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Supreme Court of Canada upholds reduction in size of Toronto City Council

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In Canada's recent federal election, voters demonstrated a passion for democracy and were willing to stand in long line-ups to exercise their right to vote. Candidates seeking office are also passionate about their ability to win elected office. In 2018, this passion wound up in court when Premier Ford's newly elected provincial government amended legislation which reduced the size of Toronto's City Council from 47 to 25 councillors. Although the election was successfully held based on the amended legislation, and 25 councillors were duly elected, the City governed by those same 25 councillors launched a challenge to the Ontario Government's power to enact the legislation which ended up in the Supreme Court of Canada.

On October 1, 2021, in a split 5-4 decision, the Supreme Court of Canada upheld Premier Ford's amended legislation and found that it was constitutionally valid: *Toronto (City) v. Ontario (AG)*, 2021 SCC 34 (CanLII).

Toronto's 2018 City Council election started on May 1, 2018, weeks before a provincial election. Under the then legislation, 47 councillors were to be elected. However, on July 27, 2018, the newly elected provincial government announced that it would be reducing the size of Toronto City Council to 25 elected councillors and eventually passed the *Better Local Government Act, 2018* to implement the size reduction. The reduction in the size of City Council led to a constitutional challenge.

At first instance, the Ontario Superior Court of Justice struck down the amendments on the grounds that rights under section 2(b) of the Canadian *Charter of Rights and Freedoms* were infringed and that the government's action was not reasonably justified in a free and democratic society. The Ontario Court of Appeal, which had granted an interim order that preserved the impact of the amendments, reversed the lower court's ruling and upheld the legislation.

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At the Supreme Court of Canada, the appellants sought to overturn the Ontario Court of Appeal's ruling even though by that point Toronto's City Council had functioned for more than two years under the reduced 25 councillor model. The appellants, which included the City itself, insisted that the provincial legislation was unconstitutional and that the enactment unreasonably infringed on the *Charter* rights of freedom of expression of candidates since it interfered with an election in progress.

For a majority of the Supreme Court, the appeal was not about *Charter* rights but whether and how Canada's Constitution restrains a provincial government from changing the conditions of municipal elections.

While section 2(b) of the *Charter* guarantees rights of freedom of expression, section 92(8) of the *Constitution Act, 1867* grants to the provinces exclusive legislative authority over "municipal institutions in the Province". In general, municipal governments are not constitutional governments. They are creatures of provincial statute.

Despite this fundamental constitutional structure, the City argued that the province's legislation to reduce the size of city council was unconstitutional for three reasons:

(a) it limited the rights of electoral participants;

(b) it violated the unwritten constitutional principle of democracy; and

(c) it ran afoul of the constitutional requirements of effective representation, which flowed from s. 2(b) of the *Charter* and s. 98(2) of the *Constitution Act, 1867*.

With respect to the City's allegation that the new provincial legislation breached s. 2(b) of the *Charter*, the majority of the Supreme Court found that the argument being advanced was positive in nature rather than a negative breach of a *Charter* right such that the City was required to prove a substantial interference with freedom of expression in order to succeed. In essence, the City was trying to impose an obligation on the provincial government to either restore the election of a 47 member council or maintain the 47 member council that existed under prior legislation.

Under Canadian Charter law as determined by the Supreme Court of Canada in *Baier v. Alberta*, 2007 SCC 31, where a party seeks to impose a positive obligation on government, the following three factors must be satisfied:

(1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime?

(2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? and

(3) is the government responsible for the inability to exercise the fundamental freedom?

These factors were simply not met.

In the majority's view, the City was unable to establish that the provincial government's decision to reduce the size of city council to 25 substantially interfered with freedom

of expression. In the factual context of the municipal election, when the provincial government enacted its impugned legislation, candidates still had more than two months to re-orient themselves and to freely express their messages. Also, the new legislation in no way whatsoever prohibited candidates from engaging in political speech. While the amendments may have reduced the effectiveness of prior political speech, the majority found that this was insufficient to meet the requirement of substantial interference.

