutory authority. Excessive judicial interference in the decisions of elected municipal councils may, as this case illustrates, have the effect of confining modern municipalities in the straitjackets of tradition.[18]

18. Local democracy has grown in step with the importance of cities and towns. It operates in a unique grassroots fashion: party structures are practically non-existent, thereby fostering direct citizen participation. In the 21st century, in one of the most urbanized countries in the world,[19] a Canada without municipalities, without elected Mayors and Councils, is unthinkable.

c) Provincial Authority under 92(8)

19. As summarized by the Superior Court decision in the "*Megacity*"[20] case, provinces have broad powers over the architecture of municipalities: no single municipal corporation has a right to exist – they can be amalgamated or restructured by the Province – and municipalities only exercise authority delegated to them, the scope of which can be modified over time.

20. However, this does not alter the status of the municipal council as a cardinal democratic

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[17] See e.g. *London (City) v RSJ Holdings Inc*, 2007 SCC 29 ("[t]he democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law" at para 38); *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 ("[m]unicipal governments are democratic institutions through which the people of a community embark upon and structure a life together" at para 33); *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 ("[i]n this context, reasonableness means courts must respect the responsibility of [municipal] elected representatives to serve the people who elected them and to whom they are ultimately accountable" at para 19).

[18] *Shell Canada Products Ltd v Vancouver (City)*, [1994] 2 SCR 231 at 245, 110 DLR (4th) 1.

[19] Over 81% of the Canadian population lives in urban settings. See "World Urbanization Prospects 2018 – Country Profiles: Canada" (last visited 5 May 2019), online: *United Nations – Department of Economic and Social Affairs: Population Division* <population.un.org/wup/Country-Profiles/>.

[20] *East York (Borough) v Ontario (AG)*, 34 OR (3d) 789, 1997 CanLII 12263 at 14 (Div Ct).

institution, an entity whose form, shape and area are malleable, but whose essence and democratic aspect are not.

d) Subsidiarity and Cooperative Federalism

21. As municipalities evolve, our law continues to develop its appreciation of the importance of municipal governance[21] and respect for it. As the Supreme Court of Canada has clearly stated,

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. … Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives. [Emphasis added.][22]

22. The constitutional principles of cooperative federalism and subsidiarity also support FCM's arguments. Allowing local, elected decision-makers to exercise their democratic mandate is beneficial to the constitutional order of the country as reflected in this appreciation of Vancouver's safe injection site in the *PHS Community Services* case:

> Insite was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it. It was launched as an experiment. The experiment has proven successful. Insite has saved lives and improved health. And it did those things without increasing the incidence of drug use and crime in the surrounding area. The Vancouver police support Insite. The city and provincial government want it to stay open. But continuing the Insite project will be impossible without a federal government exemption from the laws criminalizing possession of prohibited substances at Insite.[23]

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[21] Ending a period of attrition after *City of Montreal v Beauvais* (1909), 42 SCR 211, 1909 CanLII 60, and *Re Howard and City of Toronto* (1928), 61 OLR 563, [1928] 1 DLR 952 (CA).

[22] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 23 [*Spraytech*], quoting *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 36. The Court had already noted, at para 3, that Justice La Forest stated in *R v Hydro-Québec*, [1997] 3 SCR 213 at para 127, 151 DLR (4th) 32, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added by the Court). See also *Croplife Canada v Toronto (City)* (2005), 75 OR (3d) 357 at paras 26–27, 254 DLR (4th) 40 (CA) [*Croplife*].

[23] *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 19 [*Insite*].

23. *Spraytech*[24] and this Court's recent decision in *Canada Post*[25] further advance the principle of subsidiarity. In *Canada Post*, although the principle was not applicable on the facts of the case, this Court spoke favourably of the proposition that law-making is often best achieved at the level of government that is most responsive to local distinctiveness, needs, and diversity:

> This argument [made by FCM as intervenor in that case] draws some support from another aspect of subsidiarity that has been affirmed by legal academics: that the reason that higher levels of government and authority should not displace the pre-existing initiatives of lower levels of government and civic society, is because there is something inherently valuable in local institutions and communities being able to maintain their own projects and commitments.[26]

II. Interpreting of 92(8) of the *Constitution Act, 1867*

a) Why this Analysis is Required

24. Judicial pronouncements have yet to address 92(8) in terms of the right to fair and democratic municipal elections.[27] Indeed, no other example can be found of legislative interference with an active municipal election. In a case of first impression, exploring and applying a fully textured meaning of 92(8) to elucidate the status of modern municipal councils as protected democratic institutions is essential. FCM submits that the principle of fair and democratic election of municipal councils is immanent in the text of 92(8).

