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The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter

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The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter

Yasmin Dawood*

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I. INTRODUCTION

The Supreme Court of Canada’s political process cases cover a wide array of issues, including the right to vote, electoral redistricting, campaign finance and the regulation of political parties.¹ This article focuses on the Court’s most recent section 3 decision, *Frank v. Canada (Attorney General)*,² as well as an upcoming section 2(b) case, *Toronto (City) v. Ontario (Attorney General)*.³ In *Frank*, the Court held that provisions banning long-term non-resident citizens from voting in a federal election infringed section 3 and were not justified under section 1 of the *Canadian Charter of Rights and Freedoms*.⁴ While the *Frank* decision is notable for its powerful defence of the right to vote, it raises significant implications for the constitutionality of voter qualifications and election administration more generally.

Toronto (City) concerns Ontario’s mid-election change to Toronto’s electoral districts. Not only is this case unprecedented and disquieting, it also gives rise to a novel doctrinal puzzle: whether the mid-election restructuring of Toronto’s electoral districts infringes the freedom of expression as protected by section 2(b) of the Charter. I argue that a central question in the case is whether courts ought to take a formal approach or a contextual approach to electoral expression, and its infringement, under section 2(b). While the formal approach is intuitive and logical, I claim that the contextual approach, which leads to a finding of infringement in this case,

¹ The main cases are: *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.); *Sauvé v. Canada (Attorney General)*, [1993] S.C.J. No. 59, [1993] 2 S.C.R. 438 (S.C.C.); *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.); *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876 (S.C.C.); *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.); *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.) [hereinafter “*Sauvé II*”]; *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.); *R. v. Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12 (S.C.C.); *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31 (S.C.C.); *Opitz v. Wrzesnewskyj*, [2012] S.C.J. No. 55, 2012 SCC 55 (S.C.C.); *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, [2017] S.C.J. No. 6, 2017 SCC 6 (S.C.C.); *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.).

² [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.) [hereinafter “*Frank*”].

³ [2018] O.J. No. 4596, 2018 ONSC 5151 (Ont. S.C.J.) [hereinafter “*Toronto (City)* (ONSC)”]; *Toronto (City) v. Ontario (Attorney General)*, [2019] O.J. No. 4741, 2019 ONCA 732 (Ont. C.A.) [hereinafter “*Toronto (City)* (ONCA)”]; *Toronto (City) v. Ontario (Attorney General)*, [2019] S.C.C.A. No. 414 (S.C.C.).

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

is ultimately more consistent with the Supreme Court’s section 2(b) political process decisions.

Although *Frank* and *Toronto (City)* are not doctrinally connected, a joint appraisal of these two cases sheds light on the common underlying structure of the Court’s doctrines under sections 3 and 2(b). As I have argued elsewhere, the Court’s election law decisions identify multiple democratic rights⁵ and are attuned to the institutional context within which these rights are exercised.⁶ A joint appraisal also provides an opportunity to consider the relationship between section 3 and section 2(b). I claim that, with respect to political process cases, section 3 and section 2(b) are best understood as *distinct yet complementary rights* that are animated by the fundamental democratic values protected by the Charter.

This article is organized in three parts. Part II discusses *Frank* and considers some of its implications for future challenges to voter qualifications. Part III discusses the Court’s approach in its election law cases, and addresses the relationship between section 3 and section 2(b). Part IV focuses on *Toronto (City)* and argues for a contextual approach to electoral expression, and its infringement, under section 2(b). The conclusion summarizes the main themes.

II. *FRANK V. CANADA (ATTORNEY GENERAL) AND THE RIGHT TO VOTE*

The *Canada Elections Act*⁷ prohibited Canadians from voting in a federal election after spending five years residing outside the country, subject to certain exceptions such as membership in the public service or in international organizations.⁸ In a decision by Penny J., the Ontario Superior Court held that the five-year non-resident voting restriction infringed section 3 of the Charter, and was not justified under section 1.⁹ The court found that any limitation, such as the non-resident voting restriction, clearly constituted an infringement of the right to vote given the textual language of section 3.¹⁰ None of the steps in the section 1 analysis were satisfied.¹¹

In a 2-1 decision, the Ontario Court of Appeal reversed the Superior Court,

⁵ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 254-55.

⁶ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, 503, 519-23.

⁷ S.C. 2000, c. 9.

⁸ *Canada Elections Act*, S.C. 2000, c. 9, ss. 11(d), 222. These provisions were amended by *Elections Modernization Act*, S.C. 2018, c. 31, ss. 7, 152.

⁹ *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 98, 115, 130, 143, 153 (Ont. S.C.J.).

¹⁰ *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 79, 98 (Ont. S.C.J.).

¹¹ *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 112-115, 126, 130, 136, 151 (Ont. S.C.J.).

holding that while the non-resident voting restriction infringed section 3 it was nonetheless justifiable under section 1.¹² The majority opinion by Strathy C.J.O. and Brown J.A. accepted the government's contention that its goal of preserving "the social contract" was a pressing and substantial objective.¹³ The social contract idea, which was drawn from a passage in *Sauvé v. Canada (Chief Electoral Officer)*, referred to the connection between the "citizens' obligation to obey the law and their right to elect the lawmakers".¹⁴ The majority found that rational connection, minimal impairment and the final balancing were all satisfied.¹⁵ In a dissenting opinion, Laskin J.A. raised a number of concerns about the government's social contract objective and concluded that it did not satisfy any of the section 1 requirements.¹⁶

1. Residence and the Right to Vote

In a 5-2 majority decision by Wagner C.J.C., the Supreme Court held that the five-year non-resident voting restriction could not be justified under section 1.¹⁷ Although the Attorney General had conceded that the non-resident voting restriction infringed section 3, the majority nevertheless addressed the right to vote and the role of residence in order to provide the proper context for the justification analysis.¹⁸ Because voting is a "fundamental political right",¹⁹ explained the majority, section 3 warrants a broad and purposive interpretation of its terms particularly in view of its exemption from the notwithstanding clause in section 33.²⁰ The majority emphasized that the Charter "tethers voting rights to citizenship, and citizenship alone".²¹ For this reason, and consistent with *Sauvé II*,²² the Court rejected internal

¹² *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at para. 160 (Ont. C.A.).

¹³ *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at para. 93 (Ont. C.A.).

¹⁴ *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at para. 95 (Ont. C.A.), citing *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, at para. 31 (S.C.C.) [hereinafter "*Sauvé II*"].

¹⁵ *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at paras. 115-157 (Ont. C.A.).

¹⁶ *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at paras. 165-167 (Ont. C.A.), per Laskin J.A., dissenting.

¹⁷ *Frank*, at para. 83. The majority opinion was joined by Moldaver, Karakatsanis, and Gascon JJ. For an analysis of *Frank*, see Léonid Sirota, *Doing Right on Rights*, CanLII Connects (February 9, 2019), online: <<https://canliiconnects.org/en/commentaries/65435>>.

¹⁸ *Frank*, at paras. 4, 24-35.

¹⁹ *Frank*, at para. 1.

²⁰ *Frank*, at paras. 25, 27, 31.

²¹ *Frank*, at para. 29.

limits, such as residence, on the right to vote.²³ Section 3 makes no mention of residence, noted the majority, and this omission by the framers of the Charter is significant.²⁴ Residence is best treated as “an organizing mechanism for the purposes of the right to vote”, rather than as an internal limit.²⁵

Given the fundamental nature of the right to vote, any restrictions placed on section 3 must therefore “be carefully scrutinized and cannot be tolerated without a compelling justification”.²⁶ The Court drew a sharp line between limitations on the right to vote, which require a stringent standard of justification, and laws regulating other aspects of the electoral process, such as campaign finance rules, which are subject to judicial deference.²⁷ The majority explained that the “natural attitude of deference”, referenced in past decisions such *Harper v. Canada (Attorney General)*²⁸ and *R. v. Bryan*,²⁹ is appropriate for those cases that involve Parliament’s choices with respect to “selecting and implementing Canada’s electoral model” but not for the judicial review of “an absolute prohibition of a core democratic right”.³⁰ The Court’s position in *Frank* is consistent with its determination in *Sauvé II* that the “right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination.”³¹

In a concurring opinion, Rowe J. expressed concern that the majority opinion had not recognized the importance of residence in Canada’s system of representation.³² For Rowe J., residence is not simply an organizing mechanism; instead, it is a foundational part of the system.³³ In addition, he emphasized that *Frank* should not foreclose the constitutional permissibility of residence requirements in another context.³⁴ While residence is not an inherent limit on the right to vote, it could still constitute a justifiable limit on section 3.³⁵

²² *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, at para. 11 (S.C.C.).

²³ *Frank*, at para. 31.

²⁴ *Frank*, at para. 29.

²⁵ *Frank*, at para. 28.

²⁶ *Frank*, at para. 1.

²⁷ *Frank*, at para. 43.

²⁸ [2004] S.C.J. No. 28, 2004 SCC 33, at para. 87 (S.C.C.).

²⁹ [2007] S.C.J. No. 12, 2007 SCC 12, at para. 9 (S.C.C.).

³⁰ *Frank*, at paras. 43-44.

³¹ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, at para. 9 (S.C.C.).

³² *Frank*, at para. 84, Rowe J., concurring.

³³ *Frank*, at para. 90, Rowe J., concurring.

³⁴ *Frank*, at para. 84, Rowe J., concurring.

³⁵ *Frank*, at para. 90, Rowe J., concurring.

