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# The *Better Local Government Act* versus Municipal Democracy

SIMON ARCHER & ERIN SOBAT\*

IN AN ERA MARKED BY THE RISE of “illiberal democracies,” the rule of law we thought we knew is being tested. Courts have been asked to engage with the expanded and extraordinary use of executive and parliamentary powers everywhere—most recently in the United Kingdom (on the use of the executive’s prerogative powers to call elections against the will of Parliament) and the United States (on the legality of executive orders by the President). Locally it has taken the form of interference by the provincial government of Ontario in municipal elections, including the threat of invoking the “notwithstanding clause” in the *Charter of Rights and Freedoms* to shield such interference from effective constitutional oversight.

This special volume of the *Journal of Law and Social Policy* examines and contextualizes these acts of interference. On 27 July 2018, the Honourable Doug Ford, newly elected Progressive Conservative Premier of Ontario, announced that his government would introduce legislation to reduce the size of Toronto City Council from forty-seven to twenty-five ward seats. This, despite the fact that the 2018 municipal election period had already begun on 1 May 2018 and was well underway; that voting day was scheduled for 22 October 2018; and that the City had recently undertaken an extensive, four-year public consultation on ward boundaries, which resulted in City Council increasing the number of wards from forty-four to forty-seven. Ignoring the requirements of the *City of Toronto Act, 2006*,<sup>1</sup> the government had not previously consulted the City, provided notice about this drastic change, or even campaigned on the issue before being elected the month before.

It is helpful to note that the City and Province (under the former provincial government) had previously worked out a compromise for determining the structure and process of local government. This negotiation of jurisdiction was enacted in the *City of Toronto Act, 2006*: there would be a lengthy process to determine ward boundaries (taking into account “effective representation” principles developed for the purpose of section 3 democratic rights under the *Charter*) and a requirement that both the City and Province consult on any changes. The ward boundary review process began in 2013 and concluded in 2017, following several rounds of community consultations, many committee and Council meetings, and significant changes to the city’s governance model.<sup>2</sup> The City of Toronto’s lengthy and detailed ward boundary review process was upheld on review by the Ontario Municipal Board.<sup>3</sup> Yet the City’s long-laboured decision was over-ridden by a former City councillor (now Premier) who apparently believed from the start of the City’s review that the ward boundaries should simply match federal and provincial electoral boundaries.

On 30 July 2018, the provincial government introduced Bill 5, the *Better Local Government Act, 2018* (Bill 5 or the *Act*), for first reading in the Legislative Assembly of Ontario.<sup>4</sup> The Bill would amend the *City of Toronto Act, 2006* (Schedule 1), the *Municipal Act, 2001*

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<sup>1</sup> SO 2006, c 11, Sched A [*COTA*].

<sup>2</sup> “Toronto Ward Boundary Review,” online: <drawthelines.ca> [perma.cc/6MUC-JAF6].

<sup>3</sup> *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (ON LPAT).

<sup>4</sup> *Better Local Government Act, 2018*, SO 2018, c 11 [Bill 5].

(Schedule 2), and the *Municipal Elections Act, 1996* (Schedule 3) in order to re-divide the City's wards to match existing provincial ward boundaries, to reset the nomination period for the 2018 election, and to remove the City's power to change its own ward structure. This also affected the ward structure for the Toronto District School Board trustee elections, which were required to align with the structure for City Council elections.<sup>5</sup> Bill 5 further cancelled upcoming elections for the chairs of several regional municipalities. The effects of these changes were clear: fewer candidates would run, incumbents would (as usual) remain in office, fewer candidates and eventually councillors would be women, racialized, or LGBTQ people, and City Council would continue to be unreflective of the City's population as a whole.<sup>6</sup> Currently, Toronto, whose population is only about fifty per cent white, is represented municipally by an overwhelmingly white council. There is one Black councillor and three East Asian councillors; the remaining twenty-one are white, as is the Mayor. Other consequences seemed likely: for example, ward sizes would double, and servicing those wards be more difficult for elected representatives.

Despite significant outcry from politicians, candidates, and residents in the affected municipalities, and Toronto in particular, Bill 5 quickly passed through the Legislature and received Royal Assent on 14 August 2018. This was 105 days after Toronto's municipal election campaigning had begun and sixty-nine days before the election. Several constitutional court challenges were filed almost immediately on behalf of candidates and electors and were heard together on an expedited basis on 31 August 2018.<sup>7</sup> The applicants asked the Ontario Superior Court of Justice to strike down Schedules 1 and 3 of the *Act*, both dealing with the City of Toronto elections, as well as Regulations made pursuant to the legislation, dealing with ward boundaries and election rules (collectively, the "impugned provisions").<sup>8</sup>

On 10 September 2018, Justice Belobaba, of the Superior Court, declared the impugned provisions of Bill 5 unconstitutional and of no force and effect.<sup>9</sup> Although many legal theories were argued before the Court—several of which will be explored in more detail below—Justice Belobaba found that the impugned provisions unjustifiably infringed the freedom of expression of candidates and voters under section 2(b) of the *Charter of Rights and Freedoms*. He applied the test for infringements of section 2(b) from *Irwin Toy Ltd. v Quebec (Attorney General)* ("*Irwin Toy*"), which asks, first, whether the activity in question falls within the scope of freedom of expression, and second, whether the purpose or effect of the legislation is to interfere with that expression.<sup>10</sup> Justice Belobaba determined that Bill 5 substantially interfered with the expression of City Council candidates, which clearly fell within the scope of section 2(b), by interrupting the election process mid-stream. He also observed that reducing the number of City wards from forty-seven to twenty-five, along with the corresponding increase in ward size population from an average of about sixty-one thousand to one hundred and eleven thousand, substantially interfered

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<sup>5</sup> O Reg 391/18, made under the *Education Act*, RSO 1990, c E2, required Toronto school boards to realign their trustee ward boundaries. On 30 July 2018, Ontario directed that school boards communicate their intended number and distribution of trustees to the Ministry of Education by 14 August 2018, failing which the Minister would impose distribution plans on boards: *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Factum of the Intervenor – Toronto District School Board) at paras 4–6 [SCC Factum (TDSB)].

<sup>6</sup> See e.g. *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 (Affidavits of Myer Siematycki & Mariana Valverde describing the likely impacts of Bill 5) (on file with the authors).

<sup>7</sup> The development of full constitutional challenges to Bill 5 in approximately *two weeks*, including multiple applicants, expert evidence, and full application records, is an indication of the strength of opposition and extraordinary effort to defeat this interference in the municipal elections.

<sup>8</sup> See Bill 5, *supra* note 4; O Reg 407/18, 2018 and 2022 *Regular Elections* – Special Rules; O Reg 408/18, *Wards*.

<sup>9</sup> *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 [Application Reasons].

<sup>10</sup> [1989] 1 SCR 927 at 978.

with voters' freedom of expression by denying them a vote that can result in "effective representation."<sup>11</sup>

Under section 1, Justice Belobaba found the Province had not established that the impugned provisions had a pressing and substantial objective, nor that they were minimally impairing. When he inquired into the rationale behind the legislation, noting that the changes did not actually address the stated objective of improving parity in ward sizes, Justice Belobaba wrote that the only response he heard was "crickets."<sup>12</sup>

The government immediately appealed and sought a stay of the Court's order. In addition, the Progressive Conservatives tabled Bill 31, equivalent legislation to Bill 5 that additionally invoked section 33 of the *Charter* (the "notwithstanding clause") in attempt to shield it from constitutional scrutiny if the *Charter* infringement was upheld.<sup>13</sup>

The deployment of the notwithstanding clause—only hours following Justice Belobaba's decision—prompted opposition, dismay, and debate over the role of this sparingly-used constitutional tool. Some commentators saw a Premier using the Constitution's most extraordinary provision to pursue a personal grievance against a municipal council of which he had previously been a member. Petitions opposing its use were circulated, current and former politicians spoke out, and newspaper opinion pages weighed in.<sup>14</sup> It even became an international headline.<sup>15</sup>

Then, on 19 September 2018, a three-judge panel of the Court of Appeal granted a stay of Justice Belobaba's order pending a full decision on the appeal.<sup>16</sup> For an appellate court to stay a lower court decision pending appeal, the applicant must normally 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 disposition of the appeal.<sup>17</sup> However, this test assumes that the stay will operate as a temporary measure. Where the outcome of the stay application will practically determine the rights of the parties, the court instead asks, on the first prong, whether there is a strong likelihood that the appeal would succeed. This was such a case since the ruling would decide the ward structure for the impending election.<sup>18</sup>

In concluding that there was a strong likelihood the appeal would succeed, the Court held that the City was actually advancing a "positive rights" claim for the continued existence of a

<sup>11</sup> Belobaba J did not make any ruling based on section 3 (democratic rights) of the *Charter*. The concept of "effective representation" was originally developed in the context of section 3 jurisprudence.