25. In the *PEI Provincial Judges Reference*,[28] the source of our constitutional democracy is inferred from the preamble of the *Constitution Act, 1867*. In the *Secession Reference*, the

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[24] *Spraytech, supra* note 22 at para 3. See also *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 84; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 45; *Canada Post Corporation v Hamilton (City)*, 2016 ONCA 767 [*Canada Post*]; *Croplife, supra* note 22 at paras 17–27.
[25] *Canada Post, supra* note 24 at para 85.
[26] *Ibid*.
[27] FCM notes the *Ontario English Catholic Teachers' Assn v Ontario (AG)*, 2001 SCC 15 makes mention of the provinces' broad powers over municipal institutions. The comment is made in *obiter* but the notion that provinces can modify the structure and mandates of municipal institutions is not in question in this case. What is at stake here is the place of the municipal council as one of three cardinal democratic institutions envisaged by the Constitution, a distinct matter not addressed by the Supreme Court.
[28] *Ref 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 at para 100, 150 DLR (4th) 577.

Supreme Court explains that representativeness in our democratic institutions is simply assumed:

> The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario, supra*, at p. 57, confirmed that "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" [emphasis added].[29]

26. FCM submits that the Supreme Court's broad reference to "certain political institutions" – a reference explicitly stated to extend beyond Parliament and the Legislatures – includes municipal governments. Accordingly, a textured interpretation of the scope of 92(8) must draw upon unwritten constitutional principles applicable in these circumstances.

27. As this Court held in *Lalonde,* the goal should be to "unlock the full meaning" of 92(8):

> Although not expressly stated by the Constitution's text, such rights are immanent in the text when it is understood and interpreted in a proper and complete legal, historical and political context. When used in this way, the unwritten or organizing principles allow the courts to unlock the full meaning of the Constitution and to flesh out its terms, as explained by Lamer C.J.C. in the *Provincial Court Judges Reference* at p. 69 S.C.R., even to the extent of allowing the courts "to fill out gaps in the express terms of the constitutional scheme."[30]

28. Citing the *Secession Reference,*[31] this Court further observed, in *Lalonde*:

> These unwritten principles, said the court at p. 247 S.C.R., "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based". The court held at p. 248 S.C.R. that the unwritten principles represent the Constitution's "internal architecture" and "infuse our Constitution and breathe life into it". Further, "[t]he principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[32]

29. Justice Rand, in *Switzman v Elbling,* the "Padlock Law Case," held as much:

> … [Quebec]'s contention goes in this manner: by that head the Province is vested with unlimited legislative power over property; it may, for instance, take land without compensation and generally may act as amply as if it were a sovereign state, untrammelled by

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[29] *Secession Reference*, *supra* note 6 at para 62.
[30] *Lalonde*, *supra* note 8 at para 118.
[31] *Supra* note 6.
[32] *Lalonde*, *supra* note 8 at para 104.

> constitutional limitation. The power being absolute can be used as an instrument or means to effect any purpose or object. Since the objective accomplishment under the statute here is an Act on property, its validity is self-evident and the question is concluded.
>
> I am unable to agree that in our federal organization power absolute in such a sense resides in either legislature [emphasis added].[33]

30. FCM accepts that municipal elections are not addressed by section 3 of the *Canadian Charter of Rights and Freedoms*.[34] However, the Supreme Court of Canada, in considering the issue of voter parity, explored the meaning of s. 3 and concluded that "[T]he circumstances leading to the adoption of the Charter negate any intention to reject existing democratic institutions."[35] This statement is directly relevant to municipal councils. Coupled with s. 26 of the *Charter*, it maintains the democratic structures that existed at the time of Confederation, including the municipal franchise, as a fundamental component of the constitutional order.

b) What is Required to Achieve a Fully Textured Interpretation

i. The Living Tree in Context

31. Principles of constitutional interpretation are well established. Unlocking the full meaning of a provision "begin[s] with the language of the constitutional law or provision in question."[36] Courts are "not free to invent obligations foreign to the original purpose of the provision,"[37] and their interpretation cannot supplant the written terms.[38] In addition, judicial interpretation "must be anchored in the historical context of the provision."[39]

