COURT OF APPEAL FOR ONTARIO

CITATION: Toronto (City) v. Ontario (Attorney General), 2018 ONCA 761
DATE: 20180919
DOCKET: C65861 (M49615) and (M49624)

Hoy A.C.J.O., Sharpe and Trotter JJ.A.

BETWEEN

City of Toronto

Respondent (Respondent by Appeal)

and

Attorney General of Ontario

Applicant (Appellant by Appeal)

AND BETWEEN

Rocco Achampong

Respondent (Respondent by Appeal)

and

Ontario (Hon. Doug Ford, Premier of Ontario), Ontario (Attorney General)

Applicants (Appellants by Appeal)

and

City of Toronto

Respondent (Respondent by Appeal)

AND BETWEEN

Chris Moise, Ish Aderonmu, and Prabha Khosla, on her own behalf and on behalf of all members of Women Win TO

Respondents (Respondents by Appeal)

and

Attorney General of Ontario

Applicant (Respondent by Appeal)

and

Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi

Respondents (Respondents by Appeal)

Robin Basu, Yashoda Ranganathan and Audra Ranalli, for the appellant Attorney General of Ontario

Diana W. Dimmer, Cory Lynch and Philip Chan, for the respondent City of Toronto

Rocco K. Achampong, Gavin Magrath and Selwyn A. Pieters, for the respondent Rocco Achampong

Patrick G. Duffy and Emma Romano, for intervener the City Clerk of the City of Toronto

Howard Goldblatt, Daniel Sheppard and Louis Century, for the respondents Chris Moise, Ish Aderonmu and Prabha Khosla, on her own behalf and on behalf of all members of Women Win TO

Donald K. Eady, Caroline V. (Nini) Jones and Jodi Martin, for the interveners Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi

Derek J. Bell and Ashley Boyes, for the intervener The Canadian Taxpayers' Federation

Patrick Cotter, for the intervener Toronto District School Board

Heard: September 18, 2018

By the Court:

[1] Given the urgency of this matter, an immediate decision on this stay motion is required to ensure that the Toronto municipal elections, set for October 22, 2018, proceed in as orderly a manner as possible. In the unusual circumstances of this case, we have decided to announce our decision without delay and with briefer reasons than otherwise might be expected for a matter of this importance.

[2] The issue before us is whether to grant the Attorney General's motion for a stay pending an appeal to this court of the order of the Superior Court of Justice that the relevant provisions of Bill 5, the *Better Local Government Act, 2018*, S.O. 2018, c. 11, infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms* and are therefore of no force and effect: *City of Toronto et al. v. Ontario (Attorney General)*, 2018 ONSC 5151.

[3] The election period for the 2018 City of Toronto municipal elections, based on the City's by-laws providing for a 47-ward structure, began on May 1, 2018. Bill 5, introduced on July 30, 2018 and given Royal Assent on August 14, 2018, changed the course of the elections by imposing a 25-ward structure. Three proceedings were quickly brought to challenge the constitutionality of Bill 5, leading to the order at issue on this motion.

[4] The constitutional challenges raised several grounds, but the basis for the application judge's decision was the argument that Bill 5 infringed the s. 2(b) freedom of expression rights of both the candidates and the voters. That was also the focus of this stay motion and, accordingly, will be the focus of our reasons. Like the application judge, we are of the view that this was the strongest argument the respondents advanced.

[5] The application judge found that, although the province has plenary power to govern the affairs of municipalities (including municipal elections), by changing Toronto's ward structure well after candidates had been nominated and had commenced campaigning Bill 5 violated the s. 2(b) freedom of expression rights of both the candidates and the voters. In his view, changing the ward structure mid-election "substantially interfered with the candidate's ability to effectively communicate his or her political message to the relevant voters" and "undermined an otherwise fair and equitable election process": paras. 32, 34. The application judge found that Bill 5 infringed municipal voters' freedom of expression rights by

interfering with their right to vote. He characterized the right to vote as "an expressive activity" falling within the protection of s. 2(b) which, in his view, includes the right to "effective representation": paras. 40, 47. He found that increasing the population size of the wards from an average of 61,000 to an average of 110,000 denied the "voter's right to cast a vote that can result in effective representation": para. 60.

[6] The application judge rejected the Attorney General's submission that any infringement of s. 2(b) could be justified as a reasonable limit under s. 1 and accordingly declared parts of Bill 5 to be of no force and effect.

[7] The Attorney General has appealed the application judge's order to this court and asks this panel to stay that order pending appeal. If granted, the effect of the stay would be to leave Bill 5 in place and require the election to proceed on the basis of a 25-ward structure.