2. Revisiting Objectives in the Section 1 Analysis

Frank is also significant for its discussion of the first step of the section 1 *Oakes* analysis, which requires a pressing and substantial objective. Although this step is usually easily satisfied, the *Frank* majority concluded that the government's social contract objective was not pressing and substantial because it was "at once too general, providing no meaningful ability to analyze the means employed to achieve it, and too narrow, effectively collapsing any distinction between legislative means and ends".³⁶ Because the social contract objective aims to prevent those who are not subject to Canada's laws from voting — which is also the effect of the means employed by the government (exclusion of citizens who are insufficiently subjected to the law) — the social contract objective was found to be no more than a restatement of the legislation itself.³⁷ In addition, the majority observed that the use of social contract theory by the Court of Appeal to uphold the disenfranchisement of long-term non-residents fundamentally misinterpreted the inclusive view of voting rights in *Sauvé II*.³⁸ Although the Court rejected the preservation of the social contract as a viable objective, it held that the related objective of maintaining electoral fairness was pressing and substantial.³⁹

In a dissenting opinion, Côté and Brown JJ. argued for a new approach to section 1, urging that the analysis must acknowledge Parliament's policy-making and law-making capacity, including "defining and defending the boundaries of rights".⁴⁰ Consistent with its constitutional vision, the dissent explained that the term "limit" ought to be used instead of the term "infringement" when describing the government measure at issue.⁴¹ Not only should Parliament have an active role in defining the boundaries of Charter rights, the dissent contended, but this role is particularly relevant for the right to vote because it is a "*positive* entitlement" as compared to most Charter rights, which are "*negative* in the sense that they preclude the state from acting in ways that would impair them".⁴² In particular, explained the dissent, this approach implies that the legislature can pursue a range of objectives, some of

³⁶ *Frank*, at para. 53. The Court cited the factum of the intervener David Asper Centre for Constitutional Rights for the idea that the social contract objective and the means used to bring it about were mutually defined. *Frank* (Factum of the Interveners, David Asper Centre for Constitutional Rights, University of Toronto Faculty of Law, at para. 13) [Disclosure: I was a member of the team that worked on the Asper factum].

³⁷ *Frank*, at para. 53.

³⁸ *Frank*, at paras. 51-52.

³⁹ *Frank*, at para. 54.

⁴⁰ *Frank*, at para. 126. Côté and Brown JJ., dissenting, referencing Grégoire C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), at 104.

⁴¹ *Frank*, at para. 121, Côté and Brown JJ., dissenting.

⁴² *Frank*, at para. 142, Côté and Brown JJ., dissenting [emphasis in original].

which will be targeting a concrete problem while others will be pursuing “broader philosophical goals”.⁴³ The dissent argued that although Parliament’s social contract objective is based on a particular philosophical vision of democracy, this alone does not render it an illegitimate objective.⁴⁴

3. Section 3 and the Question of Deference

The *Frank* majority doubted that the Attorney General had satisfied rational connection with respect to a residence limit of any duration.⁴⁵ However, the majority did not reach a final conclusion on rational connection since it found that the voting measure failed the minimal impairment stage. The time period of five years had little justification and was not carefully tailored to minimize the impairment of voting rights.⁴⁶ The limit was also overbroad in its application, denying the vote to citizens who continued to have a deep connection to Canada and who were often subject to its laws.⁴⁷ In the final balancing, the majority found that the salutary effects of ensuring electoral fairness were “illusory” and clearly outweighed by the deleterious effects of “disenfranchising well over one million non-resident Canadians who are abroad for five years or more”.⁴⁸ In addition, the Court was not persuaded by the claim that the denial of the vote was temporary and reversible, observing that in “no other context do we tolerate the idea that a person can earn his or her *Charter* rights back through voluntary conduct”.⁴⁹

Notably, the *Frank* majority rejected rationales based on voter worthiness. For the Court, the denial of the right to vote not only undermines citizens’ fundamental rights but it also “comes at the expense of their dignity and their sense of self-worth”.⁵⁰ Thus, the denial of the right to vote “*in and of itself*, inflicts harm on affected citizens”.⁵¹ This harm is augmented when there is no evidence that the denial solves a concrete problem. In the absence of such a problem, the denial is inevitably about citizen worthiness, a rationale that the Court had rightly rejected in past cases.⁵²

The dissenting opinion by Côté and Brown JJ. objected to the majority’s

⁴³ *Frank*, at para. 139, Côté and Brown JJ., dissenting.

⁴⁴ *Frank*, at para. 140, Côté and Brown JJ., dissenting.

⁴⁵ *Frank*, at para. 60.

⁴⁶ *Frank*, at para. 67.

⁴⁷ *Frank*, at paras. 68-72.

⁴⁸ *Frank*, at paras. 77-78.

⁴⁹ *Frank*, at para. 81.

⁵⁰ *Frank*, at para. 82.

⁵¹ *Frank*, at para. 82 [emphasis in original].

⁵² *Frank*, at para. 82.

“unjustifiably absolutist” interpretation of section 3.⁵³ Instead, the dissent urged an approach that has two key features. First, the dissent argued that Parliament was not attempting to solve a problem but rather was “quite properly striving to shape the boundaries of the right”.⁵⁴ In view of Parliament’s rights-shaping role, the dissent was deferential in the section 1 analysis, finding that Parliament’s objective of preserving a relationship of currency between electors and the elected was pressing and substantial.⁵⁵ Rational connection and minimal impairment were met.⁵⁶ As for the final balancing, the salutary effects of preserving Parliament’s conception of the right to vote outweighed the deleterious effect of the reversible disenfranchisement of long-term non-residents.⁵⁷

Second, Côté and Brown JJ. placed considerable weight on the historical significance of Canada’s geographically based electoral system as enshrined in the *Constitution Act, 1867*.⁵⁸ Rather than an adopting an originalist account of section 3, the dissent suggested that historical commitments about the regional structure of the electoral system are relevant to deciding whether a particular limit to section 3 is justifiable under section 1.⁵⁹ For the dissent, limits to voting rights should be deferentially treated in light of such historical commitments — a sharp contrast to the textualism, and vision of progressive enfranchisement, espoused by the *Frank* majority.

4. Voter Qualifications and Election Administration

The *Frank* decision has implications for voter qualifications, most notably, the minimum age requirement. As Colin Feasby argues, considerable support can be mustered for the view that the voting age could be lowered to 16 in the wake of *Frank*.⁶⁰ Future challenges could also be brought against other administrative

⁵³ *Frank*, at para. 148, Côté and Brown JJ., dissenting.

⁵⁴ *Frank*, at para. 140, Côté and Brown JJ., dissenting.

⁵⁵ *Frank*, at paras. 139, 151-158, Côté and Brown JJ., dissenting.

⁵⁶ *Frank*, at paras. 150-151, 160-164, Côté and Brown JJ., dissenting.

⁵⁷ *Frank*, at paras. 168-172, Côté and Brown JJ., dissenting.

⁵⁸ *Frank*, at paras. 154-157, 169, Côté and Brown JJ., dissenting; *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

⁵⁹ *Frank*, at para. 155, Côté and Brown JJ., dissenting. For an argument about the Court’s use of history and originalism, see J. Gareth Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada” (2016) 53 *Osgoode Hall L.J.* 745, at 746-50. For an analysis of the dissent’s approach to section 1, see Prof. J. Weinrib, *The Frank Dissent’s Novel Theory of the Charter: The Rhetoric and the Reality*, in this volume.

⁶⁰ Colin Feasby, “Taking Youth Seriously: Reconsidering the Constitutionality of the Voting Age” *ABlawg* (June 11, 2019), online: <http://ablawg.ca/wp-content/uploads/2019/06/Blog_CF_Frank.pdf>.

measures, such as voter identification requirements,⁶¹ the location of polling places, the number of days of early voting, and so forth. Given the need for effective electoral administration, however, some limitations on the right to vote are to be expected.⁶² The *Frank* majority was careful to insist that its rejection of internal limits did not mean that every restriction on the right to vote would necessarily be unconstitutional.⁶³ Limits must be justified under section 1 rather than being incorporated into the scope of the right itself.⁶⁴ Given the rigour of the Court's approach to section 1 with respect to voting restrictions, however, the available social science evidence may be insufficient.⁶⁵ The *Frank* majority acknowledged these evidentiary difficulties, stating that in such cases the government can rely on "inferential reasoning that is premised on logic and common sense".⁶⁶ While the *Frank* majority did not place much weight on the comparative experience of other democracies with respect to non-resident voting,⁶⁷ a comparative view could be useful in the absence of reliable social science evidence.

III. DEMOCRATIC RIGHTS UNDER SECTION 3 AND SECTION 2(b)

Frank provides an opportunity to consider the Supreme Court's political process jurisprudence as a whole.⁶⁸ The Court has played an important role in supervising democratic processes, rights and values. According to the Court, the principle of democracy is a "fundamental value in our constitutional law and political culture".⁶⁹ Many of its decisions have significant implications for democratic rights and the

⁶¹ Lower courts have upheld voter identification requirements as a justified infringement of section 3. See *Henry v. Canada (Attorney General)*, [2010] B.C.J. No. 798, 2010 BCSC 610 (B.C.S.C.); *Henry v. Canada (Attorney General)*, [2014] B.C.J. No. 122, 2014 BCCA 30 (B.C.C.A.), leave to appeal refused [2014] S.C.C.A. No. 134 (S.C.C.). For a discussion of voter identification requirements in Canada, see Maxime St-Hilaire & Léonid Sirota, "Canadian Voter Identification Requirements in a Comparative Perspective" (2015) J.P.P.L. 1.

⁶² Although *Opitz v. Wrzesnewskyj*, [2012] S.C.J. No. 55, 2012 SCC 55 (S.C.C.) did not address the constitutionality of voter eligibility procedures, the Court was mindful of the need for various requirements to administer an election (at para. 38).

⁶³ *Frank*, at para. 31.

⁶⁴ *Frank*, at para. 31.

⁶⁵ Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2013-2014) 32 N.J.C.L. 173, at 176-80.

⁶⁶ *Frank*, at para. 64.

⁶⁷ *Frank*, at para. 62.

⁶⁸ For an overview and analysis, see Yasmin Dawood, "Democratic Rights" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017).

⁶⁹ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 61 (S.C.C.).

functioning of the electoral process. This set of political process cases can be described alternatively as the Court's election law decisions or as the law of democracy.⁷⁰ These cases have been decided under section 3,⁷¹ section 2(b),⁷² section 2(d)⁷³ and section 15.⁷⁴ Some cases address more than one Charter right.⁷⁵

In these cases, the Court has developed complex and nuanced theories about democracy and the right to vote. As I have argued elsewhere, there are two important features of the Court's approach.⁷⁶ First, the Court has recognized multiple democratic rights;⁷⁷ second, it has paid attention to the individual and

⁷⁰ Colin Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 43 Osgoode Hall L.J. 514, at 539 (defining the law of the political process as encompassing decisions that fall under ss. 2, 3 and 15).