32. The constitutional text is nonetheless seldom complete. Nor is the Constitution static.

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[33] [1957] SCR 28 at 302, 7 DLR (2d) 337 [*Switzman*] (Rand J. goes on to describe limits based on the distribution of powers as between Parliament and the Legislatures).
[34] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[35] *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 183, 81 DLR (4th) 16 [*Saskatchewan Boundaries*].
[36] *Caron v Alberta*, 2015 SCC 56 at para 37 [*Caron*], citing *British Columbia (AG) v Canada (AG); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 SCR 41, 114 DLR (4th) 193.
[37] *Caron*, *supra* note 36 at para 37, citing *R v Blais*, 2003 SCC 44 at para 40 [*Blais*].
[38] See e.g. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 [*Imperial Tobacco*].
[39] *Caron*, *supra* note 36 at para 37, citing *Blais*, *supra* note 37 at para 40.

The living tree principle is "a fundamental tenet of constitutional interpretation" in order to provide "a continuing framework for the legitimate exercise of governmental power."[40]

33. The Supreme Court has made a clear link between the unwritten constitutional principles and the constitution's ability to function as a living tree:

> The principles assist in the interpretation of the text and the delineation of the spheres of jurisdiction, the scope of rights and obligations and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree" …[41]

34. It is not just the constitutional tree which grows and adapts. The Court in the *Secession Reference* observes that "our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order."[42]

35. In *Saskatchewan Boundaries*, McLachlin J. (as she then was) stated that the "living tree" doctrine mandates that narrow technical approaches to interpretation should be avoided: "[t]he tree is rooted in past and present institutions and must be capable of growth to meet the future."[43] In the context of the municipal governments, both the historical context in which 92(8) was adopted, as well as the growing importance of local government in the lives of Canadians, buttress the status of the municipal council as a protected democratic institution.

ii. The Rule of Law and the Democratic Principle

36. At its core, the Supreme Court of Canada says that the rule of law has three components, summarized by this Court in *Lalonde* as follows:

> Constitutionalism and the rule of law are cornerstones of the Constitution and reflect our

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[40] *Blais*, *supra* note 37 at para 40.
[41] *Secession Reference*, *supra* note 6 at para 52.
[42] *Ibid* at para 33.
[43] *Saskatchewan Boundaries*, *supra* note 35 at 180. It is interesting to see, for example, how fundamental principles such as judicial independence have evolved over time: *Ell v Alberta*, 2003 SCC 35 at para 20.

> country's commitment to an orderly and civil society in which all are bound by the enduring rules, principles, and values of our Constitution as the supreme source of law and authority. In the *Secession Reference*, at p. 258 S.C.R., the Supreme Court outlined three essential elements of the rule of law. First, the law is supreme over both governments and private persons: "[t]here is … one law for all." Second, the creation and maintenance of a positive legal order is the normative basis for civil society. The third feature is that the exercise of public power must be based on a legal rule that governs the relationship between the state and the individual.[44]

37. At paragraph 67 of the *Secession Reference*, the Court notes that:

> … democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution.[45]

And at para 70:

> At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[46]

38. FCM argues that the right to democratic municipal elections has been inherent in 92(8) from the time of Confederation. This case calls for its explicit recognition as the state of the law today, consistent with the evolution of Canadian concepts of constitutional democracy and with the doctrine of our Constitution as a living tree.

39. In *Saskatchewan Boundaries*, McLachlin J. describes the Canadian tradition as one of "evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation …,"[47] and quotes her earlier observations in *Dixon* that this tradition is "of evolutionary democracy, of increasing widening of representation through the centuries."[48] In *Secession Reference*, the Court quotes this passage and adds that since Confederation efforts have

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[44] *Lalonde*, *supra* note 8 at para 108. See also *ibid* at para 103 for a summary of the role of the unwritten constitutional principles.
[45] *Secession Reference*, *supra* note 6 at para 67.
[46] *Ibid* at para 70.
[47] *Saskatchewan Boundaries*, *supra* note 35 at 186.
[48] *Ibid*, citing *Dixon v British Columbia (AG)*, 59 DLR (4th) 247, 1989 CanLII 248 (BC SC).

continued to extend the franchise to those previously excluded from participation.[49]

40. This gradual evolution towards a more complete democracy and broader franchise has been shared with municipal institutions and their citizens. The trajectory of protecting and extending democracy in our political institutions is one of the understandings that must be brought to bear on the interpretation of provincial power under section 92(8). Legislation which runs counter to that upward trajectory in local democracy must be highly suspect.