<sup>12</sup> Application Reasons, *supra* note 9 at paras 76–77.

<sup>13</sup> Bill 31, *Efficient Local Government Act, 2018*, 1st Sess, 24 Leg, Ontario, 2018 (first reading 12 September 2018).

<sup>14</sup> See e.g. Richard Moon, "Doug Ford's use of the notwithstanding clause reduces democracy to majority rule," *CBC News* (13 September 2018), online: <[www.cbc.ca/news/opinion/doug-ford-notwithstanding-1.4821302](http://www.cbc.ca/news/opinion/doug-ford-notwithstanding-1.4821302)> [perma.cc/9NXT-C363]; Alex Ballingall, "Charter of Rights architects – including Jean Chrétien – condemn Doug Ford's use of notwithstanding clause," *The Star* (14 September 2018), online: <[www.thestar.com/news/canada/2018/09/14/charter-of-rights-architects-including-jean-chretien-condemn-doug-fords-use-of-notwithstanding-clause.html](http://www.thestar.com/news/canada/2018/09/14/charter-of-rights-architects-including-jean-chretien-condemn-doug-fords-use-of-notwithstanding-clause.html)> [perma.cc/QYF5-5SAL]; Lorraine Weinrib, "Doug Ford can't apply the notwithstanding clause retroactively to impede democracy," *Globe and Mail* (18 September 2018), online: <[www.theglobeandmail.com/opinion/article-doug-ford-cant-apply-the-notwithstanding-clause-retroactively-to/](http://www.theglobeandmail.com/opinion/article-doug-ford-cant-apply-the-notwithstanding-clause-retroactively-to/)> [perma.cc/AZ9Y-GP9A].

<sup>15</sup> See e.g. "Amnesty Condemns 'disgraceful' use of obscure clause to cut Toronto council," *BBC News* (13 September 2018), online: <[www.bbc.com/news/world-us-canada-45478934](http://www.bbc.com/news/world-us-canada-45478934)> [perma.cc/PK95-PEJT]; Richard Poplak, "A Populist Has Exposed a Sinkhole in Canada's Democracy," *The Atlantic* (28 September 2018), online: <[www.theatlantic.com/international/archive/2018/09/a-populist-challenge-to-the-rule-of-law-in-canada/571114/](http://www.theatlantic.com/international/archive/2018/09/a-populist-challenge-to-the-rule-of-law-in-canada/571114/)> [perma.cc/A6VS-4Z2Z].

<sup>16</sup> *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 [Stay Reasons].

<sup>17</sup> *Ibid* at para 9; see also *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

<sup>18</sup> Stay Reasons, *supra* note 16 at para 10.

statutory platform—the 47-ward election.<sup>19</sup> Despite this, Justice Belobaba had applied the *Irwin Toy* framework instead of the test for section 2(b) positive rights claims from *Baier v Alberta* (*Baier*).<sup>20</sup> *Baier* dealt with a challenge to legislation that blocked teachers from running in school board elections. The teachers argued that this restriction on their candidacy violated section 2(b), while Alberta responded that section 2(b) did not guarantee candidacy rights to any particular class of persons. A majority of the Supreme Court agreed with the province, finding that the legislation did not prevent teachers from expressing themselves on education issues generally. The Court also adopted three criteria for establishing a successful positive rights claim under section 2(b), based on the test it had previously articulated under section 2(d) (freedom of association). A positive 2(b) claim requires, first, that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; second, that the purpose or effect of the legislation is to interfere with that expression; and third, that the government is responsible for the inability to exercise the fundamental freedom.<sup>21</sup> Here, the Court of Appeal felt that Justice Belobaba erred by failing to consider these criteria. The panel was also concerned that he improperly considered section 3 of the *Charter* (democratic rights) in his analysis of the section 2(b) infringement.<sup>22</sup>

Practically speaking, the stay ruling decided the case, as the appeal would not be heard for many months. In the meantime, the Toronto municipal election proceeded under Bill 5 on the basis of twenty-five wards, and the Provincial Government did not move Bill 31 past second reading in the legislature.

Arguments on the full appeal were heard by a five-judge panel on 10 and 11 June 2019. Reasons were released one year from the date of the original stay judgment, on 19 September 2019. Once again, the panel heard several theories of the case, not all of which formed part of Justice Belobaba’s judgment in the court below. The Court of Appeal panel split on the issue, with a three-judge majority overturning Justice Belobaba’s decision.<sup>23</sup> Justice Miller, writing for the majority, held the following:

- Section 2(b) of the *Charter* does not guarantee “effective expression” or the effectiveness of expression.<sup>24</sup>
- The City was advancing a positive rights claim (*i.e.*, the continued existence of a statutory platform—the 47-ward election) but did not meet the test for such a claim.<sup>25</sup>
- Section 2(b) of the *Charter* does not require that a vote in a municipal election provide for “effective representation” (a different concept than effective expression). This protection instead flows from section 3 of the *Charter*, which explicitly does not apply to municipal elections.<sup>26</sup>
- Unwritten constitutional principles cannot be used as an independent basis to invalidate legislation.<sup>27</sup>

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<sup>19</sup> *Ibid* at para 15.

<sup>20</sup> 2007 SCC 31 [*Baier*]. Belobaba J held that once the Province has opted to provide a certain electoral structure and an election has begun, expressive activity in connection with that election is protected from interference under the *Irwin Toy* test: Application Reasons, *supra* note 9 at para 37. However, he did not reference *Baier* on this issue.

<sup>21</sup> *Baier*, *supra* note 20 at para 30.

<sup>22</sup> Stay Reasons, *supra* note 16 at paras 12, 17.

<sup>23</sup> *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 [Appeal Reasons].

<sup>24</sup> *Ibid* at paras 41–46.

<sup>25</sup> *Ibid* at paras 47–69.

<sup>26</sup> *Ibid* at paras 70–76.

<sup>27</sup> *Ibid* at paras 81–89.

- Unwritten constitutional principles do not limit the Province's jurisdiction over municipal institutions pursuant to section 92(8) of the *Constitution Act, 1867*.<sup>28</sup>

In contrast, Justice MacPherson, writing for the minority, held that Bill 5 was unconstitutional because it unjustifiably interfered with the exercise of free expression rights in the middle of an election process. Justice MacPherson found the majority's characterization of candidates' expressive activities as including only "a person's past communications" to be far too narrow. Instead, he accepted that in the election context, the expression protected by section 2(b) "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."<sup>29</sup> In his view, because candidates' and voters' expressive activities unfold and intersect within the established terms of an election, to upend these terms mid-stream does not merely render their free expression less effective—it renders the expression meaningless.<sup>30</sup>

Justice MacPherson also disagreed with the majority that the City's section 2(b) argument represented a positive rights claim. He distinguished the case of *Baier* on this point. In that case, the impugned legislation was enacted two years prior to the election itself, not three months after it had started. In this case, Justice MacPherson found that the issue was not exclusion from an electoral platform, but protection from the mid-stream destruction and replacement of that platform.<sup>31</sup> In other words, the City's plea was for non-interference in an election that had already begun.

Several of the original applicants abandoned the litigation prior to or following the Court of Appeal judgment.<sup>32</sup> However, on direction from City Council, the City of Toronto sought leave to appeal to the Supreme Court of Canada, which was granted on 26 March 2020.<sup>33</sup> That appeal is now scheduled to be heard on 16 March 2021.