[8] In oral argument, counsel for the Attorney General stated that he had been instructed to advise this court that if a stay were granted, the government would not take Bill 31, the *Efficient Local Government Act, 2018*, currently before the Legislature, to a final vote at this time. Bill 31 would replace Bill 5 and include an override declaration pursuant to s. 33 of the *Charter*. We note that this undertaking was given, but add that it plays no part in our decision.

[9] The three-part legal test for when an appellate court should grant a stay of a lower court decision pending an appeal is set out in the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. Ordinarily, the applicant must demonstrate that there is a serious issue to be tried; that it will suffer irreparable harm if the stay is not granted; and that the balance of convenience favours a stay pending the disposition of the appeal.

[10] The minimal "serious issue to be tried" component of that test assumes that the stay will operate as a temporary measure and that the rights of the parties will be finally resolved when the appeal proper is heard. However, *RJR-MacDonald* recognizes that in cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, the court may give significantly more weight to the strength of the appeal: p. 338. In our view, this is such a case. An immediate decision is required to permit the Toronto municipal elections to proceed on October 22. That decision must be rendered now and, subject to further legislative intervention, our decision will determine whether the election proceeds on the basis of 25 or 47 wards. In these circumstances, greater attention must be paid to the merits of the constitutional claim and, as contemplated by *RJR-MacDonald*, we must ask whether there is a strong likelihood that the appeal will succeed.

[11] The application judge was understandably motivated by the fact that the timing of Bill 5 changed the rules for the election mid-campaign, which he

perceived as being unfair to candidates and voters. However, unfairness alone does not establish a *Charter* breach. The question for the courts is not whether Bill 5 is unfair but whether it is unconstitutional. On that crucial question, we have concluded that there is a strong likelihood that application judge erred in law and that the Attorney General's appeal to this court will succeed.

[12] The application judge's interpretation appears to stretch both the wording and the purpose of s. 2(b) beyond the limits of that provision. His decision blurs the demarcation between two distinct provisions of the *Charter*: the protection of expressive activity in s. 2(b) and the s. 3 guarantee of the democratic rights of citizens to vote and be qualified for office. The s. 3 right to vote and stand for office applies only with respect to elections to the House of Commons and the provincial legislatures: *Haig v. Canada*, [1993] 2 S.C.R. 995, at pp. 1031, 1033. Section 3 does not apply to municipal elections and has no bearing on the issues raised in this case.

[13] Unquestionably, Ontario's announcement of its intention to introduce Bill 5 disrupted the campaigns that were already underway. However, Bill 5 does not limit or restrict any message the candidates wish to convey to voters for the remainder of the campaign. Nor does it erase messages conveyed earlier, although it may reduce their effectiveness. While the change brought about by Bill 5 is undoubtedly frustrating for candidates who started campaigning in May 2018, we are not persuaded that their frustration amounts to a substantial interference

with their freedom of expression. The candidates were and are still free to say what they want to say to the voters. The inconvenience candidates will experience because of the change from 47 to 25 wards does not prevent or impede them from saying what they want to say about the issues arising in the election.

[14] There was still considerable time from the date of Bill 5's passage until voting day. Election campaigns inherently involve moving targets and changing issues that require candidates to adjust as matters proceed. Under Bill 5, nominations remained open until September 14, the same deadline that applied to the previous City elections. There is no suggestion that permitting nominations approximately 5 weeks before the election trammeled freedom of expression in any way by putting demands upon candidates who had already entered the race and who might need to strategically refocus their campaigns in response to issues raised by new candidates. In light of the time remaining for candidates to conduct their campaigns after its enactment, we are doubtful of the claim that the disruption Bill 5 caused constituted a substantial interference with the candidates' freedom of expression.

[15] Candidates had a reasonable expectation that they would be operating under a 47-ward platform when developing the messages for their campaigns. However, neither that platform nor that expectation was constitutionally guaranteed. The ward platform could be changed by by-law or by legislation. The decision of the Legislature to change it during the campaign was unexpected and perhaps alarming. But candidates have no constitutionally guaranteed right to the

47-ward platform, and Bill 5 does not deprive them of their constitutional right to say whatever they want to say about civic issues. The candidates' right to freedom of expression does not carry with it the constitutional right to insist that either the City or the Province provide or maintain a platform, absent certain conditions that the application judge did not consider in this case: see *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Haig*. The application judge relied on *Libman v. Quebec (Attorney General),* [1997] 3 S.C.R. 569, but, as explained in *Baier*, at para. 41, that case involved a claim to freedom from certain statutory restrictions on expressive activity – i.e., a negative entitlement. It did not involve a claim for a positive entitlement to a particular platform, as in this case.

