SUPREME COURT OF CANADA

CITATION: Toronto (City) *v.* Ontario (Attorney General), 2021 SCC 34

APPEAL HEARD: March 16, 2021
JUDGMENT RENDERED: October 1, 2021
DOCKET: 38921

BETWEEN:

City of Toronto
Appellant

and

Attorney General of Ontario
Respondent

\- and -

Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 85)	Wagner C.J. and Brown J. (Moldaver, Côté and Rowe JJ. concurring)
DISSENTING REASONS: (paras. 86 to 186)	Abella J. (Karakatsanis, Martin and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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City of Toronto *Appellant*

v.

Attorney General of Ontario *Respondent*

and

Attorney General of Canada,
Attorney General of British Columbia,
Toronto District School Board,
Cityplace Residents' Association,
Canadian Constitution Foundation,
International Commission of Jurists (Canada),
Federation of Canadian Municipalities,
Durham Community Legal Clinic,
Centre for Free Expression at Ryerson University,
Canadian Civil Liberties Association,
Art Eggleton,
Barbara Hall,
David Miller,
John Sewell,
David Asper Centre for Constitutional Rights,
Progress Toronto,
Métis Nation of Ontario,
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Fair Voting British Columbia *Interveners*

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2021 SCC 34

File No.: 38921.

2021: March 16; 2021: October 1.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Municipal elections — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Better Local Government Act, 2018, S.O. 2018, c. 11.

Constitutional law — Unwritten constitutional principles — Democracy — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August

14, 2018, the *Better Local Government Act, 2018*, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the *Act* and applied for orders restoring the 47-ward structure. The application judge found that the *Act* limited the municipal candidates' right to freedom of expression under s. 2(b) of the *Charter* and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s. 1 of the *Charter* and set aside the impugned provisions of the *Act*. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the *Act*. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the *Charter*, and concluded that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*, nor do they limit provincial legislative authority over municipal institutions.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and Moldaver, Côté, **Brown** and Rowe JJ.: Ontario acted constitutionally. The *Act* imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can the unwritten constitutional principle of democracy be used to narrow provincial authority under s. 92(8) of the *Constitution Act, 1867*, or to read municipalities into s. 3 of the *Charter*.

A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

However, as explained in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been

limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression, the applicable framework is that of *Baier*. As held in *Baier*, to succeed, a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016: (1) the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; (2) the claimant must demonstrate 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) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This single question, a salutary clarification of the *Baier* test, emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need

not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. The *Baier* framework therefore applies, and the City had to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The *Act* imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression. Some of the candidates' prior expression may have lost its relevance, but something more than diminished effectiveness is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the *Act*. Unwritten principles are part of the law of the Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Their legal force lies in their representation of general principles within which the constitutional order operates and, therefore, by which the Constitution's written terms — its provisions — are to be given effect. In practical terms, unwritten constitutional principles may assist courts in only two distinct but related ways.

First, they may be used in the interpretation of constitutional provisions. Where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.

Neither of these functions support the application of unwritten constitutional principles as an independent basis for invalidating legislation. On the contrary, unwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the *Charter*, a province, under s. 92(8) of the *Constitution Act, 1867*, has absolute and unfettered legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle.

As for s. 3 of the *Charter*, it guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it does not extend to municipal elections. Effective representation is not a principle of s. 2(b) of the *Charter*, nor can the concept be imported wholesale into s. 2(b). Section 3 and its requirement of effective representation also cannot be made relevant to the current case by using the democratic principle. Section 3 democratic rights were not extended to candidates or electors to municipal councils. The absence of municipalities in the constitutional text is not a gap to be addressed judicially; rather, it is a deliberate omission. The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

Per **Abella**, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application judge's declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter* restored. Changing the municipal wards in the middle of an ongoing municipal election was unconstitutional.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making.

A two-part test for adjudicating freedom of expression claims was established in *Irwin Toy*. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of

the guarantee. The second asks whether the government action, in purpose or effect, interfered with freedom of expression.

The legal framework set out in *Baier*, which was designed to address under inclusive statutory regimes, only applies to claims placing an obligation on government to provide individuals with a particular platform for expression. Claims of government interference with expressive rights that attach to an electoral process are the kind of claims governed by the *Irwin Toy* framework.

The distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes.

