Constitutional forum constitutionnel

The 2018 Toronto Municipal Election: Judicial Failure to Protect the Structure of the Canadian Constitution

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Introduction

In *Toronto (City) v Ontario (AG)*,[1] a recent decision on the legality of legislative interference in the Toronto 2018 municipal election, the Ontario Court of Appeal makes an alarming attempt to rewrite the Canadian Constitution. The subject of this revision is the legitimate role of unwritten principles in constitutional interpretation. Robin Elliot maintains, in a leading scholarly treatment of the subject, that unwritten principles can inform constitutional interpretation in two main ways: first, they can provide an independent basis on which to overrule impugned legislation; second, they can assist in interpreting constitutional text.[2] Elliot qualifies the former usage by limiting it to those principles that "can fairly be said to arise by necessary implication from provisions of the text of the Constitution … since they have the same legal status as the text."[3] The Court of Appeal, however, states that unwritten principles cannot be used as a stand-alone basis on which to overrule legislation.[4]

In this article, I draw on numerous Supreme Court of Canada decisions to argue that the Ontario Court of Appeal's view of the Constitution is, with respect, fundamentally flawed.

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1 2019 ONCA 732 [*Toronto v Ontario* (CA 2019)].

2 "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67 at 83-86, 141-42, and generally 86-98.

3 *Ibid* at 95. See also 83-84.

4 *Toronto v Ontario* (CA 2019), *supra* note 1 at para 89.

Unwritten principles inform the structure of a democratic constitution and thereby provide legislation with its claim to legitimacy. Legislation that violates foundational unwritten principles is, of necessity, subject to judicial challenge. I also argue that the Court of Appeal's doctrinally unsustainable approach to unwritten principles led to a flawed ruling on the legality of Ontario's interference in the 2018 Toronto election. In *Reference re Senate Reform*, the Supreme Court of Canada unanimously states that "constitutional interpretation must be informed by the foundational principles of the Constitution."[5] The Court of Appeal failed to provide any detailed consideration of the democratic principle, and thereby failed to recognize the constitutional imperative that protects the integrity of the electoral process.

1. Background

In the *Better Local Government Act, 2018*,[6] a newly elected Ontario government made fundamental changes to a municipal election underway in the City of Toronto. Pursuant to legislation already in force, the 2018 Toronto election began on May 1, with nomination day set for the fourth Friday in July and voting day set for the fourth Monday in October.[7] The *Local Government Act*, which became law on August 14, 2018, reduced the number of wards from 47 to 25, thereby increasing the population of the wards from approximately 61,000 to 111,000.[8] Election timelines were altered to accommodate the change in ward size.[9] On an emergency application by the City and some candidates, the Ontario Superior Court found, on September 10, 2018, that the legislated changes violated section 2(b) of the *Canadian Charter of Rights and Freedoms*[10] by unreasonably interfering with the freedom of expression of candidates and voters.[11]

The Ontario Court of Appeal shortly thereafter stayed the ruling of the Superior Court, holding unanimously that there was a "strong likelihood that application judge erred in law and that the Attorney General's appeal to this court will succeed."[12] The 2018 stay decision effectively decided the course of the Toronto election, which proceeded on the altered basis set out in the *Local Government Act*. In its 2019 decision on the merits of the case, the Court of Appeal divided 3-2, with the majority holding that the Application Judge erred in his ruling on the *Charter* violation. The dissenting Justices, on the other hand, found that the impugned legislation violated the section 2(b) rights of the candidates who stood for election. The dissenting Justices did not accept the Superior Court's ruling on the section 2(b) rights of voters.[13]

While unwritten principles arguments — centering on the democratic principle and the rule of law — were raised at each stage of the litigation, the Superior Court and the Court

5 2014 SCC 32 at para 25 [*Senate Reference*].
6 SO 2018, c 11 [*Local Government Act*].
7 *Municipal Elections Act, 1996*, SO 1996, c 32, Schedule, ss 5, 31, 33(4).
8 *Toronto v Ontario* (CA 2019), *supra* note 1 at paras 14-15, 18.
9 *Local Government Act*, *supra* note 6, Schedule 3, s 1.
10 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
11 *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151 [*Toronto v Ontario* (SC)].
12 *Toronto (City) v Ontario (AG)*, 2018 ONCA 761 at para 11 [*Toronto v Ontario* (CA 2018)].
13 *Toronto v Ontario* (CA 2019), *supra* note 1 at paras 99-100.

