JUDICIAL INTERPRETATION, FORMAL AMENDMENT OR THE BALLOT BOX: RECOGNIZING CIVIC DEMOCRACY IN THE CONSTITUTION OF CANADA

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ABSTRACT

As a result of the mid-election interference that occurred during the Toronto Civic Election in 2018, commentators have raised various ways of interpreting the Constitution of Canada, through unwritten constitutional principles or otherwise, to protect democratic civic elections. Other commentators have suggested amending provincial constitutions, as opposed to the Constitution of Canada. In this Thesis, I argue that a formal amendment to the Constitution of Canada is required to adequately protect democratic civic elections. Additionally, I take the position that truly protecting civic democracy requires constitutional protection of civic legislative and revenue raising powers on top of democratic civic elections. In doing so, I discuss living constitutionalism, the prevailing theory of constitutional interpretation in Canada, and the constraints thereon. I then discuss how the various creative interpretations of the Constitution ignore the constraints on constitutional interpretation and create uncertainty within the text of the Constitution and for the future of civic democracy.

While I am critical of alternative approaches to a formal amendment, I agree that city councils of large Canadian cities play a significant legislative role and are an important level of government in Canada. For this and other reasons, such as the majority of the population of Canada living in cities, the legislative role of large Canadian cities ought to be protected by the Constitution. I argue that the constraints on constitutional interpretation cannot be ignored, rendering a formal amendment to the Constitution of Canada the ideal method to adequately protect civic democracy within the Constitution. Although I acknowledge a formal amendment of this nature is unlikely, I continue to discuss the potential benefits of advocating for a formal constitutional amendment such as addressing these issues through the ballot box or influencing constitutional interpretation through proposed, partially complete of failed constitutional amendment proposals. Again, although I am critical of the alternative approaches to a formal amendment of the Constitution of Canada, I accept that constitutional interpretation may be the only realistic method of protecting civic elections within the Constitution of Canada.

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DEDICATION

I want to dedicate my Thesis to my parents, Patti and Brian Rankine, my spouse, Natasha Steinback and to all the researchers and professors that made this Thesis possible – see bibliography.

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1. INTRODUCTION AND SCOPE

As a result of the mid-election ward destruction that occurred in the 2018 Toronto civic election, interpreting the Constitution of Canada[1] to protect democratic civic elections has received significant attention from academia and the legal profession. In advocating for alternative approaches to a formal amendment, scholars and legal professionals have, in my view, disregarded the constraints on constitutional interpretation in favour of novel legal arguments that attempt to force constitutional protection for democratic civic elections into the current text of the Constitution. In addition, while numerous novel interpretations of the Constitution have been proposed, the prospect of formally amending the Constitution to protect democratic civic election has been largely ignored, likely due to the difficulty of formal constitutional amendment in Canada. Further, few scholars or legal professionals have considered whether constitutional protection for democratic civic elections is, in and of itself, sufficient to protect civic democracy, as defined in 1.1 of this Chapter, without providing city councils with constitutionally entrenched legislative and revenue raising powers to ensure city councils have the ability to effectively represent their constituents.

By way of background, and as further discussed in 4.2.1, the 2018 Toronto civic election began based on a 47-ward structure, however, in the middle of the election period, the Ontario legislature passed Bill 5, *The Better Local Government Act*,[2] which reduced the number of wards to 25. Not surprisingly, a constitutional challenge was brought to the Superior Court of Ontario ("ONSC") and was subsequently appealed to the Ontario Court of Appeal ("ONCA") and, with leave, to the Supreme Court of Canada.[3] At the ONSC, Justice Belobaba found that: (1) section 2(b) of the Charter protects effective representation in municipal elections; (2) the *BLGA* infringed section 2(b) of the *Charter*; and (3) that the infringement could not be justified by section 1 of the

[1] For the purpose of this thesis, reference to the "Constitution" includes both *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*] and *The Constitution Act, 1867*, 30 & 31 Vict, c 3 [*Constitution Act, 1867*] and *The 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 [*Charter*]. When this thesis refers to the "Constitution" or the "Constitution of Canada", it does not include provincial constitutions.

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

[3] 2018 ONSC 5151, 142 OR (3d) 336 [*Toronto v Ontario (ONSC)*] rev'd 2019 ONCA 732, 146 OR (3d) 705 [*Toronto v Ontario (ONCA)*] leave to appeal to SCC granted [2019] SCCA No 414 [*Toronto v Ontario (SCC Leave Decision*)] where the SCC granted leave to hear this appeal SCC case # 38921 [*Toronto v Ontario (SCC)*]. For the purposes of this thesis, this line of cases is generally referred to as "*Toronto v Ontario*" and reference to the appeal proper will be "*Toronto v Ontario (SCC)*."

Charter and the *BLGA* was struck down.[4] On appeal to ONCA, the majority of the ONCA overturned Justice Belobaba's decision, holding that the Constitution does not protect democratic civic elections and, for it to do so, a formal constitutional amendment is required.[5] The dissenting opinion, as further discussed in 4.2.1, held that the *BLGA* was an infringement of section 2(b) and could not be saved by section 1.[6] From these decisions, numerous commentators have suggested alternative means of interpreting the Constitution to protect democratic civic elections.

I argue that the alternative approaches based on creative legal arguments have the effect of informally, and therefore unconstitutionally, amending the Constitution through unconstrained constitutional interpretation. I take the novel view that the majority of the ONCA were correct and a formal amendment to the Constitution is required to properly protect civic democracy and respect the constraints on constitutional interpretation. In addition, despite the difficult threshold of formal constitutional amendment in Canada and current debate surrounding the use of unwritten constitutional principles, I further argue that advocating for a formal amendment, as opposed to relying on constitutional interpretation, remains beneficial in the event that analogous constitutional issues arise in the future, given the Supreme Court of Canada's willingness to review and, in some cases, overturn or distinguish its previous decisions.

Further, the alternative approaches discussed in 5.2 appear to propose constitutional protection for democratic civic elections merely because of the high-profile nature of the 2018 Toronto election. My analysis builds on this and argues that city councils of large cities now regulate issues of national significance as opposed to mere local or municipal concerns, and therefore, effective representation within a city council and ensuring city councils have the tools to effectively represent their constituents is essential to civic democracy. Despite the significance of cities, however, they remain "creatures of the province" as provincial legislatures have plenary power over "municipal institutions" pursuant to subsection 92(8) of *The Constitution Act, 1867*.[7] I look beyond civic election interference and consider the role of large cities, and the city councils

[4] *Toronto v Ontario (ONSC)*, *supra* note 3 at paras 40-78..
[5] *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94.
[6] *Ibid*, at para 132-135.
[7] See *Rheaume v Ontario (Attorney General)*, (1989) 48 MPLR 1 at 32, 63 DLR 241 (ONSC), aff'd (1997) 36 OR (3d) 733, 153 DLR (4th) 299 (ONCA), leave to appeal to SCC refused (1992), 93 DLR (4th) vii [*Rheaume*]

thereof, in arguing that civic democracy ought to be protected by the Constitution. Thus, constitutional protection of civic democracy requires more than mere protection of democratic civic elections; the democratic legislative role of city councils must be constitutionally protected as well, while respecting the constraints on constitutional interpretation.

Currently, most of the literature advocating for a formal constitutional amendment to protect municipal institutions have done so in the context of municipal revenue raising powers as opposed to civic democracy.[8] As discussed next under 1.1, constitutionally entrenched revenue raising powers for municipal institutions are only one aspect of civic democracy. In my view, civic revenue raising powers must be considered as only one aspect of a formal amendment to the Constitution to protect civic democracy. Therefore, a formal amendment to the Constitution ought to protect democratic civic elections and legislative heads of power in addition to revenue raising powers, amounting to wholesale constitutional reform, to constitutionally recognize large cities as an independent and autonomous level of government. Further, and as discussed below, I focus on large cities as opposed to municipal institutions, however, given the unlikelihood of a formal constitutional amendment to protect democratic civic elections, my analysis remains important to advancing civic democracy in Canada and constitutional interpretation generally.

In doing so, I begin with defining civic democracy and outlining what constitutes a large city for the purpose of this analysis. Chapter 2 discusses the current constitutional status of cities, or lack thereof, including a discussion of the historical context of large cities in Canada and the current legislative role that city councils perform within Canada's national framework. Chapter 3 discusses the current constitutional treatment of municipal institutions, democracy and the effect that the unwritten constitutional principle of democracy may have on municipal acts by analyzing whether the unwritten constitutional principle of democracy ought to be able to invalidate laws. In Chapter 3 I further outline the predominant theory of constitutional interpretation in Canada and the constraints thereon, in order to demonstrate how the alternative approaches discussed in Chapter 5 ignore these constraints and inject uncertainty into the written text of the Constitution.

[8] See Michael Dewing, W.R. Young & Erin Tolley, "Municipalities, the Constitution, and the Canadian Federal System" (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2006) at 1.

Chapter 4 discusses how the lack of constitutional protection for civic democracy has allowed provincial governments to interfere with civic elections and elected officials.

As mentioned, Chapter 5 discusses various alternative approaches to a formal amendment that have been proposed and how they disregard the constraints on constitutional interpretation. In addition, Chapter 5 outlines how the alternative approaches are not sufficient to protect civic democracy and why a formal amendment to the Constitution is required. In Chapter 6, I argue that a formal amendment to the Constitution is required owing to the uncertainty caused by the alternative approaches and Chapter 7 discusses the barriers to a formal constitutional amendment to protect civic democracy, including obtaining provincial consent.

In advocating for a formal amendment to the Constitution, Chapter 7 explains the expressive function of a formal constitutional amendment as compared to the alternative approaches discussed in Chapter 5 and sets out a proposed constitutional amendment based on the purposeful interpretation of section 96 of the *Constitution Act, 1867* and the drafting characteristics of section 35 of the *Constitution Act, 1982*. While I am critical of interpreting the current text of the Constitution to protect civic democracy, I acknowledge that an alternative to a formal amendment of the Constitution is the most likely method of advancing constitutional protection of civic democracy, in whole or in part. Because of this, I discuss how advocating for a formal amendment may assist in doing so through a partial constitutional amendment, or through the ballot box.

1.1 Defining Civic Democracy

For the purpose of my analysis, civic democracy is broken down into two essential components: (1) democratic civic elections; and (2) ensuring city councils have the necessary tools to effectively represent their constituents. In my view, an informal amendment cannot address the many democratic shortfalls that result from the exclusion of large cities as a constitutionally recognized level of government due to the plenary power of the provincial legislatures over municipal institutions. This subchapter defines civic democracy whereas Chapters 2 to 4 elaborate on the issues caused by the lack of constitutional protection for large cities.

The first component of civic democracy is democratic civic elections, which are not protected by the current Constitution, and involves constitutional protection for a citizen's right to vote for and be effectively represented within a city council. In contrast, the right to vote in federal and provincial elections is protected by section 3 of the *Charter* and contains the right to effective representation within Parliament and a provincial legislature. While the right to vote in civic elections is an expressive activity protected by section 2(b) of the *Charter*,[9] I take the position that section 2(b) does not adequately protect democratic civic elections as effective representation is not protected and section 2(b) is subject to the "notwithstanding clause". As argued herein, merely protecting the right to vote, without protecting citizens' right to be effectively represented within a city council, does little to promote and protect civic democracy.

To ensure effective representation of citizens within a city council, the second component of civic democracy, ensuring city councils have the necessary tools to effectively represent their constituents, is crucial as Canada is a representative democracy. Therefore, the right to effective representation provides citizens with one seat in the deliberations of Parliament or a provincial legislature through the right to vote.[10] Thus, if the right to effective representation extends to city councils, they require the legislative and revenue raising powers to be able to deliberate as an autonomous level of government, in order to effectively represent their constituents. Further, to ensure that upper levels of government do not interfere or limit the legislative or revenue raising powers of a city council, I argue that constitutional protection of these tools is required. As a result of *Toronto (City) v Ontario (Attorney General)*, where the Ontario Legislature passed a law (which has been held to be constitutional) reducing the number of electoral wards from 47 to 25 in the middle of an election period, many commentators have argued that the current text of the Constitution can be interpreted to protect democratic civic elections. In my view, these commentators ignore the second component of civic democracy and the constraints on constitutional interpretation. I argue that such interpretations would not provide city councils with the required tools to effectively govern in their respective legislative jurisdictions, which dilutes

[9] See Simon Archer & Erin Sobat "The Better Local Government Act versus Municipal Democracy" (2021) 34 JL & Soc Pol'y 1 at 13 where the authors describe the Attorney General of Ontario's position in *Toronto v Ontario* as "[s]ection 2(b) protects meaningful *freedom* of expression, not meaningful *expression*; there is no guaranteed protection of expression that is effective in achieving its objective" [emphasis in original].
[10] See e.g. *Reference re Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 183, 81 DLR (4th) 16 [*Electoral Boundaries Reference*].

effective representation of constituents within a city council. Thus, civic democracy extends beyond democratic civic elections and includes legislative and revenue raising powers for city councils.

