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Un-Democratizing the City? Unwritten Constitutional Principles and Ontario's Strong Mayor Powers

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UN-DEMOCRATIZING THE CITY? UNWRITTEN CONSTITUTIONAL PRINCIPLES AND ONTARIO'S STRONG MAYOR POWERS

Alexandra Flynn[1]

I. Introduction

Municipalities are a legal puzzle. Under the Constitution, they are subject to provincial jurisdiction as administrative bodies, like thousands of other tribunals, commissions, and government entities that make decisions on individuals' daily lives.[2] Local councils must heed the statutory constraints set by provincial governments, with their decisions subject to review by the courts. Yet Canadian cities create and deliver policies and services, with their leaders accountable to the public through regular elections, making them governments, too. They are essentially non-constitutionally protected governments that represent their citizens and are on the front lines of serious issues in their communities like homelessness and immigration settlement. This dual role of cities – as administrative bodies and governments – serves as the backdrop of this paper in examining what it means for provinces to determine the democratic decision-making of municipalities.

The history of Canadian municipal power can be traced to the origins of municipalities under English law.[3] After the Norman Conquest, William I granted a Charter to the City of London, and the City won the right to choose its own Mayor in 1215.[4] A month later, the *Magna Carta* confirmed these rights and granted "that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs."[5] Across the Atlantic Ocean, in what would become Canada in 1867, local governments were incorporated prior to Confederation, with cities in place prior to provinces joining the young country.[6] Municipalities were thus the country's first forms of government. One legal precedent - that despite its US origin has sometimes been invoked in Canada by courts - is the nineteenth-century doctrine of municipal authority known as "Dillon's Rule." Under this doctrine, municipalities can act only when and insofar as expressly authorized by statute.[7] This historical legacy of municipalities as both governments and mere administrative entities subject to provincial legislation continues to this day, with a contradictory medley of legislation and case law that has tried to make sense of this dual role of cities.

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[1] Associate Professor, University of British Columbia. This paper was written on the lands of the xwməθkwəy̓əm (Musqueam), Skxwú7mesh (Squamish) and səlilwətaɬ (Tsleil Waututh) Coast Salish peoples, where I live and work as an uninvited guest. I am grateful to the organizers, co-panelists and participants of Osgoode's 2023 Constitutional Cases Conference, especially Professor Emily Kidd White. Special thanks to Professors Mariana Valverde and Margot Young for their thoughtful feedback on earlier versions of this paper. All errors and omissions are my own.

[2] *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5., section 92(8) [*Constitution Act*].

[3] Andrew Sancton, *Canadian Local Government: An Urban Perspective* (Oxford University Press, 2015) at 3-5.

[4] Stéphane Émard-Chabot, Mary Eberts & William B Henderson, "Factum of the Intervener, Federation of Canadian Municipalities in *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732" at 3, online: <http://www.ontariocourts.ca/coa/C65861/files/C65861.FOI.FederationofCanadianMunicipalities.pdf> [perma.cc/T7KY-XNC3].

[5] *Ibid*.

[6] *Ibid*.

[7] Stanley Makuch, Neil Craik & Signe B. Leisk, Canadian Municipal and Planning Law (Toronto: Thomson Carswell, 2004). See also William J. Novak, *The People's Welfare* (UNC Press, 1997).

The Canadian Constitution does not prescribe or define "democracy," which is considered by the courts to be an unwritten constitutional principle. Indeed, neither the Constitution nor the *Charter of Rights and Freedoms* define what this term means. To the Supreme Court of Canada (SCC), democracy means the ability for electors to decide who governs them, with a system of majority rule and respect for other constitutional values including the rule of law and respect for minorities.[8] But the right of citizens to elect their rulers in fair elections is only guaranteed, if one sticks to the text of the *Charter*, at the provincial and federal levels.[9]

Many people, from political theorists to journalistic commentators, have noted that democracy is in worrisome peril across the world. Leaders cite bureaucracies, elites, and regulatory backlogs as obstacles that undermine more inclusive decision-making, with more top-down, efficiency-focused institutional design as the answer.[10] While there is wide variation in suggested or implemented reforms that still maintain the basic features of democracy, leaders have used government processes themselves to undermine democracy.[11] The question is in this paper is: when do provincial reforms go so far as to undermine the unwritten constitutional principle of democracy in municipalities, and what can local governments do about it?

To answer the question, this paper examines recent challenges to municipal authority in Ontario. In 2022, the Province of Ontario introduced three pieces of legislation to exercise their authority under section 92(8) of the *Constitution Act* to change the scope of municipal authority and the governance of specific municipalities. The actions piggybacked a 2021 Supreme Court of Canada decision that upheld, in a 5:4 decision, the same provincial government's unmitigated power to change the City of Toronto's electoral boundaries mid-election. I argue that the Province of Ontario's legislation concerning the exercise of mayoral power with a one-third vote of city council represents the most recent iteration of the province's assertion of authority over municipalities. These moves are not completely unprecedented, as the Canadian history of Dillon's doctrine shows, but they are new in their meddling with a basic building block of municipalities: democratic decision-making. I argue that latest set of provincial decisions has particular implications for this dual role of municipalities, framing their legal status more squarely to that of an administrative body and away from a government. In response, municipalities must challenge these actions forcefully and directly by strongly asserting their status as democratic governments – not through the courts, but in their city council chambers.

II. Municipalities as Constitutional Creatures

Under section 92 of the *Constitution Act*, the legislature of each province may "exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated," which includes "Municipal Institutions in the Province."[12] The SCC has long acknowledged that

[8] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385, at para 61 [*Re Quebec*].
[9] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] at s. 3; *Toronto (City) v. Ontario* (Attorney General), 2021 SCC 34.
[10] Kim Lane Scheppele, "Autocratic Legalism" (2023) 85 The University of Chicago Law Review 545, online, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6085&context=uclrev>.
[11] *Ibid* at 547.
[12] *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5., section 92(8). See also See e.g. Daniel Weistock, "Federalism and Cities" in James E. Sterling and Jacob T. Levy (eds), *Federalism*

municipalities are democratic governments that represent their residents.[13]

In understanding the tension between municipalities as administrative bodies and also governments, provincial legislation plays the pivotal role. Provinces continuously design and re-design municipal governments, deciding the sizes of city councils, their boundaries, whether and how they should amalgamate or de-amalgamate, the existence or non-existence of second-order local governments, and the specific powers they should have in respect to functions like planning, transit, social housing, welfare, and child care. It is hard to know where to start the story of any single provincial decision in relation to cities, given the numerous ways, big and small, that provinces decide which powers municipalities should have – or even what a "city" is and which entities are considered as municipalities.