41. FCM argues that Bill 5, specifically in the timing and circumstances of its enactment, calls out for judicial scrutiny. Bill 5 was enacted in the middle of an active election – closer to the date of the election than the beginning of the process – and without any prior indication, from a newly-elected provincial government, that this intervention would form part of its mandate.

> It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field.[50]

iii. Judicial Scrutiny

42. Judicial scrutiny of legislation has been a common feature of Canadian constitutional law. Judicial scrutiny is brought to bear on legislation alleged to be *ultra vires* by reason of the division of powers in the Constitution. It is also a feature of *Charter* jurisprudence, and of the interpretation of section 35 of the *Constitution Act, 1982*.[51]

43. In fact, our courts have always been alert to abuse. Relying on the Preamble to the *Constitution Act, 1867*, there have been landmark decisions such as *Switzman*,[52] *Saumur v City of Quebec*,[53] and *Reference re Alberta Statutes*.[54]

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[49] *Secession Reference*, *supra* note 6 at para 64.
[50] *Ladore v Bennett*, [1939] 3 DLR 1 at 7, [1939] AC 468 (PC).
[51] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[52] *Supra* note 33 at 306.
[53] [1953] 2 SCR 299 at pp 330–31, [1953] 4 DLR 641.

44. The *Trial Lawyers*[55] case offers remarkable parallels to this appeal. In that case, provincial regulations based on s. 92(14) of the *Constitution Act, 1867* imposed a court application fee. The Court examined the fee in light of s. 96 (federal appointment of judges), reading that head of power in light of the rule of law principle and stated: "[i]n the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical."[56] Pursuant to this fully textured meaning of s. 96, the Court held that the fee fell outside the province's jurisdiction because it limited access to justice, even though the language of s. 92(14) was very wide on its face. [57]

45. FCM submits that Bill 5 offends the safeguards for ordered democracy in municipal elections that are immanent in 92(8) by reason of the rule of law and the democratic principle.

46. The normative force of the unwritten foundational principles of the Constitution is well established. "The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[58]

47. The level and standards of scrutiny required may be established by judicial interpretation of the specific language of the Constitution, as is the case with section 1 of the *Charter*[59] or may be illuminated entirely by judicial reasoning, as has been done with respect to cases of *prima facie* infringement of rights affirmed under section 35 of the *Constitution Act, 1982*.[60] Such levels and standards developed within a *Charter* context may also draw upon common law principles. Judicial scrutiny within the division of powers context has evolved over decades of careful

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[54] [1938] SCR 100 at pp 132–33, [1938] 2 DLR 81.
[55] *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at paras 24, 32, 36, 38, 40, 43 [*Trial Lawyers*].
[56] *Trial Lawyers*, *ibid* at para 40. See also *ibid* at para 39.
[57] *Ibid* at para 98.
[58] *Lalonde*, *supra* note 8 at para 116.
[59] *Supra* note 34, s 1 (or with respect to the principles of fundamental justice in *ibid*, s 7, for example).
[60] See e.g. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

analysis, largely guided by constitutional language and principles.

48. As an intervener, FCM does not propose an elaborate protocol for judicial scrutiny of Bill 5. Such protocols evolve over time, on a case by case basis. A common feature of judicial scrutiny is the examination of the purposes of the legislation. Judicial scrutiny may also involve an examination of the means chosen to accomplish those purposes as well as the effect of the chosen means on the right said to be at issue.[61]

49. In this case, FCM invites the Court to analyse Bill 5 in light of its purpose, both as stated by the government of Ontario and also as discerned by the Court. It also invites the Court to scrutinize the purpose, and the effects of Bill 5 in light of the guarantees of municipal democracy immanent in section 92(8) of the *Constitution Act, 1867*.

III. Applying the Meaning of 92(8)

50. The purpose of Bill 5 is to change the number and boundaries of municipal electoral districts within the City of Toronto. FCM offers no argument on whether this purpose, in isolation, is within the power of the province and defers to the City's argument on that point.