⁷¹ The main section 3 cases are: *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.), *Sauvé v. Canada (Attorney General)*, [1993] S.C.J. No. 59, [1993] 2 S.C.R. 438 (S.C.C.), *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876 (S.C.C.), *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.), *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37 (S.C.C.), *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.), and *Frank*.

⁷² The main section 2(b) cases are: *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.), *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.), *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.), *R. v. Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12 (S.C.C.), and *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, [2017] S.C.J. No. 6, 2017 SCC 6 (S.C.C.).

⁷³ The main section 2(d) cases are: *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) and *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.).

⁷⁴ The main section 15 case is *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), in which the Court held that s. 15 was not infringed. In *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.), the Supreme Court held that a provision of the *Indian Act*, R.S.C. 1985, c. I-5 that excluded off-reserve band members from the right to vote in band elections infringed s. 15 and was not justified under s. 1.

⁷⁵ The cases which consider more than one right are: *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.), and *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.).

⁷⁶ Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-56.

⁷⁷ Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-55.

institutional aspects of these rights.⁷⁸ In so doing, the Court has developed a set of sophisticated jurisprudential tools to supervise various aspects of democratic governance — not only the structures, institutions and processes of democracy, but also its values, ideals and principles. As a result of its nuanced treatment of democratic rights, the Court has considerable flexibility in responding to a wide range of issues — such as electoral redistricting, campaign finance regulation, voter qualifications and the regulation of political parties.⁷⁹

1. Democratic Rights Under Section 3

The first feature of the Court’s approach, I claim, is that the Court has interpreted the right to vote as a plural right. That is, the Court has adopted what I refer to as a “bundle of rights” approach, which recognizes multiple democratic rights, each of which is concerned with a particular facet of democratic participation and governance.⁸⁰ Following a purposive approach, the Court has recognized that section 3 protects, in addition to the activities of voting and running for office, the following democratic rights: (1) the right to effective representation; (2) the right to meaningful participation; and (3) the right to an informed vote.⁸¹

Not only are these democratic rights indispensable to the Court’s review of the democratic process, but the violation of any right constitutes a breach of section 3. The Court has also identified a fourth democratic right, noting that section 3 “imposes on Parliament an obligation not to interfere with the *right of each citizen to participate in a fair election*”.⁸² Although the right to participate in a fair election is underdeveloped, I have argued elsewhere that it offers a promising way for the

⁷⁸ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 254-55.

⁷⁹ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 256; Yasmin Dawood, “Democratic Rights” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), at 724-25.

⁸⁰ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 254-55.

⁸¹ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 524. In the *Saskatchewan Reference*, McLachlin J. (as she was then) stated that “the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to ‘effective representation’”: *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158, at 183 (S.C.C.). For a discussion of the right to effective representation, see Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 269-75.

⁸² *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 51 (S.C.C.) [emphasis added].

Court to ensure the fairness and legitimacy of the electoral process.⁸³ For instance, it would enable the Court to counter the undue influence of partisanship on the formation of electoral laws.⁸⁴

The second feature of the Court’s approach is that it has been highly attuned to the dual individual-institutional nature of democratic rights. Rights do not exist in a vacuum but are instead exercised within a particular political, institutional and societal context. For example, the right to vote presupposes the existence of an entire infrastructure of institutions and actors, including candidates, electoral districts, elections, political parties and legislatures. Democratic rights are held by individuals, yet the exercise of these rights takes place within a particular institutional context. I use the term “structural rights” to capture the complex nature of democratic rights.⁸⁵ The participation of individuals is the key focus (hence the emphasis on rights), but individuals exercise these rights within an institutional context (hence the emphasis on structure).⁸⁶

Although the Court does not employ the language of “structural rights”, its decisions are notable for their attention to the complex nature of democratic rights. The democratic rights described above — the right to effective representation, the right to meaningful participation and the right to an informed vote — have both an individual and an institutional dimension. Although the Court has described these rights as being held by individuals, it is attuned to the broader institutional framework within which these democratic rights are defined, held and exercised.⁸⁷

To illustrate both features of the Court’s approach, consider the right to play a meaningful role in the democratic process.⁸⁸ This right was first recognized by the Court in *Haig v. Canada (Chief Electoral Officer)*⁸⁹ and subsequently developed in *Figueroa v. Canada (Attorney General)*.⁹⁰ In *Figueroa*, the Court found that the purpose of section 3 “includes not only the right of each citizen to have and to vote

⁸³ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 504.

⁸⁴ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 504.

⁸⁵ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 519-20, 525.

⁸⁶ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 255-56.

⁸⁷ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 519-25.

⁸⁸ For a discussion of the right to play a meaningful role in the democratic process, see Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 276-81.

⁸⁹ [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1031 (S.C.C.).

⁹⁰ [2003] S.C.J. No. 37, 2003 SCC 37 (S.C.C.). The right to meaningful participation was

for an elected representative in Parliament or a legislative assembly, but also *the right of each citizen to play a meaningful role in the electoral process*.⁹¹ In a democracy, each citizen “must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives”.⁹² In *Figueroa*, the Court held that a registration rule that denied benefits to smaller political parties infringed section 3 and was not justifiable under section 1.⁹³ Although this registration rule did not prevent citizens from casting a ballot, it diminished the ability of citizens to participate fully in the democratic process. As noted by the Court, political parties act “as both a vehicle and outlet” for the participation of citizens in the electoral process.⁹⁴ Thus, the rules governing political parties have a direct impact on the ability of citizens to play a meaningful role in the democratic process.⁹⁵ The right to meaningful participation, while held by individuals, has an institutional dimension because an individual’s ability to participate meaningfully is affected by the broader institutional framework within which her participation is taking place.

2. Democratic Rights Under Section 2(b)

As the Supreme Court has observed, “voting is a form of expression”⁹⁶ and section 2(b) pertains to the “expressive aspects of voting”.⁹⁷ Campaigning is another activity that receives section 2(b) protection. Election advertising is situated at the “core” of free expression, “war-ran[ing] a high degree of constitutional protection”.⁹⁸ The Court has affirmed that the connection “between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee”.⁹⁹

also acknowledged in *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 26 (S.C.C.).

⁹¹ *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 25 (S.C.C.) [emphasis added].

⁹² *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 30 (S.C.C.).

⁹³ *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at paras. 3, 90 (S.C.C.).

⁹⁴ *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 39 (S.C.C.).

⁹⁵ For a discussion of *Figueroa*, see Heather MacIvor, “The *Charter* of Rights and Party Politics: The Impact of the Supreme Court Ruling in *Figueroa v. Canada (Attorney General)*” (2004) 10:4 IRPP Choices 1.

⁹⁶ *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1040 (S.C.C.).

⁹⁷ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 57 (S.C.C.).

⁹⁸ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 84 (S.C.C.).

⁹⁹ *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 763-764 (S.C.C.).

I argue that, similar to its approach under section 3, the Court has interpreted section 2(b) to protect more than a person's right to cast a ballot or engage in campaigning. I claim that the Court has identified two democratic rights — the right to equal participation and the right to a free and informed vote — that apply to electoral expression under section 2(b). These two rights were first recognized in *Libman v. Quebec (Attorney General)*¹⁰⁰ and subsequently endorsed in *Harper v. Canada (Attorney General)*.¹⁰¹

The right of equal participation was first recognized by the Court in *Libman*.¹⁰² The Court explained that to “ensure a *right of equal participation in democratic government*, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others”.¹⁰³ The Court held that restrictions on independent spending in the context of a referendum infringed section 2(b) and were not justified under section 1.¹⁰⁴ Although the Court struck down the restrictions, it appeared to favour, as noted by Colin Feasby, an “egalitarian” approach to the rules governing spending during a referendum or an election.¹⁰⁵ Due to the “competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard”.¹⁰⁶ In *Harper*, Bastarache J. labelled *Libman*'s first principle, “the right of equal participation in democratic government”, as being concerned with an “equal dissemination of points of view”.¹⁰⁷

¹⁰⁰ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

¹⁰¹ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

¹⁰² *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.). For a discussion of the right of equal participation, see Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 *Osgoode Hall L.J.* 251, at 281-85.

¹⁰³ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.) [emphasis added].

¹⁰⁴ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at paras. 35, 85 (S.C.C.).

¹⁰⁵ Colin Feasby, “*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model” (1999) 44 *McGill L.J.* 5, at 8, 31-32.

¹⁰⁶ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

¹⁰⁷ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

The right to a free and informed vote was also first identified in *Libman*.¹⁰⁸ The Court recognized “the *right of electors to be adequately informed* of all the political positions advanced by the candidates and by the various political parties”.¹⁰⁹ In *Harper*, the Court labelled this right in *Libman* as a “free and informed vote”.¹¹⁰ Although the right to a free and informed vote falls within the scope of section 2(b), I claim that, in *Harper*, the Court recognized that the right to a free and informed vote also protects an interest under section 3. The Court explained that the “right to meaningful participation includes a *citizen’s right to exercise his or her vote in an informed manner*”.¹¹¹ Voters must “be able to weigh the relative strengths and weaknesses of each candidate and political party”.¹¹² In addition, the citizen “must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist”.¹¹³ Drawing from *Libman*, the Court declared that “the voter has a right to be ‘reasonably informed of all the possible choices’”.¹¹⁴ To be an informed voter, voters must “be able to hear all points of view”, which means that the “information disseminated by third parties, candidates and political parties cannot be unlimited” because the political discourse could otherwise be dominated by the affluent or by groups who can “flood the electoral discourse with their message”.¹¹⁵ This unequal dissemination of viewpoints undermines the “voter’s ability to be adequately informed of all views”.¹¹⁶

¹⁰⁸ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.). For a discussion of the right to a free and informed vote, see Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 *Osgoode Hall L.J.* 251, at 285-90.

¹⁰⁹ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.) [emphasis added]. An earlier version of the right appeared in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 98 (S.C.C.).

¹¹⁰ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

¹¹¹ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.) [emphasis added].

¹¹² *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.).

¹¹³ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.).

¹¹⁴ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.), citing *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

¹¹⁵ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 72 (S.C.C.).

¹¹⁶ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 72 (S.C.C.).