There is no true remedy for the 2018 municipal election. The election took place in October of that year and the new, twenty-five-member Council has been making governance decisions ever since (including the reallocation of councillor budgets and responsibilities in accordance with the new ward structure). However, the case remains of keen interest for those concerned with the legal status of local government. The central problematic—that municipal elections are not protected by democratic rights guaranteed under section 3 of the *Charter* and exempted from the application of the notwithstanding clause—has never been squarely addressed by the Supreme Court. As a result, constitutional challenges to changes in municipal governance are framed as violations of free expression or equality rights, or of unwritten constitutional principles of democracy and the rule of law.<sup>34</sup>

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<sup>28</sup> *Ibid* at paras 90–95.

<sup>29</sup> *Ibid* at para 117.

<sup>30</sup> *Ibid* at para 123.

<sup>31</sup> Appeal Reasons, *supra* note 23 at para 132. Although Belobaba J did not address the *Baier* framework, MacPherson JA's analysis was otherwise consistent with that of the court below.

<sup>32</sup> Given that the election had already occurred, the individual applicants were likely hesitant to put further resources into the case.

<sup>33</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC). The Court of Appeal determined that it was appropriate to allow the City continued standing in place of the other applicants who had abandoned the appeal: Appeal Reasons, *supra* note 23 at paras 24–29.

<sup>34</sup> See e.g. *East York (Borough) v Ontario (Attorney General)*, 1997 CanLII 12263 (ON SC).

Taking the question to the extreme degree, the Court of Appeal asked counsel for the Attorney General whether the Province had the power to eliminate municipal elections altogether: the reply was, necessarily, “yes.”<sup>35</sup> In an era in which approximately eighty per cent of Canadians live in cities,<sup>36</sup> and the most populous of those cities have economies larger than many provinces,<sup>37</sup> the asymmetry in our constitutional protections of democratic rights becomes ever more pronounced. Indeed, more recent developments continue to highlight this issue. In October 2020, the Ontario government introduced Bill 218, the *Supporting Ontario’s Recovery and Municipal Elections Act, 2020*, which would enact legislation to shield individuals and organizations from certain legal liabilities related to the COVID-19 virus.<sup>38</sup> However, this Bill would also amend the *Municipal Elections Act, 1996* to ban municipalities from implementing ranked-ballot voting in municipal elections.<sup>39</sup> The government has stated that this change will make “the electoral process consistent across municipal, provincial and federal elections”<sup>40</sup> and that it will save municipalities money.<sup>41</sup> Without any prior consultation, this move once again reverses a decision of the previous provincial government to devolve authority and choice over local electoral procedures to municipalities.<sup>42</sup> Like with Bill 5, several municipalities and commentators have criticized the Bill and questioned the motivations behind this sudden change.<sup>43</sup>

Against this backdrop, the case of Bill 5 raises numerous critical questions about local democracy. Why do we have the constitutional arrangements that we do? When were municipalities developed? For what purposes? How do they interact with other orders of

<sup>35</sup> *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 (Oral argument, Appellant).

<sup>36</sup> See e.g. “World Urbanization Prospects 2018 – Country Profiles: Canada,” online: United Nations – Department of Economic and Social Affairs: Population Division <population.un.org/wup/Country-Profiles/> [perma.cc/3B59-JHY4]; Statistics Canada, “Canada’s population estimates: Subprovincial areas, July 1, 2019” (13 February 2020), online: <www150.statcan.gc.ca/n1/daily-quotidien/200213/dq200213a-eng.htm> [perma.cc/JF8S-TEK4].

<sup>37</sup> See e.g. Statistics Canada, “Measuring the economy, region by region” (30 January 2017), online: <www.statcan.gc.ca/eng/blog/cs/economy> [perma.cc/4TQT-XLQK]; Conference Board of Canada, “Cross City Comparison: Real GDP Growth” (2020), online: <www.conferenceboard.ca/topics/economics/metro/ccp.aspx> [perma.cc/H975-XWBK].

<sup>38</sup> Bill 218, *An Act to enact the Supporting Ontario’s Recovery Act, 2020 respecting certain proceedings relating to the coronavirus (COVID-19), to amend the Municipal Elections Act, 1996 and to revoke a regulation*, 1st Sess, 42nd Parl, Ontario, 2020 (assented to 20 November 2020), Sched 1.

<sup>39</sup> *Ibid*, Sched 2.

<sup>40</sup> Government of Ontario, News Release, “Ontario Protects Workers, Volunteers and Organizations Who Make Honest Efforts to Follow COVID-19 Public Health Guidelines and Laws” (20 October 2020), online: <news.ontario.ca/en/release/58886/ontario-protects-workers-volunteers-and-organizations-who-make-honest-efforts-to-follow-covid-19-pub> [perma.cc/FV43-3P9Q].

<sup>41</sup> See e.g. Daryl Newcombe, “Province’s financial justification to end ranked ballots challenged,” *CTV News* (21 October 2020), online: <london.ctvnews.ca/province-s-financial-justification-to-end-ranked-ballots-challenged-1.5154512> [perma.cc/Q6A8-BXYW].

<sup>42</sup> See *Municipal Elections Modernization Act, 2016*, SO 2016, c15 – Bill 181 (assented to 9 June 2016); O Reg 310/16: *Ranked Ballot Elections*. The City of London was the first Ontario municipality to implement ranked ballots in its 2018 election, with other municipalities considering the option at the time Bill 218 was announced.

<sup>43</sup> See e.g. David Rider, “He gave Ontario cities the right to try a new voting system. Now Ted McMeekin can’t understand why Doug Ford is taking it away,” *The Star* (23 October 2020), online: <www.thestar.com/news/city\_hall/2020/10/23/he-gave-ontario-cities-the-right-to-try-a-new-voting-system-now-ted-mcmeekin-cant-understand-why-doug-ford-is-taking-it-away.html> [perma.cc/MHH8-CDBA]; Mary Baxter, “‘There should be local choice’: London fights to keep ranked-ballot voting,” *TVO* (30 October 2020), online: <www.tvo.org/article/there-should-be-local-choice-london-fights-to-keep-ranked-ballot-voting> [perma.cc/28YW-RR35]. Premier Doug Ford has claimed that the ranked-ballot process is confusing, stating that, “We don’t need any more complications on ranked ballots and we’re just gonna do the same way as we’ve been doing since 1867 — first past the post ... [people] don’t have to be confused, it’s very simple” (see Rider, *ibid*).

government and other regulatory imperatives? How have they realized or discouraged “effective representation”? What alternatives exist?

This special volume explores these questions. We begin here by framing the contributions within a broader consideration of the legal problem and the ways in which the applicants have tried to resolve it. That is, we will outline the various theories put before the courts that attempt to overcome the central problem of the lack of constitutional status for municipalities in Canada. Each of these theories proposes some method of protecting the integrity of municipal democratic processes from interference. In principle, that protection could be extended to municipalities by a constitutional amendment listing them as the third level of government protected by section 3 of the *Charter*. However, given the requirement for provincial consent to such an amendment, it seems certain that some other approach will be required. Following the discussion of these legal theories, we summarize the individual contributions to the special volume. Each of these pieces speak to the wider historical, social, and political context within which these theories operate.

## I. THE CASE BEFORE THE SUPREME COURT OF CANADA

The City of Toronto has been granted leave to appeal from the judgment of the Ontario Court of Appeal. The Attorney General of Ontario (AGO) is the Respondent on appeal. As of the date of writing, the Supreme Court has approved fourteen intervenors, with one additional application pending.<sup>44</sup> Only the City and the Toronto District School Board have filed factums with the Court.<sup>45</sup> However, the various parties’ arguments are contained in their applications for leave to appeal or intervene<sup>46</sup> as well as their factums at the Court of Appeal (where applicable).<sup>47</sup>

Intervenors aligned with the Appellant are the Toronto District School Board, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Centre for Free Expression at Ryerson University, CityPlace Residents’ Association, Durham Community Legal Clinic, International Commission of Jurists (Canada), Progress Toronto, Federation of Canadian Municipalities, Métis Nations of Ontario and Alberta, Fair Voting British Columbia, and a group of four former Mayors of Toronto: John Sewell, the Honourable Art Eggleton, Barbara Hall, and David Miller. Intervenors aligned with the Respondent are the Canadian Constitution Foundation and—at least on some issues—the Attorneys General of Canada and British Columbia.<sup>48</sup>

<sup>44</sup> Supreme Court of Canada, “Docket 38921 – City of Toronto v. Attorney General of Ontario,” online: <[www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38921](http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38921)> [perma.cc/8SN7-D6YF]. The Court has not yet ruled on a late application for leave to intervene by Fair Voting British Columbia, which was filed on 15 December 2020.