In the present case, the s. 2(b) claim is about government interference with the expressive rights that attach to the electoral process and it is precisely the kind of claim that is governed by the *Irwin Toy* framework. Applying that framework, it is clear

that the timing of the legislation, by interfering with political discourse in the middle of an election, violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries during an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse. The *Act* eradicated nearly half of the active election campaigns, and required candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance. The timing of the *Act* breathed instability into the election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern.

The limitation on s. 2(b) rights in this case was the *timing* of the legislative changes. Ontario offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. In the absence of any evidence or explanation for the timing of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society.

As for the role of unwritten constitutional principles, there is disagreement with the majority's observations circumscribing their scope and power in a way that

reads down the Court's binding jurisprudence. Unwritten constitutional principles may be used to invalidate legislation. The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources. Canada's Constitution, as a result, embraces unwritten as well as written rules. Unwritten constitutional principles have been held to be the lifeblood of the Constitution and the vital unstated assumptions upon which the text is based. They are not merely "context" or "backdrop" to the text. On the contrary, they are the Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.

Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions. The legislative bodies in Canada must conform to these basic structural imperatives and can in no way override them. Accordingly, unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with the Constitution's internal architecture or basic constitutional structure. This would undoubtedly be a rare

case; however, to foreclose the possibility that unwritten principles can be used to invalidate legislation in all circumstances is imprudent. It not only contradicts the Court's jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it.

Unwritten constitutional principles are the foundational organizing principles of the Constitution and have full legal force. They serve to give effect to the structure of the Constitution and function as independent bases upon which to attack the validity of legislation since they have the same legal status as the text. Unwritten constitutional principles not only give meaning and effect to constitutional text and inform the language chosen to articulate the specific right or freedom, they assist in developing an evolutionary understanding of the rights and freedoms guaranteed in the Constitution, which have long been described as a living tree capable of growth and expansion. Unwritten constitutional principles are a key part of what makes the tree grow. They are also substantive legal rules in their own right. In appropriate cases, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional.

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Tulloch, Miller, Nordheimer and Harvison Young JJ.A.), 2019 ONCA 732, 146 O.R. (3d) 705, 439 D.L.R. (4th) 292, 442 C.R.R. (2d) 348, 92 M.P.L.R. (5th) 1, [2019] O.J. No. 4741 (QL), 2019 CarswellOnt 14847 (WL Can.), setting aside a decision of Belobaba J., 2018 ONSC 5151, 142 O.R. (3d) 336, 416 C.R.R. (2d) 132, 80 M.P.L.R. (5th) 1, [2018] O.J. No. 4596 (QL), 2018 CarswellOnt 14928 (WL Can.). Appeal dismissed, Abella, Karakatsanis, Martin and Kasirer JJ. dissenting.

Glenn K. L. Chu and *Diana W. Dimmer*, for the appellant.

Robin K. Basu and *Yashoda Ranganathan*, for the respondent.

Michael H. Morris, for the intervener the Attorney General of Canada.

Mark Witten, for the intervener the Attorney General of British Columbia.

Paul Koven, for the intervener the Toronto District School Board.

Selwyn A. Pieters, for the intervener the Cityplace Residents' Association.

Adam Goldenberg, for the intervener the Canadian Constitution Foundation.

Guy Régimbald, for the intervener the International Commission of Jurists (Canada).

Stéphane Émard-Chabot, for the intervener the Federation of Canadian Municipalities.

Omar Ha-Redeye, for the intervener the Durham Community Legal Clinic.

Jamie Cameron, for the intervener the Centre for Free Expression at Ryerson University.

Geetha Philipupillai, for the intervener the Canadian Civil Liberties Association.

Christine Davies, for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell.

Alexi N. Wood, for the intervener the David Asper Centre for Constitutional Rights.

Donald K. Eady, for the intervener Progress Toronto.

Jason Madden, for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta.

Nicolas M. Rouleau, for the intervener Fair Voting British Columbia.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE AND BROWN J. —

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I. Introduction

[1] While cast as a claim of right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

[2] Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province". Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has "absolute and unfettered legal power to do with them as it wills" (*Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario* (1997), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

[3] Aside from one reference to s. 92(8) — and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case — our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet, these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says

that doing so was unconstitutional, because it limited the s. 2(b) *Charter* rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867* by virtue of that same unwritten constitutional principle of democracy.

[4] None of these arguments have merit, and we would dismiss the City's appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the *Act* coming into force and the election day. There was no substantial interference with the claimants' freedom of expression and thus no limitation of s. 2(b).