Therefore, if the Supreme Court of Canada accepts an alternative approach to a formal amendment in *Toronto v Ontario*, the issues relating to effective representation, legislative powers and revenue raising powers may remain unaddressed. In addition, failing to address the plenary power of the provincial legislatures over cities would continue to allow for interference with city councils, as discussed in Chapter 5, inhibiting the ability of city councils to effectively represent their constituents. In my opinion, constitutional protection for effective representation, without codified legislative or revenue raising powers, does not provide legal certainty or predictability in the text of the Constitution or for civic democracy. As a result, appropriate legislative and revenue raising powers are inextricably linked with the democratic right to vote in civic elections and, in fact, are required to ensure city councils have the tools to effectively represent their constituents.

1.2 Defining Large Cities

My analysis focuses on large Canadian cities.[11] While I am of the view that citizens in smaller cities and municipalities may benefit from constitutionally recognized democratic rights, smaller cities and municipalities may not have the same capacity or resources to be grouped in the same analysis as large cities. What may benefit large cities, may not necessarily benefit their smaller counterparts and *vice versa*. Although there will be overlap between large cities and their smaller counterparts as they are all defined as "municipal institutions" in the *Constitution Act, 1867*,[12] this analysis focuses on large Canadian cities as defined below.

It may be argued that no principled line can be drawn between large cities and their smaller counterparts as all municipal institutions are similar in the sense that they are democratically elected, pass legislation, provide services and act for the benefit of their residents. I argue that this is a dated view which no longer reflects the current role of cities in Canada as a result of: (1) the

[11] When this thesis refers to "cities" it is referring to "large cities" as defined in Chapter 1. Further, references to city councils also refer to the city councils of large cities as defined in Chapter 1.
[12] *Supra* note 1 at s 92(8).

dilution of Dillon's rule, which limits the legislative power of local governments to the express powers granted to them by the relevant provincial legislature;[13] (2) the urbanization of Canada; and (3) the fact that many large cities are currently governed under separate legislation than their smaller counterparts, in my view, a distinction must be drawn and, in fact, has already been drawn by many provincial legislatures.

In my view, large cities are defined as those that have the tax base and resources to operate as an autonomous level of government and contribute to both the provincial and national economy. Generally, these are the capital cities of the relevant province;[14] however, the term large cities would include non-capital cities that fulfil a similar role such as Calgary in Alberta, Saskatoon in Saskatchewan, Toronto in Ontario and Vancouver in British Columbia. These large cities have the tax base and resources to act as a constitutionally recognized level of government. In addition and as will be discussed in more detail shortly, grouping cities with their smaller counterparts, including smaller cities and municipalities, dilutes the position that cities are able to act as a constitutionally recognized level of government because their smaller counterparts do not have the resources to do so. A similar distinction has been drawn in the context of increasing or expanding the revenue raising powers of cities and the autonomy of cities.[15] Further, provincial legislatures have recognized the unique role of cities by adopting city-specific legislation or city charters.

In the context of municipal finance, Enid Slack and Harry Kitchen differentiate large cities from smaller cities or municipalities as cities have a much larger population, a "higher concentration of population and a population that is more heterogeneous in terms of social and economic circumstances."[16] In addition, "large cities are important generators of employment, wealth, and productivity growth" and "serve as regional hubs of people from adjacent communities who come to work, shop and use public services that are not available in their own communities."[17]

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[13] See Alexandra Flynn "Operative Subsidiarity and Municipal Authority: The case of Toronto's Ward Boundary Review." (2020) 56:2 Osgoode Hall LJ 271 at 281 [Flynn, "Operative Subsidiarity and Municipal Authority"],

[14] The capital cities in smaller provinces, such as the maritime provinces, and territories which have drastically smaller populations than the majority of Canadian provinces may not benefit from this analysis.

[15] See Enid Slack & Harry Kitchen, "More Tax Sources for Canada's Largest Cities: Why, What, and How?" (Toronto: University of Toronto IMGF Papers on Municipal Finance and Governance No. 27, 2016) at 2 [Slack & Kitchen, "More Tax Sources"]

[16] Enid Slack & Harry Kitchen, "Financing large Cities and Metropolitan Areas" (Toronto: University of Toronto IMFG Papers on Municipal Finance and Governance No. 3, 2011) at 2.

[17] *Ibid.*

Lastly, Slack and Kitchen explain that the emerging "knowledge based economy" has placed innovation as the key to prosperity and that the majority of innovation occurs in large cities, where citizens enjoy the benefit of proximity.[18] Slack and Kitchen further explain that smaller cities and municipalities, "may have to rely more heavily on provincial transfers compared to their larger counterparts"[19] as smaller cities and municipalities may not have the tax base to accommodate the autonomy that comes with constitutional recognition.[20] This means that smaller cities and municipalities must rely on funding from provincial legislatures, such as revenue sharing, as opposed to the revenue raising powers they possess, such as levying property taxes. Thus, smaller cities and municipalities undergo a fundamentally different analysis when discussing constitutional recognition as increasing the autonomy and legislative powers of smaller cities and municipalities may have adverse effects on upper levels of government.

While it is outside the scope of this analysis to undertake an economic analysis on the required population size to allow cities to act as a constitutionally recognized level of government, I estimate that the line could be drawn at a population of 160,000 citizens, based on Canada's smallest province – Prince Edward Island.[21] Thus, whether citizens in municipalities or smaller cities ought to be afforded constitutionally entrenched democratic rights undertakes a fundamentally different analysis than their smaller counterparts based on population and resources.

Arguments may be made that a distinction based on population may result in population fluctuations causing the population of cities to drop below the line drawn above and therefore, losing constitutional recognition. As a result of the COVID-19 pandemic and the rising cost of housing in cities, the population growth of Canadian cities has slowed; however, they have

[18] *Ibid*.
[19] Slack & Kitchen, "More Tax Sources", *supra* note 15 at 2.
[20] *Ibid.*
[21] See Prince Edward Island "PEI Population Report Quarterly" (2021) Online: *Prince Edward Island* <https://www.princeedwardisland.ca/en/information/finance/pei-population-report-quarterly> which shows that as of January 1, 2021 PEI's population was 159,819. See also Gaetan Royer, *FCM should pursue its quest for constitutional recognition,* (2013) Online (pdf): *Municipal World* <http://www.timeforcities.ca/uploads/7/4/ 8/0/7480311/constitutional_reform_municipal_world_oct_2013_gaetan_royer.pdf> at 1 where a similar distinction was drawn for constitutional recognition of cities based on the population of PEI at that time.

continued to grow.[22] Statistics Canada estimates that the growth of urban regions slowed from 1.7% to 1.3% from July 1, 2019 to July 1, 2020.[23] Further, the impact of the COVID-19 pandemic has also affected international immigration to urban regions, or cities, which has affected the growth of these areas.[24] Statistics Canada further notes that international immigration, despite being reduced as a result of the COVID-19 pandemic restrictions, continued to account for 90.3% of growth in urban areas between July 1, 2019 and July 1, 2020.[25] Rather, the COVID-19 pandemic appears to be pushing city-dwellers to nearby municipalities, resulting in urban sprawl and potentially, an increasing number of municipalities growing to cities that meet the threshold drawn above.[26] Lastly, and as briefly discussed in 7.2.3.1, the increase in the cost of housing in cities is, in my opinion, an issue that cities, namely the city councils thereof, would be able to address as a constitutionally recognized level of government. Thus, in my view, there is currently no obvious reason to expect that the population of cities would be reduced to a level where they would be under the population distinction drawn above.

Secondly, another concern that arises from grouping cities together with smaller cities or municipalities is that it may have the unintended consequence of diluting the position cities are advocating for.[27] For example, in 2004 when the former Prime Minister promised a "new deal for communities" as opposed to his originally intended "new deal for cities", the former Prime Minister effectively ignored the distinct legal problems of cities, precipitating "further political

[22] See Statistics Canada, "Population growth in Canada's large urban regions slows, but still outpaces that of other regions" (14 January 2021) Online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/daily-quotidien/210114/dq210114a-eng.htm?HPA=1>. Further, the cities that experienced the largest amount of individuals moving to surrounding municipalities were Toronto (-50,375) and Montreal (-24,880), which are both substantially above the 160,000 population distinction which, in my view, renders the decrease in population of little concern to drawing a population distinction especially when the overall population increased (*ibid*). Further, the populations of Kelowna, Calgary and Saskatoon all increased by 1.9% during the same time period (*ibid*).
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid*.
[27] See Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44:3 Osgoode Hall LJ 409 at 413. See also Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Toronto, Ontario: Oxford Scholarship Online, 2020) at 174 [Hirschl, "Constitutionalism and the Megacity"] where the author states that existing threads to expand city power suffer as they are non-city specific.

and legal difficulties for Canadian cities"[28] such as creating competition between cities.[29] Ron Levi and Mariana Valverde explain that:

> …the combined failure to recognize cities as legally, economically and socially distinct from other municipalities may produce a handful of politically powerful cities who will receive a special legal deal from their provincial governments, while others are consigned to the small town category. In turn, municipalities as a group may find it increasingly difficult to press their case, either provincially or federally.[30]

Meehan, Chiarelli and Major also note that municipalities, even within the same province, do not always exercise the same functions,[31] rendering the analysis of municipalities more individualistic, whereas large cities across Canada exercise similar, albeit not identical, legislative roles based on the distinct issues faced by large Canadian cities discussed herein. For example, smaller municipalities do not experience the same issues relating to gun crime, immigration and transportation as cities. The similarities between municipalities, as explained by Meehan, Chiarelli and Major, relate to the services they provide.[32] I argue that, while cities play a similar role as a service provider,[33] the legislative or policy creating role of city councils is much greater than their

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[28] Levi & Valverde, *supra* note 27 at 414. See also House of Commons, *Speech from the Throne*, 37-3 (2 February 2004) (Right Hon. Paul Martin) at 8.

[29] See Levi & Valverde, *supra* note 27 at 414.

[30] *Ibid* at 415.

[31] See Eugene Meehan Q.C., Robert Chiarelli & Marie France Major, "The Constitutional Legal Status of Municipalities 1849-2004: Success is a Journey, but also a Destination" (2007) 22 NCJL 1 at 14.

[32] *Ibid* where Meehan, Chiarelli & Major explain that "most municipalities have been assigned the following tasks: roads, streets, sewage systems, the taxation of land and buildings, the regulation of local land use, fire protection, the collection and disposal of residential solid waste, water systems, police and social services."

[33] The service providing role of cities is larger than that of their smaller counterparts. For example, cities are often expected to have organics or composting programs, bike lanes, on-street parking, homeless shelters, outdoor washrooms, supervised consumption sites, public transportation and other services that are lesser or non-issues in smaller cities or municipalities. Further, cities are expected to be "smart cities" providing online payment options, a social media presence and resources to their constituents. For example, see Saskatoon "City Council Meeting – Preliminary Business Plan and Budget" (Report on Saskatoon Police Service 2020/2020 Business Plan and Budget: 25 November 2019), Online (pdf): *City of Saskatoon* <www.saskatoon.ca> at appendix 2, where City Council approved a request from the Saskatoon Police Service for $828,000 additional dollars for the 2020 operating budget and $807,600 in the 2021 operating budget as a result of the creation of a supervised consumption site (i.e., needle exchange) in the corporate limits of Saskatoon, a total cost of roughly $1.6 million over two years. See also *Saskatoon (City) v Case*, 2017 SKPC 72 at para 35 where the Saskatchewan Provincial Court commented in *obiter dictum* that "the City should… take notice and strive to provide available public facilities where the need is most apparent". See also Levi & Valverde, *supra* note 27 at 440 where the authors discuss the role of cities in addressing the housing crisis, specifically noting that, "[i]t is widely acknowledges that a specific problem faced by cities, and not by most other municipalities, is the crisis created by rising house prices, higher rents, and a slowdown (or even a halt) to the provision of affordable house and public housing."

smaller counterparts and extends to issues of national significance,[34] resulting in the role of city councils or large cities being distinct from municipalities or smaller cities. As a result, cities must be separated from their smaller counterparts to acknowledge the distinct legislative role of cities in Canada.

Lastly, many provinces have acknowledged that large cities are unique from their smaller counterparts by enacting different and specific legislation for these cities as discussed in Chapter 2. While all large cities are not characterized by city-specific legislation or a city charter, the cities that are governed by their own legislation provide a useful framework for defining large cities. As provincial legislatures have acknowledged that many cities require specific legislation, the distinction between large cities and their smaller counterparts has arguably already been identified. Other provinces, such as Saskatchewan, have adopted an act specifically for cities, however, those acts also include smaller cities that do not play the same national role as large cities. Thus, the distinction drawn by provincial legislatures is useful in defining large cities, but it is not the only criteria. The tax base and resources of the city must also be considered,[35] as discussed above.

[34] See Dewing, Young & Tolley a *supra* note 8 at 2 and 6 where the writers note that "the problems of our large cities are no longer merely municipal or local problems… [t]he national goals of high employment, high growth, stable prices, viable international payments' balance, the equitable distribution of rising incomes must be primarily accomplished within our cities."