Over the last two decades, and following extensive lobbying efforts, provinces across the country have given expansive powers to large municipalities—including a few more options for raising revenue, and greater oversight in matters such as infrastructure and housing.[14] In Ontario, for example, shifts in the early 2000s resulted in new provincial legislation that provided municipalities with more authority to act and greater revenue powers, Many other provinces followed suit around the same time, enacting legislation that included "plenary" clauses granting broad latitude to municipal councils to act in the well-being of their citizens. In 2016, the province of Québec introduced legislation that gave greater autonomy to Québec and Montréal, the latter also being granted special official status as a metropolis.[15] Among other new fiscal and regulatory powers, Montréal gained new authority in housing, heritage preservation, and homelessness and immigration policy.[16]

Provinces sometimes refer to municipalities as "governments" in the text of legislation. Even so, this doesn't mean that provinces have actually ceded authority to them.[17] Legislation pertaining to municipal powers may even be called a "charter," but this does not, on its own, grant a special status that protects it from interference by subsequent provincial governments. The *City of Toronto Act, 2006* granted Toronto special powers as a recognition of its size and status, including the granting of broad permissive power to local governments to make decisions on

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and Subsidiarity (New York; New York University Press, 2015) at 259-287.

[13] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [Spraytech].

[14] See e.g. *Municipal Affairs Act*, RSO 1990, c M46; Charter of Ville de Montréal, Métropole du Québec, CQLR c C-11.4.

[15] Benoit Frate and David Robitaille, "Is la a lever or an obstacle to municipal authority?" in *Policy Options* (21 June 2021), online: <https://policyoptions.irpp.org/magazines/june-2021/is-the-law-a-lever-or-an-obstacle-to-municipal-autonomy/>.

[16] *See generally* Benoît Frate and David Robitaille, "A Pipeline Story: The Evolving Autonomy of Canadian Municipalities" (2021) 34 Journal of Law and Social Policy 94-110. *See also* Staff writer, "Quebec proposes greater autonomy, grants metropolis status for Montreal," CBC News (8 December 2016), online: <cbc.ca/news/canada/montreal/quebec-proposes-greater-autonomy-grants-metropolis-status-for-montreal-1.3888329> [perma.cc/F83M-SQDJ].

17 See Kristin R. Good, "Reconsidering the Constitutional Status of Municipalities: From Creatures of the Provinces to Provincial Constitutionalism," Centre of Excellence on the Canadian Constitution (4 February 2021), online <https://centre.irpp.org/research-studies/reconsidering-the-constitutional-status-of-municipalities-from-creatures-of-the-provinces-to-provincial-constitutionalism/> on options for provincial recognition of municipalities that go beyond statutes.

matters like the social and economic well-being of residents.[18] Section 1 of the Act reads: "The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and the city council is a democratically elected government which is responsible and accountable."[19] As a government, it has the power to "determine what is in the public interest for the City" and to "respond to the needs of the City," as well as a host of other seemingly expansive enumerated powers.[20] While initially lauded as evidence of a government-to-government relationship, the *City of Toronto Act* has not prevented the province from undermining Toronto's decisions, as discussed next.[21] Most of these powers were also inserted into Ontario's *Municipal Act*, which applies to all other municipalities in the province.[22]

No matter how expansive provincial governments have been in granting greater authority to municipalities, provinces remain the level of government in charge of decision-making when it comes to municipal authority, since the federal government (the only other government named in Constitution), has no jurisdiction over municipalities. The powers of Canadian municipalities can also be restricted even in a seemingly expansive act—in Ontario, for example, the province retained its power to override municipal decisions within the text of the *City of Toronto Act* and the *Municipal Act*.[23] And many other pieces of legislation can limited the breadth of municipal authority, including, in Ontario the *Planning Act*,[24] the *Ontario Municipal Board Act*,[25] the *Municipal Conflict of Interest Act*,[26] the *Municipal Elections Act, 1996*,[27] the *Residential Tenancies Act*,[28] the *Condominium Act*,[29] and the *Municipal Freedom of Information and Protection of Privacy Act*[30] to name a few.

As administrative bodies, municipalities make final decisions through elected city councils, which are then subject to judicial review. The SCC and other courts have also been clear that municipalities may not act *ultra vires* of their authority, with municipal decisions subject to judicial review like other administrative bodies.[31] Courts will "quash municipal action as *ultra vires*, or beyond its legal competence" if it does not conform to the applicable legislation.[32]

Over the past decades, the courts have granted a more expansive approach to municipal decision-making, sometimes allowing, for example, general welfare powers to be interpreted broadly and

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[18] See eg *City of Toronto Act, 2006*, SO 2006, c 11, Schedule A.
[19] *Ibid*, s 1(1).
[20] *Ibid*, ss 2(1), (2).
[21] Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44 Osgoode Hall L.J. 409 at 421.
[22] See eg *Municipal Act, 2001*, S.O. 2001, c. 25, s. 2.
[23] Levi & Valverde, *supra* note 21 at 454–55.
[24] RSO 1990, c P13.
[25] RSO 1990, c O28.
[26] RSO 1990, c M50.
[27] S.O. 1996, c. 32, Sched.
[28] S.O. 2006, c. 17.
[29] S.O. 1998, c. 19
[30] RSO 1990, c M56.
[31] See e.g. *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at 688-689 [Greenbaum]; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC) [Shell]; *Nanaimo (City) v. Rascal Trucking Ltd*., 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342 [Rascal Trucking]; Spraytech, supra note 13.
[32] Stanley Makuch, Neil Craik & Signe B. Leisk, *Canadian Municipal and Planning Law* (Toronto: Thomson Carswell, 2004) at 81.

generously within their context and statutory limits to achieve the legitimate interests of the municipality and its inhabitants.[33] Courts over the last two decades have applied the constitutional principles of subsidiarity and cooperative federalism to understand and protect municipal decision-making.[34] For example, municipal bylaws are operable in respect of federal pipelines, despite Parliament's exclusive powers in this domain.[35] However, even with this shift - the so-called "generous approach" to interpretation of municipal powers, courts have never deviated from the view that municipalities are under provincial authority.[36] This includes limits on a municipality's ability to enact bylaws which touch on defined areas of provincial authority.[37]

Now, Canadian law is flexible enough to allow both provincial oversight of municipalities, and a more "generous" and "liberal" interpretation. However, this stance was not always the case, owing to disagreements amongst SCC justices on the right way to approach municipalities as both governments and administrative bodies. In *Shell Canada Products*, for example, the SCC considered the City of Vancouver's decision not to do business with Shell, relying on an omnibus provision to justify the action rather than an express statutory grant of power.[38] The majority, relying on a narrow interpretation of municipal authority, ruled against the City of Vancouver based on the view that the city did not have the power to make such a decision. However, the case included a strong dissent authored by Justice McLachlin (as she then was), who argued in favour of judicial deference for elected municipal bodies on the democratic basis that their purpose is to serve the people who elected them.[39] Justice McLachlin's argument was rooted in the proposition that statutes relating to municipal authority should be interpreted in a more expansive manner, stating,

