Court File No.: 38921

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

CITY OF TORONTO

APPELLANT
(Respondent)

-and-

ATTORNEY GENERAL OF ONTARIO

RESPONDENT
(Appellant)

-and-

TORONTO DISTRICT SCHOOL BOARD

INTERVENER
(Intervener)

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, 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 AND JOHN SE WELL, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, INTERNATIONAL COMMISSION OF JURISTS (CANADA), MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA and FAIR VOTING BRITISH COLUMBIA

INTERVENENERS

FACTUM OF THE INTERVENER, PROGRESS TORONTO

(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada* and in accordance with the Order of Justice Kasirer dated December 17, 2020

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TABLE OF CONTENTS

PAGES

PART I. OVERVIEW AND FACTS

1. This case is about the integrity of the democratic process. The Ontario government's passage of Bill 5, in the midst of an election and without consultation, offends the democratic principles and norms that form the cornerstone of Canadian democracy. It undermined the rights of the almost 3 million residents of the City of Toronto to participate equally and effectively in a fair election. The Province's actions, and Bill 5, are unconstitutional.

2. Progress Toronto intervenes in this appeal to provide the Court with its perspective as a not-for-profit advocacy organization dedicated to engaging underrepresented voters in municipal democracy in Toronto and as an organization on the frontlines of the 2018 municipal election when the Province of Ontario introduced Bill 5.

3. This case provides an opportunity for this Honourable Court to elucidate the content of the unwritten constitutional principle of democracy, to affirm that the democracy principle is a grounds upon which to invalidate legislation, and for the Court to reject unconstitutional legislative action cloaked in the language of democracy. The appeal should be allowed.

A. Progress Toronto

4. Progress Toronto's mandate is to advocate and organize for a more democratic, socially just, and progressive city. Progress Toronto aims to remove barriers to public participation in local government by encouraging more consultative approaches to decision-making and advocating for elections to be more accessible and transparent.

5. Progress Toronto was established in the run-up to the 2018 Toronto municipal election. Prior to the passage of Bill 5, it provided election training, campaign planning, and conducted voter outreach. Progress Toronto was also a registered third-party under the *Municipal Elections Act, 1996*.[1] After the passage of Bill 5, Progress Toronto mobilized to educate voters about the legislative changes to the election and City Council. Progress Toronto also identified, organized,

[1] *Municipal Elections Act, 1996*, SO 1996, c 32, Sch, s. 88.6

and indemnified a group of five candidates and community leaders to intervene in the litigation challenging Bill 5 at both levels of the courts below.[2]

PART II. PROGRESS TORONTO'S POSITION ON THIS APPEAL

6. Progress Toronto submits that the passage of the *Better Local Government Act, 2018* ("Bill 5"), in the middle of an ongoing election and without consultation, was contrary to the unwritten principle of democracy enshrined in the *Constitution Act, 1867* (the "Constitution"). Bill 5 should be invalidated.

PART III. ARGUMENT

A. The Unwritten Constitutional Principles and Democracy

7. It is trite law that in addition to the written text, the Constitution contains unwritten principles that govern the exercise of constitutional authority. In the *Secession Reference*, the Supreme Court of Canada explained:

> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government… In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.[3]

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[2] Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel, and Dyanoosh Youssefi intervened at first instance in *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151 ["Sup Crt Reasons"] and on the Province's motion for stay pending appeal before the Court of Appeal for Ontario, *Toronto (City) v Ontario (AG)*, 2018 ONCA 761, but did not intervene on the merits appeal, *Toronto (City) v Ontario (AG)*, 2019 ONCA 732 ["ONCA Reasons"]

[3] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 32 ["*Secession Reference*"] (emphasis added)

8. The unwritten constitutional principles are not simply an interpretative guide; rather they are "the vital unstated assumptions" upon which the text of the Constitution is based.[4] The principles are binding on courts and governments, and give rise to substantive legal obligations.[5]

9. The Province's anti-democratic interference in Toronto's election is precisely the type of "problem" that is best addressed by the application of the unwritten constitutional principles.

10. One of the unwritten principles which forms part of the Constitution is democracy:

> …the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference*… it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.[6]

11. This principle is the cornerstone of our democracy and our Constitution. It is the baseline against which the Constitution was framed, and it remains the baseline against which limits to *Charter* rights are justified under section 1:

> This principle is the cornerstone of our democracy and our Constitution… The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[7]

12. Democracy has both institutional and individual elements. Institutionally, the democracy principle requires that governments be elected by popular franchise.[8] Individually, the democracy principle protects the right of individuals to participate in the political process.[9]

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[4] *Secession Reference* at paras 49, 51

[5] *Secession Reference* at paras 53, 54*; Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3d) 505 (Ont CA) at para 116, ["*Lalonde*"]

[6] *Secession Reference,* at para 62 (emphasis added)

[7] *R v Oakes,* [1986] 1 SCR 103 at para 64 ["*Oakes*"]

[8] *Secession Reference,* at para 65.

13. While s. 3 of the *Charter* is not directly applicable to municipal elections, the Constitutional principle of democracy is not so narrowly confined. The democracy principle extends beyond legislative bodies at the federal and provincial levels to encompass political institutions generally[10] "to be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution."[11]

14. Both constitutional and non-constitutional case law demonstrates the crucial concern with the fair conduct of elections[12] and serve to inform the content of the democracy principle. Our normative values around democracy require several features of a fair election to be present:

a. an "effective democracy" requires public faith and confidence in fair elections;[13]

b. an electoral system should strive to treat candidates and voters fairly in the conduct of elections;[14]

c. our electoral systems are premised on an "egalitarian model", meaning each citizen should have an equal opportunity to participate in the electoral process;[15]

d. loss of an opportunity to vote is the loss of a democratic right, even in local elections, and constitutes irreparable harm;[16] and

e. there is a "political stability consideration", which is consistent with the "consideration of preserving the integrity of the electoral process", that militates against last minute changes to elections; and[17]

