Our Constitution's "Most Basic Normative Commitments"? Unwritten Constitutional Principles, Municipal Elections, and Democracy

This is the second of two articles on the Supreme Court of Canada's judgment in *Toronto (City) v Ontario (Attorney General)*.[1] In the first article, I focused on the City of Toronto's claim that Ontario's *Better Local Government Act*, which restructured Toronto City Council in the middle of a municipal election, violated the *Canadian Charter of Rights and Freedoms*. In this article, I consider a second, arguably more ambitious claim made by the City: namely, that restructuring the Council mid-election violated the *unwritten* constitutional principle of democracy. As this article will explain, addressing this claim required the Court to mull over fundamental questions about the nature of the constitutional order, the role of unwritten principles within it, and the powers of the courts as the Constitution's guardians.

What Are Unwritten Constitutional Principles?

Unwritten constitutional principles are "foundational"[2] parts of the Canadian Constitution that are not explicitly laid out in any constitutional text, e.g. the *Constitution Act, 1867*. As the Supreme Court wrote in the *Reference re Secession of Quebec*, these principles are the "vital unstated assumptions upon which the text [of the Constitution] is based."[3] For example, the division of legislative power between the federal and provincial governments laid out in sections 91 and 92 of the *Constitution Act, 1867* infuses the Canadian Constitution with a foundational commitment to federalism — a commitment that is viewed as part of the Constitution in its own right as an unwritten principle.

What Was the City of Toronto's Argument?

In *Toronto v Ontario*, the City of Toronto argued that the sudden, mid-election changes that Ontario made to Toronto's ward boundaries were inconsistent with the unwritten principle of democracy — a principle that was notably affirmed by the Supreme Court in the *Quebec Secession Reference*. Even more importantly, the City argued that this inconsistency rendered the ward changes *invalid*, since section 52 of the *Constitution Act, 1982* specifies that laws that are inconsistent with the Constitution are "of no force or effect."

What Did the Court Say? The Meaning of "Full Legal Force and Effect"

In *Toronto v Ontario*, the Supreme Court recognized that the Constitution is composed of both written and unwritten norms, and that unwritten principles have "full legal force."[4] What, though, does it mean for unwritten principles to have "full legal force"? For the Court, unwritten principles do not have force in the same way that written "provisions" of the Constitution do, which means that their violation doesn't render a law invalid (as the City of Toronto suggested). Rather, according to the Court, unwritten principles have force in the sense that they help determine how the "Constitution's written terms — its *provisions* — are to be given effect."[5] Practically speaking, this means that unwritten principles can be used by the courts in two ways: 1) as an interpretive aid for better understanding the Constitution's written provisions, and 2) to develop doctrines that, while unstated, are necessary to give full effect to the Constitution's written provisions.[6]

Why, though, should unwritten principles be confined to this relatively minimal role? And why can they not be used to invalidate legislation?

The Court supplied several distinct answers to these questions. Firstly, the Court noted that unwritten principles are problematically "abstract," "nebulous," and open to interpretation.[7] As such, using them to invalidate democratic legislation would potentially undermine "'legal certainty and predictability' in the exercise of judicial review,"[8] and depart from or undermine choices that were consciously made by the Constitution's framers (such as the choice not to protect the right to vote in municipal elections).[9] As the Court put it: "[i]t is not for the Court to do by 'interpretation' what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment."[10]

The Court also noted that using unwritten principles to invalidate legislation runs into two problems in relation to the *Charter of Rights and Freedoms*:

1. Section 33 of the *Charter* (the "notwithstanding clause") provides legislatures with a way to override certain *Charter* rights. However, if courts started using unwritten principles to invalidate legislation, this could effectively render section 33 meaningless, since section 33 only allows for the override of certain rights — *not* the unwritten principles that underpin those rights.[11]

2. Section 1 of the *Charter* allows for justifiable limits on rights that are laid out in the *Charter*. However, given that unwritten principles are not laid out in the *Charter*, their violation would accordingly not be justifiable under section 1. This would mean, as the Court wrote, that the state would have "no corresponding justificatory mechanism"[12] that would shield "pressing and substantial" laws that contravene unwritten principles from invalidation.

For all of these reasons, the Court rejected the City of Toronto's claim that the violation of an unwritten principle would allow a court to invalidate an otherwise valid law. Unwritten principles are a key component of Canadian constitutional law, the Court said; but their

legal effect is far less direct or consequential than the City had claimed.