of Appeal on the stay motion rejected these claims without any analysis.[14] The majority of the Court of Appeal in its 2019 ruling considered and rejected, as a matter of law, the use of unwritten principles as a stand-alone basis to invalidate legislation.[15] The majority accepted that unwritten principles can be used as aids in the interpretation of constitutional texts, but found in a brief analysis that the *Local Government Act* could not be assailed on this basis.[16] The dissenting Justices, for their part, stated briefly that unwritten principles could not be used either alone or in combination with the *Constitution Act, 1867*[17] to invalidate the *Local Government Act*.[18] The dissenting Justices did not extend the former finding to a general statement on the permissible scope of constitutional interpretation.

2. Unwritten Principles and Legislative Sovereignty: Conflicting Views from the Ontario Court of Appeal and the Supreme Court of Canada

The subject of the place of unwritten principles in a democratic constitution has generated considerable debate amongst commentators. The Court of Appeal in *Toronto v Ontario* acknowledges this point, and cites Mark Walters and Jeffrey Goldsworthy as examples of widely diverging views.[19] But scholarly debate is not the same as doctrinal debate, and the Court of Appeal is on shaky ground when it invokes Walters and Goldsworthy without acknowledging that the Supreme Court of Canada expressly endorses Walters' views in the *Senate Reference*.[20] In a passage pinpointed in the *Senate Reference*, Professor Walters observes of the Constitution that:

> The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from the single underlying foundation. The constitutional text is not just supplemented by unwritten principles; it rests upon them.[21]

This passage is part of a larger discussion detailing the theory of the Constitution that emerges in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*[22] and *Reference re Secession of Quebec*[23] — the Supreme Court of Canada's two leading decisions on unwritten principles. Both of these decisions, it is worth noting, are also expressly endorsed in the *Senate Reference*.[24]

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14 See *Toronto v Ontario* (SC), *supra* note 11 at paras 12-13; *Toronto v Ontario* (CA 2018), *supra* note 12 at para 4.

15 *Toronto v Ontario* (CA 2019), *supra* note 1 at paras 83-89.

16 *Ibid* at paras 90-95.

17 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

18 *Toronto v Ontario* (CA 2019), *supra* note 1 at para 99. The *Charter* analysis of the dissenting Justices is significantly buttressed at one point by reference to the democratic principle (*ibid* at para 123).

19 *Ibid* at para 84, citing Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 245; and Jeffrey Goldsworthy, "Unwritten Constitutional Principles" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 277.

20 *Senate Reference*, *supra* note 5 at para 26, citing Walters, *supra* note 19 at 264-65.

21 Walters, *supra* note 19 at 264-65.

22 [1997] 3 SCR 3, 120 DLR (4th) 449 [*Judges Reference*].

23 [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

24 *Senate Reference*, *supra* note 5 at paras 23-26.

In order for the Ontario Court of Appeal to advance a doctrinally cogent understanding of the role of unwritten principles in the Canadian Constitution, meaningful engagement with the *Secession Reference* and the *Judges Reference* is necessary. Such engagement, however, is not provided. The Court of Appeal quotes the *Secession Reference* to support the contention that unwritten principles cannot offer a stand-alone basis on which to impugn legislation: "There are, as the Supreme Court has said, 'compelling reasons to insist upon the primacy of our written constitution.'"[25] With respect, the quoted statement from the Supreme Court is embedded in a decision that is entirely predicated on the view that while texts "have a primary place in determining constitutional rules, they are not exhaustive."[26] The Court of Appeal cannot extricate one isolated fragment from the *Secession Reference* and offer it as evidence that Canadian constitutional law does not recognize the power of unwritten principles to challenge legislation.