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[9] *Secession Reference*, at para 65.
[10] *Secession Reference*, at para 62, citing *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 57 ["*OPSEU*"]
[11] *Secession Reference*, at para. 67.
[12] *Figueroa v Canada*, 2003 SCC 37 at para 58; *Harper v Canada*, 2004 SCC 33 at para 103
[13] *Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 38 ["*Opitz*"]
[14] *Opitz* at para 45
[15] *Conservative Fund Canada v Canada (Chief Electoral Officer)*, 2010 ONCA 882 at para 83, leave to appeal to SCC refused, 34097 (5 May 2011)
[16] *Gift Lake Métis Settlement v Alberta (Minister of Aboriginal Relations)*, 2015 ABQB 654 at para 93

f. the Court has inherent jurisdiction to deal with matters of elections where there is no legislation which otherwise applies,[18] and judicial scrutiny is needed to ensure public confidence and trust in the electoral process.[19]

B. The Province Breached the Democracy Principle

15. State action is always subject to constitutional oversight. Individual rights of participation in our political institutions form the bedrock of the democracy principle and must be understood to form part of the Constitution. It was a breach of that principle for the Province to actively interfere in the municipal democratic process, mid-election.

16. Specifically, the mid-election changes:

a. interfered with the equal and fair participation of candidates: candidates made decisions on where to run, what to say, how to raise money, and how to publicize their views on the basis of the 47-ward system.[20] Money spent to print signs and literature under the 47-ward system was thrown away when candidates suddenly found themselves seeking election from a different group of electors (with different issues and priorities), in different communities than when their campaigns started, against different opponents. The ward amalgamation forced diverse, first-time candidates to run against incumbent candidates where previously there had been none. First-time candidates with fewer resources were further disadvantaged when Bill 5 doubled spending limits, leaving them little time to match the fundraising of the incumbents, with better name recognition and access to capital. The changes caused some candidates to drop out of the race entirely.[21] The result was that, despite a diverse electorate, the Council elected in 2018 remained predominantly white and male;

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[17] *Stevens v Conservative Party of Canada*, 2005 FCA 383 at para 47, leave to appeal to SCC refused, 31281 (27 April 2006)

[18] *Yukon (Chief Electoral Officer) v. Nelson*, 2014 YKSC 26 at para 24; *Ta'an Kwäch'än Council, Re*, 2006 YKSC 62 at paras 24-26.

[19] *Bielli v Canada (Attorney General)*, 2012 FC 916 at para 11. Importantly, the Government of Ontario also attempted to inoculate itself against potential challenges arising from the clear prejudicial effects of Bill 5 by restricting the Superior Court's jurisdiction under s 83(1) to review the validity of the election. The Court's jurisdiction was restrained in Ministerial Regulations: "2018 and 2022 Regular Elections – Special Rules", O Reg 407/18, s 12(1)

[20] ONCA Reasons at para 121

[21] ONCA Reasons at para 128; Sup Crt Reasons at para 29-31

b. created barriers to equal and effective participation of voters: electors made donations of time and money to candidates that were no longer candidates in their ward, or who withdrew completely, changing fundamentally their ability to influence the outcome. Advance voting days, designed to make the election more accessible to traditionally underrepresented voters, were cut nearly in half. The election was reduced effectively to 20 days, limiting time for voters to familiarize themselves with candidates and platforms;

c. undermined trust in the elections and faith in government: the timing of the changes caused widespread confusion and uncertainty.[22] It deflected attention away from important civic issues, triggered a flurry of legal challenges, and jeopardized the viability of administering the election on schedule.[23]

C. Bill 5 Should be Quashed

17. Unwritten constitutional principles provide an independent basis for striking down statutes. These constitutional principles give rise to substantive legal obligations, which are binding on courts and governments.[24] The principles are the "lifeblood" of the Constitution, and "are a necessary part of our Constitution."[25] Any action or legislation that offends a part of the Constitution may be struck down.

18. In *Imperial Tobacco*, the Supreme Court held that "it is difficult to conceive of how the rule of law [one of the four unwritten constitutional principles] could be used as a basis for invalidating legislation…based on its content."[26] However, nine years later, in *Trial Lawyers Association*, a majority of the Supreme Court held that the rule of law considerations formed the basis for striking down subordinate regulations of a province.[27] Justice Rothstein, in dissent, noted the effect of the majority's ruling was to ignore the Court's holding in *Imperial Tobacco*.[28] *Trial Lawyers Association* modified the holding in *Imperial Tobacco* to acknowledge that, in

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[22] ONCA Reasons at para 128; Sup Crt Reasons at para 29-31

[23] ONCA Reasons at para 128; Sup Crt Reasons at para 29-31

[24] *Secession Reference* at para 54.

[25] *Secession Reference* at paras 32, 51 [emphasis added].

[26] *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 59 ["*Imperial Tobacco*"].

[27] *Trial Lawyers Assn. of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 38-42 ["*Trial Lawyers*"].

[28] *Ibid.*, at paras 95-102f

cases where "concerns…are not abstract or theoretical."[29] violations of the rule of law provide a basis to challenge delegated legislation.

19. It is unreasonable to make a distinction between government action and government legislation when it comes to the requirement to comply with Constitutional principles. Courts have held that "[i]t is a valid argument to say that unwritten constitutional principles may give rise to substantive legal obligations or legal remedy."[30] The legal remedy, as always, will depend on the context. For example, in *Polewsky*, the Ontario Divisional Court held that the rule of law, in light of the common law constitutional right of access to justice, compelled the enactment of statutory provisions.[31] The principles and rules that form part of the Constitution must constrain the exercise of all state authority. The Province cannot be permitted to evade basic democratic norms simply by exercising their authority over subordinate government bodies.

20. Finally, other constitutional principles, such as protection for minorities and democracy, are distinguishable from the rule of law.[32] In *Imperial Tobacco* the Supreme Court noted that the principle of the rule of law was nebulous and difficult to define. It explicitly noted that as a principle, the rule of law pertained more to the application of legislation than its content, and therefore did not lend itself to use as an independent basis to challenge legislation.[33]

21. In any event, the Court of Appeal for Ontario did not encounter similar issues with the unwritten constitutional principle of respect for minorities in *Lalonde.* In that case, the court held that the Province had been unable to justify its departure from the Constitutional principle when it decided to significantly reduce the services offered at Ottawa's only francophone hospital.[34] Despite the finding that the provisions of the *Charter* did not apply, the Province's decision was quashed on unwritten principles alone.