[5] Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, and there is no freestanding right to effective representation outside s. 3 of the *Charter*. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

[6] In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

[7] On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

[8] The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the *Act* breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

[9] The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the *Act* limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the *Act*, enacted as it was during the election campaign. Secondly, he

found that the *Act* limited municipal voters' s. 2(b) right to effective representation — despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the *Charter* — due to his conclusion that the ward population sizes brought about by the *Act* were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the *Act*. As a result, the election was to proceed on the basis of the 47-ward system.

[10] The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the *Act* (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

[11] When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the *Act* as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a positive rights claim — that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded

in s. 2(b) of the *Charter*, and that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression. Further, he had erred in finding that the right to effective representation — guaranteed by s. 3 — applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

[12] The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City's standing was not challenged before this Court.

III. Issues

[13] Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

IV. Analysis

A. *Freedom of Expression*

(1) Principles of *Charter* Interpretation in the Context of Section 2(b)

[14] This appeal hinges on the scope of s. 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010), 52 *S.C.L.R.* (2d) 65). Following *Irwin Toy*, then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of "expression" (p. 969). Further, if the purpose or effect of the impugned governmental

action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

[15] Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself — such as violence — or the location of that activity is not consonant with *Charter* protection (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

[16] Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a <u>negative</u> obligation . . . rather than a positive obligation of protection or assistance" (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom <u>from</u> government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.

[17] In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that

would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).

[18] Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier*, this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

[19] The *Baier* framework is therefore not confined, as our colleague suggests, "to address[ing] underinclusive statutory regimes" (para. 148). This Court could not have been clearer in *Baier* that it applies "where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(*b*)" (para. 30). Were it otherwise — that is, were *Baier*'s application limited to cases of underinclusion — claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy*.

This is illogical. *Baier*'s reach extends beyond cases of underinclusion or exclusion, and categorically limits the "obligation[s] on government to provide individuals with a particular platform for expression" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

[20] We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a "right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways" (P. Macklem, "Aboriginal Rights and State Obligations" (1997), 36 *Alta. L. Rev.* 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying expression on that subject? While in *Haig*, L'Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is "not

always clearly made, nor . . . always helpful", she nevertheless distinguished typical negative claims from those that might require "positive governmental action" (p. 1039). This is the distinction with which we concern ourselves here.

[21] This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore*, which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The *Baier* Framework

[22] The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority*, at para. 35). Here, therefore, if the City's claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier*, at para. 35).

[23] In *Baier*, this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (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? (3) Is the government responsible for the inability to exercise the fundamental freedom?

[24] These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking — in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor — which requires that the claimant establish a *substantial* interference with freedom of expression — sets a higher threshold than that stated in *Irwin Toy*, which asks only whether "the purpose or effect of the government action in question was to restrict freedom of expression" (p. 971; see also *Baier*, at paras. 27-28 and 45).

[25] So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as

the significant overlap among the factors — particularly between the first and second — this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court's approach in *Baier* and *Greater Vancouver Transportation Authority*. To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter* (*Haig*, at p. 1041).

[26] If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed. Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and — subject to justification of such limit under s. 1 — government action or legislation may be required.

[27] There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented — that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful

expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier*, at para. 27; *Dunmore*, at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

[28] The height of this bar of effective preclusion is demonstrated by *Baier*. There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court — applying the *Dunmore* factors — concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants' ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) *Nature of the Claim*

[29] The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City's claim can be understood. Each leads to the conclusion that the claim is, in substance, a positive claim that must, therefore, show a substantial interference with freedom of expression.

[30] The first possible view of the City's claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City's requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the *Act*) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier*, this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; "[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(*b*)" (para. 36).

[31] The second possible view of the City's claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City's view, what is otherwise political expression becomes

what it calls "electoral expression" during an election period (A.F., at para. 54). Protection of this "electoral expression", it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City's claim that the impugned provisions of the *Act* limited s. 2(b) turns squarely on the *timing* of the *Act*. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested — in the event that this Court finds only that the timing of the *Act* was unconstitutional — a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

[32] The City's focus on the timing of the *Act* cannot, however, convert its positive claim into a negative one. While its claim is couched in language of non-interference — something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework — the City does not seek protection of electoral participants' expression from restrictions tied to content or meaning (as was the case, for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

[33] So understood, the claim is akin to that rejected in *Baier*. The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees),

while the claim in this case is for temporary protection — that is, for the duration of the campaign — of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the *Act* modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can — subject to the elevated threshold of a substantial interference — change the rules as they wish.