Since the right to a free and informed vote was discussed interchangeably by the Court as protecting an interest under both section 2(b) and section 3, I argue that this right is the one area of doctrinal overlap between sections 2(b) and 3. In addition, and similar to the rights under section 3, the right of equal participation and the right to a free and informed vote are intelligible only with reference to the larger institutional, political, and social context within which these rights are exercised.

In my view, the Court's discussion of these two rights suggests that they are not intended for exclusive use by the government to justify campaign finance limits. Instead, I argue that these principles can be used by the Court as a general matter to assess the constitutional sufficiency of legislation that has an impact on electoral expression. In *Harper*, the Court noted that in *Libman* it had "endorsed several principles applicable to the regulation of election spending",¹¹⁷ including the right of equal participation and the right to a free and informed vote. The Court also observed that its own conception of electoral fairness, as reflected in the *Libman* principles, was "consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society".¹¹⁸ This wording suggests that the Court has established an independent set of principles and rights — one which is consistent with Parliament's egalitarian model. Certainly, these two rights can be used as the basis for the government's legislative objectives. Indeed, in *R. v. Bryan*, the government identified "informational equality among voters" as a pressing and substantial objective.¹¹⁹ Informational equality can be viewed as the government-objective corollary of the right to a free and informed vote.

3. The Relationship Between Section 3 and Section 2(b)

Although sections 3 and 2(b) can both apply to the same set of facts, they are not interchangeable provisions. In my view, section 3 and section 2(b) are best understood as *distinct yet complementary rights* that are animated by the fundamental democratic values protected by the Charter. In *Thomson Newspapers Co. v. Canada (Attorney General)*, the Court explained that one significant distinction between these rights is that section 2(b) is subject to the override in section 33 of the Charter, but section 3 is not.¹²⁰ The Court rejected a hierarchical approach to rights, and instead observed that "*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights".¹²¹

¹¹⁷ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 61 (S.C.C.).

¹¹⁸ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 62 (S.C.C.).

¹¹⁹ [2007] S.C.J. No. 12, 2007 SCC 12, at paras. 12, 35 (S.C.C.).

¹²⁰ [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 79 (S.C.C.).

¹²¹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 877 (S.C.C.), as cited in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 80 (S.C.C.).

In the event of an overlap between the right to free expression and the right to vote, “[e]ach right is distinct and must be given effect”.¹²² In *Baier v. Alberta*, the Court clarified that the scope of one Charter right does not narrow the scope of another.¹²³ Section 3, the Court explained, “does not ‘occupy the field’ just because the right claimed . . . involves standing for an election”.¹²⁴ When both the right to vote and free expression are at issue “each right must be given effect”.¹²⁵ This means that “finding that s. 3 does not apply does not foreclose consideration of a claim under s. 2(b)”.¹²⁶ In the event of a conflict between the right to vote and freedom of expression, it is necessary to “find an appropriate balance between both sets of rights”.¹²⁷

Although section 3 and section 2(b) are distinct rights, I argue that both provisions share the common ground of fundamental democratic values. According to the Court, the Charter “protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada”.¹²⁸ The content of each right “imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole”.¹²⁹ As noted by the Court, “a value-oriented approach to the broadly worded guarantees of the *Charter* has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century”.¹³⁰ For these reasons, I claim that sections 3 and 2(b) are *distinct* rights with their own meaning and precedents, but are also *complementary* rights because they are animated by and jointly reinforce the fundamental democratic values protected by the Charter.¹³¹

¹²² *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 80 (S.C.C.).

¹²³ [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.).

¹²⁴ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 59 (S.C.C.).

¹²⁵ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 59 (S.C.C.).

¹²⁶ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 59 (S.C.C.).

¹²⁷ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 80 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at paras. 67, 72-74 (S.C.C.).

¹²⁸ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.) [citations omitted], quoting from *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 326 (S.C.C.). According to the Court, the values essential to a free and democratic society include “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.” *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.).

¹²⁹ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.), quoting from *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 326 (S.C.C.).

¹³⁰ *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, at para. 96 (S.C.C.).

¹³¹ For a discussion of the democratic values of equality and liberty in the context of

IV. *TORONTO (CITY) V. ONTARIO (ATTORNEY GENERAL) AND THE FREEDOM OF EXPRESSION*

The Supreme Court's section 2(b) political process jurisprudence is relevant to the upcoming *Toronto (City)* case. The facts of this case are unprecedented. In 2018, the Province of Ontario enacted Bill 5, known as the *Better Local Government Act, 2018*, which reduced the number of electoral wards in the City of Toronto from 47 to 25.¹³² When Bill 5 came into force on August 14, 2018, Toronto's municipal election had already been underway since May 1, 2018 under the 47-ward structure, with 509 candidates running for municipal office.¹³³ Election day was set for October 22, 2018. The Ontario Superior Court held that Bill 5 was unconstitutional on the basis that it unjustifiably infringed section 2(b).¹³⁴ Within a few days, the Ontario Court of Appeal granted a stay on the Superior Court's order, allowing the election to proceed along the new 25-ward structure.¹³⁵ The following year, in a 3-2 judgment on the merits, the Ontario Court of Appeal reversed the Superior Court on the basis that Bill 5 had not infringed section 2(b).¹³⁶ The Supreme Court granted leave to appeal in March 2020.¹³⁷

Toronto (City) raises a novel doctrinal issue: did the mid-election restructuring of Toronto's electoral districts infringe the freedom of expression as protected by section 2(b) of the Charter? In what follows, I claim that a central question in the case is whether courts ought to take a formal approach or a contextual approach to electoral expression, and its infringement, under section 2(b). A formal approach treats the expressive activity in isolation, without reference to the wider circumstances in which the expressive activity takes place. Under a formal approach, it is irrelevant that the expression in question is that of registered candidates campaigning in an election for public office during the official election period.

A contextual approach, by contrast, treats the expressive activity as being embedded within a particular institutional, political and social context. Under a contextual approach, the fact that the expression is *electoral* is central to the analysis. The use of the term "contextual" here is conceptually consistent with the contextual approach to section 1 analysis. As Wilson J. explained in *Edmonton*

electoral expression, see Yasmin Dawood, "Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality" (2013) 26 Can J.L. & Jur. 293.

¹³² *Better Local Government Act, 2018*, S.O. 2018, c. 11.

¹³³ *Toronto (City) v. Ontario (Attorney General)*, [2018] O.J. No. 4596, 2018 ONSC 5151, at paras. 4-5 (Ont. S.C.J.) [hereinafter "*Toronto (City)* (ONSC)"].

¹³⁴ *Toronto (City)* (ONSC), at para. 10.

¹³⁵ *Toronto (City) v. Ontario (Attorney General)*, [2018] O.J. No. 4742, 2018 ONCA 761, at para. 1 (Ont. C.A.).

¹³⁶ *Toronto (City) v. Ontario (Attorney General)*, [2019] O.J. No. 4741, 2019 ONCA 732, at paras. 6-8 (Ont. C.A.) [hereinafter "*Toronto (City)* (ONCA)"].

¹³⁷ *Toronto (City) v. Ontario (Attorney General)*, [2019] S.C.C.A. No. 414 (S.C.C.).

Journal v. Alberta (Attorney General), “[o]ne virtue of the contextual approach . . . is that it recognizes that a particular right or freedom may have a different value depending on the context”.¹³⁸ The contextual approach is relevant both with respect to the determination of the meaning and scope of the right, and with respect to section 1 balancing.¹³⁹ In practice, however, the contextual approach has been predominantly used in the section 1 balancing,¹⁴⁰ subject to some limited exceptions.¹⁴¹

To explore these ideas, this Part is organized in the following sections. Part IV.1 briefly discusses the lower court judgments. Part IV.2 elaborates the *Irwin Toy*¹⁴² framework and applies it to Bill 5. The main issue is whether Bill 5, in its effects, infringes section 2(b). Part IV.3 sets out three distinct approaches under the contextual account, all of which lead to a finding that section 2(b) is infringed. First, Bill 5 infringes the candidates’ electoral expression. Second, Bill 5 also infringes the two principles — the candidates’ right to equal participation and the voters’ right to a free and informed vote — which are protected by section 2(b). Third, under a broader contextual account, Bill 5 also infringes section 2(b)’s protection of the deliberative exchange among all electoral participants, an approach exemplified by MacPherson J.A.’s dissenting judgment at the Court of Appeal. Part IV.4 focuses on the *Baier* framework and positive rights. Part IV.5 compares the formal and

¹³⁸ [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at 1355 (S.C.C.), Wilson J., concurring.

¹³⁹ As Wilson J. put it, “a right or freedom may have different meanings in different contexts”, and as a result, the “value to be attached to in different contexts for the purpose of the balancing under s. 1 might also be different.” *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at 1365 (S.C.C.), Wilson J., concurring. In a later case, Cory J. explained that “[c]ontext is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as the determination of the balance to be struck between individual rights and the interests of society.” *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154, at 226 (S.C.C.), Cory J., dissenting in part.

¹⁴⁰ The contextual approach has been used extensively in the s. 1 analysis in freedom of expression cases in order to draw distinctions between different forms of expression. See Kent Roach & David Schneiderman, “Freedom of Expression in Canada” (2013) 61 S.C.L.R. (2d) 429, at 439. For a critique of the Court’s contextual approach in s. 2(b) cases, see Jamie Cameron, “A Reflection on Section 2(b)’s Quixotic Journey, 1982-2012” (2012) 58 S.C.L.R. (2d) 163, at 171; Jamie Cameron, “Justice in Her Own Right: Bertha Wilson and the Canadian Charter of Rights and Freedoms” (2008) 41 S.C.L.R. (2d) 371, at 401-402.

¹⁴¹ For example, the contextual approach has been used to determine the scope of rights in s. 7 and s. 8 cases: *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154, at 238 (S.C.C.), Cory J., dissenting in part; *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417, at paras. 45-48 (S.C.C.); *R. v. Fitzpatrick*, [1995] S.C.J. No. 94, [1995] 4 S.C.R. 154, at paras. 49-52 (S.C.C.).

¹⁴² *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

contextual approaches, and concludes that the contextual approach is ultimately more persuasive.