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[29] *Ibid.*, at para 40

[30] *Canadian Bar Assn. v British Columbia*, 2008 BCCA 92 at para 44

[31] *Polewsky v Home Hardware Stores Ltd*, 2003 CarswellOnt 2755 (Ont Div Ct) at para 76, leave to appeal allowed 2004 CarswellOnt 763 (Ont CA), cited with approval by Cromwell J (concurring in result) in *Trial Lawyers* at paras 71-72.

[32] *Lalonde* at 505

[33] *Imperial Tobacco* at paras 59, 61-62

[34] *Lalonde* at para 184.

22. In this case, it is the fact of the legislation, in the middle of an election campaign, absent any consultation or notice that is subject to constitutional oversight and scrutiny. It is not difficult to see how such action offends the democracy principle.

23. The Province's legislative competence over Municipal Institutions is not boundless. Parliamentary sovereignty "may be attenuated where the exercise of parliamentary power would threaten the very foundations of our democratic order."[35] For example, in *Reference re Alberta Legislation*, this Court held that despite the wide ambit of provincial authority over newspapers, the limit was reached when the exercise of the right of public discussion, a core component of democracy, was "substantially interfered with".[36] Similarly, in *Vriend v Alberta*, the Supreme Court held that judicial intervention based on the democratic principle was warranted where the interests of a minority had been denied consideration.[37] In *Masters Association of Ontario*, the Superior Court of Ontario found two breaches of constitutional principles sufficient to ground constitutional remedies.[38]

24. Canadians enjoy fundamental rights to participate in political activities. Provincial legislatures may not enact legislation to the effect of which "would be to substantially interfere with the operation of this basic constitutional structure."[39]

25. Bill 5 offends the unwritten constitutional principle of democracy and it should be quashed.

D. The Counter-majoritarian Role of the Courts

26. In upholding Bill 5, the Court of Appeal for Ontario held that the democracy principle could not invalidate legislation because:

> [w]ere a court to invoke unwritten constitutional principles to invalidate legislation, the consequences of judicial error – always a possibility – would be virtually irremediable. Where a court invalidates legislation using s. 2(b) of the

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[35] Vincent Kazmierski, "Draconian but Not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada" (2010) 41 Ottawa L Rev 245 at 278

[36] [1938] SCR 100 at para. 111

[37] [1998] 1 SCR 493 at para176, cited in *Lalonde* at para 107

[38] *Masters' Assn. of Ontario, supra* note 15 at para 130

[39] *OPSEU* at paras 143-144

> *Charter*, s. 33 is available to enable the legislature to give effect to its disagreement with a court's interpretation or application of that right. Were a court instead to invoke unwritten constitutional principles, constitutional amendment – by design, something that is extremely difficult to achieve – would be the only option available.[40]

27. The court's conclusion was in error.

28. There is no inherent wrong done by judicial invalidation of laws; courts do so frequently, including on the basis of unwritten principles like those found in s. 7 of the *Charter*. While judicial error is always a possibility, so too is legislative error, intentional or otherwise.

29. The result of the decision below is that the Province could enact any legislation it desired in relation to municipal government and elections, including legislation that explicitly disenfranchises a group otherwise protected under s. 15 of the *Charter*, or legislation that was insidiously discriminatory, such as by imposing an educational or literacy requirement for voters.[41] Such laws would not only violate the rights of voters, they would reduce faith in our elections, a scar that would expand far beyond just the municipal jurisdiction in which they took effect, which is the very mischief the democracy principle is intended to prevent. If in making such laws the Province invoked s. 33 of the *Charter*, the notwithstanding clause, there would be no grounds upon which the courts could intervene.

30. According to the court below, such a decision would have to stand, out of respect for the legislative branch. But this creates a sort of a tautological, democracy ourobouros: wherein a majoritarian body could reduce or eliminate the democratic rights of a minority, which is, in turn, upheld by the courts in the name of democracy, out of respect for legislative supremacy. Such an outcome is absurd. Permitting a legislature to disenfranchise municipal voters or to undermine confidence and faith in a municipal government is not democratic, though it may be permitted on a narrow interpretation of s. 3 of the *Charter*. Rather, it would be an abdication by the courts of the constitutional principles of democracy and respect for minorities, in favour of parliamentary

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[40] ONCA Reasons at para 88

[41] Or, as Michael Pal writes, the Province could appoint a second-place finisher as mayor, or throw out the results of the race entirely: "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 299

sovereignty. It ignores the role intended for the courts in our democracy: as a counter-majoritarian force, to balance the "vital unstated assumptions" upon which the Constitution is based, against the whims of the majority.

31. There are some principles so fundamental to the Canadian constitutional framework that they cannot, and should not, be overridden. Chief among them is the democracy principle. Majoritarianism, or parliamentary sovereignty, is a necessary but not sufficient condition for democracy. The best understanding of democracy encompasses more; including that it is anti-democratic to change the rules of an election mid-stream.[42] In these circumstances, the democracy principle must be allowed to trump the will of the majority.[43]

PART IV. COSTS

32. Progress Toronto does not seek costs, and asks that it not be liable for costs.

PART V. ORDER SOUGHT

33. Progress Toronto respectfully requests that the appeal be allowed in the manner sought by the Appellant, which is that the next Toronto municipal election be run under the 47-ward system.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 1, 2021

Per: 

Donald Eady / Glynnis Hawe

Paliare Roland Rosenberg Rothstein LLP

Lawyers for the Intervener, Progress Toronto

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[42] Mark Carter, "Diefenbaker's Bill of Rights and the "Counter-Majoritarian Difficulty": The Notwithstanding Clause and Fundamental Justice as Touchstones for the Charter Debate", 2019 82-2 Saskatchewan Law Review 121, 2019 CanLIIDocs 2717, https://canlii.ca/t/smkw at p 16 ["Carter"], citing Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass: Harvard University Press, 1977) at xi