> If a municipality's power to spend public money is exercised for improper purposes or in an improper manner, the conduct of the municipality should be subject to judicial review. While it is important that abuses of power are checked, however, it is also important that the courts not unduly confine municipalities in the responsible exercise of the powers which the legislature has conferred on them. Courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" … and confer the powers by reasonable implication. Such a generous, deferential approach to municipal powers will aid the efficient functioning of municipal bodies and avoid the costs and uncertainty attendant on excessive litigation. It is also arguably more in keeping with the true nature of modern municipalities, and with the flexible, more deferential approach this Court has adopted in recent cases to the judicial review of

[33] Croplife, 2005 CarswellOnt 1877; 10 M.P.L.R (4th) 1 (C.A.), leave to appeal refused, 2005 CarswellOnt 6587.
[34] Alexandra Flynn, "Operative Subsidiary and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019) 16:1 Osgoode Hall Law Journal 272.
[35] See Frate & Robitaille, *supra* note 16 at 102.
[36] *Madger v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387, 113 O.R. (3d), add'l reasons 2013 CarswellOnt 3752
[37] *Wainfleet Wind Energy Inc. v. The Corporation of the Township of Wainfleet* [2013] O.J. No. 1744.
[38] *Shell*, supra note 31.
[39] *Horton v. Greater Sudbury (City of)*, 2003 CanLII 34162 (ON SC) at para 26.

> administrative agencies.[40]

A short time later, this dissent would be reflected in two majority decisions, *Rascal Trucking*[41] and *Spraytech*.[42] In the 2001 *Spraytech* decision, the SCC again considered whether a municipal by-law that restricted the use of pesticides was *ultra vires*, or beyond the authority of a local government. In *Spraytech*,[43] the Court allowed Hudson, a town in Quebec to ban the use of aesthetic pesticides that were considered non-toxic by provincial and federal regulators.[44] The SCC considered whether the "impossibility of dual compliance" should be the test used to determine whether a municipal bylaw could be complied with alongside empowering legislation. This test establishes that provincial legislation should not be deemed to be inoperative simply because it legislates in the same area as another government.[45] In framing municipalities and their authority, the SCC stated that "municipalities as statutory bodies may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation."[46] The SCC held that municipalities "balance complex and divergent interests" in decision-making, thus warranting that "*intra vires* decisions of municipalities be reviewed upon a deferential standard."[47]

Later, the SCC considered municipal authority to issue and regulate taxi plate licences. In this case, there was no explicit reference in the enabling legislation, and the City was accused of holding a position that was discriminatory and a breach of *Charter* rights.[48] Justice Bastarache noted the shift in the interpretation of municipal authority by the courts, stating: "The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced."[49] Similarly, in *Croplife*, the Ontario Court of Appeal adopted an expansive interpretation of municipal authority, stating that general welfare powers "are to be interpreted broadly and generously within their context and statutory limits to achieve the legitimate interests of the municipality and its inhabitants."[50] The court signaled a shift away from the traditionally restrictive, prescribed approach to the interpretation of municipal power in favour of a broad purposive approach.[51] As held in *R. v. Guignard*: "This Court has often reiterated the social and political importance of local

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[40] *Shell*, *supra* note 31 at 244.
[41] *Rascal Trucking*, *supra* note 31.
[42] *Spraytech*, supra note 13.
[43] *Ibid*.
[44] Ian M., Rogers, *The Law of Canadian Municipal Corporations* (Toronto: Carswell, 1971); quoted in Spraytech, supra note 13 at 258-59.
[45] *British Columbia Lottery Corp. v. City of Vancouver*, 1999 BCCA 18 (CanLII), 169 D.L.R. (4th) 141, at 147-48. See also *Ontario v. City of Mississauga* (1981), 1981 CanLII 1860 (ON CA), 15 M.P.L.R. 212, 124 D.L.R. (3d) 385 at 232.
[46] *Spraytech*, *supra* note 13.
[47] *Rascal Trucking*, *supra* note 31 at para 35.
[48] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), 2004 S.C.C. 19 [United Taxi], referenced in *R. v. Latouche*, 2010 ABPC 166 (CanLII) at para 72.
[49] *United Taxi*, *supra* note 48 at para 6.
[50] *Croplife Canada v. Toronto (City)*, 2005 CarswellOnt 1877; 10 M.P.L.R (4th) 1 (C.A.), leave to appeal refused, 2005 CarswellOnt 6587.
[51] *Galganov v. Russell (Township)*, 2012 ONCA 409, 99 M.P.L.R. (4th) 1, leave to appeal refused 2012 CarswellOnt 15189, 2012 CarswellOnt 15190 (SCC).

governments. It has stressed that their powers must be given a generous interpretation because their closeness to the members of the public who live or work on their territory make them more sensitive to the problems experienced by those individuals."[52]

In 2019, the SCC outlined a single standard for judicial review – reasonableness – subject to a few exceptions.[53] In *Vavilov*, the SCC included municipalities, represented by city councils, as administrative bodies subject to judicial review, acknowledging that their review may not follow the same approach as other bodies.[54]: "applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging," for example "where a municipality passes a bylaw."[55] Importantly, the SCC signalled that legislation is key in determining the court's review of the administrative body's decision:

> If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language.[56]

In short, courts have been careful in balancing the dual role of local governments as governments and as administrative bodies. In *Catalyst Paper v North Cowichan*, the SCC summarized the unique nature of municipal decisions: "The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. ... [R]easonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable."[57] This is especially the case where municipalities exercise functions that are legislative in nature.[58] Citing *Catalyst Paper*, the British Columbia Court of Appeal stated in 2015, "[W]hen the City exercises its legislative powers (assuming it is acting within its jurisdiction), the principles of traditional political accountability provide the remedy: it is at the ballot box."[59]

This tension regarding municipalities as governments and administrative bodies came into sharp

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[52] *R. v. Guignard*, [2002] 2002 SCC 14 at 25.
[53] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.
[54] *Ibid*.
[55] *Ibid*. at para 137.
[56] *Ibid*. at para 110.
[57] *Catalyst Paper v North Cowichan*, 2012 SCC 2 [Catalyst Paper] at para 19.
[58] *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227 (CanLII) at paras 58-61. In Community Association of New Yaletown v. Vancouver (City), the British Columbia Court of Appeal outlined three very different kinds of administrative decisions: legislative, where municipalities enact bylaws on a range of regulatory and policy matters; business, in the administration and management of municipal assets; and quasi-judicial in matters such as licencing and rezoning.
[59] *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227 at para 62.

view in the 2021 SCC decision, *Toronto (City) v Ontario*.[60] In 2018, the Province of Ontario reduced the number of Toronto's electoral districts mid-way through the municipal election, resulting in a reduction in the number of wards from 47 to 25. The sharp reduction in the size of City Council came less than a year after Toronto had conducting a five-year ward boundary review, leading to the creation of 47 wards, three more than had previously existed. This case – and its relationship to recent Ontario legislation – is explored next.

III. Changes to municipal authority in Ontario

Courts have affirmed that provinces have the constitutional authority to decide the design and function of local governments, but with municipalities often granted deference as administrative bodies that are unique among administrative bodies and tribunals because councils are elected democratically. In other words, is provincial legislation limitless?