The *Secession Reference* stresses that unwritten principles "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood,"[27] and moreover provides that:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force," as we described it in the *Patriation Reference* …), which constitute substantive limitations upon government action."[28]

The reference here to "substantive limitations upon government action" must be taken to include limitations on legislative power. This conclusion follows from the deliberate parenthetical reference to *Reference re Resolution to Amend the Constitution*, in which Justices Martland and Ritchie, speaking of "judicially developed legal principles and doctrines," maintain that "they have been accorded full legal force in the sense of being employed to strike down legislative enactments."[29] While Justices Martland and Ritchie wrote in dissent, their comments are adopted by the entire Court in the above passage from the *Secession Reference*: "as we described it."[30]

The Ontario Court of Appeal's handling of the *Judges Reference* is, if anything, even more problematic than the very selective quotation provided from the *Secession Reference*. In the *Judges Reference*, six out of seven members of the Court state in crystal clear language that unwritten sources of authority can overrule legislation:

> [P]olitical institutions are fundamental to the "basic structure of our Constitution" (*OPSEU* …) and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy.
>
> …

25 *Toronto v Ontario* (CA 2019), *supra* note 1 at para 87, quoting *Secession Reference*, *supra* note 23 at para 53.
26 *Secession Reference*, *supra* note 23 at para 32.
27 *Ibid* at para 51.
28 *Ibid* at para 54 [emphasis added].
29 [1981] 1 SCR 753 at 844-45, 125 DLR (3d) 1 [emphasis added].
30 The unanimous Supreme Court also endorses the comments of Justices Martland and Ritchie in *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 752, 19 DLR (4th) 1.

> [T]he same constitutional imperative — the preservation of the basic structure — which led Beetz J [in *OPSEU*] to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system.[31]

The proposition outlined here is that the "basic structure" of the Constitution gives rise to an "imperative" that can overrule legislation, and finds its source in the following passage from Justice Beetz's majority judgment in *OPSEU v Ontario (AG)*:

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff CJ in *Reference re Alberta Statutes*, … "such institutions derive their efficacy from the free public discussion of affairs…" and, in those of Abbott J in *Switzman v Elbling*, … neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate." Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.[32]

The underlined portion of this passage provides that legislative power does not extend so far as to undermine the political freedoms definitional to democracy. While it is of course true that section 2(b) of the *Charter* entrenches the political freedoms discussed by the Court in *OPSEU*, Justice Beetz's analysis is based on an extra-textual source of authority, that is, on "constitutional structure." This point is soon underlined by the statement that, "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them."[33]

The Ontario Court of Appeal in *Toronto v Ontario* ignores *OPSEU*, and passes over the majority judgment in the *Judges Reference* entirely, quoting instead Justice La Forest's lone dissenting opinion:

> As La Forest J wrote, "[t]he ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution." He concluded that judicial review "is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument" and "[t]his legitimacy is imperiled … when courts attempt to limit the power of legislatures without recourse to express textual authority."[34]

With respect, a dissenting judgment from the Supreme Court of Canada that runs directly counter to a position taken by the majority cannot be cited as doctrinal authority by a lower court. Together, the *Judges Reference* and *OPSEU* stand for the proposition that legislative power is limited by the pragmatic "structural" requirements of a democratic legal order. In *OPSEU*, the "structural imperative" endorsed by the Supreme Court concerns fundamental political freedoms, and arises from the democratic principle; in the *Judges Reference*, the

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31 *Judges Reference*, *supra* note 22 at paras 103, 108 [emphasis added].

32 [1987] 2 SCR 2 at 57, 41 DLR (4th) 1 [emphasis added] [*OPSEU*]. The internal quotations are cited to *Reference re Alberta Statutes*, [1938] SCR 100 at 133, 2 DLR 81; and *Switzman v Elbling*, [1957] SCR 285 at 328, 7 DLR (2d) 337.

33 *OPSEU*, *supra* note 32 at 57.

