

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CITY OF TORONTO

Appellant
(Appellant)

– and –

ATTORNEY GENERAL OF ONTARIO

Respondent
(Respondent)

– and –

TORONTO DISTRICT SCHOOL BOARD, ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF BRITISH COLUMBIA, CITYPLACE RESIDENTS’
ASSOCIATION, CANADIAN CONSTITUTION FOUNDATION, INTERNATIONAL
COMMISSION OF JURISTS (CANADA), FEDERATION OF CANADIAN
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EXPRESSION AT RYERSON UNIVERSITY, CANADIAN CIVIL LIBERTIES
ASSOCIATION, ART EGGLETON, BARBARA HALL, DAVID MILLER and JOHN
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TORONTO, MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA
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PART I – OVERVIEW

1. This appeal presents a question of first impression in this Court: whether government action that reduces the number of electoral districts and redraws electoral boundaries in the middle of a municipal election infringes freedom of expression. Applying the “statutory platform” doctrine, a majority in the Ontario Court of Appeal (the “court below”) concluded that enactment of the *Better Local Government Act*¹ (“BLGA”) during the 2018 City of Toronto election did not violate s. 2(b) of the *Canadian Charter of Rights and Freedoms*.² The Center for Free Expression at Ryerson University (CFE) submits that the court below erred in reaching this conclusion and in failing to grant a remedy.

2. The CFE focuses on the breach of s. 2(b) arising from the BLGA’s profound impact on s. 2(b)’s rights of democratic participation in the middle of the election. First, the CFE submits that the framework for analysis in this appeal is *Irwin Toy*,³ not *Baier v. Alberta*⁴ and the statutory platform doctrine. Second, the CFE maintains that the conclusion in the court below, that there was no violation of s. 2(b), rested on an erroneous interpretation of the s. 2(b) jurisprudence. Third, the CFE submits that the appropriate remedy, under s. 24(1) of the *Charter*, is a declaration that the BLGA’s enactment and reform of City Council during a duly constituted municipal election unjustifiably violated s. 2(b)’s guarantee of expressive freedom.

3. The CFE makes no submissions on the following issues: the constitutional validity of the BLGA under s. 52(1) of the *Constitution Act, 1982*; the question of justification under s. 1 of the *Charter*; and the application of unwritten constitutional principles.

¹ [S.O. 2018, c. 11](#).

² *Toronto (City) v. Ontario (Attorney General)*, [2019 ONCA 732](#) [ONCA Reasons].

³ [\[1989\] 1 S.C.R. 927](#) [*Irwin Toy*].

⁴ [\[2007\] 2 S.C.R. 673](#) [*Baier*].

PART II – ISSUES

4. The CFE’s submissions address two issues raised by this appeal: (i) the doctrinal framework for interpreting s. 2(b), and (ii) the appropriate remedy, should the Court conclude that the *BLGA*’s enactment during a municipal electoral process violated s. 2(b) of the *Charter*.

PART III – LAW AND ARGUMENT

A. *Irwin Toy*, not the statutory platform doctrine, applies to the *BLGA*’s interference with the 2018 municipal election

5. The Court’s foundational decision in *Irwin Toy v. Quebec* established a “broad [and] inclusive approach to the protected sphere of free expression”⁵ under s. 2(b), extending the *Charter*’s protection to any activity that attempts to convey meaning.⁶ Under *Irwin Toy*’s framework, government action that interferes with expressive activity, in its purpose or effects, breaches s. 2(b) and must be justified by the government under s. 1.⁷

6. The “statutory platform” doctrine is an exception to *Irwin Toy* that elevates the threshold for breach and applies only in carefully prescribed circumstances. The doctrine is engaged when a claim under s. 2(b) advances “a positive entitlement to government action” and not “simply the right to be free from government interference.”⁸ The Court’s decisions establish that the *Baier* analysis of positive rights is restricted to instances of underinclusion.⁹ An issue of underinclusion can arise under s. 2(b) when the government creates a platform for expressive activity and selectively denies access to some participants, thereby excluding them from the platform.¹⁰ In exceptional circumstances, s. 2(b) can protect inclusive access to a statutory platform.¹¹

7. The majority in the court below found that *Baier* applied because the s. 2(b) claim sought

⁵ *Irwin Toy*, p. 970.

⁶ *Ibid.*, p. 969.

⁷ *Ibid.*, pp. 979-80.