51. FCM argues rather that the timing of enacting Bill 5 offends the principles of democracy and the rule of law. Bill 5 displaced this rule of law support for the democratic process – the normative order – of the 2018 election, while the election was under way, and replaced it with a model that had been previously considered and rejected by the Council in a decision upheld on administrative and judicial review. It did this in haste, without the grassroots democratic deliberation underlying the order already in existence, grassroots deliberation of a sort praised by the Supreme Court in *Insite*.

52. If the Court were to apply *Trial Lawyers*,[62] a finding that the rule of law had been thus

[61] This approach was followed in *Trial Lawyers*, *supra* note 55.
[62] *Ibid*.

supplanted by Bill 5 would lead directly to a finding that the legislation is *ultra vires* 92(8).

53. However, the Court may wish to follow some other models of judicial scrutiny and offer the government an opportunity to justify the timing of the law. The test for such justification might be as high as requiring a showing that interrupting the election and effecting fundamental changes to the rules of the game was a matter of necessity or urgency. Given the significant offence to the rule of law and the democratic principle caused by the passage of Bill 5, a justification of this magnitude is not an unreasonable request. Alternatively, this Court could follow the lead of the Supreme Court of Canada in *Sparrow*[63] and develop a more nuanced test for justification.

54. In FCM's respectful submission, the only ruling in this appeal that would shock the conscience of Canadians is one that says the right to fair and democratic municipal elections is not assured by their Constitution, or that a wanton intrusion upon an orderly municipal election in progress requires no justification.

PART V – ORDER SOUGHT

55. FCM commends to the Court its position on democratic municipal elections; otherwise no position is taken on what the result of this appeal should be, and no specific Order is sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2019

Stéphane Émard-Chabot

William B. Henderson

Mary Eberts

Of Counsel to the Federation of Canadian Municipalities

[63] *Supra* note 60.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.
2. *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49.
3. *British Columbia (AG) v Canada (AG); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 SCR 41, 114 DLR (4th) 193.
4. *Canada (AG) v PHS Community Services Society*, 2011 SCC 44.
5. *Canada Post Corporation v Hamilton (City)*, 2016 ONCA 767.
6. *Canadian Western Bank v Alberta*, 2007 SCC 22.
7. *Caron v Alberta*, 2015 SCC 56.
8. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2.
9. *City of Montreal v Beauvais* (1909), 42 SCR 211, 1909 CanLII 60.
10. *Croplife Canada v Toronto (City)* (2005), 75 OR (3d) 357, 254 DLR (4th) 40 (CA).
11. *Dixon v British Columbia (AG)*, 59 DLR (4th) 247, 1989 CanLII 248 (BC SC).
12. *East York (Borough) v Ontario (AG)*, 34 OR (3d) 789, 1997 CanLII 12263 at 14 (Div Ct).
13. *East York (Borough) v Ontario* (1997), 36 OR (3d) 733, 153 DLR (4th) 299 (CA).
14. *Ell v Alberta*, 2003 SCC 35.
15. *Ladore v Bennett*, [1939] 3 DLR 1, [1939] AC 468 (PC).
16. *Lalonde v Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505, 208 DLR (4th) 577 (CA).
17. *London (City) v RSJ Holdings Inc*, 2007 SCC 29.
18. *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13.
19. *Ontario English Catholic Teachers' Assn v Ontario (AG)*, 2001 SCC 15.
20. *Ontario Public School Boards' Assn v Ontario (AG)* (1997), 151 DLR (4th) 346, 1997 CanLII 12352 (ON SC).

21. *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64.

22. *R v Blais*, 2003 SCC 44.

23. *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32.

24. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385.

25. *Re Howard and City of Toronto* (1928), 61 OLR 563, [1928] 1 DLR 952 (CA).

26. *Ref 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, 150 DLR (4th) 577.

27. *Reference re Alberta Statutes*, [1938] SCR 100, [1938] 2 DLR 81.

28. *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

29. *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158, 81 DLR (4th) 16.

30. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385

31. *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23.

32. *Saumur v City of Quebec*, [1953] 2 SCR 299, [1953] 4 DLR 641.

33. *Shell Canada Products Ltd v Vancouver (City)*, [1994] 2 SCR 231, 110 DLR (4th) 1.

34. *Switzman v Elbling*, [1957] SCR 28, 7 DLR (2d) 337.