[43] Carter at p 16

PART VII - TABLE OF AUTHORITIES AND STATUTORY PROVISIONS

Cases	**Paragraphs in factum where cited**
Bielli v Canada (Attorney General), 2012 FC 916	14(f)
British Columbia v Imperial Tobacco Canada Ltd., 2005 SCC 49	18, 20
Canadian Bar Assn. v British Columbia, 2008 BCCA 92	19
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Conservative Fund Canada v Canada (Chief Electoral Officer), 2010 ONCA 882, leave to appeal to SCC refused, 34097 (5 May 2011)	14(c), 14(e)
Lalonde v Ontario (Commission de restructuration des services de santé) (2001), 56 OR (3d) 505 (Ont CA)	8, 20, 21, 23
Figueroa v Canada, 2003 SCC 37	14
Gift Lake Métis Settlement v Alberta (Minister of Aboriginal Relations), 2015 ABQB 654	14(d)
Harper v Canada, 2004 SCC 33	14
Opitz v Wrzesnewskyj, 2012 SCC 55	14(a), 14(b)
OPSEU v Ontario (Attorney General), [1987] 2 SCR 2	13, 24
Polewsky v Home Hardware Stores Ltd, 2003 CarswellOnt 2755 (Ont Div Ct), leave to appeal allowed 2004 CarswellOnt 763 (Ont CA)	19

McGill Law Journal — Revue de droit de McGill

THE UNWRITTEN PRINCIPLE OF DEMOCRACY

*Michael Pal**

This article considers the content of the unwritten principle of democracy and its potential relevance in Canadian constitutional interpretation. The unwritten principles of federalism, the rule of law and constitutionalism, democracy, and the protection of minorities set out by the Supreme Court of Canada in the *Secession Reference* have received extensive academic attention. Much yet remains unknown, however, about the democracy principle. This article argues that we should interpret the unwritten principle as embodying a "thin" or procedural account of democracy tied to meaningful participation, rather than a "thick" version imposing specific outcomes or broader obligations. I argue that whatever the weight of a "thick" account of democracy, a "thin" understanding is preferable for filling in the content of a constitutional principle that has legal force. The central critiques of the use of unwritten principles in constitutional interpretation are 1) that they lack legitimacy and 2) that they are incoherent in relation to one another. Operationalizing a thin version of democracy in constitutional interpretation responds better to the claims that the unwritten principles lack legitimacy or are incoherent. A thin account still permits the unwritten principle to carry out its functional role in constitutional interpretation, such as enabling courts to fill in gaps in the text or to engage in structural reasoning. The article considers the implications of this approach for referendums and municipal elections.

Cet article examine le contenu du principe non écrit de la démocratie et sa pertinence potentielle dans le cadre de l'interprétation constitutionnelle canadienne. Les principes non écrits du fédéralisme, de la primauté du droit et du constitutionnalisme, de la démocratie, et de la protection des minorités, énoncés par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec*, ont fait l'objet d'une attention particulière de la part de la communauté académique. On ignore cependant encore beaucoup sur le principe non écrit de la démocratie. Cet article soutient que nous devrions interpréter ce principe comme incarnant une définition « étroite » ou procédurale de la démocratie, associée à une participation significative, plutôt qu'une définition « large » imposant des résultats spécifiques ou des obligations plus vastes. Nous soutenons que, quel que soit le poids d'une définition « large » de la démocratie, une compréhension « étroite » de celle-ci est préférable pour indiquer la teneur d'un principe constitutionnel ayant une force juridique. Les principales critiques de l'utilisation de principes non écrits dans l'interprétation constitutionnelle sont 1) qu'ils manquent de légitimité et 2) qu'ils sont incohérents les uns par rapport aux autres. L'opérationnalisation d'une définition « étroite » de la démocratie dans l'interprétation constitutionnelle répond mieux aux affirmations selon lesquelles les principes non écrits manquent de légitimité ou sont incohérents. Une définition « étroite » permet au principe non écrit de remplir son rôle fonctionnel dans l'interprétation constitutionnelle, notamment en permettant aux tribunaux de combler les lacunes des textes ou d'entreprendre un raisonnement structurel. Cet article prend en considération les conséquences de cette approche pour les référendums et les élections municipales. Cet article examine les considérations de cette approche à l'égard des référendums et des élections municipales.

* I would like to thank Jean Leclair, Mark Walters, Vanessa MacDonnell, Sarah Burton, Carissima Mathen, Se-shauna Wheatle, Grégoire Webber, Jacob Weinrib, Peter Oliver, Lorraine Weinrib, Bruce Ryder, Mariana Valverde, Craig Scott, Gabriel Edelman, Alexandra Flynn, and Thomas McMorrow for their generous feedback on the various versions of this article. The article was presented at the University of Ottawa as part of the symposium on unwritten principles and also at Queen's University and the University of Toronto. I am grateful to the participants at all three workshops.

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mid-campaign was unprecedented. The boundaries of wards or districts should be set well in advance of elections—as they usually are in Canada—whether for federal, provincial, or municipal votes.

The application judge, Justice Edward Belobaba, garnered headlines for striking down the provisions in the law that altered the number of wards. He did so on the basis of section 2(b). He controversially imported the guarantee of "effective representation"[145] from section 3 of the *Charter* into section 2(b).[146] He found two breaches of section 2(b) where Bill 5 unduly diminished effective representation. First, he concluded that interference with the basic structure of the election mid-campaign harmed voters and candidates.[147] Second, he found that it was also a breach to increase the population of each ward, which was the direct result of decreasing the number of wards in the city.[148] In his holding, the population increase harmed voters because it hindered their effective representation, given the larger demands on their representatives in a more populous ward.

The Court of Appeal on a stay motion pending the appeal of Justice Belobaba's ruling expressed clear disapproval of his reasoning. A majority of the Court ultimately overruled him on the merits,[149] though with a dissent by Justice MacPherson based on freedom of expression. The majority of the Court of Appeal concluded that Justice Belobaba "wrongly imports the content of s. 3 into s. 2(b) in order to circumvent the decision of the constitutional framers not to extend the protection of s. 3 to municipal elections."[150]

Justice Belobaba was incorrect in my view in finding a second breach related to increases in the population of each ward, though not because it imported the section 3 doctrine into section 2(b). His conclusion that there was a second breach recognized constitutional damage caused by the presence of populous districts. The notion that populous districts harm their constituents is unknown in Canadian constitutional law, including in section 3 or elsewhere.[151] To the best of my knowledge, it is not a relevant

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145 The standard comes from *Reference re Provincial Electoral Boundaries*, *supra* note 35.