Undermining elections (2018)

In the run-up to *Toronto v Ontario*, Toronto's nomination period for the statutorily scheduled municipal election began in May 2018.[61] Thousands of candidates signed up in the first two months of the race, with a record number of candidates from historically marginalized communities vying for councillor positions.[62] On June 7, 2018, the Conservative party won a majority of seats in the provincial legislature and Doug Ford, a previous Toronto councillor, became the premier. The *Better Local Government Act*, also known as Bill 5, was introduced by the just-elected provincial government in June 2018, without any prior negotiations or discussions, or policy proposals.

Several candidates for City Council, mainly women and people from other historically marginalized communities, challenged Bill 5, as did the City of Toronto once empowered to do so by City Council, following a tepid response by the city's mayor.[63] A number of candidates and electors challenged Bill 5 on the basis that it violated their section 2(b) rights. The case proceeded through the courts all the way to the SCC, where ultimately the decision by the SCC was 5:4 in favour of the Province of Ontario.

The main question presented by the city in *Toronto v Ontario*, the legal case that challenged Bill 5, was whether the legislation was constitutional, as a result of its introduction mid-way through an election. On September 10, 2018, Superior Court Justice Edward Belobaba found that Bill 5 "substantially interfered with both the candidates' and the voters' right to freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*" on two grounds, and could not be saved under section 1.[64] First, the change in the number and hence the

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[60] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 [*Toronto v Ontario*].
[61] *Municipal Elections Act, 1996*, SO 1996, c 32, s 33(4). For detailed on the debates that led to the enactment of Bill 5, see Nathalie Des Rosiers, "Deference to Legislatures: The Case of the 2018 Ontario Better Local Government Act" (2021) 34 Journal of Law and Social Policy 39-67.
[62] *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 at para 31.
[63] Alexandra Flynn, "The legal case against Ford's assault on local democracy," Spacing Magazine (30 July 2018), online: <spacing.ca/toronto/2018/07/30/the-legal-case-against-fords-assault-on-local-democracy>[perma.cc/DQ4Y-84PM]
[64] *City of Toronto et al*, *supra* note 62 at para 10.

boundaries of wards mid-way through the campaign period breached candidates' freedom of expression.[65] Second, using section 3 to inform the interpretation of section 2(b), the large cut in the size of City Council and increase in the size of wards were said to violate voters' freedom of expression rights by making them unable to "cast a vote that can result in effective representation."[66] In a whirlwind decision, following the government's threat that they would invoke the notwithstanding clause to override Justice Belobaba's decision, the Court of Appeal granted the Province of Ontario's request for a stay, with the result that the election moved forward under a twenty-five ward model.[67]

One year later, the Court of Appeal decided in a 3:2 decision to overturn Justice Belobaba's decision on the grounds that the province was constitutionally empowered to design municipality authority in whatever manner it wished.[68] The majority declared Bill 5 to be constitutional, with no violations of section 2(b) of the *Charter* or of unwritten constitutional principles. They stated that the affair was a "political matter," and that the Court had "no legitimate basis" to intervene.[69] The majority emphatically rejected the argument that *Charter* section section 3 could inform section 2(b), stating that each *Charter* right must be unambiguous and "the content of one right cannot be subsumed by another, or used to inflate its content."[70] They also objected to the use of unwritten constitutional or democratic principles to overturn Bill 5, stating that even if the Act did violate either such principle, "there would be no legitimate basis for the court to invalidate" the law.[71] The two dissenting judges, led by Justice McPherson, disagreed, concluding that the province "left a trail of devastation of basic democratic principles in its wake" and that the "infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history."[72]

The decision was subsequently appealed the Supreme Court of Canada, who held in favour of the Province of Ontario in a 5:4 decision. Chief Justice Wagner and Justice Brown [as he then was], on behalf of the majority, stated that the case is fundamentally concerned not with freedom of expression but with the exercise of provincial power over municipalities.[73] The majority judgment stressed that precluding freedom of expression is a high bar that would only be met in extreme cases, which the city had not met since candidates and electors were not actually censored. More significant going forward, the majority narrowly circumscribed the permitted use of unwritten principles.[74] The majority identified only two ways in which unwritten principles can be used in constitutional cases: where the Constitution's written provisions are unclear and to fill gaps where the written Constitution is silent; the use of unwritten principles does not extend to invalidating legislation.[75] The majority's fear is that any other approach would allow the court

[65] *Ibid* at para 31.
[66] *Ibid* at para 51. Section 3 of the *Charter* guarantees Canadian citizens the democratic right to vote in a general, federal, or provincial election, and the right to be eligible for membership in the House of Commons or of a provincial legislative assembly, subject to the requirements of Section 1 of the Charter.
[67] 2018 ONCA 761, 142 O.R. (3d) 481.
[68] 2019 ONCA 732, 146 O.R. (3d) 705.
[69] *Ibid* at para 6.
[70] *Ibid* at para 76.
[71] *Ibid*.
[72] *Ibid* at para 136.
[73] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.
[74] *Ibid* at paras 27-28.
[75] *Ibid* at paras 55-57.

to impeach the legislative authority of Parliament to amend the Constitution in a manner that is "totally untethered from the text."[76]

The minority reasons authored by Justice Abella reiterated that the importance of municipal governments has been confirmed by the court's approach to a generous interpretation of local decisions.[77] The dissent also noted that that municipal elections have been a part of political life in Canada since before Confederation, and are hence part of Canada's constitutional history.[78] Justice Abella concluded with the words, "[I]n dealing with municipal elections, we are dealing with the political processes of democratic government and it is undebatable that s. 2(b) protects 'the political discourse fundamental to democracy'."[79] The SCC has since changed its composition, with some authors of both the majority and dissent since stepping down.[80]

Strong mayor powers (2022)

In *Toronto v Ontario*, the SCC did not address a scenario in which a province might seek to abolish municipal elections altogether. However, just one year after the decision was rendered, the Province of Ontario introduced measures that further challenged the governmental nature of municipalities. On August 10, 2022, the Government of Ontario introduced Bill 3, *An Act to amend various statutes with respect to special powers and duties of heads of council*.[81] Less than a month later, it was enacted. Bill 3 put in motion a promise that Premier Doug Ford had made years before, after he was defeated in the 2014 mayoral election:

> If I ever get to the provincial level of politics, municipal affairs is the first thing I would want to change. I think mayors across this province deserve stronger powers. One person in charge, with veto power, similar to the strong mayoral systems in New York and Chicago and LA. I would want our mayors to have strong powers but to be held accountable; if the voters don't like the job he or she is doing, they can fire that mayor in four years. That's how it should work.[82]

The Act, amending the *City of Toronto Act, 2006,* the *Municipal Act, 2001,* and the *Municipal Conflict of Interest Act,* provided select mayors with additional executive powers within their respective municipalities, including the ability to advance "provincial priorities" as defined by the Lieutenant Governor in Council and to make governance decisions that had previously been under the authority of city council. Under this Act, mayors have the authority to unilaterally direct municipal staff to carry out duties to implement decisions sanctioned by the mayor; to