[35] For example, based on Royer, *supra* note 14 at 1, a distinction was drawn based on the population of Prince Edward Island. The Territory of Yukon, however, has a population of roughly 42, 507 as of September 30, 2020: see Yukon Bureau of Statistics "Population Report First Quarter, 2020" (January 2021) Online: *Yukon* <https://yukon.ca/sites/yukon.ca/files/ybs/population q3_2020_r_0_0.pdf.>. Despite this, the per capita allocation of Federal support to Yukon in 2020-2021 was $26,583, for a total of $1.2 billion in federal transfers to Yukon, whereas PEI's per capita allocation of Federal support for 2020-2021 was $4,344 for a total of $731 million in federal transfers: see Government of Canada "Major federal transfers" (last modified 2 February 2017) Online: *Government of Canada* >https://www.canada.ca/en/department-finance/programs/federal-transfers/major-federal-transfers.html>. Thus, Yukon relies heavily on Federal funding which makes it difficult to argue that Yukon has the population and resources to act as an autonomous level of government. The same can be said for the Northwest Territories, which received $32,768 in per capita federal transfers, totaling $1.5 billion and Nunavut, which received $45,205 in per capita federal transfers, totaling $1.8 billion (*ibid*). Thus, the economy and resources of a city must be considered in determining whether that city can act as an autonomous level of government. In contrast, Ontario, Alberta, British Columbia and Saskatchewan received $1,497 in per capita transfers and Manitoba received $3,317, showing that these provinces rely less on fiscal transfers as opposed to their own tax base and resources.

2. CURRENT CONSTITUTIONAL STATUS OF CITIES

The Constitution is the supreme law of Canada and all laws, whether federal or provincial, must be consistent with the Constitution.[36] This Chapter outlines the current treatment of cities within the Constitution and discusses how cities, and the constituents thereof, are included in, and excluded from, constitutional protection. As this analysis is focused on civic democracy, the rights of citizens discussed herein are limited to the provisions of the Constitution that are relevant to civic democracy. This Chapter discusses the current lack of constitutional recognition of cities, and the city councils thereof, and the historical context that has led to this reality. Further, I argue that the changing role of cities has rendered the historical legal principles, that continue to apply to cities today, ill-suited to the modern role of cities and city councils.

2.1 The Changing Role of Cities and the Need for Constitutional Protection

To understand the current position of cities within Canada's governmental structure and the Constitution, a brief historical context is required. Since cities and smaller municipalities in Canada have the same origins and are both defined as municipal institutions pursuant to section 92(8) of the *Constitution Act, 1867*, the historical context discussed herein applies to all municipalities in Canada, whether a city or otherwise.

As municipalities in Canada are "the direct descendants of English municipal corporations", an understanding of the role of English municipal corporations is required.[37] "In Britain, the monarch is the government; everything the British government does is done in the name of the monarch."[38] Thus, government in Britain was not always democratic as it acted for the Monarch, as opposed to its citizens. As explained by David Marquand, "[d]emocracy came to Britain slowly, haltingly and late."[39] Further, Marquand explains that the first general election in Britain where every citizen had the right to vote, and only vote once, was in 1950.[40] Thus, even though municipal institutions were not recognized as government,[41] but rather as an "unusual

[36] See *Constitution Act, 1982*, *supra* note 1 at s 52.
[37] See Andrew Sancton, *Canadian Local Government: An Urban Perspective* (Toronto: Oxford University Press, 2011) at 3-5 [Sancton, "Canadian Local Government"].
[38] *Ibid*.
[39] David Marquand, *Democracy in Britain* (Massachusetts: Blackwell Publishers, 2000) at 270.
[40] *Ibid*
[41] See Sancton, "Canadian Local Government", *supra* note 37 at 5 where Sancton notes that municipalities were "quite separate from government."

variant of a private business corporation" which acted on their own behalf and that of their residents within the limits of their statutory authority,[42] they were not originally designed to be democratically accountable but to further administrative aims.[43] This tradition carried over into Canada by virtue of the nineteenth-century doctrine of municipal authority which has become to be known as Dillon's rule.[44]

Alexandra Flynn aptly describes Dillon's rule as, "…a relationship between municipalities and provinces that is like that of a parent and child, with provinces keeping a "watchful eye" on how municipal powers are exercised in concern that they will be inappropriately used."[45] This means that municipal authority exists by virtue of provincial legislatures and can only be exercised in the manner authorized by statute.[46] Dillon's rule reflects four key principles of municipal institutions: (1) they have no constitutional status; (2) they are creatures of statute; (3) they have no independent autonomy; and (4) they only have the powers conferred by statute.[47] While strides

[42] *Ibid* at 4 and 5.

[43] *Ibid* at 3 to 5. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281, citing Meehan, Chiarelli & Major, *supra* note 31 at 4-5. See also Mariana Valverde "Games of Jurisdiction: How Local Governance Realities Challenge the "Creatures of the Province" Doctrine" (2021) 43 JL & Soc Pol'y 21 at 36 where the writer, citing the overall thesis in Engin F. Isin, *Cities Without Citizens: The Modernity of the City as a Corporation* (Montreal: Black Rose Books, 1992), explains that "municipal incorporation in central Canada was invented not to empower citizens or create democracy but rather to further colonial administrative aims". See also *Ladore v Bennett*, [1939] AC 468, [1939] DLR 1, [1939] 2 WWR 566 (PC) where the Judicial Committee held "[s]overeign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions… If corporation A or B or C is unable to function satisfactorily it would appear to be elementary that the Legislature must have the power to provide that the functions of one or all should be transferred to some other body or corporation. For this purpose, as the corporation would be created by the province, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old."

[44] See, for example, Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281. See also Valverde, *supra* note 43 at 34 where the author explains that, the Dillon doctrine of limited, prescribed municipal powers dominated Canadian jurisprudence from the 1880's onward.

[45] Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281-2. See also Felix Hoehn "The Limits of Local Authority Over Recreational Cannabis" (2019) 50:2 Ottawa L Rev 325 at 337 where the author explains "…modern municipal statutes are phrased in a manner that counters the narrow approach of Dillon's rule, and recent decisions of the Supreme Court of Canada have also endorsed more liberal approaches to interpreting the scope of power of local governments."

[46] See Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281-2.

[47] *Ibid* citing, *East York (Borough) v Ontario (Attorney General)*, [1997] OJ No 3064 at 14, 34 OR (3d) 789 (ONSC) [*East York (ONSC)*], aff'd in *Citizens' Legal Challenge v Ontario (Attorney General)*, [1997] OJ No 4100, 36 OR (3d) 733 (ONCA) [*East York (ONCA)*], leave to appeal to SCC refused April 2, 1998. where the ONCA held that provinces can abolish cities or their powers unilaterally. See also Felix Hoehn & Michael Stevens "Local Governments and the Crown's Duty to Consult" (2018) 55:4 Alta L Rev 971 at 981 where the authors explain that, based on *East York (ONSC)*, municipalities and therefore cities, "have no independent autonomy – legislation may abolish or repeal municipal powers".

have been made, as discussed below, Dillon's rule is still generally applicable to municipalities and cities in Canada despite the significantly increased democratic legislative role of city councils.

Dillon's rule, however, is not suited to the current reality faced by city councils. To quote David Miller, a former mayor of Toronto:

> The demands on cities are more complex than ever before, and yet our powers and our revenue sources have not evolved in a parallel way. We need the funding, the legislative tools and the autonomy to be able to deal with the opportunities and challenges that come with our growth.[48]

Unlike in the nineteenth century, the majority of the population currently lives in large cities.[49] Meehan, Chiarelli and Major explain that, "[t]he reality today is that urban communities account for close to four-fifths of Canada's population and economic activity."[50] As a result, "the problems of our large cities are no longer merely municipal or local problems… [t]he national goals of high employment, high growth, stable prices, viable international payments' balance, the equitable distribution of rising incomes must now be primarily accomplished within our cities."[51] To meet these national objectives placed on cities, entrenching civic democracy within the Constitution is not only eminently desirable, but essential.

Meehan, Chiarelli and Major further explain that modern local governments are "expected to perform the dual roles of "service provider and maker of local public policy"[52] noting that, "[i]f local governments were to somehow disappear from the scene, most city inhabitants would find themselves without access to the most basic necessities: water, waste disposal, fire and police

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[48] David Miller "Parliament and democracy in the 21st century: a place at the table for cities [Revised speech to the Empire Club]" (2004) 27:3 Canadian Parliamentary Rev at 1.
[49] Dewing, Young & Tolley, *Supra* note 8 at 2.
[50] *Supra* note 31 at 6 where the author states "Canada is one of the most urbanized countries in the world: close to 80% live in cities." The author continues to state "[i]n light of such numbers, one cannot deny the fact that the economic destiny of Canada is closely linked and in fact depends on, the fortunes of our urban centres." (*Ibid* at 8 to 9). See also H. Plecher, "Urbanization in Canada 2019" (11 November 2020) Online: *Statista* <https://www.statista.com/statistics/271208/urbanization-incanada/#:~:text=In%202019%2C%2081. 48%20percent%20of,in%20Canada%20lived%20in%20cities.> where the author concludes that 81.48% of the total Canadian population lives in cities.
[51] Dewing, Young & Tolley, *supra* note 8 at 2 and 6.
[52] *Supra* note 31 at 13.

protection, roads and public transit."[53] Further, Meehan, Chiarelli and Major note that the policy role of local governments, as set out in provincial legislation, has expanded to include provisions such as "providing good government" and "develop and maintain safe and viable communities" or "to be responsible and accountable governments with respect to matters within their jurisdiction."[54]

To support this dual role, Meehan, Chiarelli and Major advocate for enhanced legal authority and fiscal authority for municipal institutions and explains that the recognition of municipal institutions as an order of government in the Constitution is an option to allow municipal institutions to "…operate more efficiently and to compete with the global economy…".[55] While Meehan, Chiarelli and Major raise a formal amendment to the Constitution as a means to an end, they conclude that "…what municipalities are seeking is increased consultation/input with other levels of government on matters that directly affect them; the legislative tools necessary… and new revenue generating tools."[56] This analysis builds upon and distinguishes the position of Meehan, Chiarelli and Major, in light of the interference that occurred in *Toronto v Ontario*, demonstrating that consultation, without constitutional protection, has not granted the protection that civic democracy requires, including increased legislative and revenue raising powers.

In addition to growing city populations, upper levels of government have also increased the legislative role of city councils by downloading or offloading significant regulation to municipal institutions.[57] For example, and very recently, upper levels of government have

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[53] *Ibid* at 14.

[54] *Ibid*. Meehan, Chiarelli & Major also explain that local governments, including city councils, are more accountable as they are the closest level of government to their constituents and the result of city councils decision making are readily apparent in the community, which allows citizens to gauge whether they are being effectively represented or not (*ibid* at 11, 12 and 13). If citizens do not feel they are being effectively represented, this can be dealt with at the ballot box. See e.g. *The Cities Act*, SS 2002 c C-11.1 at s 3(1)(a) [*The Cities Act*]. See also *The City of Toronto Act* at s 1(1) [*The City of Toronto Act*].

[55] *Supra* note 31 at 35 and 36.

[56] *Ibid*. This is further supported by Dewing, Young & Tolley, *supra* note 8 at 1 where the authors state "[t]he municipalities' quest for constitutional recognition has been largely motivated by their search for practical ways of meeting the increasing demands upon their fiscal resources. They are not inherently interested in constitutional recognition (unlike Aboriginal peoples), but see it as one means of solving their financial problems. Municipalities have, however, given clear signals that they would be just as ready to deal with their fiscal situation outside the constitutional debate."

[57] See Dewing, Young & Tolley, *supra* note 8 at 17 where the authors explain that "[s]ince 1986, the provinces have been faced with cuts to federal funds and, as a result, they have tended to push the burden downward to the

offloaded regulation of transportation network companies ("TNCs"),[58] cannabis[59] and limited handgun regulations[60] to municipal institutions. Transportation, gun crime and cannabis all present much larger issues for cities, and therefore city councils, than smaller cities and municipalities.[61] Further, as cannabis and handguns were previously, and continue to be, regulated by Parliament, it shows the capacity of city councils to regulate issues that are of national significance and the desire of upper levels of government for city councils to do so.

2.2 Recognition of the Increased Legislative Role of Cities

Parliament, provincial legislatures and the judiciary have recognized the broad legislative role of cities in various ways. Whether it be a statement in the House of Commons, codifying broad legislative powers in municipal acts or interpreting municipal acts to provide deference to city councils, courts and upper levels of government have placed city councils in a position to legislatively address or regulate issues of national significance. While the majority of jurisprudence combines city councils and their smaller counterparts together for an analysis of their legislative role, the legislative role of city councils is distinct. As discussed further, the national issues affecting Canadian society such as drugs, guns and immigration have a significantly

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municipalities, which in turn pass the costs on to the consumers. This practice is often referred to as downloading. Graham, Phillips and Maslove argue that downloading may occur through one of two ways: either the government mandates that another level of government provide a specific service and does not provide compensation for doing so; or the government simply discontinues the provision of a service, leaving another level of government to fill the gap" and that "[t]he most severe example of downloading occurred in January 1997 when Ontario's Progressive Conservative government 'initiated massive changes to the governing and funding arrangements for education, welfare, and a wide range of urban services, consulting neither the municipalities nor their associations.' The province withdrew its funding from a number of areas, including social housing, public transit and ambulance services, while maintaining control over the design and implementation of those programs. As a result, municipalities were burdened with new responsibilities, but no additional funding or real political autonomy."