146 See *Toronto (City of)* ONSC, *supra* note 8 at para 46.

147 See *ibid* at paras 27–28.

148 See *ibid* at para 59.

149 See *Toronto (City)* ONCA 2018, *supra* note 8 at paras 11–12.

150 *Toronto (City)* ONCA 2019, *supra* note 131 at para 76. At para 118, Miller JA argues that *Haig*, *supra* note 116 establishes at 1040–41 that section 3 does not apply outside of provincial and federal elections. The main case on electoral boundaries under section 3 is *Reference re Provincial Electoral Boundaries*, *supra* note 35.

151 The leading work on Canadian electoral districts is John C Courtney's *Commissioned Ridings: Designing Canada's Electoral Districts* (*supra* note 142). It does not canvas the issue of the absolute population of a district causing harm.

concern in other comparable jurisdictions either.[152] The *relative* population of districts matters, not their *absolute* size.[153] A claim that more populous districts harm representation necessarily implies keeping the population of wards relatively constant. Such an outcome can only be achieved by endlessly increasing the number of members in the legislative body to keep pace with population growth. A larger legislative body has potentially negative consequences for representation.[154] The majority of the Court of Appeal was right to overrule Justice Belobaba on this particular point, though it did so for the wrong reasons.[155]

The first breach found by Justice Belobaba in relation to the harm caused by mid-election changes has more merit. Interpretation of the relevant *Charter* provisions directly raises the role of the unwritten principle of democracy in constitutional interpretation. Electoral districts are fundamental aspects of conducting elections. They shape representation, candidate strategy and communications, informal coalitions among representatives in a jurisdiction without political parties, and the diversity of representatives, among other matters.

The reasoning by the majority of the Court of Appeal on the impact of the mid-campaign interference leaves much to be desired. Municipalities are creatures of the provinces, they held, and if a province can create or eliminate a municipality, then it can legislate as to how municipal elections are to proceed. The province can change the rules mid-campaign, just as it could simply stop the practice of having municipal elections. In other words, there is no requirement of fair procedures in the election.[156] The consequences of this approach are untenable. The implication of the Court of Appeal's conclusion is that voters in Toronto could select a mayor, but then the premier could appoint the second-place finisher as the winner or simply declare that he would not respect the outcome. Even on the facts of the case, mid-election interference was a serious and unprecedented action.

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[152] See Lisa Handley & Bernard Grofman, eds, *Redistricting in Comparative Perspective* (New York: Oxford University Press, 2008).

[153] For a discussion of how population relates to electoral boundaries, see Courtney, *supra* note 142 at 195–200.

[154] See *ibid* at 19–20.

[155] See *Toronto (City)* ONCA 2019, *supra* note 131 at paras 72–77, per Miller JA (for the majority). Its reasons for doing so were not sound in my view, as set out in the remainder of this section of the article.

[156] See *ibid* at para 77:

> Instead of working from the text of the *Charter* and giving effect to the constitutional settlement it established, the application judge worked from the premise that, if he concluded that the *Act* was unfair to candidates and voters, it must therefore be unconstitutional. The Constitution does not work that way.

Imposing mid-election changes in the basic rules of the game is qualitatively different from amending legislation about municipal elections in the normal course of things outside of a campaign under the jurisdiction provided by section 92(8) of the *Constitution Act, 1867*.

The core of the majority's analysis focused on its disapproval of Justice Belobaba's approach to the relationship between sections 2(b) and 3 of the *Charter*. The alternative interpretive approach taken by the majority of the Court of Appeal on the relationship between different rights and freedoms guaranteed by the *Charter* is a novel one unsupported by the case law. The majority labels the application of the effective representation standard developed initially under section 3 to municipal elections through section 2(b) as a "workaround."[157] The assertion is that it runs counter to the text of the *Charter* to protect municipal elections in the same way as federal and provincial elections. There is a superficial logic to this point. Section 3 refers to "elections to the House of Commons or of a legislative assembly." It does not specifically refer to municipal elections and, therefore, the majority concludes that doctrines developed under section 3 cannot legitimately be used in interpretation of section 2(b) of the *Charter*.[158]

It is not "circumvention" or a "workaround" for judges to amend doctrines in light of unexpected new scenarios, however, including the unprecedented scenario of mid-election changes in electoral districts. There is no principled reason why *Charter* rights and content must be interpreted to have unique rather than overlapping content. Justice Miller for the majority acknowledged as much in writing that "[r]ights protections often overlap"[159] and that "the coverage of particular rights can overlap."[160] Using "effective representation" as a standard initially developed pursuant to section 3 under the auspices of section 2(b) was, in his view, impermissible because it violated the "basic structure" of the *Charter*, "subsumed" the right to vote within freedom of political expression, and "inflated [the] content" of section 2(b).[161] The only support for this conclusion in the case law that is provided is a reference to paragraphs 79–80 of *Thomson Newspapers Co. v. Canada (AG)*[162] and paragraph 67 of *Harper*.[163] These paragraphs require careful scrutiny.

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157 *Ibid* at para 71.

158 The relevant portions of the majority opinion on this point are *ibid* at paras 70–77, per Miller JA.

159 *Ibid* at para 75.

160 *Ibid* at para 76.

161 *Ibid.*

162 [1998] 1 SCR 877, 159 DLR (4th) 385 [*Thomson Newspapers*].

163 See *supra* note 37.

Thomson Newspapers does indeed state that sections 3 and 2(b) are "distinct," but it did so in the scenario where both might conceivably apply. The paragraphs cited by Justice Miller simply set out that where the two provisions "overlap or come into conflict," they are to be balanced rather than placed in any hierarchy.[164] It is an assertion of the now familiar approach by the Court that balancing is preferred to conflict in interpreting related rights.[165] They "must [each] be given effect"[166] when both are operative and need to be balanced. The case does *not* stand for the proposition that the right to vote and freedom of political expression are barred from having similar content where only one is operative. The passage cited from *Harper* relies on *Thomson Newspapers* for the conclusion that the provisions of the *Charter* are "distinct" and then holds that it is wrong to equate sections 3 and 2(b).[167] These statements in *Harper*, however, are again in the service of establishing the need to engage in balancing between rights and freedoms.[168] They do not establish a rule against overlapping content where only one right or freedom is in play.