<sup>45</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Factum of the Appellant – City of Toronto) [SCC Factum (Toronto)]; SCC Factum (TDSB), *supra* note 5.

<sup>46</sup> Supreme Court of Canada, “City of Toronto v. Attorney General of Ontario – Memorandums of Argument on Application for Leave to Appeal,” online: <[www.scc-csc.ca/case-dossier/info/mal-mdaa-eng.aspx?cas=38921](http://www.scc-csc.ca/case-dossier/info/mal-mdaa-eng.aspx?cas=38921)> [perma.cc/5V52-KC46]. The motions for leave to intervene are on file with the authors.

<sup>47</sup> Court of Appeal for Ontario, “Toronto (City) v. Ontario (Attorney General),” online: <[www.ontariocourts.ca/coa/C65861/](http://www.ontariocourts.ca/coa/C65861/)> [perma.cc/6WZK-47Z6].

<sup>48</sup> The Canadian Taxpayers Foundation is not intervening at the Supreme Court. However, at the Court of Appeal, it intervened to argue that unwritten principles cannot be used to invalidate legislation, and that doing so in this case would have the effect of rewriting section 3 of the *Charter*: see *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 (Factum of the Intervenor – Canadian Taxpayers Foundation). Both the majority and the minority judges explicitly held that unwritten constitutional principles do not have this effect on their own.



## A. THE APPELLANT'S POSITION

There are four legal issues on appeal, as framed by City of Toronto's materials.<sup>49</sup> First, does section 2(b) of the *Charter* protect the expression of electoral participants from substantial mid-election changes to the election framework and rules? Second, can the unwritten principle of democracy be used as a basis for striking down the impugned provisions of Bill 5? Third, are municipal electors who are given a vote in a democratic election entitled to effective representation? And fourth, has the Province met its burden under section 1 of justifying any *Charter* infringements?

The Appellant and associated intervenors can be expected to argue that section 2(b) (free expression) of the *Charter* and section 92(8) of the *Constitution Act, 1867* (municipalities as a provincial head of power) must be interpreted purposively with regard to—among other aids—the unwritten principle of democracy, section 3 of the *Charter* (democratic rights), and the history and present nature of Canadian municipalities. In their view, rights to free expression and unwritten constitutional principles place constraints on the exercise of legislative authority vis-à-vis municipal elections.

### 1. THE CITY OF TORONTO

On the first issue, the City argues that section 2(b) requires governments to refrain from making substantial changes to the rules of an ongoing election where to do so would substantially impede meaningful public discourse in that election.<sup>50</sup> The ability of electoral participants to engage in political speech during an election depends on the stability and unchanging nature of the electoral framework in which it takes place. Once an election begins, any material change to that framework interferes with the ability of participants to express themselves and to engage in the political discourse that is central to any democratic process. The City argues that this is not a case that engages a positive right to a particular electoral process; rather, it pleads non-interference with an established and ongoing electoral process.<sup>51</sup> Furthermore, the City asks the Court to clearly limit the application of the *Baier* framework to claims by excluded speakers for access to underinclusive statutory platforms for expression. Instead, the broader *Irwin Toy* framework should apply to novel freedom of expression claims such as the case at bar.

Second, the City argues that, contrary to the definitive statement of the Court of Appeal, the Supreme Court has not confirmed whether unwritten constitutional principles have the freestanding ability to render a law unconstitutional.<sup>52</sup> In support of this assertion, the City points to several cases where the principles of judicial independence or the rule of law were employed to support constitutional challenges to legislation. The City argues that, where such challenges have been unsuccessful, it was because the applicant was unable to demonstrate that the impugned legislation offended the unwritten principle at issue, and not because unwritten principles could not be used to strike down legislation generally.<sup>53</sup> The City suggests that the unwritten principle of democracy, in particular, can be defined with reference to the section 3 jurisprudence.<sup>54</sup> On this

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<sup>49</sup> SCC Factum (Toronto), *supra* note 45.

<sup>50</sup> *Ibid* at paras 7, 50, 58, 61.

<sup>51</sup> *Ibid* at paras 44–49.

<sup>52</sup> *Ibid* at paras 70–78.

<sup>53</sup> *Ibid* at paras 75–77.

<sup>54</sup> *Ibid* at paras 102–03.

basis, democratic municipal elections must at least provide for, among other things, effective representation, non-interference, and meaningful participation.

Third, the City argues that the unwritten principle of democracy should influence the interpretation of section 92(8) of the *Constitution Act, 1867* in the context of a statutory, democratic municipal election.<sup>55</sup> Like the administration of justice under section 92(14) in *Trial Lawyers Association of British Columbia v British Columbia*,<sup>56</sup> for example, a province's ability to legislate over municipal institutions is not limitless. In this case, the unwritten principle of democracy means that a province cannot create a statutory, democratic municipal election that does not provide for effective representation of its residents.<sup>57</sup>

Fourth, the City argues that any infringement of section 2(b) of the *Charter* is not justified under the section 1 *Oakes* test.<sup>58</sup> The objective of achieving voter parity, though barely raised by the government in relation to Bill 5, was not pressing and substantial given the Supreme Court's emphasis on effective representation as meaning more than mathematical parity. Similarly, the Province had not adduced reliable evidence of the alleged ineffectiveness and inefficiency of City Council to support this goal. Neither objective was rationally connected to Bill 5 because the difference in ward populations between the two models is insignificant and there was no evidence of fewer councillors leading to increased effectiveness. Bill 5 also was not minimally impairing: if the provincial government had acted in accordance with the procedures of the *City of Toronto Act*, it presumably could have made smaller, tailored changes to ward boundaries in areas of concern while leaving the 47-ward model otherwise intact. As Justice Belobaba noted, there was no evidence that a mid-election reduction in size was the only reasonable way to address the effectiveness of City Council.<sup>59</sup> On the proportionality analysis, the alleged benefits were speculative and unsupported by the evidence, while the deleterious effects on Torontonians and the electoral process were extensive and profound.

## 2. THE CITY-ALIGNED INTERVENORS

The Toronto District School Board argues that the applicable test for a breach of section 2(b) of the *Charter* is that from *Irwin Toy*, which is satisfied in this case.<sup>60</sup> The Supreme Court has recognized both seeking election and voting as expressive acts. These separate incidents of expression may also, together, be viewed as a form of collective political expression of the community as a whole. Like trade unions in the section 2(d) jurisprudence, municipal and school board elections constitute an important democratic subsystem that ought to receive *Charter* protection. This collective expression was infringed, if not completely stifled, by Bill 5. Furthermore, Bill 5's changes to the *Education Act* and Regulations disrupted the political expression of school board trustees, both previously during the Toronto Ward Boundary Review and following the enactment of the changes when the province unilaterally threatened to impose its own trustee distribution plan. This two-week ultimatum precluded trustees from expressing their ideas on the boundaries or engaging in community consultations, undermining the core tenets of democracy.

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<sup>55</sup> *Ibid* at paras 114–18.

<sup>56</sup> 2014 SCC 59 at para 26.

<sup>57</sup> SCC Factum (Toronto), *supra* note 45 at paras 117–18.

<sup>58</sup> *Ibid* at paras 132–50.

<sup>59</sup> Application Reasons, *supra* note 9 at paras 70–77.

<sup>60</sup> SCC Factum (TDSB), *supra* note 5.