[34] To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward

structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined with her broad articulation of the *Irwin Toy* threshold in this context — whether legislation "destabiliz[es] the opportunity for meaningful reciprocal discourse" — such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the *Constitution Act, 1867*.

[35] In sum, the City advances a positive claim and the *Baier* framework applies.

(b) *Application of Baier*

[36] As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

[37] Here, the candidates and their supporters had 69 days — longer than most federal and provincial election campaigns — to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign

remained. It was twice that.) The *Act* did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the *Act* prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

[38] It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure — and larger ward populations — came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

[39] While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation — see, for instance, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J.

and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 — more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

[40] Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance,

the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

[41] The City says that the expression at issue here — again, what it calls "electoral expression" — is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the "unique role" of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier*. Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier*, at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

[42] In sum, the *Baier* threshold is not met here. The *Act* imposed no limit on freedom of expression.

[43] Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it "offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election" (para. 161). This ignores the Province's written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints

of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) *Effective Representation*

[44] The City also says that the impugned provisions of the *Act* infringe "effective representation", an incident of the guarantee contained in s. 3 of the *Charter* which, the City says, can be imported into s. 2(b).

[45] Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees "only the right to vote in elections of representatives of the federal and the provincial legislative assemblies" (*Haig*, at p. 1031 (emphasis added)) and "does not extend to municipal elections" (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80; *Harper*, at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

[46] In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of "prime importance" (*Reference re Prov. Electoral

Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldly growth in the size of Toronto City Council (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (2001), at pp. 15 and 19).

[47] And *even were* effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the *Act*. It is not disputed that the 25-ward structure of the *Act* enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review's reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors — geography, community history, community interests and minority representation — that could conceivably justify a departure from parity (see *Reference re Prov. Electoral Boundaries (Sask.)*, at p. 184).

B. *Democracy*

[48] The second issue on appeal is whether the impugned provisions of the *Act* are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court's s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

[49] The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 93; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law,

"infuse our Constitution" (*Secession Reference*, at para. 50). Although not recorded outside of "oblique reference[s]" in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are "foundational" (para. 49), without which "it would be impossible to conceive of our constitutional structure" (para. 51). These principles have "full legal force" and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p. 845). "[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches" (C.A. reasons, at para. 84, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

[50] Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that "full legal force" necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism* — and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would

infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

[51] Further, the authorities she cites as "recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government" (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary — for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

[52] Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision . . . is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and

recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the "constitutional requirements that are derived from the federal character of Canada's Constitution" (pp. 844-45 (emphasis added)). And this is precisely the point — while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

[53] To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof — particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act*, *1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is

also why, once “constitutional structure” is properly understood, it becomes clear that, when our colleague invokes “constitutional structure”, she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

[54] Ultimately, what “full legal force” means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has “full legal force” within its proper ambit. Our colleague’s position — that because unwritten constitutional principles have “full legal force”, they must necessarily be capable of invalidating legislation — assumes the answer to the preliminary but essential question: what *is* the “full legal force” of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their “full legal force” is realized *not* in *supplementing* the written text of our Constitution as “provisions of the Constitution” with which no law may be inconsistent and remain of “force or effect” under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not “provisions of the Constitution”. Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution’s written terms — its *provisions* — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

[55] First, they may be used in the interpretation of constitutional provisions. Indeed, that is the “full legal force” that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence

and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing "the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined" (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

[56] Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

[57] Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

[58] First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 *Queen's L.J.* 389, at pp. 427-32). Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

[59] Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the *Charter* — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concep[t] of democracy . . . ha[s] no canonical formulatio[n]" (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many

of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers” (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that “protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box” (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., “unjust or unfair” *or otherwise normatively deficient*).

[60] We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities”, in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate “notwithstanding a provision included in section 2 or sections 7 to 15” *only*. Secondly, s. 1 provides a basis for the state to justify limits on “the rights and freedoms set out” in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not “set out”

in the *Charter*. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

[61] Our colleague says that the application of s. 33 "is not directly before us" (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33's application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

[62] We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (*Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

[63] In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court's jurisprudence supports this conclusion.

