Toronto v Ontario: Municipal Elections, Freedom of Expression, and Provincial Authority

Can a province change the number of electoral wards in the middle of a municipal election? According to the recent Supreme Court decision in *Toronto (City) v Ontario (Attorney General)*,[1] the answer is yes.

As the 2018 Toronto municipal elections were well underway, the Ontario government decided to reduce the size of Toronto City Council. The government announced its intention on July 27th, the same day that nominations for the elections closed. Several weeks later, the *Better Local Government Act, 2018*[2] came into effect, reducing the number of City Council seats from 47 to 25. The *Act* was challenged in court by the City of Toronto, and the Ontario Superior Court declared the *Act* invalid. However, the Ontario Court of Appeal disagreed, and thus the election proceeded with 25 wards, as required by the *Act.*

Despite the election's end, Toronto appealed the decision of the Ontario Court of Appeal to the Supreme Court. The City of Toronto argued (among other things) that the *Act* was unconstitutional because it violated rights that are protected by section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*),[3] including candidates' freedom of expression and voters' right to effective representation. On October 1, 2021, the Supreme Court ruled in favour of the province, deeming the *Better Local Government Act* constitutional and legally valid.

Charter Sections 2(b) and 3 and Their Role in Municipal Elections

The *Charter* issues in this case revolved around:

Section 2(b), which guarantees individuals' "freedom of thought, belief, opinion and expression." The City argued that by changing the ward boundaries so close to the election, the provincial government had unjustifiably infringed upon these rights of the candidates.

Section 3, which guarantees that "every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." While section 3 only applies to provincial and federal elections, the City argued that the principle of effective representation that underpins it can be "read into" section 2(b) and made applicable to municipal elections.

By a narrow majority of 5-4, the Supreme Court decided that the province had not violated the section 2(b) rights of the candidates, and that the section 3 right of effective representation does not extend to municipalities via section 2(b).

Provinces Have Constitutional Authority Over Municipalities

To understand the Court's ruling, it is first important to understand the constitutional status of municipalities. Under section 92(8) of the *Constitution Act, 1867*,[4] municipalities are under provincial jurisdiction. This means that provinces have the "constitutional authority"[5] to change "municipal institutions"[6] — including the size of city councils — if they so choose.

At the same time, though, provincial laws and actions must still comply with other portions of the Constitution, including the *Charter*. Accordingly, in this case the question was not whether the Ontario government could restructure Toronto City Council — section 92(8) of the *Constitution Act, 1867* empowers it to do so — but whether the unusual ***timing*** of the ward changes infringed on the section 2(b) rights of the candidates and voters.

The Supreme Court's Reasoning on Section 2(b) Rights

The City's argument is a positive rights claim.

The Court divided section 2(b) rights into *positive* and *negative* rights. A positive right is one which imposes an obligation upon the government to do something for an individual — in this case, to facilitate expression and provide a platform for it. In contrast, a negative right is one which requires the government not to interfere in an individual's ability to do something — in this case, an individual's ability to express themselves.

In *Toronto v Ontario*, the Court found that the City's claim is a positive claim: the City wanted the provincial government to provide candidate's with a specific platform for expression by either restoring the previous 47-ward structure, or by maintaining the ward distribution in place at the time of the election's commencement.[7] While the former is obviously a positive claim, the Court found that the latter also amounts to a positive claim — albeit in a less obvious way. In the Court's view, both versions of the City's claim involve asking the provincial government to *do something*: namely, to provide electoral candidates with a specific platform (the council structure that was in place at the beginning of the election cycle) through which they can exercise their freedom of expression.

The section 2(b) positive rights test

Courts use different tests to assess positive and negative rights claims under section 2(b). Positive rights violations are harder to prove than negative ones, and for them to succeed three questions will all need to be answered in the affirmative:

1. Is the claim grounded in freedom of expression?

2. Does the lack of access to a particular platform for expression amount to a *substantial interference* with freedom of expression, or was it done with the purpose of interfering with freedom of expression; and

3. Is the government responsible for the inability of the claimant to exercise their freedom of expression?[8]

In *Toronto v Ontario*, the Court summed up this test in one question: "Was the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government had either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?"[9]

Having applied this test to the City's claim, the Court determined there was no section 2(b) violation. In support of this conclusion, the Court relied on two key arguments. Firstly, it claimed that there was no interference in the freedom of candidates to campaign or to say what they wanted in their campaigns,[10] and noted that the City wasn't claiming that the Province acted with the purpose of interfering with expressive freedom.[11] Secondly, it noted that the threshold of "substantial interference" is quite high, and will be met only in extreme and rare cases when meaningful expression has been "effectively precluded" by the state.[12] Given that candidates still had 69 days to campaign under the new ward boundaries and were able to raise significant amounts of funds, the Court decided that this high threshold was not met in this case.[13]

Section 3 Rights Cannot Be Extended to Municipal Elections Via Section 2(b)

Section 3 of the *Charter* guarantees citizens the rights to vote and run for office in provincial and federal but not municipal elections. While the text of section 3 doesn't mention a right to "effective representation," the Supreme Court has recognized this additional right as an "incident"[14] of section 3 — although like the rights to vote and run for office, this right only applies to the federal and provincial levels.