A cleaner solution in my view would have been to rely on the unwritten principle of democracy as the interpretive guide in assessing whether section 2(b) prevents changing the rules in the midst of a municipal election in a manner that affects expressive freedom. This assessment is made independently of what analysis might proceed under section 3. If the "basic structure" of the Constitution is at stake, surely the principle of democracy is relevant. The Court of Appeal majority[169] and dissent[170] rejected the argument that the unwritten principle of democracy barred the mid-election dissolution of the electoral map. The reasoning of the majority is that unwritten principles should not on their own be the basis for invalidating legislation.[171] The notion that the democracy principle could inform the evolution of section 2(b) doctrine is not considered.[172] There is no analysis of the

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164 *Thomson Newspapers*, *supra* note 162 at para 80.

165 See *R v NS*, 2012 SCC 72 at para 52.

166 *Thomson Newspapers*, *supra* note 162 at para 80.

167 *Harper*, *supra* note 37 at para 67.

168 See also *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877, 120 DLR (4th) 12 ("*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights").

169 See *Toronto (City)* ONCA 2019, *supra* note 131 at paras 81–89, per Miller JA. The Court also rejected the claim that unwritten principles limited the jurisdiction over municipalities granted to the provinces in section 92(8) of the *Constitution Act, 1867*, *supra* note 17.

170 See *Toronto (City)* ONCA 2019, *supra* note 131 at para 99 (bullet point #3), per MacPherson JA.

171 *Ibid* at para 89.

172 The majority considers the unwritten principles in relation to the division of powers over municipalities and the possible role of section 92(8) in the case (see *ibid* at paras 90–95).

41 Ottawa L. Rev. 245

Ottawa Law Review
2009-2010

Article

Draconian but Not Despotic: The "Unwritten" Limits of Parliamentary Sovereignty in Canada

Vincent Kazmierski [a1]

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More than a decade after the *Quebec Secession Reference*, the issue of whether unwritten constitutional principles may be applied as free-standing limits on legislation remains a contentious issue. Interestingly, academics and judges seem to be approaching the issue from different perspectives. Whereas scholars have adopted an "American" focus on the potential dangers to the legitimacy of judicial review that are raised by judges departing from the constitutional text to identify and apply constitutional principles as limits on legislation, Canadian judges appear to be adopting a "British" approach that recognizes the legitimacy of unwritten principles but favours the principle of parliamentary sovereignty above other principles.

This article argues that viewing decisions of Canadian courts through the lens of British common law constitutionalism provides a new perspective on some of the most important appellate and Supreme Court of Canada decisions that have considered the application of unwritten constitutional principles as limits on legislation. It suggests that while these decisions may appear (on their face) to limit the scope of the application of unwritten constitutional principles, the decisions actually include the building blocks for an approach that ultimately recognizes the potential for unwritten principles to limit legislation that substantially interferes with the democratic process.

The article proceeds beyond the parameters of the existing debate concerning the role of unwritten principles in Canadian constitutional law by providing a detailed analysis of several key cases from a new perspective. In so doing it builds a new framework for understanding the Supreme Court's approach to this issue.

Table of Contents

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***247** It is well within the power of the legislature to enact laws, even laws some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and other branches of government.

Chief Justice McLachlin in *Babcock v. Canada (Attorney General)* [1]

I. INTRODUCTION

The late 1990s witnessed a watershed in Canadian constitutional law. In the course of 11 months between September 1997 and August 1998, the Supreme Court of Canada released two seminal decisions involving the application of unwritten constitutional principles: the *Provincial Judges Reference* [2] and the *Quebec Secession Reference*. [3] These decisions propelled unwritten constitutional principles into the forefront of Canadian constitutional discourse. Now, more than a decade later, the issue of the appropriate role for unwritten principles in a constitutional order that includes extensive constitutional texts continues to fuel debate among Canadian scholars and jurists. However, in many cases, the scholars and jurists appear to be engaged in different debates.

Among scholars, there appears to be a general consensus accepting less radical applications of unwritten constitutional principles in the process of constitutional and statutory interpretation and in the regulation of administrative authority. ***248** However, the issue of whether unwritten constitutional principles may be applied as free-standing limits on legislation remains contentious. Academic critics of the application of unwritten constitutional principles as limits on legislation have focused much of their attention on two specific concerns related to the relationship between unwritten constitutional principles and the legitimacy of judicial review. [4] First, critics have argued that the application of unwritten principles will result in judges moving beyond their legitimate role as interpreters

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principle of democracy in either situation is fundamentally the same, namely preventing the government from using its control of the legislature to undermine the limits on its own power. In the case of the principle of judicial independence, the government and the legislature should be restricted from interfering with the ability of the judiciary to act as an independent arbiter of the exercise of government or legislative power. With respect to the principle of democracy, the government and the legislature should be restricted from interfering with the representative function of the legislature, including its role in promoting the capacity of citizens to participate in the political process and to hold their representatives (and through them the government) accountable.

A review of *Babcock, Imperial Tobacco* and *Charkaoui* thus suggests that, while the Supreme Court has sought to limit the potential application of unwritten constitutional principles as mechanisms for invalidating legislation, it has left open the possibility that certain principles may be used to invalidate legislation in some circumstances. This is consistent with the common law approach to judicial review in so far as it recognizes that there must be some limitation on the scope of parliamentary supremacy. While the Supreme Court has thus far focused exclusively on the capacity of the principle of judicial independence to invalidate legislation where it substantially interferes with the adjudicative role of the courts, it has offered no principled reason why the principle of democracy could not also be used to invalidate legislation that imposed substantial interference with the democratic process.

*278 V. THE PRINCIPLE OF DEMOCRACY AND THE LIMITS OF PARLIAMENTARY SOVEREIGNTY

The notion that parliamentary sovereignty may be attenuated where the exercise of parliamentary power would threaten the very foundations of our democratic order is supported by a number of Supreme Court cases. It finds some of its earliest roots in the Implied Bill of Rights cases, particularly the *Alberta Press* case. It has also been reinforced in several cases following the entrenchment of the *Charter*.