(a) *The Provincial Court Judges Reference*

[64] In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act*, *1867* (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

> The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

[65] In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect to constitutional text. It is thus not dissimilar to this Court's approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)*, at paras. 8-10); unwritten constitutional

principles inform the purpose of the provisions of the text, thus guiding the purposive definition (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose" (*Quebec (Attorney General)*, at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)*, the Constitution "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation "must first and foremost have reference to, and be constrained by, [its] text" (para. 9).

[66] Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself* "emanates" from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned

(paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) *The Secession Reference*

[67] In *Secession Reference*, this Court said:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in [*Reference re Resolution to Amend the Constitution*], *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference — the conditions for secession of a province from Confederation — which the Court was called upon to answer. The case combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a "<u>legal</u> framework" in the form of a set of rules to legitimize secession, was enforceable only *politically* as "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101 (emphasis added); see also Elliot, at p. 97).

[68] Of course, the Court made clear that it had identified "binding obligations under the Constitution of Canada" (para. 153), and that a breach of those obligations would occasion "serious legal repercussions" (para. 102). But the Court also acknowledged the "non-justiciability of [the] political issues" involved (para. 102), which meant that the Court could have "no supervisory role" over the political negotiations (para. 100). Recognizing that the "reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm" (para. 153), the Court fashioned rules in the event of whose breach the "appropriate recourse" would lie in "the workings of the political process rather than the courts" (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

[69] Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that case had legal force by way of a judicial declaration, how that declaration would be given effect — that is, *enforced* — was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) *Babcock and Imperial Tobacco*

[70] At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that "[a]lthough the unwritten constitutional principles are capable of limiting government actions, . . . <u>they do not do so in this case</u>" (para. 54 (emphasis added)). She reached this conclusion on the basis that "unwritten principles must be balanced against the principle of Parliamentary sovereignty" (para. 55), concluding:

> 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. [para. 57]

[71] McLachlin C.J.'s statement that unwritten constitutional principles are "capable of limiting government actions" was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants' proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

> . . . the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by <u>necessary implication</u> from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

[72] In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law "is not an invitation to trivialize or supplant the Constitution's written terms", nor "is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are "capable of limiting government actions" is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, "but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)" (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

[73] This, we would add, is a complete answer to our colleague Abella J.'s assertions that this Court has "never, to date, limited" the role of unwritten constitutional principles, and that their interpretive role is not "narrowly constrained by textualism" (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle — the rule of law — and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) *Trial Lawyers Association of British Columbia*

[74] In *Trial Lawyers Association of British Columbia*, this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the *Constitution Act, 1867*, violated s. 96 of the *Constitution Act, 1867* as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was "further supported by considerations relating to the rule of law" (para. 38), as "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230).

This was, she said, "consistent with the approach adopted by Major J. in *Imperial Tobacco*" (para. 37):

> The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by <u>necessary implication</u> from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

[75] In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) <u>Relevance of the Democratic Principle to Municipal Elections</u>

[76] Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution — including its establishment of the House of Commons and of provincial legislatures — connotes certain freely elected, representative, and democratic political institutions (*Secession Reference*, at para. 62).

[77] The democratic principle has both individual and institutional dimensions (para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law (paras. 66-67).

[78] In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) *Section 92(8) of the Constitution Act, 1867*

[79] The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.*, at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier*, at para. 39).

[80] Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards' Assn. of Alberta*).

(b) *Section 3 of the Charter*

[81] Nor can the democratic principle be used to make s. 3 of the *Charter* — including its requirement of effective representation — relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a

gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the *Charter*.

[82] Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier*, at para. 39). Again, and like the school boards at issue in *Baier*, municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence

from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation" (*Quebec (Attorney General)*, at para. 4). It 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.

(3) Conclusion on the Democratic Principle

[83] Even had the City established that the *Act* was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the *Act* unconstitutional. The *Act* was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to introduce the legislation at a particular time. (As the application judge correctly noted, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the *Act* and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

[84] In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by

narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the *Constitution Act, 1867*. Nor can they be applied to judicially amend the text of s. 3 of the *Charter* to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

[85] We would dismiss the appeal.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA J. —

[86] Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

[87] The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of

political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

[88] The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

[89] The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

[90] Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

<u>Background</u>

[91] In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was "to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of 'effective representation'" (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

[92] Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor's staff, and individually interviewed members of the 2010-2014 City Council and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

[93] The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review's *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

[94] The Boundary Review's *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

[95] At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 "to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required" (*Additional Information Report*, August 2016 (online), at p. 10).