34 *Toronto v Ontario* (CA 2019), *supra* note 1 at para 87, quoting *Judges Reference*, *supra* note 22 at paras 314-16.

imperative concerns the status of the judiciary, and arises from the unwritten principles of judicial independence and the separation of powers.[35]

The Ontario Court of Appeal's view that legislation is not subject to strictures drawn directly from unwritten principles cannot survive the weight of the above authorities. *OPSEU*, the *Judges Reference*, the *Secession Reference*, and the *Senate Reference* all provide that the Canadian Constitution has "an internal architecture,"[36] and that, while texts "have a primary place in determining constitutional rules, they are not exhaustive."[37] The Constitution "embraces unwritten, as well as written rules,"[38] and "contain[s] a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government."[39]

Under the Canadian Constitution, the important point is not whether courts can use unwritten principles to overrule legislation, but rather when such extreme action is warranted. Here the authorities stress that a light and respectful touch is essential because legislative sovereignty is itself a foundational principle.[40] Expressions of democratic will should be questioned on the basis of unwritten sources of authority only when the structural coherence of the Constitution is implicated.[41] The proper task for the Court of Appeal in *Toronto v Ontario* was to consider the role of unwritten principles within the structure of the Constitution and assess the effect of the *Local Government Act* on that structure. That critical analysis was not provided by any of the Courts in the litigation surrounding the 2018 Toronto election.

3. The *Local Government Act*, the Democratic Principle, and the Integrity of the Electoral Process

As noted near the outset of this article, the Supreme Court has stated that "constitutional interpretation must be informed by the foundational principles of the Constitution."[42] The starting point for considering the constitutionality of the *Local Government Act* should be *OPSEU* and the democratic principle.[43] *OPSEU* provides that legislatures cannot interfere with political freedoms because such freedoms enable democracy and thereby secure the legitimacy of leg-

35 The Court declares in the *Judges Reference*, *supra* note 22 at para 138, that the structural imperatives of judicial independence "inhere … in a fundamental principle of the Canadian Constitution, the separation of powers."

36 *Secession Reference*, *supra* note 23 at para 50, citing *OPSEU*, *supra* note 32 at 57. See also *Judges Reference*, *supra* note 22 at para 108; *Senate Reference*, *supra* note 5 at para 26.

37 *Secession Reference*, *supra* note 23 at para 32.

38 *Judges Reference*, *supra* note 22 at para 92.

39 *Secession Reference*, *supra* note 23 as para 32.

40 See especially *Babcock v Canada (AG)*, 2002 SCC 3 at paras 54-55 [*Babcock*], where the Court reminds litigants attempting to challenge a provision in federal legislation that "[a]lthough the unwritten constitutional principles are capable of limiting government actions," such principles nevertheless "must be balanced against the principle of Parliamentary sovereignty."

41 As the Court points out in *Babcock*, *ibid* at para 57, "it is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government."

42 *Senate Reference*, *supra* note 5 at para 25.

43 As noted previously, the claimants in the litigation over the *Local Government Act* raised unwritten principles arguments based on both the democratic principle and the rule of law. My analysis is confined

islation itself. An enactment that substantially alters the rules governing an ongoing electoral contest falls directly in the path of the *OPSEU* proposition which, it must be remembered, is expressly endorsed and extended in the *Judges Reference*. The issue is not free expression, but rather the cogency of the electoral process itself.

The electoral process, like political freedom, allows democracy to function and gives lawmaking its legitimacy. The ordered procedures that govern elections are about as fundamental to the democratic principle as can be imagined. In the *Secession Reference*, the Supreme Court states that:

> [D]emocracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. … Put another way, a sovereign people exercises its right to self-government through the democratic process.[44]

The idea of "self-government" encapsulates the political and administrative structure of a democratic society: citizens govern themselves by making the rules by which they are bound. This is a circular framework, a point stressed by Jürgen Habermas when he observes that in a democratic society "citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."[45] What the Supreme Court refers to as the "democratic process" is the line that joins citizens in their mutually sustaining roles as "authors" and "addressees" of the law.

Maintaining the integrity of this line is of critical importance to the entire enterprise of "self-government," and must be subject to a "structural imperative" of the kind recognized in *OPSEU* and the *Judges Reference*. Indeed, in *Harper v Canada (AG)*, the Supreme Court observes that:

> Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R v Oakes*, … [1986] 1 SCR 103, at p 136, Dickson CJ concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives.[46]

"[C]onfidence" in the electoral process translates directly into "faith" in lawmakers. Lawmakers — for example, the elected members of Toronto City Council — make rules that bind electors.