The David Asper Centre reiterates its arguments on freedom of expression that were adopted by the minority of the Court of Appeal.<sup>61</sup> It argues that freedom of expression in the electoral context goes beyond the one-way right of candidates and the electorate to express views and cast ballots. Rather, this encompasses a wider framework for full deliberative engagement of voters, incumbents, new candidates, volunteers, donors, campaign organizers and staff, and the media. The expressive rights protected in an election are distinct and require a pre-determined, stable electoral process to support the free political expression of all participants. This requires, among other things, that electoral rules be clear from the beginning of the election period, that the timing of the election be free from interference, and that candidates and the electorate know with whom to communicate and how that communication will occur. Any disruption to this process, such as through a mid-stream legislative change, interferes with section 2(b).

The Canadian Civil Liberties Association will deal primarily with the interpretation and application of *Baier*.<sup>62</sup> This case demonstrates the tension among the lower courts in choosing whether to apply the *Baier* positive rights analysis or the broader *Irwin Toy* test for infringements of section 2(b).<sup>63</sup> The Court should therefore reconsider or at least restrict the application of *Baier*, for example, in cases where core electoral speech is at stake. The focus of the section 2(b) inquiry should properly be on whether the state's conduct (in purpose or effect) is a non-trivial interference in expressive content or activity, and not on drawing "delicate distinctions" between positive and negative rights claims. Alternatively, the challenge to Bill 5 is not one of under-inclusion. However, Bill 5 interferes with section 2(b) even under the *Baier* framework, because there is at minimum a government obligation to establish clear ground rules and electoral boundaries in advance of a municipal election to ensure that meaningful expressive activity can take place.

The Centre for Free Expression focuses on Bill 5's interference with the electoral process, namely in the timing of the legislation during the electoral period.<sup>64</sup> This interfered with the freedom of expression of candidates for office, members of their campaign teams, third party participants, and the electorate. The Court should apply the *Irwin Toy* framework to make a declaration that the legislation's enactment during a subsisting democratic process violated section 2(b) rights, rather than invalidating the legislation itself.

The CityPlace Residents' Association argues that the Court must consider municipal electors as distinct from political candidates in its analysis.<sup>65</sup> Section 2(b) protects the expressive rights of prospective voters and Bill 5's impact on their interests must be considered at every stage of the electoral process. This is not limited to participation in the formal electoral period itself, but also in pre-election democratic processes such as the Toronto Ward Boundary Review. The unwritten constitutional principle of democracy similarly protects the participation of City residents in this democratic consultation process. Electors' expressive and democratic interests were engaged as soon as the discussion on ward boundaries began and the government was constitutionally obligated to respect this process once it was underway. Bill 5 therefore radically

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<sup>61</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – David Asper Centre for Constitutional Rights).

<sup>62</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Canadian Civil Liberties Association).

<sup>63</sup> *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927.

<sup>64</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Centre for Free Expression).

<sup>65</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – CityPlace Residents' Association).

and unjustifiably undermined a multi-year political conversation that began in 2013, rather than only during the 2018 election period.

The Durham Community Legal Clinic highlights the disproportionate impacts of Bill 5 on the expressive rights of low-income and historically marginalized communities.<sup>66</sup> Such individuals already have reduced access to the “marketplace of ideas” and effective representation, despite being significantly affected by government decision-making. For example, low-income and historically marginalized communities rely heavily on municipal services such as social housing and tenant protections, and Bill 5 directly reduces their ability to participate in municipal processes by increasing ward sizes. Bill 5’s expansion of Toronto District School Board wards similarly impacted the ability of trustees to provide effective representation to residents who rely on the public education system to transition out of poverty. The Court should consider these unique impacts in assessing whether Bill 5’s infringement of section 2(b) is justifiable.

The International Commission of Jurists (Canada) does not argue that unwritten constitutional principles can independently invalidate legislation.<sup>67</sup> Rather, these principles can properly fill an interpretive gap in this case by including the basic protections of section 3 within section 2(b) rights in the context of municipal elections. Because the Province adopted a specific model for democratic municipal institutions under section 92(8), the fundamental democratic principles under section 3, as well as the principles of constitutionalism and the rule of law, preclude Ontario from undermining free expression in the electoral process. Amendments to election rules when the election process is already underway limit the freedom of speech of candidates. The proper test is therefore that from *Irwin Toy* and not *Baier*, although the *Baier* test is also met. Had the amendments been made to the electoral process prior to the electoral period, they might have been valid, provided they did not otherwise undermine the rule of law, democracy, or constitutionalism.

In contrast, Progress Toronto argues that the constitutional principle of democracy *does* have freestanding ability to invalidate legislation.<sup>68</sup> Unwritten principles are binding on courts and governments and give rise to substantive legal obligations. Individual rights of participation in political institutions, including municipal institutions, form the bedrock of the democracy principle. Bill 5 was anti-democratic because it was passed without consultation and in the middle of an election period. Progress Toronto also challenges the Court of Appeal’s argument that invalidating legislation on this basis improperly places it beyond the scope of the notwithstanding clause. It argues that this reasoning is incorrect as a matter of constitutional supremacy and the fundamental nature of the constitutional principles. Progress Toronto will also draw on its experience participating in the Toronto municipal election process to make submissions on how the democracy principle should be addressed in the Court’s interpretation of section 2(b) rights.<sup>69</sup>

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<sup>66</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Durham Community Legal Clinic)

<sup>67</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – International Commission of Jurists (Canada)).

<sup>68</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Progress Toronto).

<sup>69</sup> On this point, see also Michael Pal, “The Unwritten Principle of Democracy” (2019) 65:2 McGill LJ 269. Pal argues that section 2(b) can be interpreted in light of the democracy principle, which should at least protect procedural fairness and meaningful participation in municipal elections in order to safeguard political expression. Under this approach, changing the rules of the game mid-election was a clear violation of section 2(b).

The Métis Nations of Ontario and Alberta also challenge the conclusion that unwritten constitutional principles can never be used to strike down legislation.<sup>70</sup> The unwritten principle of democracy is conceptually similar to the “honour of the Crown” in Aboriginal law. As in that context, constitutional principles combined with specific fact situations can generate legally enforceable Crown duties that may require judicial remedies, including the invalidation of legislation. Alternatively, the Court should distinguish the honour of the Crown as a *sui generis* constitutional principle flowing from the unique relationship between the Crown and Indigenous peoples. This would ensure that this concept is not inadvertently affected or altered in a case about municipalities. Furthermore, pre-existing Aboriginal communities and Peoples have unique constitutional status and—unlike municipalities—are not “creatures of statute” even when they may be included in or subject to federal or provincial legislation.

The Federation of Canadian Municipalities reiterates arguments made at the Court of Appeal that the Province’s exercise of authority under section 92(8) is constrained by the unwritten principle of democracy.<sup>71</sup> Municipal councils have a distinct, pre-Confederation history and cardinal democratic role. This historical context, as well as the growing complexity and size of cities, are relevant to the Court’s analysis. The exercise of the Province’s section 92(8) powers through democratically elected municipal councils has always been part of the constitutional framework. While the Province may have jurisdiction over the “architecture” of municipal councils or their powers, it does not have the ability to abolish democracy in a given locality.<sup>72</sup>

Finally, the Mayors’ group will argue that Bill 5 was both procedurally and substantively outside the authority of the province.<sup>73</sup> The Court’s approach to section 2(b) must consider the unique “conduit” role of elected officials—which requires close engagement with constituents—when evaluating the disruptive nature of Bill 5 and its consequences for effective representation. Section 2(b) protected the engagement of candidates with voters in the specific context of the pre-Bill 5 ward model. Effective representation should be recognized under section 2(b) and requires considering whether the electoral system promotes the election of individuals who are actually representative of communities. The timing of Bill 5 magnified existing disparities between candidates by undermining a ward system that allowed for increased diversity. Furthermore, the independent status of cities as an order of government should be constitutionally recognized, similar to the special status of courts under provincial jurisdiction. The contemporary importance of cities means that they must be protected from outside meddling in their democracies, for example, through implied limits to provincial authority under section 92(8).

## B. THE RESPONDENT’S POSITION

The Respondents and associated intervenors can be expected to reiterate arguments made at the Court of Appeal, particularly where they are reflected in the majority’s decision.

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<sup>70</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Métis Nation of Ontario and Métis Nation of Alberta).

<sup>71</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Federation of Canadian Municipalities).