[58] See *The Vehicles for Hire Act*, SS 2019, c V-3.2. See also *Metro Taxi Ltd. et al v Ottawa (City)*, 2018 ONSC 509 where a class action lawsuit was certified as a result of regulations relating to transportation network companies.

[59] See *The Cannabis Control (Saskatchewan) Act*, SS 2018, c C-2.111.

[60] See Bill C-21, *An Act to amend certain Acts and to make certain consequential Amendments (firearms)*,2nd Sess, 43rd Parl, 2021, (first reading on February 16, 2021) which was tabled by the Federal Government to amend the *Firearms Act*, SC 1995, c 39 to allow municipalities to pass bylaws banning handguns within their jurisdiction, a power not previously granted to municipalities or cities. For a further example, see Bill C-6 *An Act to Amend the Criminal Code (conversion therapy)* 2nd Sess, 43rd Parl, 2020 (first reading on October 1, 2020) where conversion therapy will become a criminal offence (if passed) and cities have taken the initiative to pass bylaws regulating the same. For example, see City of Calgary Bylaw No. 20M2020, *The Prohibited Businesses Bylaw* at section 3 and Schedule A with prohibits businesses engaged in certain forms of conversion therapy. This example shows the national importance of a city council's legislative ability.

[61] See Statistics Canada, "Firearm-Related violent crime" (2018) Online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/en/pub/89-28-0001/2018001/article/00004-eng.pdf?st=nikIrPIJ> which shows the vast majority of handgun crime in Canada occurs in cities, predominantly in Toronto.

larger effect on cities than their smaller counterparts. As discussed further in 2.3.1, city councils are now democratically accountable to their electorate, and are being granted increased legislative roles, resulting in the right to effective representation within a city council being fundamental to Canadian democracy.

2.2.1 Parliament has Recognized Cities' Legislative Role

While Parliament is generally not directly involved in municipal governance, numerous federal political actors have expressed the importance of cities in Canada. Paul Martin, the former Prime Minister, in his 2004 Throne Speech stated that: "Canada's municipalities can play a crucial role in helping the Government meet its national priorities – for the integration of immigrants, for opportunities for Aboriginal Canadians living in urban centres, for tackling homelessness, and for emergency preparedness and response."[62] Further, in 2004, Paul Martin described what he referred to as a "new deal for communities" which meant that, "…city hall has a real seat at the table of national change."[63] In 2017, the current Prime Minister, the Right Honourable Justin Trudeau stated: "[w]e know our country is only as strong as the towns and cities we're made of. We're only as strong as our rec centres and social housing, our wastewater and public transit. We heard you when you said you needed a strong partner in Ottawa."[64] Notwithstanding these comments, little has been done by the Federal government to support cities, or the city councils thereof, in fulfilling the increased and increasing legislative role they exercise.[65] While the Federal government has proposed bills to increase municipal autonomy, the other tools required to promote civic democracy, such as increased revenue raising powers, have not yet followed.[66] In fact, many

[62] Martin, *supra* note 28 at 8.
[63] *Ibid*.
[64] See Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 272.
[65] *Ibid* where the author notes that the comments from the former and current Prime Minister, "suggest that municipalities have a direct government-to-government relationship with the federal government. But the remarks lie in stark contrast to the tattered 150-year-old pages of the *Constitution Act, 1867*, where a city or town can do whatever the province empowers them to do, but not more."
[66] See Meehan, Chiarelli & Major, *supra* note 31 at 8-9 where the authors state that "[w]eak revenue growth of local government has been accompanied by federal and provincial downloading of services. The passing of responsibilities (decentralization) has been founded on cost-cutting initiatives by upper levels of governments – the provincial and federal authorities have passed on to municipalities responsibility for services they no longer wish to fund. If responsibilities are passed on, it makes sense they be passed on responsibly – passing a responsibility while withholding funding is the literal exact opposite of passing the buck: the responsibility is passed, but not the buck" and "[t]he basic problem associated with the downward flow of responsibilities has simply been that it has not been accompanied by a shifting or financial resources or authority – this has left municipalities in difficult circumstances."

federal legislative or policy changes have the, presumably unintended, consequence of compounding issues faced by city councils.

In addition to TNC, cannabis and handgun regulations, federal immigration policies[67] have led to an influx of newcomers who typically settle in large cities.[68] Generally, cities, and therefore city councils, are left to accommodate newcomers with little assistance from upper levels of government.[69] Many newcomers have professional degrees; however, provincial regulations have not recognized many foreign educational institutions, nor do they provide "equivalency programs" for certain degrees, leaving city councils to identify or create employment opportunities for those newcomers.[70] Currently, city councils have some tools to do so, such as approving tax abatement agreements to attract businesses and create employment opportunities,[71] however, these agreements result in a reduction of property tax revenue to address issues of national significance. Further, when a federal tax deduction for businesses providing downtown parking was removed, cities were left to sort out significant street congestion.[72] Therefore, federal laws may result in unintended outcomes that city councils are left to regulate while the impact on municipalities is minimal, if there is any impact at all.

2.2.2 Provinces Have Recognized Cities' Legislative Role

Provincial legislatures have also recognized the important and increasing legislative role of city councils. In 2002, prior to the Saskatchewan legislature passing *The Cities Act*, the Honourable Mister Osika noted that "city governments are in the best position to make local decisions for the benefit of their residents."[73] Provincial legislatures have shown this by: (1)

[67] This thesis does not take a position on the current federal immigration policies. Rather, this thesis argues that the unintended consequences of Canada's federal immigration policies have left cities to attempt to identify and create employment for these newcomers.
[68] See Hirschl, "Constitutionalism and the Megacity", *supra* note 27 at 174.
[69] See Enid Slack & Harry Kitchen "Special Study: New Finance Options for Municipal Governments" (2002) 51:6 Can Tax J 2215 at 2224 and 2272 [Slack & Kitchen, "New Finance Options"].
[70] See Hirschl, "Constitutionalism and the Megacity", *supra* note 27 at 283 where the author explains that cities may be in a better position to create jobs than upper levels of argument. To add to this analysis, cities would require the financial and resource capacity to do this, which is why a formal amendment to the Constitution is required.
[71] See e.g. *The Cities Act*, *supra* note 54 at s 244(3).
[72] See Dewing, Young & Tolley, *supra* note 8 at 5.
[73] Saskatchewan "Bill No. 23 – The Cities Amendment Act, 2003" 2nd Reading, *Legislative Assembly of Saskatchewan*, 24-3(14 May 2003) (Hon. Mr. Osika) at 1088. See also Hirschl, "Constitutionalism and the Megacity", *supra* note 27 at 283 where the author supports this proposition.

codifying broad legislative power for city councils;[74] and (2) granting immunity (or partial immunity) for policy decisions made by city councils.[75] As a result of these provisions, the judiciary's ability to quash bylaws is generally limited[76] as it cannot override a policy decision merely because it disagrees with the decision made by a city council.[77] Thus, the judiciary cannot interfere with a city council's policy decisions, or ostensibly the effective representation of its constituents, as city councils are legislatively protected in making decisions on behalf of the electorate. Although provincial legislatures have granted city councils significantly broader legislative powers than they once had, provincial legislatures have continued to reserve themselves the power to limit, or interfere in, a city council's legislative role, as discussed in Chapter 4.

Provincial legislatures have also recognized a distinction between cities and municipalities. This proposition is self-evident as many provincial legislatures have adopted separate legislation and regulations for cities as compared to municipalities. Provincial legislatures have done this in three ways. First, certain legislatures have adopted general city legislation that applies only to cities. In Saskatchewan, for example, municipalities are incorporated and governed by *The*

[74]See e.g. *The Cities Act*, *supra* note 54 at s 6(1) which states "[t[he power of a city to pass bylaws is to be interpreted broadly for the purposes of: (a) providing a broad authority to its council and respecting the council's right to govern the city in whatever manner the council considers appropriate, within the jurisdiction provided to the council by law; and (b) enhancing the council's ability to respond to present and future issues in the city." See also *The City of Toronto Act*, *supra* note 54 at s 6(1) which states that "[t]he powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the city's ability to respond to municipal issues." See also *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13 at para 35, [2000] 1 SCR 342 [*Nanaimo Trucking*] where the SCC held that "municipalities balance complex and divergent interests" in decision making. See also Alexandra Flynn "With Great(er) Power Comes Great(er) Responsibility: Indigenous Rights and Municipal Autonomy" (2021) 34 JL & Soc Pol'y 111 at 114 [Flynn, "Indigenous Rights and Municipal Autonomy"].

[75] See e.g. *The City of Toronto Act*, *supra* note 54 at s 213. See also *The Cities Act*, *supra* note 54 at s 322.. Further, see Gerald E. Frug, "The City as a Legal Concept" (1980) 93 Harv L Rev 1057 at 1109-20 for a discussion of how Dillon's rule previously required doubt in a city councils exercise of power to be resolved against the exercise of that legislative power.

[76] See Meehan, Chiarelli & Major, *supra* note 31 at 22-26 and the accompanying footnotes for a review of the grounds to challenge bylaws. Further, as a result of the SCC's watershed decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 44 DLR (4th) 1 [*Vavilov*] "jurisdiction" is no longer a ground of judicial review, but acts as a legal constrains in the *Vavilov* reasonableness analysis.

[77] See e.g. *232169 Ontario Inc. (Farouz Sheesha Café) v Toronto (City)*, 2017 ONCA 484 at para 25, 67 MPLR (5th) 183 [*Sheesha Café (ONCA)*]. See also the lower court decision *2326169 Ontario Inc. v The City of Toronto*, 2016 ONSC 6221 at para 55, 59 MPLR (5th) 279 [*Sheesha Café (ONSC)*] where Goldstein J. held "Council therefore made a policy choice. The by-law was passed by an overwhelming majority of city councilors. It was an exercise of democratic decision making. It is not part of this Court's function to overturn the will of elected officials by, in effect, second-guessing their policy decisions" [emphasis added] and *ibid* at para 32 where Goldstein J. held, "[r]ules of construction should not be used to usurp the legitimate role of municipal councils as democratic institutions."

Municipalities Act[78] or *The Northern Municipalities Act*,[79] whereas cities are incorporated and governed pursuant to *The Cities Act*. Second, certain legislatures have adopted city-specific legislation. Ontario, for example, has passed *The City of Toronto Act* and *The City of Ottawa Act*,[80] whereas the smaller cities and municipalities are governed by *The Municipal Act*.[81] Lastly, certain legislatures have adopted city charters, which generally have the same purpose and effect as city-specific legislation.[82] City charters in Canada have been passed in Vancouver,[83] Montreal[84] and Winnipeg.[85] In addition, the Alberta Legislature has created city charters for Calgary[86] and Edmonton,[87] as regulations to *The Municipal Government Act*.[88] The *Calgary Charter Regulation* and *Edmonton Charter Regulation* supersede the application of *Alberta's Municipal Government Act*, which applies to all cities and municipalities in Alberta, in the event of conflicting provisions.[89]

Evinced by city-specific legislation is the fact that legislatures have attempted to accommodate the unique role of cities, although these attempts have not been overly successful. For example, after substantial revisions to *The City of Toronto Act* in 2006, Ontario's Minister of Municipal Affairs stated, seven-years later, that:

> [t]here were moments when we were having a beer during the more casual side of this process, and we were dreaming about just the incredible things that could potentially come from this… To be honest with you, here we are, how many years later, and not too many things have come forward.[90]

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[78] SS 2005 c M-36.1 [*The Saskatchewan Municipalities Act*]
[79] SS 2010, c N-5.2.
[80] SO, 1999, c. 14, Sched. E [*The City of Ottawa Act*]. See also *City of St Johns Act*, RSNL 1990, c C-17. See also *City of Mount Pearl Act*, RSNL 1990, c C-16. See also *City of Corner Brook Act*; RSNL 1990, c C-15. See also *City of Lloydminster Act*, SA 2005, c C-13.5. See also *City of Hamilton Act*, SO 1999 c 14, Sch C. See also *The City of Flin Flon Act*, SM 1989-90, c 72. See also the *City of Greater Sudbury Act*, SO 1999, c 14, Sch A. See also the *City of Lloydminster Act*, SS 2004, c C-11.2.
[81] SO 2001, c. 25 [*The Ontario Municipal Act*].
[82] See Andrew Sancton "The False Panacea of City Charters? A Political Perspective on the Case of Ontario" (2016) 9:3 SPP Research Papers at 7 [Sancton, "False Panacea"].
[83] See *Vancouver Charter*, SBC 1953 C 55.
[84] See *Charter of Ville De Montreal, Metropolis of Quebec*, 2000, c. 56, Sch. 1; 2017, c. 16, s. 1.
[85] See *The City of Winnipeg Charter*, SM 2002, c. 39.
[86] See *City of Calgary Charter, 2018 Regulation*, 40/2018 [*Calgary Charter Regulation*].
[87] See *City of Edmonton Charter, 2018 Regulation*, 39/2018 [*Edmonton Charter Regulation*]
[88] RSA 2000, c M-26 [*Alberta's Municipal Government Act*]
[89] See *Alberta's Municipal Government Act, supra* note 88 at s 141.5(3). See also *Calgary Charter Regulation, supra* note 86 at s 3. See also *Edmonton Charter Regulation, supra* note 87 at s 3.
[90] Sancton, "False Panacea", *supra* note 82 at 13.