The circular transaction of power definitional to the democratic principle, however, cannot proceed where there is instability or disorder in the electoral process that challenges full confidence in participatory mechanisms. Stability is "essential" to stimulate and nourish the

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to the democratic principle. The targeted nature of the legislation, however, raises at least the possibility of rule of law concerns. I leave this subject for another inquiry.

44 *Secession Reference*, *supra* note 23 at para 64 [emphasis added].

45 *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996) at 449. Habermas also observes that "[l]egitimate law closes the circle between the private autonomy of its addressees, who are treated equally, and the public autonomy of enfranchised citizens, who, as equally entitled authors of the legal order, must ultimately decide on the criteria of equal treatment" (*ibid* at 415).

46 2004 SCC 33 at para 103 [emphasis added] [*Harper*].

participatory nature of self-governance. Yet the uncontroverted evidentiary findings of the Ontario Superior Court lead to the conclusion that the *Local Government Act* seriously undermined the ordered processes structuring the 2018 Toronto election:

> The immediate impact of Bill 5 was wide-spread confusion and uncertainty. … There was uncertainty flowing from the court challenge, the possibility that the court challenge might succeed and the consequences for all concerned if this were to happen.
>
> The evidence is that the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues.[47]

These findings of fact, which are subject to deference, were not questioned by the Court of Appeal in either of its judgments. In the 2018 stay ruling, the Court of Appeal offered the following response to the Application Judge's findings, saying "[t]here was still considerable time from the date of Bill 5's passage until voting day. Election campaigns inherently involve moving targets and changing issues that require candidates to adjust as matters proceed."[48] In the circumstances, these comments are, with respect, surprisingly short-sighted. While elections are generally very dynamic and fluid, and often marked by great upheaval and chaos as the players jockey for positions on rapidly evolving issues, such fluidity must arise from within a given election contest, and according to the pre-established rules of that contest. The *Local Government Act*, on the other hand, introduced "wide-spread confusion and uncertainty" into the Toronto election from the outside. This unprecedented intrusion cannot be rationalized in the manner proposed by the Court of Appeal.

External interference in an electoral process is completely antithetical to the concept of "self-government" singled-out in the *Secession Reference* as the most important "substantive goal" served by the democratic principle. The interference caused by the *Local Government Act* ultimately threatened the stability of the line connecting citizens in their mutually sustaining roles as authors and addresses of the law. The possible effects on the quality and value of citizen "participation," and thus on citizen "faith" and "confidence" in the process and its outcome — all found to be "essential" in *Harper* — are incalculable.

Conclusion

The *Local Government Act* undermined the ordered process of the 2018 Toronto election, and thereby violated an essential condition of Canadian democracy. The Ontario Courts should have recognized that the legislation was unconstitutional on the basis of a "structural imperative" that electoral processes must be respected and cannot be undermined by mid-stream legislative action.

I conclude by addressing the question of the scope of legislative power over "Municipal Institutions in the Province" under section 92(8) of the *Constitution Act, 1867*. It is settled law that "[m]unicipalities are entirely the creatures of provincial statutes."[49] The Ontario legislature could have cancelled the 2018 Toronto election at any point, or even nullified the election

47 *Toronto v Ontario* (SC), *supra* note 11 at paras 30-31 [emphasis added].

48 *Toronto v Ontario* (CA 2018), *supra* note 12 at para 14.

49 *R v Greenbaum*, [1993] 1 SCR 674 at 687, 100 DLR (4th) 183. See also *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 at para 33.

returns the day after the election, without any violation of the democratic principle. Indeed, the Province could go even further and abolish the municipality of Toronto altogether at any point in time, again with no violation of the democratic principle. But the Province cannot interfere in the established process of selecting a functioning government. The democratic principle, and by extension, the "basic structure of our Constitution," will not tolerate interference with established electoral processes — federal, provincial, or municipal — once an election is underway if the results of the election are to give rise to a government capable of binding citizens through law.

If the Ontario government intended that a valid City Council would emerge from the 2018 Toronto election and have the authority to make laws binding on the citizens who voted in that election, then a democratic process was set in place and unwritten constitutional constraints on provincial legislative power were engaged. The citizens of Toronto have the constitutional right to be the authors and addressees of the laws made by their local representatives. This circular transaction of power can only proceed where the elector process is ordered and coherent.