⁸ *Baier*, para. 30.

⁹ *Ibid.*, para. 37; *G.V.T.A. v. Canadian Federation of Students*, [2009] 2 S.C.R. 295, para. 30 [*Translink*].

¹⁰ See *Native Women’s Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995.

¹¹ *Baier*, para. 25.

access to the pre-existing “platform” or structure for City Council, and raised a question of positive rights.¹² The CFE submits that *Baier* and the statutory platform doctrine do not apply because the *BLGA* does not raise any issue of underinclusion. The *BLGA* does not purport to regulate expressive activity at all, either by including or excluding any candidate or participant in the municipal election from a statutory platform. The *BLGA* is not comparable to *Baier*, where a discrete class of persons – school employees – was excluded from the statutory platform that defined eligibility for office as a school trustee.¹³ The gravamen of the s. 2(b) complaint is not the composition of City Council, but the timing of the *BLGA*’s enactment in the middle of an election process. On that element of the claim, s. 2(b) does not serve as a “sword” to impose positive obligations on the government. Instead, s. 2(b)’s guarantee of expressive freedom acts as a “shield” from government interference with rights of democratic participation.

8. The court below also erred in extending the statutory platform concept to circumstances that are not supported by precedent. This Court applied the concept in *Baier* and has not extended it since then. In *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, the Court cautioned against interpreting the doctrine expansively, because to do so risks transforming many freedom of expression cases into positive rights claims.¹⁴ The Court also declined to apply *Baier* and the statutory platform doctrine in *Criminal Lawyers’ Association*. There, in addressing access to government information, the Court held that the freedom of expression question was “best approached by building on the methodology in *Irwin Toy*”.¹⁵ As Fish J. observed in *Translink*, “*Baier* rests on its own factual foundation and was not intended to break fresh constitutional ground”.¹⁶

9. Access to a statutory platform is not the central s. 2(b) issue in this appeal; rather, the question is whether the *BLGA*’s effects on an ongoing electoral process violated the *Charter*’s guarantee of expressive freedom. *Baier* and the statutory platform doctrine do not apply to the right to be free from government interference during an electoral process; in principle, the rights

¹² [ONCA Reasons](#), paras. 54-55.

¹³ See [Baier](#), paras. 3-9.

¹⁴ [Translink](#), para. 34 (emphasis added).

¹⁵ *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, [2010] 1 S.C.R. 815, para. 31.

¹⁶ [Translink](#), para. 101 (concurring opinion) (emphasis added).

of democratic participation at stake in this appeal are governed by *Irwin Toy*'s framework for s. 2(b) analysis.

B. The *BLGA*'s enactment during the 2018 municipal election violated s. 2(b) of the *Charter*

10. The CFE submits that the court below should have applied *Irwin Toy* and found that the *BLGA*'s enactment during an electoral process violated s. 2(b) of the *Charter*. Though the *BLGA* does not prohibit or ban expressive activity, the concept of breach under s. 2(b) includes government action affecting expression that serves the guarantee's underlying values.¹⁷ *Irwin Toy* states that a court must decide whether government action affects expression, and that the onus is on the claimant to demonstrate a negative effect on activity that serves s. 2(b)'s values.¹⁸ By interfering with expressive activity that defines s. 2(b)'s core values, the *BLGA*'s enactment during the election violated the "effects" branch of *Irwin Toy*'s purpose-effects test.

11. In addition, the court below made three principal errors in interpreting s. 2(b). First, it transformed a negative entitlement of freedom from government interference into a positive claim of "effective" expression. Second, it failed to consider s. 2(b)'s underlying values and the rights of democratic participation at stake. Third, it erroneously applied the substantial interference test, which does not apply to s. 2(b) claims governed by *Irwin Toy*. These errors led the court below to conclude that the *BLGA*'s enactment during the 2018 municipal election did not violate rights of democratic participation of the candidates, third party participants and campaigners, and the electorate at large.

i. Effects on expression versus effective expression

12. The court below treated concerns about the *BLGA*'s impact on the election campaign as a positive rights claim. In particular, the court stated that the government has no constitutional duty to "promote, enhance, or even preserve the effectiveness of anyone's political expression"¹⁹ and added that "the efficacy of expression" is not guaranteed by s. 2(b).²⁰ In this way, the court

¹⁷ *Irwin Toy*, p. 969.

¹⁸ *Ibid.*

¹⁹ *ONCA Reasons*, para. 43 (emphasis added).