1. Decisions of the Superior Court and the Court of Appeal

At the Ontario Superior Court, Belobaba J. found that Bill 5 unjustifiably infringed section 2(b) in two respects.¹⁴³ First, the candidate's freedom of expression was breached by the enactment of the new ward structure while the election campaign was already underway.¹⁴⁴ Relying on the *Irwin Toy* framework, Belobaba J. held that Bill 5's mid-election change to the electoral districts "substantially interfered with the candidate's ability to effectively communicate his or her political message to the relevant voters".¹⁴⁵ Second, the voter's free expression "right to cast a vote that can result in effective representation" was breached by Bill 5's effect of nearly doubling the population size of the wards.¹⁴⁶

In a majority judgment by Miller J.A., the Court of Appeal held that Belobaba J. incorrectly expanded the scope of section 2(b) from a protection against government interference with expression to a guarantee that "government action would not impact the effectiveness of that expression in achieving its intended purpose".¹⁴⁷ That is, section 2(b) protects individuals from government interference with the expressive activity itself, not the intended result of the activity.¹⁴⁸ Thus, legislation that changes the ward structure, "such that a person's past communications lose their relevance and no longer contribute to the desired project (election to public office)" does not amount to an infringement of section 2(b).¹⁴⁹ As for the second infringement, Miller J.A. held that it was based on an interpretation of free expression that impermissibly imported the value of effective representation from section 3 into the scope of section 2(b).¹⁵⁰

In addition, Miller J.A. held that the candidates were actually making a positive rights claim to a platform for expression, and therefore *Baier*, rather than *Irwin Toy*, applied.¹⁵¹ According to Miller J.A., the first two steps of the test in *Baier* were met.¹⁵² This establishes that the claim is a positive rights claim, at which point, at

¹⁴³ *Toronto (City)* (ONSC), at paras. 10, 20.

¹⁴⁴ *Toronto (City)* (ONSC), at para. 20.

¹⁴⁵ *Toronto (City)* (ONSC), at para. 32.

¹⁴⁶ *Toronto (City)* (ONSC), at para. 20.

¹⁴⁷ *Toronto (City)* (ONCA), at para. 39.

¹⁴⁸ *Toronto (City)* (ONCA), at para. 41.

¹⁴⁹ *Toronto (City)* (ONCA), at para. 41.

¹⁵⁰ *Toronto (City)* (ONCA), at para. 71. I agree with this assessment.

¹⁵¹ *Toronto (City)* (ONCA), at para. 48.

¹⁵² The majority found that the first step of *Baier* was met: a form of expression (electoral campaigning) was at issue. At the second step, the majority determined that the claimants were making a positive rights claim to a particular platform, rather than a claim to be free from government interference. *Toronto (City)* (ONCA), at paras. 51, 55, applying *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 30 (S.C.C.).

the third step of *Baier*, the three factors set forth in *Dunmore v. Ontario (Attorney General)* must be satisfied.¹⁵³ Because none of the three *Dunmore* factors could be satisfied in this case, Miller J.A. held that the claimants' section 2(b) claim had failed.¹⁵⁴

In a dissenting opinion, MacPherson J.A. held that Bill 5 infringed section 2(b) because it “substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun”.¹⁵⁵ The mid-election timing of Bill 5 “changed the entire landscape” of an election that was almost two-thirds of the way through the election period.¹⁵⁶ As such, it amounted to a “substantial attack on the centrepiece of democracy” in an active election in one of the three levels of government.¹⁵⁷

2. The *Irwin Toy* Framework

To determine whether expressive activity is protected by section 2(b), there are three inquiries under the *Irwin Toy* framework. First, does the activity in question have expressive content, thereby bringing it within the scope of section 2(b) protection? Second, is the activity excluded from that protection as a result of either the method or location of expression? Third, if the activity is protected by section 2(b), does an infringement of the protected right result from either the purpose or the effect of the government action?¹⁵⁸ The first two steps are met: the activity in question — electoral expression — falls within the scope of section 2(b) and there is nothing about its method or location that would warrant exclusion. As for the third step, the main question is whether Bill 5, in purpose or effect, infringed the freedom of expression.

The purpose of Bill 5 does not infringe free expression. In order to effectuate the

¹⁵³ *Toronto (City)* (ONCA), at para. 56, citing *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, 2001 SCC 94, at paras. 24-26 (S.C.C.) [hereinafter “*Dunmore*”].

¹⁵⁴ Under the first *Dunmore* factor, the majority reasoned that the candidates' claim was not grounded in the freedom of expression because it was ultimately concerned with the efficacy of expression, which is not protected by s. 2(b). While the claim failed here, Miller J.A. nonetheless analyzed the two remaining factors. Under the second factor, the majority concluded that there was no substantial interference because the ward change did not prevent the candidates from engaging in expression. As for the third factor, the majority stated that this factor must also fail because the claimants had not been barred from engaging in free expression. *Toronto (City)* (ONCA), at paras. 60-61, 63, 68.

¹⁵⁵ *Toronto (City)* (ONCA), at para. 128, MacPherson J.A., dissenting.

¹⁵⁶ *Toronto (City)* (ONCA), at para. 114, MacPherson J.A., dissenting.

¹⁵⁷ *Toronto (City)* (ONCA), at para. 116, MacPherson J.A., dissenting.

¹⁵⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 967-977 (S.C.C.); *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, 2005 SCC 62, at para. 56 (S.C.C.); *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, 2011 SCC 2, at para. 38 (S.C.C.).

change to the ward system, however, Ontario enacted regulations in addition to Bill 5. One of these regulations, Ontario Regulation 407/18,¹⁵⁹ which came into effect on August 15, 2018, established special rules for the 2018 and 2022 elections by replacing various provisions of the *Municipal Elections Act, 1996*.¹⁶⁰ Reg 407/18 provides a number of new campaign finance rules, including directing the city clerk to calculate new maximum expense limits for candidates,¹⁶¹ establishing a new formula for determining the number of electors,¹⁶² requiring the use of this new formula to calculate the expense limits for candidates and third parties,¹⁶³ and directing the city clerk to notify candidates about their maximum expense limits.¹⁶⁴

It is plausible to argue that the campaign finance provisions in Reg 407/18 satisfy the purpose prong of the *Irwin Toy* framework. A possible objection, however, is that Reg 407/18 did not engage in a “restriction” of speech because the new campaign finance limits were doubled due to the larger ward sizes imposed by Bill 5. Yet *Irwin Toy* does not draw this distinction: it simply asks “whether the purpose or effect of the impugned governmental action was to *control* attempts to convey meaning through that activity”.¹⁶⁵ *Irwin Toy* is not concerned with whether the government has engaged in greater or lesser regulation of expression as compared to some earlier state of affairs; the only issue is whether the government has aimed to control expression. The *Irwin Toy* infringement standard is easy to meet; courts seem to accept any degree of limitation as a restriction of section 2(b). That being said, even if the purpose of Reg 407/18 is to control expression, it would likely be treated separately from Bill 5.

For this reason, the effects prong of *Irwin Toy* must be considered. As described above, the second step of *Irwin Toy* asks whether the impugned law, in purpose or effect, restricts the freedom of expression. For the effects prong, a claimant must additionally show that her activity promotes at least one of values underlying free expression, namely, the pursuit of truth, democratic participation or individual self-fulfillment.¹⁶⁶ This additional requirement is met since electoral expression clearly advances the underlying values of section 2(b).

The remaining question is whether the effects of Bill 5 restrict expression. Both

¹⁵⁹ *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18 [hereinafter “Reg 407/18”].

¹⁶⁰ S.O. 1996, c. 32, Sch.

¹⁶¹ *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, ss. 10(2), 10(3).

¹⁶² *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, s. 11(2).

¹⁶³ *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, s. 11(2).

¹⁶⁴ *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, ss. 10(2), 10(3).

¹⁶⁵ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 972 (S.C.C.) [emphasis added].

¹⁶⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 976 (S.C.C.).

Belobaba J. at the Superior Court and MacPherson J.A. dissenting at the Court of Appeal found that Bill 5 “substantially interfered” with free expression.¹⁶⁷ The “substantial interference” standard of infringement is used in section 2(d) cases. It is also used under the positive rights section 2(b) *Baier/Dunmore* test because *Dunmore* is a section 2(d) case. The “substantial interference” test is considered to be far more demanding than the infringement standard under section 2(b).¹⁶⁸ No doubt this tougher standard was used by Belobaba J. and MacPherson J.A. because if the section 2(b) infringement standard is satisfied under the positive rights *Baier* framework, then it would certainly be met under the *Irwin Toy* framework. For clarity, though, “substantial interference” is not the standard under *Irwin Toy* for demonstrating infringement when the effects of government action are at issue.¹⁶⁹ To demonstrate an infringement, *Irwin Toy* asks “whether the purpose or effect of the government action in question was to restrict freedom of expression”, which the Court alternatively describes as an inquiry into whether “the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity”.¹⁷⁰

3. The Contextual Approach to Electoral Expression

To shed further light on the question of whether Bill 5, in its effects, infringed section 2(b), it is helpful to consider, first, the nature of electoral expression, and, second, the impact of Bill 5 and its accompanying regulations on electoral expression.

(a) *Electoral Expression as Legally Mediated Speech*

Campaign speech plays a central role in the election process. It is comprised of two kinds of speech: regulated and unregulated. Unregulated campaign speech is akin to ordinary expression: it takes place when candidates have conversations with voters, engage in debates with political opponents or give interviews to the media. Regulated speech — which I will refer to as “electoral expression” — is subject to a set of complex and stringent rules in order to ensure the fairness of an election. In the electoral context, money is effectively the equivalent of speech. To ensure electoral fairness, campaign finance rules place strict limits on the amount of money

¹⁶⁷ *Toronto (City)* (ONSC), at paras. 10, 32, 38; *Toronto (City)* (ONCA), at para. 128, MacPherson J.A., dissenting.

¹⁶⁸ Jamie Cameron & Nathalie Des Rosiers, “The Right to Protest, Freedom of Expression, and Freedom of Association” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), at 749.

¹⁶⁹ *Langenfeld v. Toronto Police Services Board*, [2019] O.J. No. 4619, 2019 ONCA 716, at paras. 33, 36-39 (Ont. C.A.) (affirming that the “substantial interference” standard should not be used for the effects prong of *Irwin Toy*).