What is particularly concerning in the context of Toronto, is that the Ontario Legislature, commonly referred to as Queen's Park, amalgamated numerous municipalities to create the current "megacity" that is Toronto.[91] Thus, Queen's Park created the largest and most populous city in Canada and has not yet granted Toronto the tools it needs to fulfill its nationally significant role in Canadian society.

City-specific legislation or city-charters continue to leave cities subject to the plenary power of provincial legislatures.[92] Even if additional powers are granted to cities, those powers can be repealed by the provincial legislature by majority vote. Although certain provincial legislatures have adopted consultation provisions, they have not generally been enforced by the courts,[93] nor are they enforceable as a constitutional convention.[94] For example, *The City of Toronto Act* sets out consultation requirements for matters of mutual interest;[95] however, despite the lack of consultation in *Toronto v Ontario*, the mid-election ward boundary alteration was upheld by the ONCA.[96] Although increased consultation has been identified by Meehan, Chiarelli and Major as the main desire of municipal institutions,[97] there is considerable doubt that further consultation would be effective without constitutional protection as the courts have not struck down laws based on a lack of consultation with cities.[98] Therefore, while city-specific legislation or city-charters aim to accommodate the unique role of cities, they do little to protect civic democracy.

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[91] This led to the constitutional challenge in *East York (ONSC)*, *supra* note 47.
[92] *Ibid* at 1.
[93] See *Toronto v Ontario (ONCA)*, *supra* note 3 at paras 106-107 for the dissenting opinion on the consultation provision in *The City of Toronto Act*.
[94] See *East York (ONSC)*, *supra* note 47 at 14. See also *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 799, 125 DLR (3d) 1 [*Patriation Reference*] where the SCC holds "[a] close look at some other cases and issues raised on the so-called crystallization reveals no support for the contention."
[95] *Supra* note 54 at s 1(2) and (3). See also *The Cities Act*, *supra* note 54 at s 223 for a similar, but different, provision in Saskatchewan's city legislation.
[96]See *Toronto v Ontario (ONSC)*, *supra* note 3, at para 70.
[97] See Meehan, Chiarelli & Major, *supra* note 31 at 35.
[98] See *East York (ONSC)*, *supra* note 47 at 12-13 where the ONSC states "[t]he evidence supports the conclusion that Bill 103 simply appears on government's legislative agenda with little or no, public notice and without any attempt to enter into meaningful consultation with those people who would be most affected by it – the more than 2,000,000 inhabitants of Metro Toronto. Such, however, is the prerogative of government. The court has made it clear that there is no obligation on government to consult with the electorate before it introduces legislation. It may exercise its powers as it sees fit, subject only to constitutional constraints." [emphasis added].

2.2.3 Courts' Have Recognized Cities' Legislative Role

Further, although the judiciary continues to recognize cities as "creatures of the province,"[99] they have acknowledged the broad bylaw making powers of municipal institutions and defer to the legislative decisions of city councils. The Supreme Court of Canada has commented that modern municipal legislation, which has increased the legislative authority of cities, reflects the true nature of modern municipalities and cities:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. The notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products v Vancouver*… 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… This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular areas, choosing instead to confer them broad authority over generally defined matters… This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.[100]

Combined with the reform of municipal legislation providing that a local governments role is to provide "good government" and to "responsible and accountable governments", *United Taxi* and *Catalyst Paper* illustrate the important governmental role played by municipalities, especially cities, due to the significant portion of the population contained therein. Further, *United Taxi* and *Catalyst Paper* demonstrate the dilution of Dillon's rule and supports constitutional recognition of cities as an important level of government.

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[99] As mentioned, this is the result of cities and smaller municipalities both being treated as "municipal institutions" pursuant to section 92(8) of the *Constitution Act, 1867*.

[100] *United Taxi Drivers Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 6, [2004] 1 SCR 485 [*United Taxi*]. See also *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at paras 19 and 30, [2012] 1 SCR 5 [*Catalyst Paper*] where the SCC explains that city councils, in passing bylaws, may "consider broader social, economic and political factors that are relevant to the electorate" which as noted by the Hon Mr. Osika, *supra* note 73 at 1088, city councils are in the best position to determine. See also *Friske v Arborfield (Town)*, 2017 SKQB 297 at para 27, 67 MPLR (5th) 31 where Turcotte J. held "[t]he Court is to interpret the power of a municipality to pass bylaws broadly." See also *Shell Canada Products v Vancouver (City)*, [1994] 1 SCR 231 at 255, 110 DLR (4th) 1 [*Shell Canada*] where McLachlin J.'s dissenting opinion explains that "legislatures introduce clauses such as these for the very purpose or permitting municipalities themselves to decide what is the in the best interests of their citizenry" which became the majority decision in *Nanaimo Trucking*, *supra* note 74 at paras 36-7. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 283. See also *Sheesha Café (ONSC)*, *supra* note 77, at para 32-34.

A further example of the judiciary recognizing broad city legislative powers occurred when Toronto banned the smoking or vaping of hookah in hookah lounges as a health concern for employees and citizens. Regarding this, the ONCA upheld the decision of the ONSC, holding:

> The application judge was alive to the hardship the passage of the by-law may occasion for the appellants. However, he recognized that it was not the court's role to second-guess the policy decisions made by elected officials. The *City of Toronto Act* specifically immunizes by-laws against judicial review for reasonableness: s. 213. The application judge was limited to determining the legal validity of the city's bylaw, and he made no errors in doing so.[101]

Thus, while city councils do not have *carte blanche,* they are provided with significant discretion in passing bylaws, policies and resolutions. This, however, does not prevent provincial legislatures from abolishing or limiting the legislative powers of city councils that are currently codified in provincial legislation, without consultation.

Although deference to the policy decisions of government, including city councils, is a step in the right direction, it has also worked against cities. In *East York (ONSC),* the ONSC dealt with a challenge to Bill 103, *The City of Toronto Act, 1997* ("Bill 103") which, as discussed in 4.2.2, combined numerous municipalities to form the "megacity" of Toronto that exists today.[102] In reviewing the constitutionality of Bill 103, the ONSC held that, "[i]t is not the role of the court to pass on the wisdom of the legislation … [s]pecifically, it is not for the court to determine whether the megacity will be good, or bad, for the inhabitants" of Toronto. [103] Thus, deference to legislative decision making is a double-edged sword as it has allowed interference with civic democracy, as well as promoting it.

The modern reality is that cities house the majority of the population in Canada, resulting in the legislative role of city councils extending beyond mere local concerns. The increased legislative role of city councils has been recognized through broad authority to pass bylaws and significant discretion in making decisions for the benefit of their residents. While this has been

[101] *Sheesha Café (ONCA), supra* note 77 at para 25.
[102] See *East York (ONSC), supra* note 47 at 2.
[103] *Ibid* at 13.

acknowledged by Parliament, provincial legislatures and the judiciary, a meaningful constitutional amendment to protect a city council's democratic legislative role has yet to occur. This has left city councils, and the voters thereof, susceptible to upper levels of government interfering with civic democracy.

2.3 Where Cities are Included in the Constitution

Cities are included in the Constitution in two ways. First, municipal institutions are mentioned in section 92(8) of the *Constitution Act, 1867*. Second, municipal institutions have been interpreted to be government actors for the purposes of the application of the *Charter*. As mentioned, cities and all other types of municipalities are treated the same under the Constitution, as they are universally incorporated in the term "municipal institutions" which appears in section 92(8) of the *Constitution Act, 1867*.[104] Therefore, this analysis applies to large cities, small cities and municipalities.

2.3.1 Section 92(8): The Plenary Power of the Provincial Legislatures

Section 92(8) of the *Constitution Act, 1867* provides provincial legislatures with plenary power over municipal institutions. In 1909, the Ontario Divisional Court considered the term "municipal institution" and held that:

> [t]he term "municipal institution" appears intended to give compendious expression to a state of affairs which exists in a defined populated area, the inhabitants of which are incorporated and entrusted with the privileges of local self-government or administration responsive to the needs, the health, the safety, the comfort, and the orderly government of an organized community… Having created the municipality, the Province is able to confer upon that body any or every power which the Province itself possess under [section 92][105]

While this interpretation of the term "municipal institution" is 112 years old, it continues to outline the plenary relationship between provinces and cities to date. In 1998, the ONSC adopted the same view, holding that:

[104] See pages 24-25, *below*, for more information on this topic.
[105] *Smith v London (City) (1909)*, 20 OLR 133 (Div. Ct.) at 154. See also *East York (ONSC)*, *supra* note 47 at 15.

> Since at least 1896 the law has been clear that s. 92(8) gives provincial Legislatures the right to "create a legal body for the management of municipal affairs" which includes the amalgamation of such bodies and the establishment of their geographic boundaries… Section 92(8) gives the Legislature the power to delegate to municipalities any authority which is conferred on it by s. 92 and to withdraw any authority previously delegated, and either retain it, or redelegate it to another body.[106]

Further, Ran Hirschl has explained that "'municipal institutions' are creatures of provincial governments, controlled exclusively by provincial authority (through s. 92 of the *Constitution Act, 1867*) alongside 'charities,' 'eleemosynary institutions' (non-profits), 'shops,' and 'saloons and taverns.'"[107] The above jurisprudence makes it clear that the Constitution does not treat municipal institutions as a level of government, but rather, a creature of provincial legislatures.

In essence, section 92(8) has entrenched Dillon's rule into the Constitution since Confederation,[108] and therefore cities exist because provincial legislatures allow them to. Provincial Legislatures have the constitutional authority to abolish cities, and the councils thereof, in their entirety,[109] change election boundaries,[110] or even amalgamate various regional districts or municipalities to create "megacities".[111] Section 92(8), put simply, constitutionalized the "creatures of statute" doctrine, which currently characterizes cities.[112] In my view, and as discussed in 2.1, Dillon's rule, and therefore section 92(8) of the *Constitution Act, 1867*, no longer reflects the legislative role of city councils in Canada.

As a result of the plenary power of provinces over municipal institutions, city councils do not have constitutionally enumerated heads of legislative power like Parliament and the provincial legislatures. Currently, a city council's bylaw making powers are set out in provincial legislation

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[106] *East York (ONSC), supra* note 47 at 13.
[107] Ran Hirschl, *Cities in National Constitutions: Northern Stagnation, Southern Innovation*, (Toronto: University of Toronto IMGF Papers on Municipal Finance and Governance No. 51, 2020) at 6.
[108] See *East York (ONSC), supra* note 47 at 14.
[109] *Ibid*.
[110] See *Toronto v Ontario (ONCA), supra* note 3 at para 3.
[111] See *East York (ONSC), supra* note 47 at 10.
[112] See Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281 where the author quotes Stanley Makuch, Neil Craik & Signe B Leisk, *Canadian Municipal and Planning Law*, 2nd ed (Toronto: Thomson Carswell, 2004) at 81 to explain that "'[m]unicipal institutions are within the provinces exclusive authority and have no protection against the changes imposed on them by provinces'. It is this constitutional luminosity that have led municipalities to be called 'creatures of the province', with provincial governments empowered to set rules regarding what municipalities can and cannot do."

and can be expanded on or limited by the provincial legislatures as they see fit. Without the appropriate and constitutionally entrenched tools, such as legislative powers and revenue raising powers, civic democracy will continue to be limited and subject to provincial interference. As discussed in 7.1.2, amendments to entrench enumerated heads of power and sufficient revenue raising powers for city councils are fundamental to promote and protect civic democracy.

2.3.2 Section 32: Charter Scrutiny for Municipal Institutions

Section 32 of the *Charter*, which states that the *Charter* applies to, *inter alia*, "…the legislature and government of each province in respect of all matters within the authority of the legislature of each province", has been interpreted to include city councils as government actors.[113] As a result, the legislative role of city councils is subject to *Charter* scrutiny. Neither the *Charter* nor the Constitution, however, contain provisions designed to protect civic democracy.

In the landmark case of *Godbout v Longueil (Ville)*,[114] three justices of the Supreme Court of Canada interpreted section 32 of the *Charter* as including municipal institutions and therefore, cities. La Forest J. held that "the ambit of section 32 of the Canadian Charter is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments."[115] As city councils are "democratically elected by members of the general public and are accountable to their constituents in a manner analogous to Parliament and to provincial legislatures" cities are subject to *Charter* scrutiny in their legislative function and otherwise.[116] Therefore, while city councils are treated differently than upper levels of government for the purpose of constitutional democratic protection, they are treated the same when passing legislation, in the sense that it must be consistent with the *Charter*.