<sup>72</sup> At the Court of Appeal, the Federation also proposed that the Court develop a new justificatory standard where a law offends an unwritten constitutional principle, much like the Supreme Court has done under section 35 (Aboriginal and Treaty rights): see *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 (Factum of the Intervenor – Canadian Federation of Municipalities). This point is not raised in the Federation’s application for leave to intervene.

<sup>73</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Art Eggleton, Barbara Hall, David Miller and John Sewell).

## 1. THE ATTORNEY GENERAL OF ONTARIO

The AGO has made three key arguments about the application of the *Charter* to this case.<sup>74</sup> First, section 2(b) does not protect against “mid-election interference”; there is no *Charter* right to a mid-campaign *status quo* or any particular ward model.<sup>75</sup> Section 2(b) protects meaningful *freedom* of expression, not meaningful *expression*; there is no guaranteed protection of expression that is effective in achieving its objective. The AGO argues that the City really seeks protection for a particular platform for expression and not freedom from interference with expressive activity. This is actually a positive rights claim but does not meet the test for such a claim from *Baier*.

Second, the AGO argues that the *Charter*’s protection of “effective representation” under section 3 cannot be imported into section 2(b) for municipal government.<sup>76</sup> Section 3 applies only to provincial and federal elections. Reading in such a right would create a third order of government and rewrite the constitution. However, even under the effective representation standard, there is no prescribed maximum constituent-councillor ratio. As such, Justice Belobaba effectively constitutionalized the so-called “ombudsman” role of municipal councillors to deal with constituent complaints about City services—a facet of municipal governance that is simply not protected by the *Charter*.

Finally, unwritten constitutional principles of democracy or the rule of law do not support the invalidation of Bill 5.<sup>77</sup> While unwritten principles may occasionally be used as an interpretive aid to fill a true gap in the written text of the constitution, where there is no such gap, they cannot be used to rewrite the text. If unwritten principles are used to invalidate legislation, there would be no opportunity to justify state action under section 1 of the *Charter* as there is with other rights, which would be contrary to the overall constitutional architecture. Furthermore, democracy and the rule of law were respected in this case under the doctrine of parliamentary sovereignty. The Legislative Assembly, and not City Council, is the democratically elected constitutional body with authority over municipalities. The rule of law as applicable to the legislative branch means only that the legislature must comply with legislated requirements as to manner and form.

Although it was ultimately not necessary to the Court of Appeal’s conclusion, the AGO also argued there that if a *Charter* infringement was found, it was nonetheless justified under section 1.<sup>78</sup> Justice Belobaba erred in finding that the objectives of improving City Council efficiency and improving voter parity were not pressing and substantial. Since the 47-ward model would not have achieved the Legislature’s objectives, the Province was under no obligation to adopt it in order to satisfy the minimal impairment branch. The City’s post-election changes to Council governance and councillor resources demonstrated that the change did not jeopardize the councillor ombudsman role. Adopting the federal election boundaries achieved voter parity in 2018, rather than by 2026, as would have been the case under the 47-ward model.

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<sup>74</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument of the Respondent – Attorney General of Ontario) [MOA (Ontario)].

<sup>75</sup> *Ibid* at paras 47–53.

<sup>76</sup> *Ibid* at paras 56–60.

<sup>77</sup> *Ibid* at paras 61–65.

<sup>78</sup> *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 (Factum of the Appellant – Attorney General of Ontario) at paras 92–100.

The Court has also granted the AGO's motion to adduce new evidence regarding the interpretation of Bill 5.<sup>79</sup> This means the appeal will be decided on a broader evidentiary record—including post-election evidence—than that considered by the courts below.

## 2. THE ONTARIO-ALIGNED INTERVENORS

The Canadian Constitution Foundation also reiterates its arguments on constitutional interpretation from the Court of Appeal.<sup>80</sup> First, the Court should focus on identifying the scope of a particular *Charter* right through textual interpretation to determine what it does and does not cover, rather than relying too heavily on the section 1 justificatory stage. Second, unwritten constitutional principles cannot be used to expand the scope of *Charter* rights. In other words, purposive interpretation should be an exercise in identifying a right's ambit, beginning with the text rather than "judicial elaborations" through the case law (or unwritten principles), in order to determine what is excluded from coverage. Courts' preference for relying on the inherently more subjective section 1 analysis opens the door to judicial discretion and, while taking a broad view of rights at the outset, ultimately makes their guarantee less certain across cases. It does not appear that the Court of Appeal paid much attention to this urged interpretive approach.

It is not yet certain what arguments will be raised by the Attorneys General of Canada and British Columbia. However, it is expected that they will intervene primarily or exclusively on matters of *Charter* interpretation. For example, the federal government may argue that section 3 of the *Charter* should not be used to interpret section 2(b), which would be consistent with their position in other cases.<sup>81</sup> Similarly, British Columbia may address whether unwritten constitutional principles can constrain the interpretation of section 92(8) of the *Constitution Act, 1867*. Both may argue, like the AGO, that unwritten constitutional principles do not have freestanding force to invalidate duly passed legislation.

## II. OTHER THEORIES ON THE CONSTITUTIONAL STATUS OF MUNICIPALITIES

This summary of the positions and arguments reflects what the parties have crafted as answerable questions for the Court. There are other theories of the case—or more generally, proposed solutions to the constitutional conundrum of municipalities' exclusion from section 3 of the *Charter*. Before canvassing these arguments, we note that while the Supreme Court has commented on the non-application of section 3 to municipalities, the Court has never squarely addressed this question in the context of a municipal election based on a full record. Rather, the

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<sup>79</sup> See Supreme Court of Canada, "Decision on motion to adduce new evidence" (28 August 2020), online: <[www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38921](http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38921)> [perma.cc/7K2U-A5MP].

<sup>80</sup> *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) (Memorandum of Argument on Motion for Leave to Intervene – Canadian Constitution Foundation). The CCF now points to the methodology endorsed in the recent case of *Quebec (Attorney General) v 9147-0732 Québec Inc.*, 2020 SCC 32.

<sup>81</sup> See e.g. *Haig v Canada*, [1993] 2 SCR 995; *Harper v Canada (Attorney General)*, 2004 SCC 33; *Baier*, *supra* note 20.

Court's substantive cases on delegated electoral frameworks address referenda (*Haig*) and school board elections (*Baier*).<sup>82</sup>

## A. "READING IN"

Perhaps the most direct proposal comes from Colin Feasby, who has argued that the gap in constitutional protection of municipal democratic rights should be filled by "reading in" municipalities to section 3 of the *Charter*.<sup>83</sup> He begins from the proposition that the Court's section 3 jurisprudence has made elections more fair and democratic, while electoral processes outside of its ambit—referenda, band council elections, municipal elections, school board elections—are often equally if not more important to Canadians. Furthermore, the Supreme Court has interpreted section 3 as more than merely a formal right to cast a ballot or stand for election. For example, in provincial and federal elections, section 3 includes the right to effective representation<sup>84</sup> and meaningful participation.<sup>85</sup> Here, Feasby adopts Yasmin Dawood's conceptualization of democratic rights as "structural rights."<sup>86</sup> These entitlements, such as the right to vote or to stand for election, are defined largely by their institutional context; they cannot be properly understood without reference to the institutional framework of elections and the structure of our political system. Professor Dawood has argued that the Supreme Court's recognition of a "bundle" of democratic rights enables it to play a regulatory or supervisory role in the democratic process—particularly to avoid and remedy partisan self-dealing by those elected representatives who set electoral rules.

Against this backdrop, Feasby suggests that an overly narrow approach to interpreting section 3 has deprived courts of the tools to regulate the democratic process outside of federal and provincial elections. He suggests that rather than this narrow approach (which has prompted attempts to fit democratic rights under section 2(b)), the Court should establish a new rule: "Where a government, Federal or Provincial, delegates a legislative role to a democratically chosen body or where a government, Federal or Provincial, effectively delegates a decision to the electorate in a referendum, section 3 of the Charter applies." In other words, when a legislature delegates law-making to a democratically elected body (as opposed to some other kind of administrative body), section 3 protections for democratic processes should follow. Otherwise, a legislative body governed by section 3 can delegate its power to an elected body chosen by electors with lesser constitutional protections. He notes that this is consistent with the constitutional principle of democracy, the intuition of Justice Belobaba in *City of Toronto* and other SCC jurisprudence, and Canada's commitments under Article 25 of the International Covenant on Civil and Political Rights (which is analogous to section 3 but without limits based on level of government).