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[76] *Ibid* at para 57.
[77] *Ibid* at para 58.
[78] *Ibid* at para 116.
[79] *Ibid* at para 121.
[80] See Supreme Court of Canada, *Current and Former Judges* (n.d.), online: <https://www.scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx>.
[81] Legislature of Ontario, *Strong Mayors, Building Homes Act, 2022*, online: <Bill 3, Strong Mayors, Building Homes Act, 2022> [*Bill 3*].
[82] Rob and Doug Ford, Ford Nation: Two Brothers, One Vision (Toronto: HarperCollins 2016), pp. 85–86, quoted from Zack Taylor, "Strong(er) Mayors – What Difference Will They Make?" IMFG Forum Paper (2023), online: <https://tspace.library.utoronto.ca/bitstream/1807/127410/1/imfgforum_no13_strongermayors_zacktaylor_may_15_2023.pdf> at 1.

exercise general control and management of the affairs of a municipality, including downgrading the role of the chief administrative officer to that of a chief of staff; and determining the organizational structure of municipalities.[83] Mayors can also advance provincial priorities despite existing procedural by-laws and exercise a veto authority if the justification relates to a provincial priority. Vetoes must be in writing and are subject to a council override with a two-thirds council vote.[84] The Act provides that a decision made legally and in good faith cannot be quashed or judicially reviewed, signalling that an accountability mechanism exists through a two-thirds vote that can override the mayor's veto.[85]

A few months later in 2022, the Province introduced Bill 39, *The Better Municipal Governance Act, 2022*, as a secondary and complementary instrument to Bill 3 to strengthen mayoral executive power.[86] Bill 3 initially applied to Toronto and Ottawa, but by June 2023 was expanded to 26 other municipalities in Ontario.[87] The legislation allows mayors to unilaterally advance by-laws to advance a provincial priority and to compel the passing of the proposed by-law if there is one-third support in the council as opposed to majority support. The legislation suggests that the existing municipal framework is inefficient and ineffective to advance provincial priorities such as housing. Under the new legislation, accountability is derived primarily from mayoral elections and provincial mandates.

Bill 39 was immediately met with sharp pushback from media pundits, academics, and politicians on the grounds that Bill 39 makes municipal governance undemocratic.[88] An expert on election law from Laval University noted that he'd "never heard of anything like it."[89] Five former mayors of Toronto signed an open letter to then-Mayor John Tory calling the extended powers undemocratic and contrary to majority rule.[90] The Association of Municipalities Ontario also objected to the changes, stating that allowing "a mayor to make law with the support of just one third of the council will disenfranchise elected councillors and potentially destabilize and undermine the authority of municipal government."[91]

The strong mayor powers have been critiqued on four main grounds. First, the legislation was unilaterally introduced by the Province without acknowledgement of the governmental nature of

[83] Bill 3, *supra* note 80, s. 2.
[84] *Ibid*.
[85] *Ibid*.
[86] Legislature of Ontario, Bill 39, *The Better Municipal Governance Act, 2022*, online: <https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-39>.
[87] Minister of Municipal Affairs and Housing, "Strong Mayor Powers Expanded to Mayors in 26 Municipalities" Government of Ontario (16 June 2023), online: <https://news.ontario.ca/en/backgrounder/1003166/strong-mayor-powers-expanded-to-mayors-in-26-municipalities>.
[88] See eg Mariana Valverde and Alexandra Flynn, "Citizens are the real losers under Ontario's 'strong mayor' law" in *The Toronto Star* (12 December 2022).
[89] Edward Keenan, "'Good luck, Toronto': Our new minority-rule mayor law leaves global experts baffled" in *The Toronto Star* (8 December 2022), online: < https://www.thestar.com/opinion/star-columnists/2022/12/08/good-luck-toronto-our-new-minority-rule-mayor-law-leaves-global-experts-baffled.html>.
[90] Progress Toronto, "Letter from 5 Former Mayors of Toronto to Mayor John Tory" Online: <https://www.progresstoronto.ca/former-mayors-letter-to-tory>.
[91] Association of Municipalities of Ontario, "AMO's Remarks to the Standing Committee on Heritage, Infrastructure and Cultural Policy on Bill 39, The Better Municipal Governance Act, 2022" (1 December 2022), online: <bit.ly/46Aeihi>.

municipalities, nor was the novel law formulated in consultation with local governments. There is little doubt that the new legislation is contrary to the spirit of Section 1 of the *City of Toronto Act, 2006,* which provided that "it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation," including the "to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City."[92] The *Municipal Act* has a similar provision.[93] It is unlikely that a court would find the legislation unconstitutional or legally impermissible on this basis. These bills, like the legislation that cut the size of City Council during Toronto's election, are consistent with the SCC's endorsement of the Ford government's vision of federalism whereby provinces decide how municipalities will be structured and governed, seemingly without limitation.

Second, the legislation reflects a shift in the balance of power from councillors to mayors. Toronto's mayor is elected at-large, meaning that all eligible voters amongst the city's 2.8 million citizens are able to vote, versus individual councillors, who are elected at the ward level by approximately 111,000 residents in each. Prior to the passing of these bills, mayors were just one member of the council with a single vote, which required the mayor to act as a consensus-builder within the council.[94] In the 2022 election, Toronto voters elected the most racially-representative city council ever.[95] Bills 3 and 39 ultimately reduce the power of Toronto's councillors, since the mayor can now make decisions on issues that the provincial government has earmarked as priorities, even without a majority of council votes, and can make key decisions individually, such as hiring and firing senior administrators. While this significant shift in power has important implications for the representation of local residents, it does not trigger legal questions regarding the province's ability to introduce such a change.

Third, the rationale for the strong mayor powers does not fundamentally address the goal of more social and affordable housing, which requires provincial attention and resources, not just municipal goodwill. When Bills 3 and 39 were introduced, the purported rationale was to address the housing crisis.[96] The provincial government outlined two housing-related provincial priorities in the regulations that accompanied Bill 3: building 1.5 million new residential units across Ontario by 2031; and the construction and maintenance of infrastructure (including transit, roads,

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[92] The agreement referenced in Section 1 of the City of Toronto Act, 2006, S.O. 2006, c. 11, is framed as a consultation and cooperation agreement signed by officials in both governments setting out the details of how they will engage, including "Respect for each other's jurisdiction and authority" (Agreement on Cooperation and Consultation between the City of Toronto and the Province of Ontario, online: <https://www.ontario.ca/page/agreement-cooperation-and-consultation-between-city-toronto-and-province-ontario>). The Province has entered into a similar agreement with the Association of Municipalities of Ontario (Association of Municipalities of Ontario: Memorandum of understanding, online: < https://www.ontario.ca/page/association-municipalities-ontario-memorandum-understanding>). The agreements were in place at the time that the provincial actions described in this paper took place.

[93] Municipal Act, supra note 22, s. 3.