A. *Reference re Alberta Legislation* [111]

The *Alberta Press* case was the first case to raise the possibility that a right of political speech could be inferred from the *Constitution Act, 1867*. [112] The case involved a reference from the Alberta government that asked the Supreme Court to pronounce on the validity of three provincial bills introduced by Alberta's provincial government in order to implement a system of social credit in the province. [113]

During the course of his decision, Chief Justice Duff considered whether the provincial power to regulate newspapers might be limited in light of the importance of freedom of expression to the democratic process. He stated:

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> Some degree of regulation of newspapers everybody would concede to the Provinces. Indeed, there is a very wide field in which the Provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the *B.N.A. Act* and the statutes of the Dominion of Canada. [114]

These *obiter* comments were relied upon by judges of the Supreme Court in a number of subsequent pre-*Charter* cases and became the foundation for an argument that the Constitution mandated limits on legislation that would substantially interfere ***279** with the parliamentary process in Canada. [115] This line of reasoning was taken the furthest by Justice Abbott in concurring reasons in *Switzman v. Elbling*, where he argued that the efficacy of Parliament was so dependent on public debate of important issues that no level of government could "abrogate [the] right of discussion and debate." [116]

B. *O.P.S.E.U. v. Ontario (Attorney General)*

Claims that limits on parliamentary sovereignty could be inferred from the nature of our constitutional order, particularly the parliamentary system it was established to protect, continued after the entrenchment of the *Charter* in cases such as *O.P.S.E.U. v. Ontario (Attorney General)*. [117] *O.P.S.E.U.* involved a challenge to several sections of Ontario's *Public Service Act* [118] on the grounds that they were *ultra vires* the Ontario government. The impugned provisions prohibited civil servants from participating in particular political activities such as running for election to Parliament and canvassing or soliciting funds on behalf of political parties. [119]

In addition to division of powers arguments, the appellants sought to impugn the legislation on the basis of *Charter* grounds. However, the Supreme Court refused to hear the *Charter* arguments. In the alternative, the appellants advanced an argument that the legislation violated fundamental rights to participate in certain political activities. In the course of examining this argument in his reasons, Justice Beetz accepted the basic premise that there are fundamental rights that may be inferred from the Constitution, independent of the *Charter*. Justice Beetz stated:

> Perhaps the appellants' strongest argument was the one based on the existence in Canada of certain fundamental rights to participate in certain political

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> activities. For this argument, they relied on such cases as *Reference re Alberta Legislation* and *Switzman v. Elbling*.
>
> 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 ***280** of Duff C.J.C. in *Reference re Alberta Legislation* at p. 107 D.L.R., p. 133 S.C.R., "such institutions derive their efficacy from the free public discussion of affairs ..." and, in those of Abbott J. in *Switzman v. Elbling* at p. 371 D.L.R., p. 328 S.C.R., 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. [120]

Justice Beetz thus found, in *obiter*, that the basic constitutional structure, which includes freely elected legislatures functioning in an environment of free discussion of political issues, must be protected from substantial interference. His comments concerning the inability of either Parliament or the provincial legislatures to substantially interfere with the operation of a basic constitutional structure supporting political participation are strikingly similar to the comments made by Sir John Laws, noted earlier.

Interestingly, in his minority opinion, Chief Justice Dickson also discussed the existence of constitutional principles. He noted that several decisions of the Supreme Court "manifest a clear recognition that freedom of speech and expression is a fundamental animating value in the Canadian constitutional system." [121] However, Chief Justice Dickson was quick to point out that no one constitutional principle should be held as the ultimate constitutional principle. Different constitutional principles may come into conflict with each other and must each be accorded appropriate respect. He stated:

> It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which may sometimes conflict. It is for that reason that the passage in *Fraser* upon which the appellants rely so heavily is followed immediately by these words, at p. 128 D.L.R., p. 463 S.C.R.:
>
> But [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against,

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> other important, and often competing values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values. [122]

Chief Justice Dickson's warning applies as readily to the principle of parliamentary sovereignty as it does to the principle of freedom of expression. Neither ***281** principle may be taken as absolute, but rather each must be understood in light of the other and in light of its role in promoting the democratic system of governance that is the ultimate foundation of the Canadian Constitution. This balancing process is required under the Supreme Court's approach to the application of unwritten constitutional principles. [123]

C. Reference Cases

O.P.S.E.U. was not the only case in which members of the Supreme Court have favourably commented on the limitations on parliamentary sovereignty suggested by the Implied Bill of Rights approach. In the *Provincial Judges Reference*, Chief Justice Lamer noted the approach adopted in the Implied Bill of Rights cases and pointed out that the approach was based on the recognition that the Court could prescribe limits on government's ability to "undermine the mechanisms of political accountability." [124]

Similarly, in the *Patriation Reference*, Justices Martland and Ritchie noted that, at times, the Supreme Court has had to consider issues for which the text of the Constitution provided no answer. In such situations, they found, the Court "denied the assertion of any power which would offend against the basic principles of the Constitution." [125] Justices Martland and Ritchie themselves relied on the approach adopted by Chief Justice Duff in *Alberta Press Reference*. This approach held that "the powers requisite for the protection of the constitution itself arise by necessary implication from the B.N.A. Act as a whole ...." [126] Justices Martland and Ritchie noted that the approach adopted by Chief Justice Duff in the *Alberta Press* case was an example of "judicially developed legal principles and doctrines" that had been "accorded full legal force in the sense of being employed to strike down legislative enactments." [127] In the *Quebec Secession Reference*, the Supreme Court endorsed this view that such legal principles, derived from the basic structure of the Constitution, may have full legal force. [128]

***282** The recognition that the courts have the power to restrict the government from interfering with the basic democratic structures established by the Constitution is also consistent with the approach to *Charter* interpretation advocated in the Chief Justice's majority reasons in *Sauvé v. Canada (Chief Electoral Officer)*. [129] In considering whether denying the vote to prisoners serving sentences of two years or more violated the right to vote protected by section 3 of the *Charter*, Chief Justice McLachlin emphasized the fundamental