¹⁷⁰ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 971-972 (S.C.C.).

that candidates can spend on election advertising during the election period. There are also limits that apply to donors and third parties.

The *Municipal Elections Act, 1996*, as modified by Bill 5 and its accompanying regulations, contains several rules specifying the amount of money that can be spent by candidates or contributed to them. Crucially, there are significant penalties for breach. If a candidate for municipal office contravenes any provision of the *Municipal Elections Act, 1996*, she is guilty of an offence.¹⁷¹ If convicted of an offence, she could be fined up to \$25,000.¹⁷² If a judge finds that a candidate knowingly committed an offence, the candidate can be imprisoned for a term of up to six months.¹⁷³ This means that if a municipal candidate knowingly overspends on election advertising — that is, knowingly engages in more electoral expression than the rules allow — she could face imprisonment if she is convicted. The possibility of incarceration as a consequence for engaging in political speech signals that electoral expression can be distinguished from ordinary expression. We might ask why it is constitutionally permissible to imprison a municipal candidate for six months for knowingly engaging in more political speech than is allowed by the *Municipal Elections Act, 1996*. The answer is that electoral expression amounts to a particular kind of expression that is heavily regulated in order to ensure the fairness of elections. The legally mediated nature of electoral expression is what distinguishes it from ordinary speech.

(b) *The Impact of Bill 5 on Electoral Expression*

In order to explore the impact of Bill 5 on the candidates' electoral expression and the campaign finance rules to which they were subject, I have developed a stylized illustration. Bill 5's provisions, and the provisions of Reg 407/18, are elaborated in detail in order to counter the idea that the problem lies with the underlying *Municipal Elections Act, 1996* and not with Bill 5.¹⁷⁴ While the sums of money are simplified for convenience, the illustration uses the actual provisions of Bill 5 and its accompanying regulations, as detailed in the notes.

¹⁷¹ *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 94.

¹⁷² *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 94.1(1).

¹⁷³ *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 94.1(1).

¹⁷⁴ Ontario claims that there is “no evidentiary foundation” for the court “to address a 2(b) challenge with respect to electoral finances”. Such a claim, argues Ontario, would require expert evidence analyzing “detailed information on campaign fundraising and spending from a broad range of candidates who entered the race before or after Bill 5 was enacted”. *Toronto (City) (ONCA) (Reply Factum of the Appellant Attorney General of Ontario at para. 23)* [citations omitted]. This assertion is puzzling. A court could simply read the plain words of Bill 5 and the accompanying regulations to discover how the new rules applied to candidates who had registered prior to Bill 5 coming into force. In *Harper*, for example, the Supreme Court interpreted the campaign finance provisions in the *Canada Elections Act* without recourse to an in-depth study. *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at paras. 53, 57 (S.C.C.).

The illustration involves two candidates, Candidate A (“Anna”) and Candidate B (“Bob”). Anna registered as a municipal candidate for Ward 47 on May 1, the first day of the election period.¹⁷⁵ Her spending limit for electoral expression was \$1,000 for the election period.¹⁷⁶ Anna spent \$1,000 on lawn signs, which displayed her name, a map of Ward 47, and a slogan “Anna for Ward 47”. The nomination period ended on July 27.¹⁷⁷

Bill 5 came into force on August 14 and the accompanying regulations, Reg 407/18, came into effect on August 15. Ward 47 no longer existed, and Anna found herself in Ward 25. On August 16, Anna filed a Change of Ward Notification with the City Hall Elections Office to stay in the race, as required by Bill 5.¹⁷⁸ As provided for by the new regulations, Anna was given a new expense limit of \$2,000 by the City Clerk.¹⁷⁹ The new spending limit reflected the fact that Ward 25 had a population twice as big as the former Ward 47, which it replaced.¹⁸⁰ As provided for by Bill 5, any money Anna had already spent carried over and counted against her new \$2,000 expense limit.¹⁸¹ Because Anna had already spent \$1,000, she was left with \$1,000 for electoral expression in her new ward (Ward 25) for the remainder of the election period. Since she could not use her lawn signs for Ward 47, she was forced to start anew.

On the same day, August 16, Bob registered as a first-time candidate in the same ward (Ward 25) as Anna. As provided for by Bill 5, Bob received an expense limit of \$2,000. Bob thus had \$2,000 to spend on campaign speech for the remainder of the election period, while Anna had only \$1,000 for the same time period.

Did the effects of Bill 5 restrict Anna’s electoral expression?

¹⁷⁵ The ward numbers are fictional but they are meant to capture the fact that all the electoral districts changed in the middle of the election period.

¹⁷⁶ In the period prior to Bill 5, the actual spending limit was calculated by a formula based on the ward population. *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., ss. 88.20(7), 88.20(11) (providing formula for electors); *General, O. Reg 101/97*, s. 5 (providing formula for expense limit).

¹⁷⁷ City of Toronto Election Services, “Municipal Election Report” (2018), at 15, online: <<https://www.toronto.ca/wp-content/uploads/2019/07/96b2-2018-Election-Report.pdf>>.

¹⁷⁸ *Better Local Government Act, 2018*, S.O. 2018, c. 11, Sch. 3, s. 10.1(4), amending the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(4).

¹⁷⁹ *2018 and 2022 Regular Elections – Special Rules*, O. Reg 407/18, s. 10.

¹⁸⁰ *2018 and 2022 Regular Elections – Special Rules*, O. Reg 407/18, s. 11(2) (providing new calculation for the number of electors).

¹⁸¹ The guidelines state that “[f]iling the Change of Ward Notification Form does not constitute a new nomination or campaign; any money you already raised or spent carries over”. Toronto City Hall, “Bulletin for Candidates: Changes to Municipal Election Legislation” (August 2018), at 1, online: <<https://www.toronto.ca/wp-content/uploads/2018/08/9775-Bulletin-for-Candidates-August-16.pdf>>. Candidates that carried over from before Bill 5 came into force to after Bill 5 came into force were deemed not to be newly nominated. *Better Local Government Act, 2018*, S.O. 2018, c. 11, Sch. 3, s. 10.1(6), amending the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(6).

(c) The Formal Approach to the Effects of Bill 5

A formal approach would find no restriction of section 2(b). The fact that Anna could no longer use her lawn signs after August 14 did not constitute an infringement of her expression because the lawn signs were still in existence. As Miller J.A. noted, there was no interference with freedom of expression because Bill 5 “did not, and could not, erase the messages that had already been communicated”.¹⁸² The candidates were still able to speak on any topic they chose. All that happened was that the candidates’ past communications lost relevance and were no longer useful to the candidates’ campaigns for public office.¹⁸³ For this reason, their complaint was better understood as a plea that the government not diminish the effectiveness of their expression. Section 2(b), however, provides no guarantee that the government will protect the effectiveness of speech; indeed, the government may engage in its own speech, such as the issuance of health warnings on products, which could undermine the speech of others.¹⁸⁴

Nor would a formalist think that Anna has any legitimate constitutional complaint about the fact that she has only \$1,000 to spend in the new Ward 25 as compared to Bob, who has double the amount of money for electoral expression. Bill 5 deemed that the nomination period had not yet ended by changing its end date from July 27, 2018 to September 14, 2018.¹⁸⁵ On this view, there was one long nomination period from May 1 to September 14. Candidates within an electoral ward had the same expense limits, regardless of when they registered during the nomination period. From a formal perspective, both Anna and Bob have the same cumulative expense limit — \$2,000 — for the election period, and hence there is no constitutional injury. Indeed, a formal approach would say that Bill 5 *increased* the amount of available speech for each candidate. Due to the doubling of ward sizes, the expense limits, and hence the available speech for each candidate, had likewise doubled.

(d) The Contextual Approach to the Effects of Bill 5

By contrast, a contextual approach would place significant weight on the nature of electoral expression as speech which is taking place within and being constrained by the legal and institutional framework of an election. An important caveat: while attention to this legal and institutional context is helpful for understanding *why* section 2(b) is infringed, it does not mean that the legal and institutional framework *itself* is brought under section 2(b). Section 2(b) only protects electoral expression, not the framework of the election.

¹⁸² *Toronto (City)* (ONCA), at para. 58.

¹⁸³ *Toronto (City)* (ONCA), at para. 41.

¹⁸⁴ *Toronto (City)* (ONCA), at para. 43.

¹⁸⁵ *Better Local Government Act, 2018*, S.O. 2018, c. 11, Sch. 3, s. 10.1(3), amending the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(3). The nomination date was extended by a court order to September 21, 2018. *Toronto (City) v. Ontario (Attorney General)*, Order of the Ontario Court of Appeal (dated September 19, 2018), at para. 3.

The contextual approach would start with the observation that the 2018 municipal election actually consisted of *two* elections with different electoral districts, different nomination periods and different campaign finance limits. By dint of Bill 5's legislative fiat, these two elections were "deemed" to be a single, continuous election. In reality, however, a new election forcibly supplanted an active election two-thirds of the way through the existing election period. As a result of Bill 5's dismantling of the first election, and its replacement with a second election, the electoral expression of certain candidates was infringed.

To illustrate the infringement of section 2(b), consider the function of one type of electoral expression: the lawn sign. A lawn sign's expressive contribution consists of various messages, including information about the candidate, the electoral district and the key issues that form the candidate's platform. The lawn sign also sends a message from the voter who exhibits it. The sign speaks continuously and passively for the duration of the election period; the candidate and the voter displaying the sign can take no further action and the message will continue to be expressed. If a street displays lawn signs from several candidates, the collective electoral expression amounts to continuous, ongoing speech which forms an essential part of the democratic discourse, allowing for reflection and deliberative exchanges among voters.

If Bill 5 had not eliminated Ward 47, Anna would have been able to speak continuously through her lawn signs for the entire election period. As a direct result of Bill 5, the messages from those lawn signs no longer amount to electoral expression; that is, they no longer play the function of electoral expression given the change to the underlying institutional context within which that expression is taking place. Electoral expression is, as a definitional matter, regulated campaign speech that takes place within and is constrained by the legal framework of an election.