[94] Zack Taylor and Martin Horak, "Strong mayor powers in Ontario are a gross violation of democratic principles" in *Policy Options* (16 December 2022), online: <https://policyoptions.irpp.org/magazines/december-2022/strong-mayor-powers-in-ontario-are-a-gross-violation-of-democratic-principles/>.

[95] Mark McAllister and Meredith Bond, "New faces bringing diversity to Toronto City Council," CityNews (25 October 2022), online: <https://toronto.citynews.ca/2022/10/25/new-faces-toronto-city-council/>.

[96] *Ibid*.

utilities, and servicing) to support accelerated supply and availability of housing.[97] The signalling of these to the exclusion of other issues as provincial priorities is unsurprising. Canada has a severe shortage of housing across the country, including in Ontario.[98]

In June 2022, the federal government calculated that 580,000 new homes would need to be constructed each year to address the lack of affordable housing, almost triple the Canadian average of home completions a year over the past decade.[99] It is widely acknowledged that local governments are ill-equipped to solve the problem: while local governments have played a role through innovative land use planning, they are deeply constrained by their limited fiscal capacity.[100] They rely heavily on property taxes and are prohibited from levying income or other more progressive taxes.[101] Even so, Bills 3 and 39 cannot be constitutionally challenged on the basis that they are poor policy approach to solving this complex social problem.

Fourth, where provincial priorities are engaged, as per the 'strong mayor' law, municipalities need not make decisions based on majority rule – acknowledged to be a central feature of democracy.[102] Traditional accountability mechanisms such as procedural by-laws and majority support by councillors when enacting or repealing by-laws cease to apply when provincial priorities are invoked by a 'strong' mayor. This means that a mayor's power shifts from being one of multiple elected officials, to having a disproportionate power with approval permitted based on their vote, plus a mere one-third of city council. The catch is that this option can only be asserted in relation to 'provincial priorities' as decided by provincial officials, not municipalities. Arguably, majority rule is upheld, since Ontario mayors are elected at-large meaning that the decisions taken is seen to reflect the will of the people, who presumably support the mayor. However, this argument has yet to be judicially tested and, even if accepted, is undermined by the fact that the power can only be used in relation to provincial priorities. The constitutionality of this feature of the new legislation is explored next.

IV. Can unwritten constitutional principles save local democracy?

The preamble to Canada's Constitution says that Canada "is to have a Constitution similar in

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[97] O. Reg. 582/22: Provincial Priorities under the COTA and O. Reg. 580/22: Provincial Priorities under the MA came into force on December 20, 2022; *see also* Steve Clark, Minister of Municipal Affairs and Housing, "More Homes, Built Faster: Ontario's Housing Supply Action Plan 2022–2023," online: <https://www.ontario.ca/page/more-homes-built-faster> and John Mascarin and Jennifer Bilas, "Strong Mayors – Shifting the Municipal Governance Model," Aird Berlis (12 September 2022), online: <https://www.airdberlis.com/insights/publications/publication/strong-mayors-shifting-the-municipal-governance-model>.

[98] Canada Mortgage and Housing Corporation, "Canada's Housing Supply Shortage: Restoring affordability by 2030" (23 June 2022), online: <https://www.cmhc-schl.gc.ca/blog/2022/canadas-housing-supply-shortage-restoring-affordability-2030>.

[99] This doesn't include areas for which data is missing, including homeless and hidden populations, students, and those who are living with others due to financial constraints, but would prefer not to.

[100] Taylor & Horak, *supra* note 93.

[101] Social housing units in British Columbia, for example, are owned and operated by a provincial crown corporation known as BC Housing. Similar agencies exist in Saskatchewan (Saskatchewan Housing Corporation), Nova Scotia (Housing Nova Scotia), and Manitoba (Manitoba Housing). Toronto is the outlier - responsibility for social housing was downloaded to them by Ontario in the mid-1990s as part of Local Services Realignment.

[102] Taylor & Horak, *supra* note 93.

principle to that of the United Kingdom."[103] This means that Canada's Constitution "was meant to continue the constitutional principles from the United Kingdom," which is comprised of written and unwritten components.[104] The notion of an unwritten constitutional principle consists in the fact that there are norms so fundamental to a country's legal system that they must be acknowledged by the courts whether or not they are specifically referenced in constitutional texts.[105] While scholars and judges disagree about the extent to which unwritten norms can serve as justiciable doctrine, with some suggesting that it is the legislators role alone to determine laws,[106] the legitimacy of unwritten constitutional principles in Canadian law has long been acknowledged by the courts.[107]

The defining SCC decision on democracy as a constitutional principle is set out in *Reference re Secession of Quebec*, which in considering the key political hypothetical of a secession, examined the basic foundation of the Canadian constitutional system.[108] These underlying principles were said to form the "internal architecture of the Constitution" and "infuse … and breathe life into it."[109] The court has identified four unwritten principles, although it also left room for others to be added to the list: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.[110] A key point is that the court stated that underlying constitutional principles are in "symbiosis"; one cannot be invoked to trump or exclude another principle.[111]

As Jamie Cameron and Bailey Fox write, "Government action that is unfair or contrary to democratic values is not necessarily unconstitutional."[112] At first blush, the jurisprudence suggests that unwritten constitutional principles ought to be invoked to invalidate provincial legislation that enables less than majority rule on a city council vote. While sufficient shifts have taken place since *Toronto v Ontario* to lend credence to the argument that provincial legislation that interferes with majority rule at the municipal level is incompatible with the principle of democracy, the absence of municipalities in the Constitution and section 3 of the *Charter* continue to be impediments in using unwritten constitutional principles to argue that legislation like Bill 39 is unconstitutional. I argue that a better route to challenge this overreach exists: for municipal councils themselves to resist using strong mayor powers. This approach, I contend, operationalizes the principle of democracy and legitimizes the claim that municipalities are democratic governments, not mere administrative units.

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[103] Preamble to the *Constitution Act*, *supra* note 2.
[104] *Reference re Secession of Quebec* ("*Re Quebec"*), [1998] SCJ No 61, 2 SCR 217 [*Re Quebec*] at para 44.
[105] Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Unwritten Constitutional Principles: What Is Going On?" Remarks Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand Wellington, New Zealand (2005), online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx>.
[106] See eg AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).
[107] *Re Quebec*, *supra* note 104.
[108] [1998] SCJ No 61, 2 SCR 217.
[109] *Re Quebec*, *supra* note 104 at para 40. For a detailed review of the "bundle of democratic rights" *see also* Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51.1 Osgoode Hall Law Journal 251-296.
[110] *Re Quebec*, *supra* note 104 at para 39.
[111] *Ibid.*
[112] Jamie Cameron and Bailey Fox, Toronto's 2018 Municipal Election, Rights of Democratic Participation, and Section 2(b) of the Charter, 2021 30-1 *Constitutional Forum* 1, 2021 CanLIIDocs 814, <https://canlii.ca/t/t30l> at 3.

