

TOP FIVE 2022

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases (or in this year's resource, six cases) that are of significance in the educational setting. The 2022 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

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

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/19011/index.do>

Facts

On August 14, 2018, the province of Ontario, under the leadership of Premier Doug Ford, passed the *Better Local Government Act* (the "Act") which reduced the number of electoral wards³ in the City of Toronto from 47 to 25. The Act was passed at a time when campaigning for municipal elections was well underway already.

Procedural History

The Act was challenged in the Superior Court of Justice by the City of Toronto on the basis that it violated freedom of expression, freedom of association, and equality, and that it also violated the unwritten constitutional principles of democracy and the rule of law.

The application judge found that the Act violated section 2(b) (freedom of expression) because it limited the

freedom of expression of municipal candidates in the election and that it also limited the right of voters to effective representation under section 3, and could not be saved under section 1 of the *Charter*.

The majority at the Court of Appeal later found that there had been no limitation to the freedom of expression of municipal candidates and that the right to effective representation under section 3 of the *Charter* did not apply to municipal elections and bore no influence on the section 2(b) analysis. The Court of Appeal also held that unwritten constitutional principles cannot be used by the courts to strike down legislation which is in compliance with the *Charter*. The court ruled that unwritten constitutional principles did not limit a province's legislative authority over municipal institutions. The Court of Appeal

³ Wards are political areas of varying size, depending on the city. For instance, the Ontario Justice Education Network is in the University-Rosedale Ward in Toronto, which covers a large portion of downtown and includes some residential areas.



reversed the application judge's decision and allowed the Government of Ontario's appeal.

Issue

Two issues arose in this case:

1. Did the *Act* limit the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election?
2. Can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

Decision

Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ (Majority)

The SCC held in a split 5-4 decision that the province's appeal should be allowed because it had acted constitutionally when it decided to pass the *Act* to reduce the number of electoral wards to 25.

Ratio

Provinces have legislative authority over municipalities. Unwritten constitutional principles cannot be used to invalidate legislation.

Reasons

Freedom of Expression

Since the City was asking the province to provide access to a specific statutory platform for expression (by increasing the number of electoral wards to 47 again), the Supreme Court stated that the City was advancing a positive claim. This means they were asking the provincial government to do something as opposed to refraining from doing something. The majority of the Supreme Court said that, because the municipal candidates had 69 more days to campaign and express themselves in accordance with the new ward structures, there was no substantial interference with their freedom of expression.

Effective Representation

With respect to the right to effective representation under section 3 of the *Charter*, the majority stated that what is important is the "relative population of the wards" and not the absolute size of the wards themselves. Increasing the number of councillors as the population of the city grows would be very difficult to achieve. Additionally, section 3 democratic rights do not apply to candidates in municipal councils.



Unwritten Constitutional Principles

The City argued that the decrease in the number of wards denied voters effective representation which, in turn, violated the unwritten constitutional principle of democracy. However, the majority at the Supreme Court held that unwritten constitutional principles, including the principle of democracy, cannot be used to invalidate legislation because they don't have the same authority as legislation, and because they are too abstract. Instead, unwritten constitutional principles can only be used to help understand constitutional principles and structural doctrine that isn't stated in the written Constitution. Provinces still have legal power to make laws that have to do with municipalities, which is limited only by the *Charter*. This power isn't restricted by constitutional principles.

Dissent

Abella, Karakatsanis, Martin and Kasirer JJ

The dissenting judges saw things differently. The issue for them was not whether the province had legal authority to change the electoral wards in general but whether this power existed in the middle of an ongoing municipal election which. According to the dissent, the timing of the use of this power destabilized the foundations of the electoral

process, infringed section 2(b) of the *Charter* and was therefore unconstitutional. Like federal or provincial elections, section 2(b) applies to protect freedom of expression during municipal elections as well. The dissent found that the infringement on the freedom of expression could not be saved by section 1. The dissenting judges also stated that unwritten constitutional principles could be used to invalidate legislation, albeit only in rare cases.



Discussion

1. What is Freedom of Expression?
2. Why would a provincial government want to decrease the number of electoral wards in a city?
3. The majority at the Supreme Court said the *Act* did not restrict what candidates could say or do to the extent that it violated their Freedom of Expression. If the *Act* had been passed with even less time left in the election, would this still be the case?
4. What did the court say was the role of unwritten constitutional principles as they relate to making the law?
5. How do you think a decrease in electoral wards could affect the constitutional principle of democracy?