[16] The application judge found that because Bill 5 made the messages the candidates sought to convey less effective, it infringed their s. 2(b) rights. This proposition is not supported by the jurisprudence interpreting s. 2(b). *Baier* and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 hold that legislation that has the effect of diminishing the effectiveness of a message, but does not prevent the communication of that message, does not violate s. 2(b): *Delisle*, at paras. 40-41; *Baier*, at para. 48. As the minority recognized in *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 827, s. 2(b) does protect "the ability to attempt to persuade one's fellow citizens through debate and discussion": para 16. However, it does not follow that government measures which do not prevent

candidates from attempting to persuade voters, but have the effect of making those attempts less effective at achieving their desired result, violate s. 2(b).

[17] With reference to the s. 2(b) rights of the voters, the application judge, at paras. 40-61, placed significant reliance on the right to "effective representation", a concept recognized by the Supreme Court in *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158. We find it difficult to see how the right to effective representation, which is at the core of s. 3, is somehow embraced by s. 2(b), which protects freedom of expression. Section 2(b) and s. 3 rights are distinct rights to be given independent meaning: *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 877 at para. 67; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80. Moreover, as already noted, s. 3 of the *Charter* has no application to municipal elections and it does not protect them: *Haig*, at p. 1031; *Baier*, at paras. 38-39. While rights can overlap and a limit on the scope of one right should not be used to narrow the scope of another right, it does not follow that doctrines pertaining to s. 3 can be imported to expand the reach of s. 2(b).

[18] Finally, the application judge's conclusion that Ontario substantially interfered with the voter's right of freedom of expression when it doubled the ward population size from a 61,000 average to a 110,000 average cannot be supported. The size of the City's electoral wards is a question of policy and choice to be determined by the legislative process subject to other provisions of the *Charter*,

including s. 15(1). Whether wards of 61,000 or 110,000 are required to ensure effective representation is a debatable issue that cannot be determined by reference to the right to freedom of expression. Further, we share the application judge's inclination that there is no infringement of s. 15(1).

[19] Given our conclusion with respect to s. 2(b), it is not necessary to consider the application judge's conclusions concerning the application of s. 1 of the *Charter*.

[20] Our finding of a strong *prima facie* case on appeal bears upon the analysis under the second and third prongs of the *RJR-MacDonald* framework: see *RJR-MacDonald*, at p. 339. We recognize that in this case, Ontario does not have a monopoly on the public interest and that the City also speaks for the public interest. However, having acceded to the argument of the respondents that the more exacting "strong likelihood of success" standard should be applied and having reached the decision that the judgment under appeal was probably wrongly decided, we have no doubt that the moving party would suffer irreparable harm if a stay were not granted. It is not in the public interest to permit the impending election to proceed on the basis of a dubious ruling that invalidates legislation duly passed by the Legislature. We do not accept the respondents' submission that, because Ontario exercised its legislative authority to enact Bill 5, it does not have "clean hands" and should not be entitled to the equitable relief of a stay from this court.

[21] Similarly, the balance of convenience favours granting a stay. As the Supreme Court held in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, at para. 9, "[c]ourts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter." The court then stated that "only in clear cases" will stays preventing the "enforcement of a law on the grounds of alleged unconstitutionality succeed." Given our tentative conclusion that Bill 5 does not suffer from constitutional infirmity, we have no hesitation in finding that the balance of convenience favours granting a stay.

[22] The respondents insist upon the unfairness in the timing of Bill 5 and point to the uncertainty it has created. However, as noted by the application judge, at para. 30, the court challenge has exacerbated the difficult timeline the City Clerk faces in making the necessary preparations for the election. The City Clerk took steps to implement a 25-ward election upon the passage of Bill 5 and then reverted to plans for a 47-ward election after the application judge's order. The City Clerk has indicated that she has done all she can in the circumstances to prepare for either a 25 or 47 ward election and, provided the issue is resolved promptly, an election on either basis remains possible. The respondents' claim to succeed on the balance of convenience is untenable.

[23] For these reasons, the order of the Superior Court is stayed.

[24] The City Clerk and the Attorney General ask this court to make certain ancillary orders required to conduct the election in an orderly manner. The City of Toronto indicated that it would not oppose those orders if a stay were granted. We are prepared to make the orders sought, subject to any further submissions as to the necessary details, and we remain seized of the matter for that purpose.

Released: SEP 19 2018

Alexandra Hoy A.C.J.O.

Paul Rouleau J.A.

Gary Trotter J.A.