The unwritten place of municipalities in the Constitution

In *Re Quebec*, the court affirmed that "democracy expresses the sovereign will of the people."[113] At its core, democracy is based on a political system of majority rule.[114] The SCC in *Re Quebec* drew on *R v Oakes* to articulate the values underlying democracy:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[115]

In *Re Quebec*, the SCC referenced Section 3 of the *Charter* to affirm the importance of free and fair elections, with the ability for individuals to participate as electors and candidates.[116] They also acknowledged the tensions between democracy at the provincial and federal levels, stating, "The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion."[117] The extension of this holding to municipalities is in tension with recent jurisprudence, in particular that the text of Section 3 of the *Charter* makes clear that the provision does not apply to municipalities. In *Toronto v Ontario*, the City of Toronto and several intervenors argued that Section 3 of the Charter can be read into other sections, including Section 2(b).[118] The SCC narrow majority rejected this argument, stating that Section 3 extends only to effective representation concerning provincial and federal elections, and cannot be used to interpret any other *Charter* section.[119]

Importantly, the SCC in *Toronto v Ontario* decided that the unwritten constitutional principle of democracy cannot be used to strike down provincial legislation. The Court's majority held that the "nebulous" and "highly abstract" principle of democracy runs the risk of rendering "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers."[120] By contrast, the SCC distinguished the use of the unwritten principle of "federalism" to strike down legislation, given its reflection in Sections 91 and 92 of the Constitution.[121]

It would not be legally foolish to advance a challenge to Bill 39 based on unwritten constitutional principles or to find the legislation incompatible with democracy based on the arguments

[113] *Re Quebec*, *supra* note 104 at para 44.
[114] *Ibid* at para 63.
[115] *R. v. Oakes*, [1986] 1 S.C.R. 104 at p. 136.
[116] *Re Quebec*, *supra* note 104 at para 65.
[117] *Ibid* at para 66.
[118] *Toronto v Ontario*, *supra* note 60 at para 44.
[119] *Ibid* at para 45.
[120] *Toronto v Ontario*, *supra* note 60 at para 59.
[121] *Ibid* at para 53.

below.[122] While *Toronto v Ontario* was decided relatively recently, the strong dissent and changes to the bench suggest that the court could be persuaded differently in this specific case.

First, the issue in relation to Bill 39 differs from *Toronto v Ontario* in that the court could not be asked to determine the limits of provincial authority under Section 92(8) of the Constitution. Instead, the legal question asks whether permitting a city council to pass a bylaw without a majority of city council violates the principle of democracy. The answer to whether municipalities are governments has been long-decided: they are non-constitutionally protected governments. In Justice Abella's dissenting judgment, she acknowledged the central place of municipalities within Canada's federal system, stating that "municipalities are a crucial level of government."[123]

In *Reference re Greenhouse Gas Pollution Pricing Act* ("*Re: GHG*")[124] and *Canadian Western Bank v Alberta* (*"CWB"*)[125] the SCC expanded on the meaning of democracy in light of other unwritten constitutional principles, namely federalism. In *CWB*, the SCC was unwavering that the Constitution is to be applied with the principle of "co-operative federalism" with a clear place for municipalities. The SCC explained co-operative federalism as follows:

> The division of powers, one of the basic components of federalism, was designed to uphold … diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.[126]

In *CWB*, the SCC established that municipalities, as being the closest level to affected citizens, should be given recognition in their decision-making.[127] In so doing, the SCC applied the language of the Constitution as a "living tree"[128] that must be "tailored to the changing political and cultural realities of Canadian society," and "continually be reassessed in light of the fundamental values it was designed to serve."[129] Constitutional doctrines are used to balance the overlap of rules made by governments and ensure sufficient predictability in the operation of powers.[130] The principle of co-operative federalism decries having "watertight compartments" within which governments may act, leaving an important role for municipalities as

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[122] *Ibid* at para 51. Note the argument that courts in the United Kingdom can only issue a declaration of incompatibility between primary legislation and the *European Convention on Human Rights*, 213 U.N.T.S. 221; *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4).
[123] *Toronto v Ontario*, *supra* note 60 at para 116.
[124] 2021 SCC 11.
[125] 2007 SCC 22.
[126] *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 S.C.R. 3 [hereinafter "*Canadian Western Bank*"] at para. 22-23.
[127] *Toronto (City) v. Goldlist Properties Inc*., 2002 CanLII 62445 (ON SCDC) at para. 35.
[128] *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.) at 136.
[129] *Ibid.*
[130] *Ibid.*

representatives and stewards of the local community.[131]

Second, Bill 39 almost certainly represents the "rare case" where legislation goes beyond Canada's basic political architecture by authorizing decision-making that requires less than a majority of votes.[132] As Justice Abella notes, the ability to review legislation to assess whether it is compliant with the constitution means that the court can uphold or dismiss it: "Otherwise, there is no point to reviewing it."[133] The idea that provincial legislation can remove the democratic nature of municipalities without any judicial recourse challenges the very notion of democracy.

In the SCC's view, to be considered legitimate, democratic institutions must allow for the participation and accountability of public institutions that are created under the Constitution.[134] In order for the political system to possess legitimacy, there must be interaction between the rule of law and the democratic principle.[135] To the SCC, democracy requires a commitment to acknowledgment of dissenting voices.[136] In setting out this conception of democracy, the court specifically referenced the "federal and provincial level" (although importantly, not federal and provincial governments").[137]

The recent Ontario legislation also disrupts the notion of an orderly political system. There is no global precent for the legislation. It goes beyond any strong mayor powers in other jurisdictions, including the United States. As Professor Karen Chapple, Director of the University of Toronto's School for Cities, observed, "A strong mayor in Chicago or New York can veto bylaws passed by a majority of council. This power is checked, however, by council's ability to override a veto with a two-thirds vote. In no American city, with or without a strong mayor, can bylaws be passed without the support of a majority of councillors; this power would be seen as fundamentally undemocratic."[138]

A challenge to Bill 39 would also defend the rule of law. The rule of law provides citizens with a stable, predictable, orderly society, whereby legal rules including unwritten constitutional norms are followed.[139] The SCC has set out the elements of the rule of law, and the first two are: supremacy of law over the acts both of governments and private people; and positive laws which preserve a normative order.[140] Allowing a one-third vote of City Council therefore triggers democracy and the *rule of law*, not democracy and federalism, which may be a sufficient distinction with *Toronto v Ontario* to lead to a different outcome in this case.[141]

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[131] See e.g. *Canadian Western Bank*, *supra* note 79; *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, 2001 SCC 67 (CanLII), [2001] 3 S.C.R. 113; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2).
[132] *Toronto v Ontario*, *supra* note 60 at para 52.
[133] *Ibid* at para 170. See also *Re Quebec*, *supra* note 104 at p. 845.
[134] *Toronto v Ontario*, *supra* note 60.
[135] *Ibid*.
[136] *Ibid* at para 68.
[137] *Ibid*.
[138] Taylor, *supra* note 81 at 6.
[139] *Re Quebec*, *supra* note 104 at para 70.
[140] *Ibid* at para 71, referencing the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52.
[141] *Ibid* at para 67.