²⁰ *Ibid.*, para. 60 (emphasis added).

misconceived the entitlement, transforming it from a right to be free from the effects of government interference into an affirmative claim of effective or efficacious expression.

13. The *BLGA* profoundly affected electoral expression by precipitously terminating one election, under the 47-ward map, and replacing it with a different election based on different wards, boundaries, and deadlines for candidates. The evidence in the record amply supports a conclusion that the *BLGA* fundamentally affected expressive rights of democratic participation during the 2018 municipal election. The court below acknowledged the *BLGA*'s impact, noting that most candidates had produced campaign materials that were specific to particular wards, that time and money had been invested in campaigning with "ward-specific messaging", and that there was severe frustration and confusion about whether and how to proceed under an ongoing election that had been dramatically altered.²¹ Moreover, though it misapplied the standard, the court did not disturb the application judge's finding of fact that the *BLGA*'s enactment interfered with the candidates' freedom of expression.²²

14. On this point, *Thomson Newspapers v. Canada* provides an instructive example of interference and its impact on constitutionally protected rights of democratic participation.²³ There, the Court held that an opinion poll blackout that applied only in the final 72 hours of a federal election campaign had a "profound impact" on expressive freedom, and unjustifiably violated s. 2(b) of the *Charter*.²⁴ On the evidence in this appeal, it would be impossible to reach a different conclusion about the *BLGA*'s impact on the 2018 municipal election.

ii. Rights of democratic participation

15. Under the purpose-effects test, government action affecting expressive freedom violates s. 2(b) when the claimant establishes the underlying value of the expression.²⁵ On the question of breach, it is significant that the court below failed to acknowledge and validate the rights of democratic participation at stake. This Court's jurisprudence has consistently emphasized that

²¹ [ONCA Reasons](#), paras. 35-36.

²² See, e.g., *City of Toronto v. Ontario (Attorney General)*, [2018 ONSC 5151](#), para. 37 [ONSC Reasons].

²³ *Thomson Newspapers v. Canada (AG)*, [\[1998\] 1 S.C.R. 877](#) [*Thomson Newspapers*].

²⁴ *Ibid.*, para. 127.

²⁵ [Irwin Toy](#), pp. 976-77.

political expression and expression related to democratic processes are at the core of s. 2(b).²⁶ The *Charter*'s guarantee of expressive freedom embraces and protects the right of meaningful participation in election processes, as well as the right of the electorate to be informed and to exercise the right to vote in an informed manner.²⁷ These values directly engaged the rights of all participants, including, candidates, campaigners, third party participants, and the electorate, that were affected by the *BLGA*'s enactment in the middle of the 2018 municipal election.

16. Moreover, the court below read s. 2(b) narrowly against s. 3 of the *Charter*, despite *Thomson Newspapers*, which held that each right is distinct and must be given effect,²⁸ and *Baier*, which cautioned that s. 3 should not be used to “read down” the scope of s. 2(b).²⁹ Properly understood, the s. 2(b) claim to freedom from government interference with electoral expression neither conflicts nor overlaps with or subsumes s. 3's entitlement into s. 2(b). To the contrary, the jurisprudence has consistently held that the *Charter*'s guarantee of expressive freedom should be read broadly, generously, and inclusively to protect the meaningful participation of those involved in democratic processes.³⁰ This includes the electorate. The lower court's failure to acknowledge the values at stake led to the conclusion that the *BLGA*'s impact on the electoral process did not violate s. 2(b).

iii. The threshold for breach under Irwin Toy

17. Apart from its definition of expression and purpose-effects test, both of which must be read generously in favour of the guarantee, *Irwin Toy* sets no threshold for breach. The court below erred in applying the “substantial interference” test to the *BLGA*'s disruption of a duly constituted election process. This is an elevated test that is foreign to *Irwin Toy* and only applies to positive rights claims. The substantial interference standard evolved under s. 2(d)'s guarantee of associational freedom³¹ and migrated to s. 2(b) under the positive rights analysis in *Baier*. As the

²⁶ *Libman v. Quebec (AG)*, [1997] 3 S.C.R. 569, para. 30; *Thomson Newspapers*, paras. 92-94; *Harper v. Canada (AG)*, [2004] 1 S.C.R. 827, para. 84 [*Harper*]; *R. v. Bryan*, [2007] 1 S.C.R. 527, paras. 26, 27, 99.