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[113] *Supra* note 1, at s 32(1)(b).
[114] [1997] 3 SCR 844, 152 DLR (4th) 577 [*Godbout*]
[115] *Ibid* at 47.
[116] *Ibid* at 51. See also *Pacific National Investments Ltd. v Victoria (City)*, 2000 SCC 60 at para 33, [2000] 2 SCR 860 where Lebel J. held that, "municipal governments are democratic institutions." See also *City of Guelph v Board of Health*, 2011 ONSC 5981 at para 78, 97 MPLR (4th) 70 where the ONSC acknowledges that cities are local democracies. See also *Sheesha Café (ONSC) supra* note 77 at para 55.

Even though civic democracy is not protected by the written text of the Constitution, there is logic to the inclusion of cities in section 32 of the *Charter* as it prevents provincial legislatures from delegating matters to city councils to perform an "end-run" around the constitutionally protected rights in the *Charter*. Treating cities as a level of government for the purpose of *Charter* scrutiny, shows that Dillon's rule, while still in existence, is being diluted. As mentioned, Dillon's rule treats cities as creatures of statute, whereas subjecting them to *Charter* scrutiny demonstrates that modern cities are more akin to a constitutionally protected level of government.[117] The broad legislative powers granted to city councils increase their autonomy, attract *Charter* scrutiny and separate cities from the control of the provinces. With the majority of Canadians residing in cities, the increased legislative role of city councils and section 32 of the *Charter* applying to city councils, as a matter of logic and principle, city councils, and the voters thereof, require constitutionally entrenched democratic protection to fulfill their legislative role. Such constitutional protection allows the electorate to be effectively represented within a city council and, as discussed further, provides city councils with the legislative tools to be able to effectively represent their constituents.

2.3.3 Conclusion: Where Cities are Included

As provincial legislatures have plenary power over cities within their jurisdiction, city councils are at the mercy of the relevant provincial legislature and can only legislate in the areas the provincial legislature allows them to.[118] Despite this plenary power, a city council's legislative role is subject to *Charter* scrutiny in the same manner as Parliament and the provincial legislatures as they are *democratically* elected bodies that perform a function analogous to upper levels of government.[119] As the Courts have acknowledged that city councils have an analogous role to upper levels of government, effective representation within a city council is crucial to promote democracy in Canada. Given the lack of democratic protection in the Constitution for city councils, and the voters thereof, however, upper levels of government retain the ability to interfere with civic elections and the democratic decision-making process of a city council.[120] As effective

[117] See chapter 2.1, *above*, for a further discussion on Dillon's Rule.
[118] See page 24-25, *above*, for additional information on the provinces plenary power over municipal institutions.
[119] See page 25-26, *above*, for further information on this argument.
[120] See chapter 4, *below*, for further information on interference with elected officials and civic elections.

representation is granted to citizens through the *Charter*, in my view, a formal amendment to the Constitution is not only necessary but required.

2.4 Where Cities are Excluded

Cities and their citizens are excluded from the Constitution in several ways that affect civic democracy. First, city councils are excluded from the text of section 3 of the *Charter* which is entitled "Democratic rights of citizens". Second, the Constitution does not provide city councillors with protection analogous to that of parliamentary privilege. Third, cities have no constitutionally recognized revenue raising powers or enumerated heads of legislative power. In this section, I describe these exclusions and show how each of them negatively affects civic democracy.

Despite the fact that civic democracy is not constitutionally protected, provincial legislatures have codified some democratic protection for city councils in provincial legislation as discussed further in this Chapter. In my opinion, this represents a dilution of Dillon's rule.[121] While the dilution of Dillon's rule and the broad and purposive interpretation of municipal powers could form an argument that constitutional recognition for city councils, and the voters thereof, is not required, the lack of constitutional protection allows provincial legislatures to continue to interfere in civic elections and with a city council's legislative function. Therefore, the dilution of Dillon's rule supports the need for constitutional protection of civic democracy to ensure citizens can be effectively represented by their respective city council and that city council has the tools to do so.

In my view, only a formal amendment to the Constitution to protect civic democracy would effectively eradicate Dillon's rule as municipal statutes would flow from the Constitution as opposed to provincial legislation. Should the Supreme Court of Canada accept an alternative approach in *Toronto v Ontario* and interpret the current text of the Constitution to protect democratic civic elections, cities and city councils would still be at the mercy of the provincial legislatures regarding legislative and revenue raising powers. In my view, and as argued further below, this could have the opposite effect as intended as, although democratic civic elections would be constitutionally protected, provincial legislatures could abolish or limit a city council's legislative role, leaving little for city councils to deliberate on behalf of the electorate. Thus, such

[121] See Hoehn, *supra* note 45 at 337.

an interpretation could effectively restore the historical application of Dillon's rule, setting civic democracy back as opposed to promoting it.

2.4.1 Democratic Rights

Section 3 of the *Charter* states that, "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and be qualified for membership therein."[122] Thus, voters and candidates in federal or provincial elections have a protected *Charter* right to either vote or run as a candidate, and to be effectively represented within Parliament or a legislative assembly, whereas voters and candidates in civic elections are not afforded equivalent rights.

"For many individuals, local government is the most important level of government, dealing with matters of direct and immediate concern, and providing the most direct and accountable political institution."[123] Given the importance of representation at the local level, entrenching democratic civic elections in the Constitution would allow city councils to operate as an independent level of government, free from interference from upper levels of government, supporting Canadian democracy. Meehan, Chiarelli and Major explain that municipal institutions are "truly agents of democracy" as they are the level of government closest to the people and "most able to represent local aspirations and needs."[124] Thus, "citizens of a municipality are provided with the power to influence and determine the range of service made available to their community."[125] While Meehan, Chiarelli and Major are referring to municipal institutions generally, I argue that these concerns are more prevalent in cities as city councils govern or regulate matters that are beyond mere local concerns, as discussed in 2.1 and 2.2. As a result, effective representation for citizens in their city council is, at a minimum, of equal importance as

[122] *Supra*, note 1 at s 3.
[123] Meehan, Chiarelli & Major, *supra* note 31 at 12.
[124] *Ibid* at 12 to 13. Further, Meehan, Chiarelli & Major explain that "[l]ocal governments give effect to democratic ideals because they are readily accessible to local constituents. Not only do they provide the electorate with an outlet to voice their concerns and needs but, because the results of local decisions are readily apparent in the local community, citizens can actually evaluate the effectiveness of their government and the degree to which their representatives actually fulfill their obligations/pledges." (*ibid* at 11 to 12).
[125] *Ibid* at 12.

upper levels of government,[126] and the municipal electorate can better gauge whether a city council is effectively representing their constituents, leading to more accountable local government and supporting democracy.

Prior to the promulgation of the *Charter*, there was no constitutionally entrenched right to vote for, or to be effectively represented, in Parliament or a legislative assembly. Despite this lack of democratic protection, significant advances in the "right" to vote occurred prior to the *Charter* coming in force. For example, "denial of the right to vote on the basis of gender, religion, race, ethnicity and income had been removed from the law, and administrative steps had been taken to improve access to the vote for people with disabilities, people away from home on election day, and members of the public service and the military serving abroad."[127] The *Charter* ensured that the right to vote for Canadian citizens was constitutionally protected.[128] Civic elections are similar as there are no restrictions in civic election legislation based on race, ethnicity, gender or any factor other than residency and age,[129] as provisions of this nature would be likely to infringe the *Charter*. Although the *Charter* protects citizens from discrimination in voting,[130] it does not prevent upper levels of government from interfering in civic elections and thus, constitutional protection is required to truly protect democratic civic elections.

The Supreme Court of Canada has held that the right to vote contained in section 3 contains the right to effective representation as Canada is characterized by a representative democracy: "[e]ach citizen is entitled to be represented in government. Representation comprehends the idea

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[126] *Ibid* at 10 where Meehan, Chiarelli & Major explain that "[d]espite the fact that Canadian local governments increasingly play an important role at both the international and domestic level they are misperceived as mere purveyors of services rather than as governing institutions with an important role in Canadian Society. That urban governments are presented as creatures of the provinces inevitably encourages the misperception that they are not on equal footing with the federal and provincial governments."

[127] Elections Canada "A History of the Vote in Canada: Advancing Fairness, Transparency and Integrity, 1982-2020" (12 January 2021) Online: *Elections Canada Website* <https://www.elections.ca/content.aspx?section=res&dir=his/chap4&document=index &lang=e>. See also "Section 3 – Democratic Rights" (last modified 25 January 2021) Online: *Government of Canada* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art3.html> for a list o the restrictions on the right to vote set out in section 3 of the *Charter*.

[128] See Elections Canada, *supra* note 127.

[129] See *Fitzgerald (Next Friend of) v Alberta*, 2004 ABCA 184 at para 2, 27 Alta LR (4th) 205, leave to appeal to SCC refused [2004] SCCA No 349, where the Alberta Court of Appeal determined that disallowing minors to vote infringed the *Charter* but such infringement was saved under s 1 of the *Charter*.

[130] For municipal elections, this would be through section 15 of the *Charter*, as section 3 it only applies to Parliament and provincial legislatures.

of having a voice in the *deliberations of government* as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative".[131] Therefore, the right to vote in a federal or provincial election protects relative parity of voting power.[132] If one person's vote is diluted in comparison with that of another's, the result is uneven and unfair representation.[133] The Supreme Court of Canada has acknowledged that absolute voter parity is not possible but goes on to hold that infringements of voter parity are only acceptable if they "contribute to better government of the populace as a whole."[134] Therefore, the democratic rights protected by section 3 of the *Charter* protect effective representation as well as the right to vote or run as a candidate in a federal or provincial election.

As it is written, section 3 of the *Charter* does not protect the democratic right to vote or run as a candidate in a civic election. The ONSC has agreed with this interpretation, holding:

> I agree with the Attorney-General that, prima facie, s. 3 does not apply to the case at bar and that the delegation of powers does not make the delegatee [*sic*] into the delegator. The words "legislative assembly" are contained in other sections of the Charter where they could not be interpreted as including municipal councils. There is no constitutional impediment to a province abolishing municipal councils. If the applicant succeeded on its s. 3 argument, the result would be that a province could not abolish municipalities. Municipalities are creatures of the province.[135]

Therefore, the democratic rights contained in section 3 of the *Charter* do not apply to the electorate or candidates in civic elections. There are many reasons why this exclusion is important, as discussed in further detail below. The principal reason, however, is that section 3 of the *Charter* provides protection for "effective representation"; in other words, it provides for a vote that "retains its impact."[136] Since city councils are excluded from section 3, the right to vote or run in a civic election does not protect effective representation.

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[131] *Electoral Boundaries Reference*, *supra* note 10 at 184. [Emphasis added]. See also *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 25, [2019] 1 SCR 3 [*Frank v Canada*] where Chief Justice Wagner, speaking for the majority, states, "[t]he right of every citizen to vote lies at the heart of Canadian democracy."
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*
[135] *Rheaume*, *supra* note 7 at 31. See also *Baier v Alberta*, 2007 SCC 31 at para 39, [2007] 2 SCR 673 [*Baier*].
[136] Archer & Sobat, *supra* note 9 at 13.

In *Rheaume*, as cited in the preceding paragraph, the ONSC held that the terms "legislative assembly" contained in section 3 of the *Charter* does not extend to city councils. There is good reason for this. While city councils and provincial legislatures are both democratically elected and have democratic legislative roles, city councils are structured differently than a legislative assembly. For the most part, city councils are not characterized by "party" politics. Although party politics are not inherent in Parliament or provincial legislatures, they have come to be the norm. Thus, city councils differ as there is no opposition or "government-in-waiting" that provides a necessary check and balance on the party with the most seats.[137] As city councils are generally a group of independent elected officials, procedural decisions or decisions relating to election procedures, may be subject to bias as city councillors may vote their personal interest, as distinguished from a financial interest,[138] with no opposition to perform the necessary check-and-balance. As a result, merely expanding the term "legislative assembly" to include city councils does not acknowledge or accommodate the different structure thereof. In addition, this alternative to a formal amendment would only address the right to vote and effective representation for citizens but would not provide city councils the necessary tools to effectively represent its constituents.

In addition, the interference in the 2018 Toronto election could not happen in a federal or provincial election as upper levels of government pass the legislation governing their own elections.[139] While city councils have some control over election procedures,[140] the provincial legislatures generally pass legislation governing civic elections.[141] Federally, neither the House of Commons or the Senate of Parliament sit during an election period, as Parliament has been

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[137] See e.g. Nathalie Des Rosiers "Deference to Legislatures: The Case of 2018 Ontario Better Local Government Act" (2021) 34 JL & Soc Pol'y 39 at 43 where author explains that the leader of the opposition provided the "check and balance" on the current Ontario government in debating the *BLGA* stating, "[i]f the provincial government wants to start a conversation about how to improve municipal government, I'm all for that. But let's follow a proper process in doing so." [emphasis added].

[138] See e.g. *The Cities Act*, *supra* note 54 at s 115 for the definition of a financial interest in Saskatchewan which creates a conflict, whereas a personal interest may not.

[139] See *The Canada Elections Act*, SC 2000 c 9.

[140] See e.g. City of Saskatoon Bylaw No. 8191, *The Election Bylaw, 2012* which outlines the use of permissible voting technology, such as optical scanners, and mail-in ballot procedures. See also Toronto Municipal Code, Chapter 53 – Elections which authorizes the use of vote-counting equipment.