Despite the possibility and potential validity of a challenge based on the unwritten constitutional principle of democracy, I conclude that a better approach exists, one that cements the municipality as a government: insisting on majority rule for every decision, even those related to provincial priorities.

Re-Democratizing the City

There are good reasons to object to provincial decisions that undermines local democracy, including a city's principled stance – as representatives of local constituents – that they are democratic governments, not mere administrative bodies. However, the success of a legal challenge is far from certain. In her analysis of unwritten constitutional principles, Professor Vanessa Macdonnell notes the current lack of robust court decisions invalidating legislation as contrary to unwritten constitutional principles.[142] Macdonnell suggests that legal actions have mainly, and only occasionally, "assisted in the interpretation and application of the written constitution and other legislation."[143] Its main function is one of "gap-filling," meaning the interpretation of legislation or impugned government conduct.[144]

Likewise, Professor Michael Pal suggests that the democracy principle ought to be limited as a justiciable tool, in part because the courts have focused on narrow view of democracy as majority rule, rather than a principle grounded in transparency and deliberation.[145] Without undermining the important role of the courts, Pal cautions that the courts as the arbitrators of the unwritten principles will ultimately erode the "soul of democracy," in particular by minimizing the centrality of public participation.[146] Instead, the constitutional principle of democracy can be seen as imposing concrete obligations on governments themselves.[147] This is consistent with Macdonnell's view that unwritten constitutional principles should operate "as a code of good governance."[148]

Options other than a constitutional challenge exist for cities. As Professor Jean Leclair states, "the legitimacy of invoking unwritten constitutional principles will depend on the purpose they serve and on how courts use them."[149] In particular, municipalities can use their power under existing legislation and as local representatives to undermine Bill 39.

First, mayors can commit to majority rule and city councils can urge them to do so. Bill 39 does not mandate that the mayor exercise strong mayor powers in relation to provincial priorities. Instead, it the mayor's individual decision. To date, the notion of a code of good governance that includes a commitment to democracy has been endorsed in municipalities across the province, including mayors of municipalities that were granted the enhanced powers after the cities of

[142] Vanessa A. MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" (2019) 65:2 McGill Law Journal 175.
[143] *Ibid.*
[144] *Ibid.*
[145] Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269.
[146] *Ibid.*
[147] *Ibid.*
[148] MacDonnell, *supra* note 142.
[149] Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27:2 Queen's LJ 389 at 431.

Ottawa and Toronto. For example, a majority of City Council members in Toronto voted in favour of a motion asking the current and future mayors to not use the powers granted under Bill 39 that permit a motion to be passed with less than a 50 percent + 1 majority of Council members present.[150] Toronto Mayor Olivia Chow has promised not to use the powers, stating, “"I do not want to violate the principle of democracy because that is pretty sacred."[151] Since Bill 39 was extended to other municipalities in June 2023, other Ontario mayors have made similar commitments, citing respect local democracy and collaborative relationships with other councillors.[152]

Second, municipalities can assert their democratic roles by moving beyond the legal codes that purportedly define them. The law provides a seemingly coherent structure for municipal government generally. The *Constitution Act* articulates that municipalities are within the provincial domain, which the Province of Ontario in turn executes through municipal acts. The law thus sets out a ladder or hierarchy of power, with the federal government “on top,” leading downwards towards the municipality, which in strict constitutional terms may not even be considered a government. But, the reality of law’s relations, the “law on the street,” tells a different story. Municipal governments consistently challenge the legal codes that profess to govern and maintain a great deal of power when it comes to how they choose to govern themselves.[153] The hierarchical notion of municipal authority is in tension with the shifting intergovernmental relations, whereby cities and their mayors are increasingly important players within the country evidenced, for example, by the federal government transferring billions to municipalities for infrastructure, transit and housing.[154] Municipalities are well-placed to affirm their legitimate role as governments by committing to democracy.

V. Conclusion

Municipal councils are administrative bodies, like thousands of other tribunals, commissions, and government entities that make decisions on individuals’ daily lives.[155] Local councils must heed the statutory constraints set by provincial governments, with their decisions subject to

[150] City Council, CC2.3 - Legislative Changes to City Governance - Bill 3 and Bill 39 (14 December 2022), online: <https://secure.toronto.ca/council/agenda-item.do?item=2023.CC2.3>.
[151] Canadian Press, “Housing, property taxes, strong mayor powers: Olivia Chow weighs in as Toronto's mayor-elect” in CBC News (27 June 2023), online: <https://www.cbc.ca/news/canada/toronto/olivia-chow-mayor-elect-metro-morning-1.6889658>.
[152] Ted Raymond, “Sutcliffe vowing not to use expanded 'strong mayor' powers,” CTV News (16 November 2022), online: <https://ottawa.ctvnews.ca/sutcliffe-vowing-not-to-use-expanded-strong-mayor-powers-1.6155935>; Brandon Maher, “Ford weighs in on Regional mayors turning down strong mayor powers,” CityNews (27 June 2023), online: <https://kitchener.citynews.ca/2023/06/27/ford-weighs-in-on-regional-mayors-turning-down-strong-mayor-powers/>.

[154] See e.g. the Federal Gas Tax Fund, a now-permanent federal infrastructure funding program that gives funding directly to municipalities, including $152 million per year to the City of Toronto (Government of Canada, “The Federal Gas Tax Fund: Permanent and Predictable Funding for Municipalities” (12 April 2017), online: <http://www.infrastructure.gc.ca/plan/gtf-fte-eng.html>.
[155] Levi & Valverde, *supra* note 21.

review by the courts. However, municipalities are also governments that represent their citizens, addressing serious issues in their communities.[156]

Municipalities, and especially cities, have long called upon provinces to provide them with more authority to act and the power to raise revenue. In response, provincial legislation has led to legislation granting broad permissive power to local governments to make decisions on matters like the social and economic well-being of residents.[157] In addition, courts over the last two decades have applied the constitutional principles of subsidiarity and cooperative federalism to understand municipal decision-making.[158] While the Supreme Court of Canada (SCC) has consistently noted that these principles may not disturb or rewrite the *Constitution Act*, these cases have opened the door to understanding municipalities as representative governments, albeit non-constitutionally protected ones.

The Province of Ontario's strong mayor legislation is unprecedented in framing of municipalities as administrative bodies, rather than governments. Bills 3 and 39 were introduced on the heels of the SCC's 2021 decision, which narrowly permitted Ontario's disruption of Toronto's 2018 election to stand. The legislation allowing decisions with less than a majority vote – the baseline of democracy – undermines the view of local governments at all. Municipalities strongly objected to this legislation, with many promising not to use these powers. This approach is the right one. While a challenge based on an argument of unwritten constitutional principles may have traction, the true power of a Canadian municipality lies in its track record of making and re-making local governance as inclusive, representative, and participatory.

[156] *Constitution Act*, *supra* note 2, s. 92(8).
[157] See eg *City of Toronto Act*, 2006, SO 2006, c 11, Schedule A.
[158] Flynn, *supra* note 34.