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importance of the right to vote to the democratic framework established by the Constitution. She went on to underline the importance of judicial protection of such fundamental aspects of the democratic framework:

> The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system. [130]

The above cases suggest that parliamentary sovereignty may be limited where legislation threatens fundamental elements of the democratic process. The mechanisms of political participation and democratic accountability are basic structures of the Constitution, which the courts must vigilantly protect. Fundamental interferences with these basic structures must be rejected by the judiciary; this is not a matter of judicial discretion, but rather is a duty imposed on judges by the Constitution. Chief Justice McLachlin's reasons in *Sauvé* focus on the duty imposed on courts by the *Charter*. However, the passages cited above from *O.P.S.E.U.*, the *Patriation Reference*, the *Provincial Judges Reference*, and the *Quebec Secession Reference* emphasize the fact that the important institutional role the courts must play in ensuring that legislatures do not undermine the very source of their legitimacy is one that extends beyond protecting the rights explicitly set out in the *Charter*.

Admittedly, in Canada, much of the protection of the democratic process may be achieved through the application of written provisions of the Constitution, particularly, sections 2 to 5 of the *Charter*. As such, the need to rely on the principle of democracy as an independent limitation on legislative interferences with the democratic process is likely to be rare. However, there are areas where the democratic process may remain vulnerable to attack. One example is the absence of explicit constitutional ***283** protection for access to government information, which is widely regarded as crucial for meaningful participation in the democratic process. To date, the right to vote protected by section 3 of the *Charter* has not been applied by the Supreme Court to protect access to government information. However, it would be inconceivable for a representative democracy to function effectively if access to government information was completely eliminated or even significantly constrained. [131] For example, it is difficult to see how voters could make meaningful choices when selecting their political representatives unless they have access to sufficient information about both the different candidates (and their parties) and about the conduct of the government.

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I have argued elsewhere that the scope of section 3 of the *Charter* should be interpreted to protect access to government information necessary to ensure that voters can make informed choices in the electoral process.[132] Such an extension of the scope of section 3 beyond the limits of its historical application would use the principle of democracy to build on the Supreme Court's existing jurisprudence and its identification of the role of section 3 in ensuring meaningful democratic participation.[133] Yet even the extension of section 3 to protect access to government information necessary to ensure that citizens can make informed electoral decisions may leave access to government information unprotected in many instances, particularly if the protection of section 3 is limited to protecting access in electoral contexts alone.

Access to government information is also essential to ensure that the elected representatives are able to effectively hold the government to account between elections. The notion of responsible government becomes meaningless if the members of the legislature do not have access to sufficient information to judge whether they continue to have confidence in the cabinet and prime minister. The imperative of access to government information extends beyond information necessary to inform the votes of citizens to information necessary for the proper functioning of other mechanisms of accountability including the day-to-day parliamentary process and parliamentary committees. It also extends to other mechanisms of accountability including the work of Officers of Parliament and commissions of inquiry.

***284** There are numerous legislative restrictions that may be relied upon by government to impede access to information deemed necessary to hold government to account outside of the electoral process.[134] While most existing legislative restrictions on access would likely survive constitutional scrutiny, the far greater concern is that more severe restrictions on access may be imposed in the future.[135] It is not at all certain that section 3 of the *Charter* will be applied by the courts to protect against such restrictions on access to information in non-electoral contexts, although I have argued that it should. Similarly, the protection of access to information through section 2(b) of the *Charter* remains uncertain, although the Supreme Court's recent decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* suggests the Court may protect access to information as a derivative right under section 2(b) in limited circumstances.[136] Again, while I have argued that section 2(b) *should* be interpreted to protect access to government information, the limits of the existing jurisprudence must be accounted for.

The limits suggested by existing *Charter* jurisprudence highlight the access gap in the explicit terms of the Constitution. If section 3 is restricted to protect only the meaningfulness of political participation through the formal electoral process and section 2(b) is narrowly applied to protect against government restrictions on expression, then legislative restrictions

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on access to government information will escape *Charter* scrutiny in many contexts. By contrast, the approach advocated in this ***285** article recognizes that the protection of the democratic process extends beyond the strict application of the written provisions of the Constitution. As such, it provides that, even if the explicit provisions of the *Charter* do not protect access to the information necessary for the democratic process to function effectively, the principle of democracy may stand ready to do so.

VI. CONCLUSION

The Supreme Court's renewed interest in unwritten constitutional principles has highlighted the continued relevance of the principle of parliamentary sovereignty within our constitutional framework. Undoubtedly, the principle had lost much of its impact after the entrenchment of the *Constitution Act, 1982*, complete with a *Canadian Charter of Rights and Freedoms*, and a clause declaring the Constitution to be the supreme law of Canada. [137] However, claims that unwritten constitutional principles might be applied to limit legislation have inspired judges to explicitly explore the ways in which the principle of parliamentary sovereignty continues to operate in areas of jurisdiction not included within the ambit of the *Charter*. In many cases, Canadian judges have relied on the application of the principle of parliamentary sovereignty to reject claims to limit legislation through the application of other unwritten constitutional principles. These cases may seem, at first reading, to restrict the normative scope of unwritten constitutional principles as independent limits on legislation. However, in my view the application of the principle of parliamentary sovereignty in these cases should be understood in the broader context of what may be called a common law approach to the role of unwritten principles in constitutional interpretation.

This common law approach, which has been nurtured in Great Britain but is by no means limited to the British context, includes two important components. First, the common law approach holds that courts play an important role in identifying and applying fundamental principles within the constitutional framework. Second, the common law approach appreciates the importance of the principle of parliamentary sovereignty while also recognizing the need to protect other fundamental principles, including those that protect the democratic process. As such, the common law approach rejects an absolute conception of parliamentary sovereignty on the basis that such an absolute conception is inconsistent with modern conceptions of democratic governance.

***286** Canadian courts have engaged this common law approach when considering the application of unwritten constitutional principles. Thus, while emphasizing the continued importance of the principle of parliamentary sovereignty, Canadian judges have acknowledged that judges might recognize limits on parliamentary sovereignty. Although Canadian courts have not expressly articulated such limitations on parliamentary sovereignty in recent cases, the need to protect the fundamental principles that support the democratic

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