[141] See e.g. Ontario's *Municipal Elections Act*, 1996, SO 1996 c 32 Sched. 2, s 1-10. See also *The Local Government Elections Act*, SS 2015 c L-30.11 [*LGEA*]. See also *The Municipal Councils and School Boards Elections Act*, *2005*, CCSM c M257. See also *Local Authorities Election Act*, RSA 2000 c L-21. See also the *Local Government Act*, RSBC 2015 C 1, part 3.

dissolved.[142] Thus, mid-election destruction of federal electoral boundaries cannot be passed during an election period. While each province controls their own election procedures through legislation, they do not allow the legislative assemblies to meet after the Lieutenant Governor in Council ("LGIC") dissolves the legislative assembly. Thus, provincial legislation governing provincial elections cannot be amended during the election period. After dissolution, no legislative business can take place until a general election is held, a new legislature is summoned, a speaker is elected and the speech from the throne occurs.[143] As evinced by the facts of *Toronto v Ontario*, provincial legislatures are free to amend legislation regulating civic elections at any time, including during an election period. Thus, without constitutional protection, civic election legislation can be amended during an election period, unlike the legislation governing federal and provincial elections.

Notwithstanding the above, provincial legislatures have codified democratic election processes for municipal institutions and these democratic processes have been considered as a relevant factor in subjecting cities to *Charter* scrutiny as a governmental entity.[144] As provincial legislatures continue to have plenary power over cities, they remain in control over the election process for city councils and can abolish the democratic process by majority vote. In addition, provincial legislatures currently have control over the other legislative tools, such as legislative and revenue raising powers, required to ensure effective representation of citizens within their city council. Thus, city councils continue to lack the constitutional protection required to fulfill their democratic legislative role.

2.4.2 Parliamentary Privilege

Parliamentary privilege, in its broadest sense, provides immunity for Members of Parliament ("MPs") or Members of Legislative Assemblies ("MLAs")[145] from civil or criminal liability for the statements they make in the course of their legislative duty.[146] For Parliament, this

[142] See Parliament of Canada "Prorogation Puts Parliament on Hold" (18 August 2020) Online: *Senate of Canada* <https://sencanada.ca/en/sencaplus/how-why/prorogation-puts-parliament-on-hold/>.
[143] See Ontario "The Lieutenant Governor and the Legislature" (2017) Online: *Lieutenant Governor of Ontario* <http://www.lgontario.ca/en/constitutional-role/lieutenant-governor-legislature/>.
[144] See *Godbout, supra* note 114 at 881.
[145] This term also encompasses the provincial equivalents of MLA's in other provinces, such as Members of Provincial Parliament in Ontario and Members of House Assemblies in Newfoundland.
[146] See *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29, [2005] 1 SCR 667 [*Vaid*].

privilege is entrenched in section 18 of the *Constitution Act, 1867* and recognized in section 4 of *The Parliament of Canada Act*.[147] Provincial legislatures are permitted to enact statutes defining privilege for MLAs by virtue of section 45 of the *Constitution Act, 1982*.[148] City councillors, on the other hand, have no comparable constitutional protection.

Prior to discussing the ramifications of potential civil and criminal liability for statements of city councillors made performing their legislative duties, a further analysis of the scope of parliamentary privilege is warranted. In 2003, the Speaker of the House of Commons ruled:

> We have parliamentary privilege to ensure that the other branches of government, the executive and judicial, respect the independence of the legislative branch of government, which is this House and the other place. This independence cannot be sustained if either of the other branches is able to define or reduce these privileges. … The privileges of this House and its members are not unlimited, but they are nonetheless well established as a matter of parliamentary law and practice in Canada today, and must be respected by the courts. Judges must look to Parliament for precedents on privilege, not to rulings of their fellow judges since it is Parliament where privilege is defined and claimed.[149]

Thus, parliamentary privilege grants MPs and MLAs the autonomy to speak freely in performing their legislative function without the threat of criminal or civil liability attaching to their comments. Further, it protects from both judicial and executive interference in an elected official's legislative function.

The Constitution provides two limits on parliamentary privilege. First, section 18 of the *Constitution Act, 1867* limits the extent of privilege that Parliament may confer on itself as it states that privilege cannot be greater "than those enjoyed at the time by the House of Commons of the United Kingdom."[150] Second, the preamble limits privilege as the reference to "a Constitution similar in Principle of that of the United Kingdom",[151] which in effect provides for a Westminster parliamentary system, limiting parliamentary privilege to legislative functions necessary to ensure

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[147] RSC, 1985, c. P-1.
[148] See *Fielding v Thomas*, [1892] AC 600.
[149] See Marc Bosc & Andre Gagnon (Eds) "House of Commons Procedure and Practice" (2017) 3rd Ed, Online: *House of Commons* <https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_03_3-e.html#footnote-362>.
[150] Bosc & Gagnon, *supra* note 149 at chapter 3. See also *Vaid*, *supra* note 146 at para 38.
[151] *Constitution Act, 1867*, *supra* note 1 at s 18.

the proper functioning of the Parliamentary House of Commons.[152] In *Vaid*, the Supreme Court of Canada held that parliamentary privilege protects: (1) freedom of speech; (2) control by the House over debates or proceedings in Parliament, including day-to-day procedure; (3) the power to exclude strangers from proceedings; (4) disciplinary authority over MPs or MLAs; (5) disciplinary authority over non-members who interfere with parliamentary duties; and (6) immunity for MPs and MLAs from being subpoenaed to attend court during a parliamentary session.[153] Thus, parliamentary privilege provides protection for MPs and MLAs from civil lawsuits; however, the judiciary continues to play a limited role in such matters, as discussed below.

Prior to 1982 and therefore the *Charter*, the Ontario High Court held that the courts had no jurisdiction over statements made in Parliament.[154] Post-*Charter* the Supreme Court of Canada has held that "courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to privilege."[155] In *Vaid*, the Supreme Court of Canada elaborated on this holding that parliamentary privilege does not constitute "enclaves shielded from the ordinary law of the land."[156] Thus, for privilege to attach, MPs or MLAs must show that their conduct is closely connected with their legislative duties and if the application of privilege is established, the judiciary cannot interfere.

In addition to providing immunity, parliamentary privilege provides legal certainty of what MPs and MLAs can and cannot do in the course of their legislative duty. For example, *The Legislative Assembly Act*[157] in Saskatchewan adopts the same privilege and immunity as held by the Parliamentary House of Commons,[158] however, it goes on to list what is considered a breach

[152] See *Vaid supra* note 146 at para 13 and 38.
[153] *Ibid* at para 29. See also Bosc & Gagnon, *supra* note 149 at chapter 3.
[154] See *Roman Corporation Limited v Hudson's Bay Oil and Gas Co.*, [1971] OR 418 at 7, 18 DLR (3d) 134 (ONSC) leave to appeal to ONCA refused, [1972] 1 OR 444, 23 DLR (3d) 292, leave to appeal to SCC refused [1973] SCR 820, 36 DLR (3d) 413. See also Bosc & Gagnon, *supra* note 149 at chapter 3.
[155] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House Assembly)*, [1993] 1 SCR 319 at 384 to 385, 100 DLR (4th) 212 [*New Brunswick Broadcasting*]
[156] *Vaid*, *supra* note 146 at para 29.
[157] SS 2008, c L-11.3 [*Saskatchewan's Legislative Assembly Act*]
[158] *Ibid* at s 23.

of privilege[159] and what the punishment for the breach may be.[160] Thus, there is arguably no need for civil lawsuits for statements or conduct that occur in the legislative assembly, as internal mechanisms of discipline exist, rendering MPs and MLAs immune from civil liability or ordinary criminal prosecution in carrying out their legislative role.[161] Despite these provisions, the judiciary is still occasionally called upon to determine if parliamentary privilege attaches in a given scenario.

City councillors, on the other hand, have no protection from civil or criminal liability beyond that of the ordinary litigant provided by the common law or the provisions of the relevant provincial legislation.[162] Elected city councillors do not benefit from absolute privilege as they "do not have the sufficient safeguards necessary for granting absolute privilege to speech made during council meetings."[163] Further, the ONSC has held that "the common law has justified granting absolute privilege to legislatures because of their constitutionally protected ability to examine, discuss, and judge its own members."[164] Thus, for Parliament and legislatures, the Speaker "has a variety of remedies that he or she may employ" including, but not limited to, "an apology, naming the members, and ejecting them from the legislature until they retract their comments."[165] City councils do not have a constitutionally protected ability to discipline their own members like Parliament and the provincial legislatures, nor do city councils have any constitutionally protected mechanism for internal discipline.

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[159] *Ibid* at ss 24(1) and (2).
[160] *Ibid* at s 25.
[161] *Ibid*. See also s 26 which codifies privative clause stating that "[t]he determinations or findings of the Legislative Assembly on any proceedings pursuant to this Act are final and conclusive" (*ibid* at s 26) and s 28 which sets out immunity from civil action, prosecution, arrest, imprisonment or damages (*ibid* at s 27). See also Alberta's *Legislative Assembly Act*, RSA 2000 c L- 9 at s 13 [*Alberta's Legislative Assembly Act*] for an analogous immunity provision. See also *Legislative Assembly Act*, RSO 1990, c. L-10 at s 37 [*Ontario's Legislative Assembly Act*] for another analogous immunity provision. See also the *Legislative Assembly Privilege Act*, RSBC 1996 c 529 at ss 4 and 5[*British Columbia Legislative Assembly Privilege Act*] for British Columbia's immunity provision and the Legislative Assemblies power to inquire and punish its members.
[162] See e.g. *Prud'homme v Prud'homme*, 2002 SCC 85 at para 24, [2002] 4 SCR 663 [*Prud'Homme*] where the SCC states that elected municipal officials are governed by public law.
[163] *Gutowski v Clayton*, 2014 ONSC 2908 at para 65, 32 MPLR (5th) 7, aff'd 2014 ONCA 921, 124 OR (3d) 185 leave to appeal denied [2015] SCCA No 74 [*Gutowski*].
[164] *Ibid*.
[165] *Ibid.* See also *Saskatchewan's Legislative Assembly Act*, *supra* note 157 at s 25(1) which outlines the penalties for breaching privilege, which may include imprisonment for a period determined by the Legislative Assembly (*ibid* at 25(1)(a)).

Although elected city councillors are not protected by absolute or parliamentary privilege, they are not entirely unprotected from civil liability. City councillors can rely on the common law defamation defence of qualified privilege, which requires the accuser to show that malice is the dominant intent of the councillor's comments.[166] Additionally, city councillors may be protected by "good faith" immunity clauses contained in their governing legislation.[167] Despite these protections, the mere threat of damages awards or the cost of defending a civil action may create an impediment to open democratic debates at council meetings.[168] Lastly, the lack of constitutionally protected privilege and internal discipline mechanisms for elected city councillors permits interference in city council matters from upper levels of government.

Despite the lack of constitutional protection afforded to city councillors, provincial legislatures have amended legislation to grant more tools to city councils to govern themselves. While these tools are not protected by the Constitution, they provide city councils a limited ability to discipline their members and hold city councillor's responsible outside of the courts. Modern provincial legislation requires city councils[169] to appoint integrity commissioners[170] and pass a code of ethics[171] for city councillors allowing for city councils to operate similarly to Parliament or the provincial legislatures in terms of internal discipline. Provincial legislatures have thus acknowledged the importance of an open democratic debate at city council meetings but, as with any power granted to city councils, they exist at the behest of the provincial legislatures and can be repealed or amended as the provincial legislature desires. In addition, the threat of civil or criminal liability, or the cost of defending such allegations,[172] may impede open democratic discussions at city council meetings.

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[166] See *Gutowski*, *supra* note 163 at para 5.
[167] See e.g. *The Cities Act*, *supra* note 54 at s 317(1).
[168] Anti-SLAPP (strategic lawsuit against public participation) legislation may play a role in further protecting city councilors from lawsuits relating to statements at city council meetings; however, an in-depth analysis on Anti-SLAPP legislation in the context of statements made by city councilors is outside the scope of this analysis.
[169] This applies to councils for other municipalities in many provinces as well. See, for example, *The Saskatchewan Municipalities Act*, *supra* note 78 at s. 93.1. See also *The Ontario Municipal Act*, *supra* note 81 at ss 223.2 and 223.2
[170] See e.g. *The City of Toronto Act*, *supra* note 54 at 158.
[171] See e.g. *The Cities Act*, *supra* note 54 at s 66.1 and *The Cities Regulations*, 2003 c C-11.1 Reg 1 at s 3.1 which sets out the model code of ethics for city councillors in Saskatchewan. See also *The City of Toronto Act*, *supra* note 54 at s 157. See also *The City of Ottawa Act*, *supra* note 80 at s 223.2.
[172] This is not a concern in Parliament or provincial legislatures as they have absolute immunity clauses. See e.g. *Saskatchewan's Legislative Assembly Act*, *supra* note 157 at s 28 which provides immunities for MLAs in Saskatchewan. See also *Alberta's Legislative Assembly Act*, *supra* note 161 at s 13. See also *Ontario's Legislative*

The increased legislative autonomy granted to city councils to internally govern themselves demonstrates a dilution of Dillon's rule by the provincial legislature. Provincial legislatures are consistently increasing the autonomy of city councils and providing them with certain measures to act in a similar capacity to Parliament or legislative assemblies. Without a formal amendment to the Constitution, however, the measures adopted by provincial legislatures by ordinary legislation will only provide city councils with limited protection, as opposed to fully protecting civic democracy, and may be removed or limited by provincial legislatures as they see fit.