[96] City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

[97] The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of

the Board rejected the appeals and approved the By-laws on December 15, 2017 (*Di Ciano v. Toronto (City)*, 2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

> The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

[98] An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

> Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

[99] On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

[100] On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

[101] The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

[102] The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

[103] The nomination period was extended to September 14, 2018, but the election date remained the same — October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month

to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

[104] The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

[105] In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (*Better Local Government Act, 2018*, S.O. 2018, c. 11 (“*Act*”), Sch. 3, s. 1; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified

candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

[106] The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

[107] On September 10, 2018, Belobaba J. held that the *Act* was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

[108] On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.'s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

[109] On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.'s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. "impermissibly extended the scope [of] s. 2(b)" to

protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

[110] In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the *Act* infringed s. 2(b), concluding that "[b]y extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters".

[111] I agree with MacPherson J.A.

Analysis

[112] Under s. 92(8) of the *Constitution Act, 1867*, the provinces have exclusive jurisdiction over "Municipal Institutions in the Province". The question therefore of whether the Province has the authority to legislate a change in Toronto's ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the *Charter*, which states:

> **2** Everyone has the following fundamental freedoms:
>
> . . .
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[113] The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

[114] It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the *Charter* applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

[115] When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

[116] Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that "services

should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences" (*Greater Toronto*, at p. 174; see also D. Siegel, "Ontario", in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (2009), 20, at p. 22; A. Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 *Osgoode Hall L.J.* 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

> important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.
>
> (*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

[117] The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

[118] The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is . . . closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342).

[119] These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

> courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

[120] The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged — the duties of elected members "to the electors", and of

electors “in the election of their representatives” (*Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583).

[121] How then does all this relate to the rights in s. 2(b) of the *Charter*? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects “the political discourse fundamental to democracy” (*R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765).

[122] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that “participation in social and political decision-making is to be fostered and encouraged” (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being “at the core of s. 2(b)”, and curtailed under s. 1 “only in service of the most compelling governmental interest” (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

[123] This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the *Charter*.

[124] *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

[125] Dealing with the first part, the "activity" at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, noted that

> *[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.* Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. [Emphasis added; pp. 763-64.]

[126] The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court's jurisprudence under s. 2(b) of the *Charter* has usually arisen in circumstances

where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard.[1] The case before us, on the other hand, deals with whether the *effect* of the legislation — redrawing the ward boundaries and cutting the number of wards nearly in half mid-election — was to interfere with these expressive activities.

[127] Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

> . . . the right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming

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[1] This Court's jurisprudence has involved, for example, restrictions on: **publication** (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527); **obscene content** (*R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120); **advertising** (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] 2 S.C.R. 295); **language** (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790); **harmful content** (*R. v. Sharpe*, [2001] 1 S.C.R. 45; *R. v. Keegstra*, [1990] 3 S.C.R. 697); **manner or place of expression** (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141); **who can participate in a statutory platform for expression** (*Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Baier v. Alberta*, [2007] 2 S.C.R. 673); **voluntary expression** (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610); **expenditures on expression** (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827); or **access to information** (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

> listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." [Citations omitted.]
>
> (*Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775)

[128] In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, "Freedom of Expression in Canada" (2013), 61 *S.C.L.R.* (2d) 429; J. Weinrib, "What is the Purpose of Freedom of Expression?" (2009), 67 *U.T. Fac. L. Rev.* 165).

[129] Political expression during an election period is always "taking place within and being constrained by the legal and institutional framework of an election" (Y. Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 *S.C.L.R.* (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, this Court explained that elections and referendums are "procedural structure[s] allowing for public discussion of political issues essential to governing", which serve to ensure "a reasonable opportunity to speak

and be heard" and "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties" (paras. 46-47).

[130] The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

> Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions. All exercises of expression, at each and every stage of the electoral process — not only the final act of voting — must receive consistent and robust *Charter* protection. [Footnotes omitted.]
>
> (I.F., at para. 8)

[131] The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

> . . . the electoral process is the primary site in which the representative relationship is constructed. Indeed, "[c]ampaigns . . . are a main point — perhaps *the* main point — of contact between officials and the populace over matters of public policy." The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]

("The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, "Freedom of Expression and Democracy", in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, "Free Speech as the Citizen's Right", in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

[132] An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

[133] State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including "participation in social and political decision-making" (*Irwin Toy*, at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

[134] A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by "[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled"

(M. Pal, "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269, at p. 302).