Hence, a change in the rules such that the lawn signs no longer constituted electoral expression in the context of the election (even if they still amounted to ordinary speech) amounts to the "control" of speech, and thus infringes section 2(b) under the *Irwin Toy* standard. The infringement arises because Bill 5's mid-election change to the ward structure prevented certain candidates from engaging in meaningful electoral expression in the context of the election and in light of the electoral laws to which they were subject. The *Baier* standard of substantial interference is also arguably satisfied: the degree of interference with the candidates' electoral expression is so profound that their speech no longer even amounts to electoral expression as a definitional matter.

That the effects of Bill 5 result in the control of speech, and hence a restriction of section 2(b), is also evident when we compare Anna to Bob. The direct effect of Bill 5 (rather than the underlying *Municipal Elections Act*) is that Anna has half the electoral expression available to her as compared to Bob, even though they are both candidates for the same seat in the new Ward 25. Bill 5's interference is heightened by the fact that the candidates may not engage in more electoral expression than is allowed by the rules; indeed, a conviction for knowingly overspending on election

advertising could result in imprisonment. From a contextual perspective, the mid-election change to the ward structure controlled, restricted and substantially interfered with the candidates' electoral expression, rather than merely reducing its effectiveness.

A formalist may object that the above analysis essentially amounts to an argument about the effectiveness of speech, which is not protected by section 2(b). This proposition is based on *Delisle v. Canada (Deputy Attorney General)*, in which the Court held that section 2(b) is not infringed if the exclusion of claimants from a statutory platform "diminished the effectiveness of the conveyance of this message [of solidarity]".¹⁸⁶ The expression at issue in *Delisle* — the "message of solidarity" — referred to the activity of forming an official union under a collective bargaining statute.¹⁸⁷ The positive rights cases hold that, in the context of a claim for inclusion in a statutory platform, section 2(b) does not protect the effectiveness of the conveyance of a message.

I suggest, however, that the effectiveness of the *conveyance* of a message refers specifically to the expressive activity of inclusion in a statutory platform; it does not mean that section 2(b) never protects meaningful expression. Consider, for example, the Supreme Court's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, which held that section 2(b) "may require disclosure of documents in government hands where it is shown that, without the desired access, *meaningful public discussion and criticism on matters of public interest* would be substantially impeded".¹⁸⁸ Crucially, the Court used the *Irwin Toy* framework and explicitly declined to rely on the positive rights *Baier/Dunmore* framework.¹⁸⁹ To engage section 2(b), a claimant must show that access to documents "is necessary to permit *meaningful debate and discussion* on a matter of public interest",¹⁹⁰ provided, however, that it "does not encroach on protected privileges, and is compatible with the function of the institution concerned".¹⁹¹ Section 2(b) does not guarantee access to information; instead, it is "a derivative right which may arise where it is a

¹⁸⁶ [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at para. 41 (S.C.C.). The Court held that the exclusion of RCMP officers from a statutory bargaining scheme did not violate either s. 2(d) or s. 2(b) (at paras. 10, 40-41).

¹⁸⁷ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at paras. 39-41 (S.C.C.).

¹⁸⁸ [2010] S.C.J. No. 23, 2010 SCC 23, at para. 37 (S.C.C.) [emphasis added]. For an analysis of this case, see Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 S.C.L.R. (2d) 429, at 518-19.

¹⁸⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 31 (S.C.C.).

¹⁹⁰ *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 58 (S.C.C.) [emphasis added].

¹⁹¹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 5 (S.C.C.).

necessary precondition of meaningful expression on the functioning of government”.¹⁹² If the preconditions for meaningful expression can, in certain limited circumstances, attract section 2(b) protection, it is reasonable to infer that section 2(b) protects meaningful expression itself in certain limited circumstances.

My claim here is not that section 2(b) always protects either meaningful expression or the preconditions necessary for it, but rather that section 2(b) can do so in certain limited circumstances. Similar to the access to information context, I suggest that a claimant would have to show that the government’s action “substantially impeded” meaningful electoral expression. In addition, I suggest that the protection against government action that substantially impedes meaningful electoral expression would exist *only during the election period*. This qualification would allow the government to regulate elections, including subjecting expression to various campaign finance rules, provided that there is no substantial mid-election impediment to meaningful electoral expression.

(e) Democratic Rights and Principles Under Section 2(b)

A related argument is that the effects of Bill 5 also violated certain rights and principles announced by the Supreme Court in its section 2(b) political process decisions. As described above in Part III.2, the Court has interpreted the freedom of expression as protecting more than the activities of voting and campaigning. In *Harper*, the Court noted that in *Libman*, it had “endorsed several principles applicable to the regulation of election spending”, including the “right to equal participation” and the “right to a free and informed vote”.¹⁹³

A threshold question is whether these principles should be applied to a municipal election. A possible objection is that these section 2(b) principles should not apply because section 3 does not apply to municipalities.¹⁹⁴ As discussed above in Part III.3, however, the Court has explained that the scope of section 3 should not be used

¹⁹² *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 30 (S.C.C.).

¹⁹³ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

¹⁹⁴ *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1031 (S.C.C.); *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 39 (S.C.C.). As s. 3 does not apply to municipalities, the democratic rights under s. 3 (such as the right to meaningful participation) would also not apply to a municipal election. For an intriguing argument about how s. 3 could be interpreted to apply to elections outside the federal and provincial context, see Colin Feasby, “*City of Toronto v Ontario* and Fixing the Problem with Section 3 of the Charter” ABlawg (September 28, 2018), online: <http://ablawg.ca/wp-content/uploads/2018/09/Blog_CF_Toronto_Section_3_Sept2018.pdf>. Given space constraints, this article does not address the larger question of the constitutional status of cities. At a minimum, it is worth noting that “Municipal Institutions” fall under provincial jurisdiction according to section 92(8) of the *Constitution Act, 1867*.

to narrow the scope of section 2(b).¹⁹⁵ In addition, the cases in which these principles are developed concern issues outside campaign finance regulation, such as opinion polls,¹⁹⁶ referendums¹⁹⁷ and blackout rules.¹⁹⁸ This suggests that the principles have a broader application than simply campaign finance regulation in provincial and federal elections. Another possible objection is that these principles are restricted for the sole use by the government to justify campaign finance limits. However, as discussed above in Part III.2, these democratic rights apply to electoral expression under section 2(b) as a general matter and therefore are not restricted to such use.

The first principle, the right to equal participation, is concerned with the “equal dissemination of points of view”.¹⁹⁹ In its section 2(b) cases, the Court has been highly attuned to the differential impact of wealth on democratic discourse. Although Bill 5 and its regulations do not on their face provide different limits for candidates, their effects result in a situation in which one candidate (Bob) has effectively double the available budget; *i.e.*, double the amount of electoral expression, as compared to another candidate (Anna), when both candidates are competing for the same seat in the same electoral district. One reason why it is unpersuasive to argue that the “real election period” took place between August 14 and October 22 is that Bill 5’s impact on the campaign finance rules destroyed the level playing field among candidates. For a contextualist, the stark difference in available campaign expenses, and hence in available electoral expression, between Anna and Bob infringes the right to equal participation as recognized by the Court’s section 2(b) cases.

Libman’s second principle, the right to a free and informed vote, involves “the right of electors to be adequately informed of all the political positions advanced by the candidates and the various political parties”.²⁰⁰ In *Harper*, the Court declared

¹⁹⁵ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.). The Court explained that s. 3 “does not ‘occupy the field’ just because the right claimed . . . involves standing for an election” (at para. 59).

¹⁹⁶ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.).

¹⁹⁷ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.).

¹⁹⁸ *R. v. Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12 (S.C.C.).

¹⁹⁹ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.). For a discussion of the right of equal participation, see Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 *Osgoode Hall L.J.* 251, at 281-85.

²⁰⁰ *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.). For a discussion of the right to a free and informed vote, see Yasmin

that “the voter has a right to be ‘reasonably informed of all the possible choices’”.²⁰¹ It will be difficult for Anna to adequately inform voters in the new Ward 25 of her political positions. Not only is Anna working with half the amount of electoral expression as Bob, but she is also confronted with the confusion of voters in the new ward who may no longer be focusing on the issues at stake given all the upheaval. Indeed, moving back to the actual case, Belobaba J. stated that the “evidence is that the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues”.²⁰² The candidates’ efforts “to convey their political message about the issues in their particular ward were severely frustrated and disrupted”.²⁰³ If the candidates are unable to convey their campaign messages, then the voters’ right to be adequately informed about the candidates’ political positions has been infringed.

(f) Deliberative Engagement in the Electoral Context

A related contextual approach is to focus on the campaign speech of *all* the electoral participants (candidates, voters, volunteers, donors and the media, among others) who engage in a deliberative exchange within the legal and institutional framework of an election. This broader approach is exemplified by MacPherson J.A.’s dissenting opinion at the Ontario Court of Appeal.²⁰⁴ Justice MacPherson stated that the expressive activity affected by Bill 5 was explained by the intervener, the David Asper Centre for Constitutional Rights:

The *Charter’s* guarantee of freedom of expression is a key individual right that exists within and is essential to the broader institutional framework of our democracy. In the election context, freedom of expression is not a soliloquy. It is not simply the right of candidates to express views and cast ballots. It expands to encompass a framework for the full deliberative engagement of voters, incumbents, new candidates, volunteers, donors, campaign organizers and staff, and the media, throughout a pre-determined, stable election period. [Citations omitted.]²⁰⁵

Because the rules of a municipal election are established from the beginning of the election period, candidates “make decisions within these terms about whether

Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter” (2013) 51 Osgoode Hall L.J. 251, at 285-90.

²⁰¹ *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.), *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

²⁰² *Toronto (City)* (ONSC), at para. 31.

²⁰³ *Toronto (City)* (ONSC), at para. 31.

²⁰⁴ *Toronto (City)* (ONCA), at paras. 117-118, MacPherson J.A., dissenting.

²⁰⁵ *Toronto (City)* (ONCA), at para. 117, MacPherson J.A., dissenting, citing the Factum of the Intervener David Asper Centre for Constitutional Rights, at para. 1. [Disclosure: I provided comments to the team that drafted the Asper factum. The omitted citation is to Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 503].

and where to run, what to say, how to raise money, and how to publicize their views”.²⁰⁶ Voters learn about the candidates and the issues, and they form their views and preferences. The news media facilitate the sharing of information about the election, which is essential for democratic deliberation.²⁰⁷ These expressive activities “unfold and intersect within a legal framework”.²⁰⁸ As such, the guarantee of free expression would be “meaningless if the terms of the election, as embodied in the legal framework, could be upended mid-stream”.²⁰⁹ For these reasons, Bill 5 “substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun”,²¹⁰ thus infringing section 2(b).