However, in *Toronto v Ontario*, the City argued that the principle of "effective representation" applies to municipal affairs via section 2(b). Furthermore, the City argued that the new ward distribution violated the principle of effective representation — and hence section 2(b) — by creating wards of roughly equal size as opposed to wards based on population distribution (as would have been the case under the 47-ward distribution).[15]

The Court, though, found that the principles of section 3 — including the principle of effective representation — are quite distinct from those of section 2(b) and cannot be captured under it. According to the Court, the *Charter*'s framers intentionally did not include municipal representation in section 3, and the rights and principles that it covers should accordingly not be extended to municipal elections.[16]

Justice Abella's Dissent

This case was clearly a difficult one for the Court, and four of the Court's nine Justices expressed their disagreement with the five-Justice majority by writing a separate "dissenting" opinion.

The dissent, written by Justice Rosalie Abella, argues that one of the key purposes of section 2(b) is the protection of political discourse.[17] While Justice Abella did not dispute the fact that a province has the legal authority to change municipal wards, she found that doing so in the middle of a municipal election was an interference with the ability of candidates and voters to express themselves politically.[18] This interference included: the absence of notice; the lack of additional time to fundraise; and the fact that more than half of the candidates certified before the ward changes dropped out of the elections after the changes came into effect.[19]

The majority used the wrong test for the right

Crucially, the dissent disagreed with the majority's conclusion that the City's claim concerned a positive right.[20] In this regard, the dissent frames the case as being "about government interference with the expressive rights that attach to an electoral process" and not about the provincial government "provid[ing] … a municipal election so that [the claimants] … can express themselves."[21] The dissent accordingly suggested that the correct test for the case is the less arduous test for violations of *negative* section 2(b) rights, which requires the claimant to show that the activity under consideration conveys or attempts to convey meaning, and that the legislation or action under scrutiny interferes with that activity.[22]

Having established that municipal elections are crucial vehicles for political expression and that the government's redrawing of the ward boundaries mid-election was an interference with that expression, the dissent found that the section 2(b) rights of candidates and voters had been violated. Furthermore, the dissent found that these violations could not be legally justified under section 1 of the *Charter*, which permits violations that are "reasonable," "prescribed by law," and "demonstrably justified in a free and democratic society." The dissent accordingly argued that the impugned provisions of the *Better Local Government Act* were unconstitutional and invalid.[23]

Conclusion: The *Charter*, Political Expression, and Municipal Elections

While the decision of the majority essentially affirmed longstanding constitutional norms of provincial jurisdiction over municipalities, Justice Abella's dissent demonstrates that the Court is sharply divided over the impact that the *Charter* has on these longstanding norms. Given the growing role of municipalities in Canadians' everyday lives, it will be interesting to see if future Supreme Court cases on the relationship between provincial jurisdiction and municipal governance continue or break with the reasoning of the majority on this issue.

* Part Two of this article will evaluate the Court's ruling on whether the *Better Local Government Act*'s alleged violation of an unwritten constitutional principle rendered it invalid.

[1] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

[2] *Better Local Government Act, 2018*, SO 2018, c 11.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[4] *Constitution Act, 1867*, RSC 1985, Appendix II, No. 5, s 92(8).

[5] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 3.

[6] *Ibid* at para 2.

[7] *Ibid* at para 30-32.

[8] *Ibid* at para 23.

[9] *Ibid* at para 25.

[10] *Ibid* at para 37.

[11] *Ibid* at para 27.

[12] *Ibid* at para 27.

[13] *Ibid* at para 37.

[14] *Ibid* at para 44.

[15] *Ibid* at paras 44, 47.

[16] *Ibid* at para 45.

[17] *Ibid* at para 114.

[18] *Ibid* at para 89.

[19] *Ibid* at para 105.

[20] *Ibid* at para 152.

[21] *Ibid* at para 151.

[22] *Ibid* at para 156.

[23] *Ibid* at para 162.