[135] For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

[136] After the *Act* came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The *Act* eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards "no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place" (Dawood, at p. 132). Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

[137] The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had "focused on the concerns and the needs

of the approximately 55,000 residents of Ward 14" (A.R., vol. XV, at p. 80). Ward 14 was abolished by the *Act*.

[138] Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

> Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I . . . know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.
>
> . . .
>
> If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.
>
> (A.R., vol. XI, at pp. 15-16)

[139] Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he

dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

[140] Another candidate, Jennifer Hollett, explained the effect of the two week "legal limbo" (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

> Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister's powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.
>
> . . .
>
> The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

[141] Megann Wilson, another candidate and participant in the Women Win TO's training program, described the ensuing uncertainty vividly:

> Since . . . the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in — and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward

> will make it more difficult for voters to make a good decision about what candidate to vote for since electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents — a significant distraction from the municipal issues I am trying to engage residents about.
>
> As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.
>
> (A.R., vol. X, at p. 132)

[142] Since the *Act* did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely due to the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

> We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable. . . . It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.

(A.R., vol. IX, at p. 125)

[143] Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as “deeply disappointing . . . as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time” (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that “his own political expression has been compromised” and that “candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him” (A.R., vol. IX, at p. 104).

[144] It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

[145] The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the

specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

[146] Nominations were extended to September 14, leaving only five weeks — from the date that nominations closed, solidifying which candidates were running and in what wards — for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

[147] The timing of the *Act*, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant

political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the *Charter*.

[148] With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.[2] The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to "claims of underinclusion", "exclusion from a statutory regime" and "underinclusive state action" (*Dunmore*, at paras. 24-26; *Baier*, at paras. 27-30). It has no relevance to the legal or factual issues in this case.

[149] The *Baier* framework was, additionally, confined to its unique circumstances by this Court's subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia*

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[2] *Haig v. Canada*, [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

Component, [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier* "summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual" (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

> . . . taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.
>
> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a *distinction* was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

[150] The *Baier* test has no application to this appeal. As Deschamps J.'s full quote shows, it is clear that *Baier* only applies to claims "placing an obligation on government to provide individuals with a particular platform for expression". *Irwin Toy*, on the other hand, applies to claims that are about "protecting the underlying freedom of expression of those who are free to participate in expression on a platform", like the case before us.

[151] None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the *Charter* requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier*, at para. 42; *Greater Vancouver Transportation Authority*, at para. 35; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 31).

[152] In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.[3] To paraphrase Gertrude Stein, a right is a right is a right. The threshold

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[3] The same legal standard has applied to claims with respect to: **freedom of association under s. 2(d)** (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the **right to life, liberty and security of the person under s. 7** (*Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 (safe injection facility)); and **equality under s. 15** (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*.

[153] All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction "is notoriously difficult to make . . . . Appropriate verbal manipulations can easily move most cases across the line" (S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 *U. Pa. L. Rev.* 1293, at p. 1325).

[154] It is true that freedom of expression was once described by L'Heureux-Dubé J. in *Haig v. Canada*, [1993] 2 S.C.R. 995, as prohibiting "gags" but not compelling "the distribution of megaphones" (p. 1035; see also K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig* — a precursor to *Baier* — L'Heureux-Dubé J. acknowledged that this was an artificial distinction that is "not always clearly made, nor . . . always helpful" (p. 1039; see also *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 666-68, per L'Heureux-Dubé J., concurring).

[155] There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights "baby" in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

[156] The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse "as an instrument of democratic government" (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)'s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier*, adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy*, which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

[157] Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

[158] This brings us to s. 1 of the *Charter*. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as "demonstrably justified in a free and democratic society" (*Charter*, s. 1; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

[159] But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: "We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement" (Office of the Premier, *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

> During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.
>
> So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a

> streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.
>
> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

[160] Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 188).

[161] But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

[162] In the absence of any evidence or explanation for the *timing* of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

[163] While this dispenses with the merits of the appeal, the majority's observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court's binding jurisprudence warrants a response.

[164] In the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as "a Constitution similar in Principle to that of the United Kingdom" (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 *McGill L.J.* 207).

[165] The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430, at p. 438). Our Constitution, as a result, "embraces unwritte[n] as well as written rules" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 92, per Lamer C.J.).

[166] It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten

constitutional principles have full legal force and can serve as substantive limitations on all branches of government.[4]

[167] Unwritten constitutional principles have been held to be the "lifeblood" of our Constitution (*Secession Reference*, at para. 51) and the "vital unstated assumptions upon which the text is based" (para. 49). They are so foundational that including them in the written text "might have appeared redundant, even silly, to the framers" (para. 62).