4. The *Baier* Framework and Positive Rights

At the Court of Appeal, Miller J.A. held that because the claimants could not satisfy the *Baier* requirements, their section 2(b) claim failed.²¹¹ A possible rejoinder is that the *Baier/Dunmore* criteria are satisfied on the facts of this case. The advantage to this response is that it supports the proposition in *Haig* that while the government is not required to provide a platform, it must abide by the Charter when it chooses to provide one.²¹² The difficulty with treating this case as a successful positive rights claim, however, is that it runs the risk of turning every election law case into a statutory platform case. In my view, this would be enormously cumbersome.

Another possible response is to distinguish *Baier*. In his dissenting judgment, MacPherson J.A. distinguished *Baier* on three grounds. Whereas *Baier* concerned the exclusion of a class of people from an election, the present case involved the “mid-stream destruction” and replacement of that platform. Second, the applicants in *Baier* asserted a positive entitlement whereas the City made a claim for non-interference in an ongoing election. Finally, *Baier* did not involve changes to an active election.²¹³

An alternative argument, I suggest, is that *Baier* is inapplicable because the “expression” at issue in the section 2(b) positive rights cases involves the expressive activity of participating in a specific statutory platform. In *Baier*, for instance, the expression at issue was the expressive activity of standing for election for the office

²⁰⁶ *Toronto (City)* (ONCA), at para. 121, MacPherson J.A., dissenting.

²⁰⁷ *Toronto (City)* (ONCA), at para. 122, MacPherson J.A., dissenting.

²⁰⁸ *Toronto (City)* (ONCA), at para. 122, MacPherson J.A., dissenting.

²⁰⁹ *Toronto (City)* (ONCA), at para. 123, MacPherson J.A., dissenting.

²¹⁰ *Toronto (City)* (ONCA), at para. 128, MacPherson J.A., dissenting.

²¹¹ *Toronto (City)* (ONCA), at paras. 68-69.

²¹² *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1041 (S.C.C.).

²¹³ *Toronto (City)* (ONCA), at para. 132, MacPherson J.A., dissenting.

of school trustee.²¹⁴ In *Delisle*, the expression at issue was the “message of solidarity” expressed by the activity of forming an official union under a collective bargaining statute.²¹⁵ In *Haig*²¹⁶ and *Siemens v. Manitoba (Attorney General)*,²¹⁷ the expression at issue was the activity of voting in a referendum and a plebiscite, respectively. Given the nature of the expression at issue in these cases, the claimants demanded inclusion in a statutory regime or platform, which transformed their claim into a positive rights claim under section 2(b). By contrast, the expression at issue in this case is *not* the candidates’ expressive activity of standing for office; instead, the relevant expression is their actual campaign speech. Anna does not need inclusion in a statutory platform to speak through her lawn signs. All she has to do is purchase the signs with her campaign funds and ask her supporters to display them.

It is also relevant that the Supreme Court appears to have limited the application of the *Baier/Dunmore* framework in two cases decided after *Baier*. In *Criminal Lawyers’ Assn.*, the section 2(b) access to information decision discussed above, the Court noted that some of the parties had relied on *Baier/Dunmore* and that the lower courts were divided on the application of *Dunmore*.²¹⁸ The Court stated that “[i]n our view, nothing would be gained by furthering this debate”.²¹⁹ Rather than applying *Baier/Dunmore*, the Court went on to use the *Irwin Toy* framework.

Without delving into the Court’s recent case law on section 2(d),²²⁰ it is also worth noting that in another post-*Baier* case, *Ontario (Attorney General) v. Fraser*, the Court explained that it had consistently rejected the distinction between negative

²¹⁴ *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 31 (S.C.C.). The Court held that the exclusion of teachers from the school trustee election did not infringe s. 2(b) (at para. 60).

²¹⁵ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at paras. 39-41 (S.C.C.). The Court held that the exclusion of RCMP officers from a statutory bargaining scheme did not violate either s. 2 (d) or s. 2(b) (at paras. 10, 40-41).

²¹⁶ *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1041 (S.C.C.). The Court held that s. 2(b) does not “impose upon a government . . . any positive obligation to consult its citizens through the particular mechanism of a referendum” (at 1041).

²¹⁷ *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, 2003 SCC 3, at para. 41 (S.C.C.). The Court held that the plebiscite was a creation of legislation and thus any right to vote in it must be provided for by the statute itself (at para. 42).

²¹⁸ *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 31 (S.C.C.) [emphasis added].

²¹⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 31 (S.C.C.) [emphasis added].

²²⁰ Due to space constraints, this article does not consider the Court’s recent s. 2(d) decisions.

freedoms and positive rights.²²¹ For the Court, the purposive approach to Charter interpretation is what ultimately matters: “A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities, just as a purposive interpretation of freedom of expression may require the state to disclose documents to permit meaningful discussion.”²²² As discussed above in Part III.2, the Court’s interpretation of section 2(b) in the political process context resulted in the identification of two key principles — the right of equal participation and the right to a free and informed vote — both of which shed useful light on Bill 5’s infringement of section 2(b).

5. The Formal Approach vs. the Contextual Approach

The formal approach, which finds no infringement of section 2(b) on account of Bill 5, is intuitive and possesses an immediate logic. Despite the strength of the formal approach, I suggest that the contextual approach is, on balance, ultimately more persuasive. In its political process cases, the Court has already adopted a contextual approach in its purposive analysis of sections 2(b) and 3. These cases have not only recognized a number of democratic rights but have also described these rights with a nuanced attention to the institutional context within which these rights are exercised. A contextual approach to electoral expression and its infringement at issue in *Toronto (City)* is consistent with the Court’s existing purposive and contextual approach to sections 2(b) and 3.

Another consideration is that, unlike certain Charter rights such as section 7 and section 15, the Supreme Court has consistently taken a capacious approach to the scope of section 2(b) and the finding of infringement, such that the analysis in section 2(b) cases usually takes place at the justification stage under section 1. An additional consideration is that the unwritten constitutional principles of democracy and the rule of law²²³ reinforce the conclusion that mid-election changes to electoral rules are inconsistent with the underlying values of the Constitution. While unwritten constitutional principles have been used to invalidate governmental action,²²⁴ neither the democracy principle nor the rule of law principle should, in my view, be used to invalidate the legislation at issue in this case.

A final consideration lies outside the four corners of section 2(b). In recent years,

²²¹ *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, at paras. 67, 69 (S.C.C.).

²²² *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, at para. 70 (S.C.C.).

²²³ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 49-54, 61-69, 70-78 (S.C.C.).

²²⁴ *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at paras. 83, 89 (S.C.C.); *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, [2016] S.C.J. No. 39, 2016 SCC 39 (S.C.C.).

nations around the globe have fallen prey to democratic decline. This erosion of democracy has been brought about, in part, by executive-driven, legislatively endorsed alterations to electoral structures, which while technically “legal”, have subverted the norms and spirit of constitutional democracy, not to mention its accountability and representativeness.²²⁵ This dismantling of electoral and constitutional protections is usually defended on the grounds that such changes are necessary to improve efficiency and reduce corruption. The only defence against such democracy-undermining laws is a contextual approach that provides a greater range of interpretive options than a purely formal approach.

Under the contextual approach, section 2(b) has been infringed, at which point the analysis would turn to section 1. According to Belobaba J., the province failed to show that its objectives — improved efficiency and voter parity — were so pressing and substantial that the ward structure had to be altered in the middle of the election.²²⁶ The court also found that the province could not establish minimal impairment because it had not shown why a less intrusive measure, such as restructuring the wards after the election, was not chosen.²²⁷ Justice MacPherson, dissenting at the Court of Appeal, agreed with Belobaba J. that there was no pressing and substantial objective to support Bill 5.²²⁸ In my view, and in keeping with international standards, mid-election changes to election rules should be discouraged in order to safeguard electoral fairness.²²⁹ For this reason, the burden on the state to justify a mid-election change should be commensurately heavy.

V. CONCLUSION

As I have argued elsewhere, the Supreme Court has long played a vital role in protecting the fairness and legitimacy of the democratic process.²³⁰ Continuing this

²²⁵ Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018), at 43-48; Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Broadway Books, 2018), at 1-10; Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015).

²²⁶ *Toronto (City)* (ONSC), at para. 72.

²²⁷ *Toronto (City)* (ONSC), at paras. 74-75.

²²⁸ *Toronto (City)* (ONCA), at para. 135, MacPherson J.A., dissenting.

²²⁹ International norms emphasize the importance of the stability of electoral rules. See, e.g., Council of Europe (European Commission for Democracy through Law), *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, II.2.63, at para. 64, online: <https://www.cvk.lv/upload_file/Code_ENG.pdf> (noting that the “stability of some of the more specific rules of electoral law, especially those covering the electoral system [such as] . . . the drawing of constituency boundaries” must be protected for the credibility of the electoral process).

²³⁰ Yasmin Dawood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (2012) 62 U.T.L.J. 499, at 504.

function in *Frank*, the Court described the right to vote as a “core tenet of our democracy”.²³¹ Given our global era of democratic decline and rising authoritarianism, accompanied by various practices to erect barriers to the right to vote, the *Frank* decision sends a clear message to legislatures that restrictions on the right to vote will be subject to exacting scrutiny.

The *Frank* decision provided an opportunity to consider the Court’s political process jurisprudence as a whole. The Court has identified multiple democratic rights under section 3 and section 2(b), and it has also been attuned to the institutional context within which these rights are exercised. With respect to the relationship between the right to vote and the freedom of expression, I claim that section 3 and section 2(b) are best understood as distinct yet complementary rights that are animated by and reinforce the fundamental democratic values protected by the Charter.

As for the upcoming *Toronto (City)* case, a central question is whether courts ought to take a formal approach or a contextual approach to electoral expression, and its infringement, under section 2(b). The consequences of this choice are significant, not only for the immediate case but also for the Court’s general approach to its review of the electoral process.

²³¹ *Frank*, at para. 1.