²⁷ *Harper*, para. 71.

²⁸ *Thomson Newspapers*, para. 80.

²⁹ *Baier*, paras. 58-59.

³⁰ See, e.g., *Harper*, paras. 70-71.

³¹ See *Baier*, paras. 27, 30, citing *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

Ontario Court of Appeal recently explained, “substantial interference has no application if the freedom of expression claim asserts a right to be free from government interference.”³² In particular, the Court noted that

... any attempt to incorporate the “substantial interference” requirement into s. 2(b) claims based on alleged government interference with freedom of expression would have negative consequences. If one were to hold that the effect of government action would be said to limit freedom of expression only if it caused “substantial interference” with that right, a broad range of potential government action that interfered with freedom of expression, but not substantially, would be placed beyond Charter review. The government would not be called to justify that interference with freedom of expression under s. 1 of the Charter.³³

The substantial interference test is contrary to *Irwin Toy*. As this appeal demonstrates, it risks excluding expressive activity that is deserving of protection from the ambit of section s. 2(b). This appeal invites and requires the Court to affirm that this standard has no place in the *Irwin Toy* analysis.

C. A declaration under s. 24(1) of the Charter is a just and appropriate remedy

18. It is the *BLGA*’s interference with electoral expression in the middle of a municipal election, not the composition of City Council, that constitutes the breach of s. 2(b) in this appeal. Should this Court conclude that the *BLGA* unjustifiably violated s. 2(b), a remedy for that breach must be granted.³⁴ The violation of s. 2(b) is historical, the election having occurred on October 22, 2018, and an injunction to prevent the *BLGA* from taking effect during the election would not be timely. In considering the question of remedy at this stage, the CFE submits that three principles should be considered:

- (a) First, “a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights”,³⁵

³² *Langenfeld v. Toronto Police Services Board*, [2019 ONCA 716](#), para. 37.

³³ *Ibid.*, para. 39 (emphasis added).

³⁴ *R. v. Ferguson*, [\[2008\] 1 S.C.R. 96](#), para. 82.

³⁵ *Doucet-Boudreau v. Nova Scotia (Min. of Education)*, [\[2003\] 3 S.C.R. 3](#), para. 24.

- (b) Second, the Court’s approach to s. 24(1) remedies must be flexible and responsive to the needs of a given case³⁶, and the form and breadth of a declaration will be shaped by the fundamental principle that the courts should provide “meaningful remedies” for the violation of constitutional rights;³⁷ and
- (c) Third, a court can properly issue a declaration where it has jurisdiction over the issue, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it.³⁸

19. The appropriate remedy is a declaration that the *BLGA*’s enactment during the 2018 City of Toronto municipal election violated s. 2(b) rights of democratic participation. In this appeal, such a declaration represents a “narrow remedy, available independently of consequential relief” that will have “practical utility”.³⁹ Further, each of the criteria for granting a declaration are present in this appeal.⁴⁰

20. First, this Court’s jurisdiction to grant a declaration is not in question: declarations have long been available where, as here, a rights violation occurred in the past.⁴¹ Second, the *BLGA*’s enactment during the electoral process and breach of s. 2(b) rights of democratic participation is real, not theoretical. The history of this election, including mid-election changes to the electoral map, urgent litigation, and uncertainty that undermined electoral expression – and quite possibly the integrity of the democratic process – could be repeated. A declaration that the government unconstitutionally violated s. 2(b) is just and appropriate, as well as necessary, in these circumstances.

21. Third, the party raising the constitutional issue has an interest in its resolution. Here, the appellant City of Toronto stands in the shoes of parties to the initial application who settled their claim, as well as others who are not party to the litigation.⁴² The City’s interest in the resolution

³⁶ *Ontario (A.G.) v. G*, [2020 SCC 38](#), para. 144 [G].

³⁷ *Ibid.*, para. 154.

³⁸ *Canada (Prime Minister) v. Khadr*, [\[2010\] 1 S.C.R. 44](#), para. 46 [Khadr].

³⁹ *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* [2020 SCC 4](#), para. 42; *Solosky v. the Queen*, [\[1980\] 1 S.C.R. 821](#) [Solosky].

⁴⁰ *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016 SCC 12](#), para. 11.

⁴¹ See *Solosky*, p. 833; *Kelso v. The Queen*, [\[1981\] 1 S.C.R. 199](#), p. 210; *Khadr*, para. 31.