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<sup>82</sup> In a municipal amalgamation case, *Sinclair v Quebec (Attorney General)*, 1991 CanLII 36 (SCC), [1991] 3 SCR 134, the section 3 issue was dismissed orally (the court delivered written reasons on a separate official languages issue). For a discussion, see Alexandra Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019) 56:2 Osgoode Hall LJ 271.

<sup>83</sup> See Colin Feasby, "City of Toronto v Ontario and Fixing the Problem with Section 3 of the Charter," *Ablawg* (28 September 2018), online: <[ablawg.ca/2018/09/28/city-of-toronto-v-ontario-and-fixing-the-problem-with-section-3-of-the-charter/](http://ablawg.ca/2018/09/28/city-of-toronto-v-ontario-and-fixing-the-problem-with-section-3-of-the-charter/)> [perma.cc/JH8W-8EF8].

<sup>84</sup> *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 SCR 158 [*Saskatchewan Boundaries Reference*].

<sup>85</sup> *Figueroa v Canada (Attorney General)*, 2003 SCC 37.

<sup>86</sup> See Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 UTLJ 499; Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights Under the Charter" (2013) 51 Osgoode Hall LJ 251.



Bruce Ryder has expressed a similar argument.<sup>87</sup> He suggests that bodies delegating their law-making powers under section 91 or 92 of the *Constitution Act, 1867* must do so through a fair electoral process that complies with section 3 of the *Charter*. This would prevent provincial legislatures from circumventing the Constitution through delegation. Ryder has further noted that Feasby's argument resonates with comments made by Justice La Forest in *Godbout v Longueuil (City)*:<sup>88</sup>

The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves “matters within the authority” of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are – as a simple matter of fact – governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.

There are echoes of this theory in the proposed submissions of several intervenors. For example, the International Commission of Jurists (Canada) asks the Court to effectively read in constitutional protection for municipalities via the “gap-filling” role of the unwritten principle of democracy. In the Commission's submission, however, this protection would be limited to ensuring non-interference in an ongoing electoral process. The Mayors' group also argues for recognition of municipalities as an independent order of government with effective autonomy over local decision-making.

## B. “MANNER AND FORM” CONSTRAINTS

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<sup>87</sup> See Bruce Ryder, “Bill 5, the so-called ‘Better Local Government Act, 2018’...” (30 July 2018), online: *Twitter* <twitter.com/BBRyder/status/1024043534683398149>; Bruce Ryder, “Thoughtful piece by @ColinFeasby...” (28 September 2018), online: *Twitter* <twitter.com/BBRyder/status/1045745151342247936> [perma.cc/9F7G-PCG9].

<sup>88</sup> 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at para 48.

Craig Scott has suggested that “manner and form” limits on amending the *City of Toronto Act, 2006* were not observed in the enactment of Bill 5.<sup>89</sup> This principle is “a little-discussed doctrine of Westminster constitutionalism” that operates to place legislative constraints on parliamentary supremacy.<sup>90</sup> Manner and form refers to a statutory requirement that one legislature seeks to impose on future legislatures in the form of either preconditions to inhibit, or permissions to facilitate, the enactment, amendment, or repeal of certain statutes. For example, a government might be required by statute to conduct a public consultation and table a report in the legislature before re-enacting a piece of legislation with a sunset clause. This can be circumvented through a two-step process during a legislative sitting that, first, repeals the manner and form rule(s) and, second, enacts the substantive statutory amendment or repeal. However, Scott and others have speculated that, if a legislature made a manner and form rule itself subject to a manner and form requirement, this might foreclose the two-step option for amendment or repeal.<sup>91</sup>

Scott notes that the pre-Bill 5 *City of Toronto Act, 2006* contained a kind of manner and form rule, the purpose of which was to prevent amendments to City Council composition in an election year. The *Act* had a primacy clause that made the City’s bylaws on Council composition superior to other provincial law.<sup>92</sup> Section 135(4) further provided that if such a bylaw was passed in the year of a regular election and before voting day, it would not come into force until after the second regular election following the passage of the bylaw (*i.e.*, not until 2022 in the context of Bill 5). Scott argued that in light of the constitutional principles of democracy and the rule of law, section 135(4) should be read as constitutionally barring the amendment of Council composition rules if the amendment is intended to affect an election in the same year as its enactment.<sup>93</sup> For its part, the Attorney General of Ontario has argued that any manner and form requirements were respected.<sup>94</sup>

### C. UNCONSTITUTIONAL WARD BOUNDARIES

Finally, Michael Pal has argued that the new City ward boundaries, which are the same as those used in federal and provincial elections, are themselves unconstitutional because they fail to

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<sup>89</sup> See Craig Scott, “Why fundamental constitutional principles should prevent Ontario from interfering with Toronto’s election,” *The Star* (2 August 2018), online: <[www.thestar.com/opinion/contributors/2018/08/02/why-fundamental-constitutional-principles-should-prevent-ontario-from-interfering-with-torontos-election.html](http://www.thestar.com/opinion/contributors/2018/08/02/why-fundamental-constitutional-principles-should-prevent-ontario-from-interfering-with-torontos-election.html)> [perma.cc/SYT7-9SZ5].

<sup>90</sup> See Craig Scott, “Consultation, Cooperation and Consent in the Commons’ Court: ‘Manner and Form’ After Mikisew Cree II” (2019) 94 SCLR (2nd) 155. This is a limited exception to the general principle that a current legislature cannot bind a future legislature.

<sup>91</sup> See *e.g.* Peter W Hogg, *Constitutional Law of Canada: 2016 Student Edition* (Toronto: Thomson Reuters, 2016) at 12–18; Kristin R Good, “The Fallacy of the ‘Creatures of the Province Doctrine’: Recognizing and Protecting Municipalities’ Constitutional Status,” Institute on Municipal Finance and Governance (IMFG Papers on Municipal Finance and Governance, No 46, 2019) at 20–27. This would effectively be a way to “constitutionalize” the rule.

<sup>92</sup> *COTA*, *supra* note 1, s 135(2) as it appeared on 13 August 2018.

<sup>93</sup> Scott argues that the constitutional principle of democracy should apply to municipalities given that the Supreme Court found this includes “faith in social and political institutions which enhance the participation of individuals and groups in society” and is “fundamentally connected to substantive goals, most importantly, the promotion of self-government”: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 64.

<sup>94</sup> MOA (Ontario), *supra* note 74 at para 63.

provide effective representation under section 3 of the *Charter*.<sup>95</sup> The federal boundary commission that established these electoral ridings in 2013 did not prioritize representation by population or voter parity and accepted ridings with very different population numbers.<sup>96</sup> This resulted in significant discrepancies even within the same city. For example, in Toronto, according to 2016 census data, Don Valley East has approximately 95,000 residents, while Etobicoke Lakeshore has 129,000.<sup>97</sup> Canadian courts have often accepted large deviations from representation by population for rural and remote areas, for example in the *Saskatchewan Boundaries Reference*.<sup>98</sup> However, that was in 1991 in a geographically large province. Here, the significant variation within the same city dilutes the voting power of residents in larger ridings. It is also true of many ridings outside of the Greater Toronto Area. Thus, it is an open question whether a court today would find the current federal-provincial riding map to be constitutional under section 3. A successful challenge to these districts would not technically prevent their use municipally, but it is unlikely that they would still be used for the City of Toronto if found unconstitutional for federal elections. While section 3 may not directly apply to municipal elections, it applies to the ward map now in place in Toronto. Thus, any change to the federal-provincial map would at the very least have an indirect, political effect on municipal wards.