[168] Unwritten constitutional principles are not, as the majority suggests, merely "context" or "backdrop" to the text. On the contrary, unwritten principles are our Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act,*

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[4] See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: **United Kingdom** (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 102, per Lord Steyn (judicial independence); *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868, at para. 51, per Lord Hope (judicial independence and rule of law)); **Australia** (*Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245 (H.C.) (judicial independence); *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51 (H.C.) (federalism); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410 (H.C.) (federalism); *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520 (H.C.) (freedom of political communication); *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162 (the right to vote)); **South Africa** (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); **Germany** (*Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and **India** (*Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

1867" (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

[169] Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes*, per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, "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":

> 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 C.J. in *Reference re Alberta Statutes,* at p. 133, "such institutions derive their efficacy from the free public discussion of affairs . . . ." and, in those of Abbott J. in *Switzman v. Elbling,* at p. 328, 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. [p. 57]

[170] This leads inescapably to the conclusion — supported by this Court's jurisprudence until today — that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

[171] In the *Secession Reference*, a unanimous Court confirmed that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action" (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("*Patriation Reference*"); see also *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of

government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

[172] The Court's reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have "full legal force". In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles "*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*" (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to "preserving the integrity of the federal structure" (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), and *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 (see also *Secession Reference*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

[173] This Court expressly endorsed the unwritten principles of democracy as the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated" (*Secession Reference*, at para. 62); the rule of law as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, per Rand J.), "the very foundation of the

Charter" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent "where giving effect to that intent is precluded by the rule of law" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 23); federalism as "a foundational principle of the Canadian Constitution" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 3, per Wagner C.J.); and judicial independence as a "constitutional imperative" in light of "the central place that courts hold within the Canadian system of government" (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

[174] In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in

circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

[175] In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy — the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

[176] Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction

of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

[177] And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

[178] The majority's emphasis on the "primordial significance" of constitutional text is utterly inconsistent with this Court's repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and "function as independent bases upon which to attack the validity of legislation . . . since they have the same legal status as the text" (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 95; see also H.-R. Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 *Am. J. Comp. L.* 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. "Full legal force" means full legal force, independent of the written text.

[179] Unwritten constitutional principles do not only "give meaning and effect to constitutional text" and inform "the language chosen to articulate the specific right or freedom", they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as "a living tree capable of growth and expansion" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

[180] Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

> [The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

[181] Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

> The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is "to fill out gaps in the express terms of the constitutional scheme." This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.
>
> *But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases*. . . . We must alter the bridge metaphor accordingly: 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 this single underlying foundation. *The constitutional text is not just supplemented by unwritten principles; it rests upon them.* [Emphasis added; footnote omitted.]
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> ("Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

[182] It is also difficult to understand the need for the majority's conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the *Charter*. This question is not directly before us.

[183] Finally, I see no merit to the majority's argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the *Constitution Act, 1982* only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that "any law that is inconsistent with the *provisions* of the Constitution is . . . of no force or effect". The majority's reading of s. 52(1), like much

of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

[184] It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

> . . . it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

[185] The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 *Alta. L. Rev.* 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982)). There is no need, as a result, to constrain the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

[186] I would allow the appeal and restore Belobaba J.'s declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter*.

Appeal dismissed, ABELLA, KARAKATSANIS, MARTIN *and* KASIRER JJ. *dissenting.*

Solicitor for the appellant: City of Toronto, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Toronto District School Board: Toronto District School Board, Toronto.

Solicitor for the intervener the Cityplace Residents' Association: Selwyn A. Pieters, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the International Commission of Jurists (Canada): Gowling WLG (Canada), Ottawa.

Solicitor for the intervener the Federation of Canadian Municipalities: Federation of Canadian Municipalities, Ottawa.

Solicitor for the intervener the Durham Community Legal Clinic: Durham Community Legal Clinic, Oshawa.

Solicitor for the intervener the Centre for Free Expression at Ryerson University: Borden Ladner Gervais, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Goldblatt Partners, Toronto.

Solicitors for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell: Goldblatt Partners, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: St. Lawrence Barristers, Toronto.

Solicitors for the intervener Progress Toronto: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta: Pape Salter Teillet, Toronto.

Solicitor for the intervener Fair Voting British Columbia: Nicolas M. Rouleau, Toronto.