⁴² See [ONCA Reasons](#), paras. 24-28.

of the constitutional question dovetails with the interests of all those engaged in the 2018 municipal election process whose rights were affected by the *Charter* violation. The City of Toronto also has an independent interest in a remedy, because the *BLGA*'s enactment during an electoral process and the ensuing constitutional challenge caused uncertainty and confusion in its management of the election.⁴³

22. The criteria for a declaration, including the practical utility of a remedy, are met. Accordingly, the just and appropriate remedy under s. 24(1) is a declaration that the *BLGA*'s enactment during the 2018 municipal election unjustifiably violated s. 2(b) of the *Charter*.

PART IV – ORDER REQUESTED

23. The CFE takes no position on the disposition of the appeal.

PART V – COSTS

24. The CFE seeks no costs and asks that no costs be awarded against it.

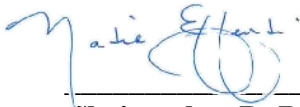
PART VI – SUBMISSIONS ON PUBLICATION

25. The CFE takes no position with respect to the submissions on publications

⁴³ See [ONSC Reasons](#), paras. 79-80.

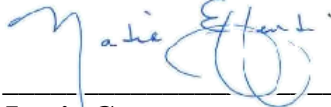
ALL OF WHICH IS RESPECTFULLY SUBMITTED, on this 1st day of February 2021.

Per:



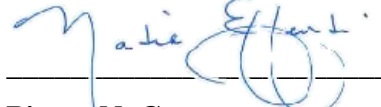
Christopher D. Bredt
Counsel for the Intervener

Per:



Jamie Cameron
Counsel for the Intervener

Per:



Pierre N. Gemson
Counsel for the Intervener

PART VII – TABLE OF AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	<i>Baier v. Alberta</i> , [2007] 2 S.C.R. 673, 2007 SCC 31	2, 6, 7, 16, 17
2.	<i>Canada (Prime Minister) v. Khadr</i> , [2010] 1 S.C.R. 44	18, 20
3.	<i>City of Toronto v. Ontario (Attorney General)</i> , 2018 ONSC 5151	13
4.	<i>Daniels v. Canada (Indian Affairs and Northern Development)</i> , 2016 SCC 12	19
5.	<i>Doucet-Boudreau v. Nova Scotia (Min. of Education)</i> , [2003] 3 S.C.R. 3	18
6.	<i>Dunmore v. Ontario (Attorney General)</i> , [2001] 3 S.C.R. 1016	31
7.	<i>G.V.T.A. v. Canadian Federation of Students</i> , [2009] 2 S.C.R. 295	6, 8
8.	<i>Haig v. Canada (Chief Electoral Officer)</i> , [1993] 2 S.C.R. 995	6
9.	<i>Harper v. Canada (AG)</i> , [2004] 1 S.C.R. 827	15, 16
10.	<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927	2, 5, 10, 15
11.	<i>Kelso v. The Queen</i> , [1981] 1 S.C.R. 199	20
12.	<i>Langenfeld v. Toronto Police Services Board</i> , 2019 ONCA 716	17
13.	<i>Libman v. Quebec (AG)</i> , [1997] 3 S.C.R. 569	15
14.	<i>Native Women’s Assn. of Canada v. Canada</i> , [1994] 3 S.C.R. 627	6
15.	<i>Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)</i> 2020 SCC 4	19
16.	<i>Ontario (A.G.) v. G</i> , 2020 SCC 38	18
17.	<i>Ontario (Public Safety and Security) v. Criminal Lawyers’ Association</i> , [2010] 1 S.C.R. 815	8
18.	<i>R. v. Bryan</i> , [2007] 1 S.C.R. 527	15
19.	<i>R. v. Ferguson</i> , [2008] 1 S.C.R. 96	18

No.	Authority	Paragraph Reference
20.	<i>Solosky v. the Queen</i> , [1980], 1 S.C.R. 821	19, 20
21.	<i>Thomson Newspapers v. Canada (AG)</i> , [1998] 1 S.C.R. 877	14, 15, 16
22.	<i>Toronto (City) v. Ontario (Attorney General)</i> , 2019 ONCA 732	1

Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	<i>Better Local Government Act</i> S.O. 2018, c. 11, English	generally
	<i>Better Local Government Act</i> S.O. 2018, c. 11, French	generally

PART VII – STATUTES, REGULATIONS, ETC.

See Part VII above.