### III. CONTRIBUTIONS TO THE SPECIAL ISSUE

This special volume places Bill 5 and these constitutional theories in their wider historical, social, and political context. Several of these contributions were originally presented at a workshop on “The legal and political status of local democracy in Canada,” hosted by the Centre for Criminology and Sociolegal Studies at the University of Toronto on 27 September 2019. This session brought together lawyers and academics to discuss the constitutional role of municipalities and municipal democracy in Canada. This special volume continues that discussion by bringing together contributions from scholars and community members whose lives and work have been affected by Bill 5 or who have engaged with wider debates on municipal democracy.

Mariana Valverde opens the volume by looking beyond the standard account of how municipal government developed in Ontario (*i.e.*, the slow incorporation of cities and towns and incremental expansion of local democracy over the nineteenth and twentieth centuries). Instead, she uncovers the complex, multiplayer games of jurisdiction that actually characterize local government on-the-ground. Like in the First Nations context, Valverde argues that jurisdictional disputes are not based on zero-sum assertions of sovereignty so much as dynamic efforts to claim, negotiate, expand, and even disavow power in particular contexts. She then reviews the history of municipal structures in Ontario, tracing provincial efforts to systematize and curtail the powers of local governments. In contrast, federal interventions have skirted the “creatures of the province” doctrine without explicitly challenging it. Valverde’s review supports the conclusion that municipal incorporation was invented not to empower citizens but rather to further colonial administrative aims. At the same time, the monopolization of political and legal power by the two

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<sup>95</sup> Michael Pal, “The new City boundaries are the same as those used for provincial + federal elections...” (15 August 2018), online: *Twitter* <[twitter.com/mikepalcanada/status/1029785982948790272](https://twitter.com/mikepalcanada/status/1029785982948790272)> [perma.cc/8QDA-VB5S]. See also Pal, “The Unwritten Principle of Democracy”, *supra* note 69 at 297.

<sup>96</sup> See Michael Pal, “The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts” (2015) 61:2 McGill LJ 231 at 255–58.

<sup>97</sup> See City of Toronto, “Ward Profiles,” online: <[www.toronto.ca/city-government/data-research-maps/neighbourhoods-communities/ward-profiles/](http://www.toronto.ca/city-government/data-research-maps/neighbourhoods-communities/ward-profiles/)> [perma.cc/6KAU-TRN4].

<sup>98</sup> *Saskatchewan Boundaries Reference*, *supra* note 84.

Crowns has always been more of an aspirational claim than a reality, with jurisdictional games often leading to unpredictable results. Constitutional arguments should therefore be supplemented by evidence about actual practices of local democracy.

Beginning with the same legal fiction—that municipalities are “creatures of provincial statute”—Nathalie DesRosiers considers the degree of deference that courts should give to rights-infringing legislative enactments. After surveying the case law and commentary on deference generally, DesRosiers questions the judicial approach to deference where democratic rights are affected. She argues that courts should be less deferential where core democratic rights are attenuated and sets out a six-point framework to guide the analysis in such cases. DesRosiers then applies this analytical framework to the enactment of Bill 5. She finds that the legislative debate surrounding the passing of Bill 5 focused on the question of whether the government had a political mandate (having failed to campaign on the issue), but also included debate on expertise, elector and candidate rights, failure to consult, proper procedure, and finally, partisan motives. Her analysis leads to the conclusion that the legislative process did not meet the standards of conduct required when altering democratic rights (focus, deliberation, and participation) that justify deference from courts. Finally, she situates this conclusion within the wider dialogue between the courts and legislatures.

Kate Glover Berger examines similar issues through the lens of judicial review. She focuses on the new approach to judicial review from *Canada v Vavilov*, decided by the Supreme Court of Canada in 2019. Berger considers the implications of an inconsistency between legislation and underlying unwritten constitutional principles as well as the significance of institutional design to understanding the role, relationships, and reform of public actors. Central to her discussion is the concept of “structural constitutionalism”: the relationships between the judiciary, administrative state, executive, legislatures, and the public that are at issue, expressly or implicitly, in all cases of judicial review. She argues that when the Supreme Court took on the task of reframing judicial review in *Vavilov*, it should have drawn more heavily on insights from architectural features of the constitution (structural constitutionalism) and from the relationship between administrative decision-making and constitutional interpretation (administrative constitutionalism). Taking Bill 5 as a case study, this approach would have promoted the development of a consistent vision of the grand constitutional order across constitutional and administrative law.

Benoît Fraite and David Robitaille shift the discussion away from the City of Toronto to trans-border issues that affect municipalities more broadly. Their case study looks at proposals for oil and gas pipelines that cross municipal boundaries. The authors begin by tracing some of the contours of expanded municipal powers (developed through provincial legislative acts, and in particular, by denoting “spheres of jurisdiction”) during the 1990s and 2000s, trends which, the authors suggest, responded to the emerging needs of cities. This statutory expansion was also reflected in judicial decision-making. The discussion then turns to the applicability of municipal ordinance in areas of federal jurisdiction—such as inter-provincial pipelines—and notes that courts have slowly found that municipal ordinance will apply in federal jurisdictions unless there is an irreconcilable conflict. The authors argue that there are effectively four coordinate (*i.e.*, non-subordinated) jurisdictions at play—federal, provincial, Aboriginal, and municipal—and that they should be treated as such notwithstanding the otherwise subordinate nature of municipal jurisdiction.

Alexandra Flynn examines the interaction of municipal democracy (and its debates) with Aboriginal title and Indigenous rights. Flynn notes that about half of all Indigenous people in

Canada live in cities, and many First Nations have treaty and land interests both within and adjacent to cities. Given protections under section 35 of the *Constitution Act, 1982*, any reform of municipal governance is likely to affect these rights and interests. Flynn provides an assessment of issues and options that allow cities to more effectively regulate themselves (and all municipal authority), namely constitutional amendment, legislative enactment, or judicial decision-making, as well as some international comparisons. She goes on to note that there is not yet an independent duty for municipalities to consult Indigenous peoples and communities despite the effects of municipal decision-making on their rights and interests. Notwithstanding this lack of protection, Flynn describes some of the current initiatives in Toronto to integrate Indigenous representation and voice in municipal institutions. Flynn argues that the use of section 43 of the *Constitution Act, 1982* (the legal avenue proposed by John Sewell in this volume) and other mechanisms to bolster municipal authority must include consideration of Aboriginal and Treaty rights and the interests of urban Indigenous peoples.

In the Voices and Perspectives section of the volume, Prabha Khosla and Melissa Wong offer a behind-the-scenes look at the 2018 Toronto municipal election before and after Bill 5. Khosla and Wong worked with Women Win Toronto (WWTO), a program initiated by a group of experienced women political campaigners. Khosla and Wong tell the story of WWTO through some of its members and their campaigns in the 2018 election—or at least, those that were developed until Bill 5 was enacted. Khosla and Wong provide an on-the-ground description of how candidates organize to run for municipal office, as well as the barriers that women and racialized candidates face against predominantly white and male incumbents. The Toronto Ward Boundary Review process that preceded the 2018 election increased the number of wards in part to assist with opening up new opportunities for traditionally excluded candidates. As Khosla and Wong report, many women and racialized candidates spent over a year building their campaigns in anticipation of the first election under this new ward model. A significant part of the planning and resources that went into those campaigns was rendered useless or irrelevant by Bill 5. They conclude their piece with recommendations for ensuring City Council better reflects the City's diverse population.

In the final contribution to the special volume, John Sewell explores one possibility for legally cementing municipalities as an order of government: a proposed “Charter City” of Toronto with constitutional protection for a defined jurisdiction. The proposal is not new: as Valverde discusses in her essay, proposals for city “charters” date back to at least the 1880s in Ontario. Sewell makes the case for a degree of autonomous local government in Toronto based on the radical change in population demographics since Confederation and the political manipulation of local affairs by provincial governments. He then outlines the process for approving a charter city under section 43 of the *Constitution Act, 1982*. Sewell introduces the specific charter proposal for Toronto, which would include jurisdiction over land-use planning, housing, roads, health, and education, and shared jurisdiction over social services, migration and settlement services, and policing. Fiscally, the City would have full control over property taxation and shared (but guaranteed) access to a portion of income and excise taxes. In sum, Toronto would be a constitutionally protected order of government, with its own jurisdiction to legislate and tax.