35. *Toronto (City) v Ontario (AG)*, 2018 ONCA 761.

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

37. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

SCHEDULE "B"

RELEVANT STATUTES

***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.**

GUARANTEE 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.

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.

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

GENERAL

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Constitution Act, 1867 **(UK), 30 & 31 Vict, c 3, excerpts of ss 91–92, reprinted in RSC 1985, Appendix II, No 5:**

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;

[…]

Exclusive Powers of Provincial Legislatures

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.
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

***Incorporation of the City, 1834*, S Prov C 1834 (4 Will), c 23**

AN ACT,

To extend the limits of the Town of York; to erect the said Town into a City; and to Incorporate it under the name of the City of Toronto.

[Passed 6th March, 1834.]

WHEREAS from the rapid increase of the population, commerce and wealth, of the Town of York, a more efficient system of Police and municipal government than that now established has become obviously necessary; *And whereas* none appears so likely to attain effectually the objects desired as the erection thereof into a City, and the Incorporation of the Inhabitants, and vesting in them the power to elect a Mayor, Aldermen, and Common Councilmen, and other Officers, for the management of the affairs of the said City, and the levying of such moderate taxes as may be found necessary for improvements and other public purposes: *And whereas* the name of York is common to so many towns and places, that it is desirable, for avoiding inconvenience and confusion, to designate the Capital of the Province by a name which will better distinguish it, and none appears more eligible than that by which the site of the present town was known before the name of York was assigned to it: *Be it therefore enacted*, by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act of the Parliament of Great Britain entitled, "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign entitled, 'An Act for making more effectual provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province," and by the authority of the same, That so much of the first section of an Act of the Parliament of this Province passed in the fifty-fourth year of the reign of His late Majesty King George the Third, entitled "An Act to empower the Commissioners of the Peace for the Home District, in their Court of general Quarter Sessions assembled, to establish and regulate a Market in and for the town of York in the said District," as authorises the said Commissioners to appoint such days and hours for exposing to sale Butcher's meat, butter, eggs, poultry, fish and vegetables, and to make such other orders and regulations relative thereto as they shall deem expedient, together with the second, third, and fourth sections of the said recited Act: and also, so much of the second section of an Act of the Parliament of this Province, passed in the second year of the reign of His late Majesty King George the Fourth, entitled "An Act to repeal in part a certain part of an Act passed in the forty-third year of His late Majesty's reign, entitled 'An Act to extend the provisions of an Act passed in the thirty-

***London Charter* (1067).**

[Translated from Old English]

“William King greets William the Bishop and Geoffrey the Portreeve and all the citizens in London, French and English, in friendly fashion; and I inform you that it is my will that your laws and customs be preserved as they were in King Edward's day, that every son shall be his father's heir after his father's death; and that I will not that any man do wrong to you. God yield you.”

***King John’s Charter to London* (May 9, 1215).**

[Translated Excerpt]

“Know ye that we have granted … to our barons of our city of London, that they may choose to themselves every year a mayor, who to us may be faithful, discreet and fit for government of the city, so as, when he shall be chosen, to be presented unto us, or our Justice if we shall not be present… and he shall swear to be faithful to us; and that it shall be lawful to them, to amove him and substitute another, if they will, or the same to retain …”

***Magna Carta* (June 15, 1215), Clause 13**

[Original Latin]

XIII

Et civitas Londoniarum habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas. Praeterea volumus et concedimus quod omnes aliae civitates, et burgi, et villae, et portus, habeant omnes libertates et liberas consuetudines suas.

[English Translation]

13

And the city of London is to have all its ancient liberties and free customs, both on land and water. Moreover we wish and grant that all other cities, boroughs, towns and ports are to have all their liberties and free customs.

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

Respondents (Appellants)

and

CITY OF TORONTO, ROCCO ACHAMPONG, CHRIS MOISE, ISH ADERONMU, and PRABHA KHOSLA, on her own behalf and on behalf of all members of Women Win TO, JENNIFER HOLLET, LILY CHENG, SUSAN DEXTER, GEOFFREY KETTEL AND DYANOOSH YOUSSEFI

Applicants/Interveners (Respondents in Appeal)

Court File No: C65861

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

FACTUM OF THE INTERVENER, THE FEDERATION OF CANADIAN MUNICIPALITIES

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