The Principle of Democracy and the Case at Hand

Having offered clear commentary on the role that unwritten constitutional principles play in Canadian constitutional law, the Court then turned to the question of the specific role played by the democracy principle in the case at hand. To this end, the Court began by affirming the principle of democracy as a core unwritten principle of Canada's Constitution which encompasses both the processes and substantive goals of self-government. However, despite this affirmation, the Court was equally clear that this principle, like other unwritten principles, "cannot be used as an independent basis to invalidate legislation."[13] The Court then addressed the question of how this principle of democracy interacts with other relevant constitutional provisions: namely, sections 92(8) of the *Constitution Act, 1867* and section 3 of the *Charter.*

Section 92(8) gives provinces authority to legislate in regards to municipal affairs, and the Court noted that it had previously found that this authority is "absolute and unfettered," subject only to the *Charter*.[14] Moreover, the Court noted that a number of unwritten principles — including the rule of law, constitutionalism, and the democracy principle itself — actually serve as strong arguments for upholding the *Better Local Government Act*, given that this *Act* was passed by a duly elected government in compliance with written constitutional law.[15]

As mentioned in the first article in this series, section 3 of the *Charter* lays out democratic rights, giving all Canadians the right to vote for representatives of federal and provincial legislative bodies. Addressing the argument that the principle of democracy added an implied right to municipal representation to this section, the Supreme Court claimed that there is no textual basis for this conclusion. If anything, the Court said, the explicit omission of municipalities from section 3 of the *Charter* indicates a deliberate choice, on the part of the *Charter's* framers, to not confer any form of protected constitutional status on municipalities. Thus, to "read in" a constitutional right to municipal representation would not be a case of interpreting the Constitution, but rather amending it by giving new constitutional status to a third order of government.[16]

Moving Forward: Unwritten Principles and the Constitutional Status of Municipalities

Justice Abella, writing for the dissent, argued that constitutional texts emanate from (but are not exhaustive of) underlying unwritten principles, which in turn are the "Constitution's most basic normative commitments."[17] As such, the dissent rejects the notion that these unwritten principles exist primarily to fill structural gaps in written texts and as aids to the interpretation of written constitutional provisions. Rather, for Justice Abella, unwritten principles exist independently of written constitutional provisions, and may even predate them. She accordingly suggests that the "full legal force and effect" of unwritten principles means that, like written constitutional texts, they can render inconsistent laws invalid. In

other words, Abella regards a violation of an unwritten principle as an independent ground for declaring the violating law invalid — even if no written provision of the Constitution has been violated.[18]

Conclusion: A Divided Court, an Uncertain Future

While the Court's ruling might make it seem like the role of unwritten principles is now somewhat settled, it is interesting to note one important caveat: the Court's openness on the role that could be played by the unwritten principle of the honour of the Crown in Aboriginal law.[19] While the Court did not say that this unwritten principle can be invoked on its own invalidate legislation, it did explicitly leave open this possibility, thereby leaving ample room for the debate over the role of unwritten principles to continue in the future.

More generally, though, the sharp split between the 5-judge majority and the 4-judge dissent suggests that the role of unwritten principles (and the role of the judges who enforce them) is in fact far from legally settled. As the Court's composition gradually changes over time, it is possible that the *Toronto* majority will either solidify or dissolve. This is particularly true in light of the increasing usage of the notwithstanding clause, since using unwritten principles (and unwritten rights) as grounds for judicial invalidation is one way of potentially taming the notwithstanding clause and inhibiting its most damaging effects.[20] For now, though, the role of unwritten principles has been constrained, and it remains to be seen if the radically different route offered by the dissent could open up in the future.

[1] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*Toronto v Ontario*]

[2] *Ibid* at para 49.

[3] *Reference re Secession of Quebec*, 1982 2 SCR 217 at para 49.

[4] *Toronto v Ontario*, *supra* note 1 at para 49.

[5] *Ibid* at para 54.

[6] *Ibid* at paras 55-56.

[7] *Ibid* at para 59.

[8] *Ibid* at para 59.

[9] *Ibid* at paras 59 & 82.

[10] *Ibid* at para 82.

[11] *Ibid* at para 60.

[12] *Ibid* at para 60.

[13] *Ibid* at para 78.

[14] *Ibid* at para 79.

[15] *Ibid* at paras 79-80.

[16] *Ibid* at paras 81-82.

[17] *Ibid* at para 168.

[18] *Ibid* at para 169.

[19] *Ibid* at para 62.

[20] For example, see Kristopher Kinsinger, "Can the Notwithstanding Clause Be Used to Violate Pre-existing Rights?", *The National Post* (5 May 2021), online: <https://nationalpost.com/opinion/kristopher-kinsinger-can-the-notwithstanding-clause-be-used-to-violate-pre-existing-rights>.