The majority stated at paragraph 39 that only extreme government action that extinguishes the freedom of expression can rise to the level of a substantial interference with freedom of expression. Section 2(b) was not a guarantee of effectiveness or continued relevance of a political message.

In any event, candidates were provided with sufficient time – 69 days – to pivot their campaign messages. Indeed, the majority noted that fresh evidence adduced by the province, which had not been before the judge at first instance, established that municipal candidates were not effectively precluded from expressing themselves in the election. Campaigns were hard-fought and vigorous.

The Supreme Court's majority also rejected the City's argument that the legislation's impugned provisions infringed "effective representation", which guaranteed under s. 3 of the Charter as it relates to provincial and federal elections, could be imported into s. 2(b). At paragraph 45, the Court stated: "Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different Charter right."

With respect to whether the impugned provisions of the Act violated the unwritten constitutional principle of democracy, the Supreme Court's majority recognized that the Constitution embodied written and unwritten norms and that principles of democracy and the rule of law were ingrained in the Constitution. However, the force of unwritten principles did not extend to invalidating legislation under the Charter. The majority of the Court noted that, among other things, to do so would limit the legislative override preserved by s. 33 of the Charter. If the court relied on an unwritten principle to override a piece of legislation, the majority reasoned that a legislature could not utilize the override provision, which was an undeniable constitutional bargain that had been made at the time the Charter was adopted, since s. 33 only applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15".

Further the principle could not be used to override the division of powers of the *Constitution Act, 1867*. Rather, at paragraph 80, the majority explained that the unwritten constitutional principle strongly favoured upholding the validity of legislation that conformed to the text of the Constitution. Simply put, the province had the Constitutional authority to reduce the size of City Council. The reduction was enacted through a valid legislative process and accordingly the City's arguments failed. At paragraph 4, the Supreme Court's majority said that none of the City's arguments had merit.

In contrast, the minority relied heavily on the framework from *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), to find that the timing of the province's change interfered with political discourse, thereby violating s. 2(b). Under *Irwin Toy*, a two-part test was established for ruling on freedom

of expression claims. The first part asks if the activity falls within the scope of conduct protected by freedom of expression. The second part asks whether the government's action interferes with the expression. According to the Supreme Court's minority, the provincial legislation interfered with expressive rights that were connected to the electoral process. This fell within the *Irwin Toy* framework.

As well, the Court's minority concluded that the s. 2(b) breach could not be saved by s. 1.

While the minority expressed concern that the province offered no explanation as to why the changes were made in the middle of an ongoing municipal election, the Court's majority noted at paragraph 27, that there was nothing to suggest that the province acted with the purpose of interfering with freedom of expression and that the newly-elected provincial government had in fact moved swiftly to reduce the size of Toronto's City Council after taking office.

The Court's majority was heavily critical of the minority's opinion, affirming that while unwritten principles are part of *the law* of the Canada's Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms, "unwritten constitutional principles cannot serve as bases for invalidating legislation" (para. 63).

This decision clearly demonstrates once again that provincial governments reign supreme over municipal governments. Municipal governments simply have no independent constitutional status. Municipal governments are the creation of the provincial government. And in the circumstances of this case, as found by the majority, the province's decision to reduce the size of City Council during an election was constitutional, particularly since candidates were allowed to fully express their views despite the changes, and voters were able to cast their ballots freely for their candidates of choice. There was no evidence whatsoever that democracy had been detrimentally affected by the duly enacted legislation.

Curiously, if the City had won this appeal, it would have left the following perplexing legal riddles since the 2018 municipal election would have technically been invalid. Would all of the City's resolution passed by its 25 member council been invalid and, moreover, would the Supreme Court of Canada's decision to overturn the 2018 election have been enforceable since the 25 member council was required to pass a resolution to appeal the Court of Appeal's decision that upheld the reduction in the size of Toronto's City Council? Given the majority's decision, those riddles will not have to be solved.

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