2.4.3 Division of Powers

Sections 91 and 92 of the *Constitution Act, 1867* set out the areas in which Parliament and the provincial legislatures may exclusively legislate. These provisions have become known as the "division of powers" as they set out the legislative power and jurisdiction of each constitutionally recognized level of government. Constitutionally entrenched legislative powers provide Parliament and the legislatures with the tools, such as revenue raising powers, required to exercise their democratic role and effectively represent their constituents. Civic democracy requires the same.

Currently, provincial legislatures can delegate any issues falling within their heads of legislative power to cities.[173] Provincial legislatures also have complete control over the revenue raising powers that cities can utilize. While the municipal legislation in each province varies slightly, cities are generally entitled to legislate in broad areas that relate to matters respecting the city.[174] As broad legislative jurisdiction is already granted to cities, it demonstrates that cities play an important legislative role that has effects beyond the corporate limits of the relevant city. For example, when the City Council for Saskatoon was debating its proposed bylaw to prohibit abusive conversion therapy practices, the Councillors acknowledged that the proposed bylaw would likely

Assembly Act, *supra* note 161 at s 13. See also *British Columbia's Legislative Assembly Privilege Act*, *supra* note 161 at s 4. Thus, while MLA's possess legislative immunity, city councilors may still have to defend civil actions if there is an argument that they acted in bad faith. See *Deren v Saskatchewan Watershed Authority*, 2015 SKQB 366 at para 157, [2020] 5 WWR 731, aff'd 2017 SKCA 104, where Justice Elson sets out the test to determine bad faith in relation to a good faith immunity provision.

[173] See *East York (ONSC)*, *supra* note 47 at 13-14.

[174] See e.g. *The Cities Act*, *supra* note 54 at ss. 8(1). See also *The City of Toronto Act*, *supra* note 54 at ss. 8(2).

not be enforced but rather a symbolic bylaw,[175] sending a message to society at large. Again, this demonstrates that the legislative powers of city councils have a similar national, or even international,[176] impact to that of Parliament or the legislative assemblies. Cities and city councils, however, remain subject to the provincial legislature that has created them.

If provincial legislatures do not agree with the decisions made by city councils under their legislative areas, those powers can be repealed entirely or limited by a legislative amendment. In addition, and as discussed further in 4.1, certain provincial legislatures have reserved themselves the right to limit the powers of city councils by regulation or interfere with the democratic decision-making process of city councils.

Civic democracy requires city councils to possess the autonomy and adequate funding to effectively represent their constituents.[177] This would not be a simple task and would require significant consultation with upper levels of government to determine what the appropriate legislative and revenue raising powers for a city council would be, without overburdening the tax base.[178] City councils are generally limited to property taxes, utility or user fees and revenue sharing from upper levels of government, which provide a limited means of raising revenue and risks overburdening a city's tax base if increased legislative powers are not coupled with increased revenue raising powers.[179] While it is not within the scope of this analysis to provide an in-depth analysis on the revenue raising issues that plague cities, sufficient revenue raising powers are essential to civic democracy. As explained in Chapter 6, calling for an increase in revenue raising

[175] See Alex MacPherson "Local conversion therapy ban possible in Saskatoon, but 'largely symbolic'" (16 April 2020) Online: *Saskatoon StarPhoenix* < https://thestarphoenix.com/news/local-news/local-conversion-therapy-ban-possible-in-saskatoona-but-largely-symbolic> where the writer notes that the bylaw would be difficult to enforce and "largely symbolic", "according to a report from city administrators."
[176] See Meehan, Chiarelli & Major, *supra* note 31 at 32 where the authors explain that "[t]he new global order clearly presents cities with the opportunity to become international players on the economic front. The scope of policy and action of local governments, however, is severely limited by their constitutional position and lack of autonomy – municipal governments are not free to design, adopt, and ultimately implement, whatever policies are viewed as locally optimal."
[177] *Ibid.*
[178] *Ibid* at 9 and 10 where the authors state, "[p]roperty and business taxes can be increased only so much each year – as a responsible, responsive and accountable level of government, municipal authorities cannot, and do not want to, overburden local taxpayers."
[179] *Ibid* at 31 where Meehan, Chiarelli & Major explain "[t]hat municipalities lack fiscal generating tools to increase their revenues seriously constrains and undermines their ability to meet the demands and needs of their constituents. Limited funds to meet increased demands impedes the ability of municipal authorities to make responsive choices." See also Slack & Kitchen, "New Finance Options" *supra* note 69 at 2224.

powers may increase the difficulty of formally amending the Constitution to recognize and protect civic democracy.

2.4.4 Conclusion: Where Cities are Excluded

The current text of the Constitution does not provide protection for civic democracy, including the right of citizens to vote for, and be effectively represented in, a city council and does not provide the tools city councils require to be able to effectively represent their constituents. Further, city councils do not benefit from parliamentary privilege or constitutionally entrenched heads of legislative power. Because of the lack of constitutionally entrenched powers and immunity, provincial legislatures have adopted mechanisms for city councils to internally govern themselves and have granted broad bylaw making powers to city councils. Although city councillors may still be subject to civil or criminal liability for statements made at city council meetings, these provisions demonstrate a dilution of Dillon's rule and increase the autonomy of city councils.

2.5 Conclusion: Chapter 2

Provincial legislatures have plenary power in relation to municipal institutions, which include cities. Through judicial interpretation, cities and city councils are subject to *Charter* scrutiny pursuant to section 32 of the *Charter* as they perform government functions and are democratically elected. Despite this interpretation, citizens do not have the constitutionally protected right to effective representation within a city council. Lastly, unlike Parliament and the provincial legislatures, city councils do not possess constitutionally entrenched heads of legislative power or revenue raising powers.

Provincial legislatures have also granted city councils broad bylaw making powers, democratic election processes and certain internal mechanisms to govern their legislative role. While civil and criminal liability continues to be applicable to city councillors in performing their legislative role, the above makes it clear that Dillon's Rule has been diluted. Given the failure of city-specific legislation, city charters or other legislative amendments to accommodate the national legislative role of city councils, entrenching civic democracy in the Constitution through a formal constitutional amendment is required. Although Dillon's rule has been diluted by provincial

legislatures, interference from upper levels of government continues to be permitted and, as a result, constitutional protection of civic democracy is necessary.

3. CONSTITUTIONAL INTERPRETATION, DEMOCRACY AND LEGISLATION

So far, I have focused on the constitutional treatment of cities and city councils. This Chapter sets out the background necessary to understand the role of democracy within the framework of the Constitution, the effect it may have on provincial legislation and the actions of upper levels of government that interfere with civic democracy. A brief background of the principles of constitutional interpretation will precede this analysis.

3.1 Constitutional Interpretation

As mentioned, pursuant to section 52 of the *Constitution Act, 1982*, the Constitution is the supreme law of Canada and any law inconsistent with it is of no force and effect to the extent of the inconsistency. While this proposition seems straight-forward, it has become more complicated with the Supreme Court of Canada's recognition of the "inner architecture" of the Constitution and the doctrine of living constitutionalism. This subchapter summarizes both of these doctrines.

Importantly, in the *Reference re Supreme Court Act, ss. 5 and 6*,[180] the Supreme Court of Canada "positioned itself as the only body that can constitutionally interpret the Constitution as to others and as to itself, a position that could conceivably raise a conflict, but that one could justify under section 52 of the *Constitution Act, 1982*, which makes the Constitution of Canada supreme and by implication the Court's interpretation of it as well."[181] Therefore, the Supreme Court of Canada is the final arbiter of constitutional interpretation, which renders the Supreme Court of Canada's interpretation of the Constitution as supreme as the written provisions therein. Therefore, any interpretation of the provisions of the Constitution by the Supreme Court of Canada, whether based on unconstrained constitutional interpretation or not, can invalidate legislation in the same manner as the written text. As discussed below, without constraints on constitutional interpretation

[180] 2014 SCC 21, [2014] 1 SCR 433 [*Supreme Court Reference*].
[181] Richard Albert "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada" (2015) 41:1 Queen's LJ 143 at 158. [Albert, "Unconstitutional Constitutional Amendment"].

the Supreme Court of Canada may re-frame the provisions of the Constitution as if they are "empty vessels" to be filled with meaning or purpose as the Supreme Court of Canada sees fit.[182]

3.1.1 The Inner Architecture of the Constitution

In addition to section 3 of the *Charter*, democracy has been identified by the Supreme Court of Canada as an "unwritten constitutional principle". The alternatives discussed in Chapter 5 rely on the inner architecture of the Constitution, specifically the unwritten principle of democracy, and unconstrained constitutional interpretation to argue that the current text of the Constitution can be interpreted to protect democratic civic elections.

In the *Reference re Secession of Quebec*,[183] the Supreme Court of Canada held that the Constitution goes beyond the written text and has an "internal architecture".[184] This internal architecture consists of underlying and unwritten principles that breathe life into the provisions of the Constitution.[185] According to the Supreme Court of Canada, "it would be impossible to conceive of our constitutional structure without them" and they "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."[186] Lastly, the Supreme Court of Canada held that unwritten principles assist in the interpretation of the text and, *inter alia*, "the role of our political institutions."[187] Thus, unwritten constitutional principles aid in interpreting the provisions of the Constitution and breathe life into the written text of the Constitution. As discussed later in this Chapter, there is an ongoing debate as to whether unwritten constitutional

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[182] See *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 151, 38 DLR (4th) 161 [*Public Service Employee Reference*] where Justice Major holds that "[i]t follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society." See also David Mullan "Underlying Constitutional Principles: The Legacy of Justice Rand" (2010) 34:1 UNB LJ 73 at 78 -79. See also Roy Millen "The Independence of the Bar: An Unwritten Constitutional Principle" (2004) 84:1 La Revue du Barreau Canadien 107 at 121 where the author states, "[i]t will be appreciated that what one judge sees as 'rewriting' or 'amending' the written constitution will be regarded by another as merely interpreting its 'rationale' or 'basic purpose'."

[183] [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].

[184] *Ibid* at para 50. See also *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 57, 41 DLR (4th) 1 where the SCC referred to the internal architecture as a "basic constitutional structure."

[185] See *Secession Reference*, *supra* note 183 at para 50.

[186] *Ibid* at para 51.

[187] *Ibid* at para 52.

principles are merely interpretative aids or are hardened doctrinal precedent that can invalidate legislation.

If the alternative approaches to a formal constitutional amendment raised by the parties in, or by academics in response to, *Toronto v Ontario* are adopted by the Supreme Court of Canada, the inner architecture of the Constitution will be able to invalidate provincial legislation that is not consistent with the Supreme Court of Canada's interpretation of the Constitution. This would mean that unwritten constitutional principles, such as the unwritten principle of democracy, and unconstrained constitutional interpretation would have the full force of the written text of the Constitution. I argue that constitutional interpretation must be constrained by, *inter alia*, the written text of the Constitution, the historical context and precedent. To decide otherwise would allow the Supreme Court of Canada to fill provisions of the Constitution with whatever meaning the Supreme Court of Canada sees fit, as if they are "empty vessels".

3.1.2 Living Constitutionalism

The Supreme Court of Canada has accepted living constitutionalism as the predominant doctrine of constitutional interpretation. Living constitutionalism requires the Constitution to be interpreted in a broad and organic manner, allowing the Constitution and the provisions thereof to adapt with the changing of times.[188] Four central commitments to living constitutionalism have been identified, being: (1) progressive interpretation; (2) use of a purposive methodology; (3) the absence of any necessary role for the original intent of the framers of the Constitution; and (4) the presence of other constraints on constitutional interpretation.[189]

The Supreme Court of Canada has described progressive interpretation as "one of the most fundamental principles of constitutional interpretation".[190] Progressive interpretation allows the

[188] See *Secession Reference*, *supra* note 183 at para 42. See also *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 880, 125 DLR (3d) 1 where the SCC states that "[t[he main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period." [emphasis added]. See also W.J. Waluchow, "The Living Tree" Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds, *The Oxford Handbook of The Canadian Constitution* (Oxford: Oxford University Press, 2017) at 897.
[189] See Bradley Miller "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 CANJLJUR 331 at 6.
[190] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698 [*Same-Sex Marriage Reference*].

Constitution to adapt to changes in society due to the passage of time, without altering the written text of the Constitution. For example, in the *Same-Sex Marriage Reference*, the Supreme Court of Canada held that "a head of power must continually adapt to cover new realities."[191] Therefore, new ideas, inventions, norms or even technologies can be placed within the heads of power enumerated in section 91 and 92 of the *Constitution Act, 1867* or provided *Charter* protection if they fit within the purpose of the written provisions.

In my view, the Supreme Court of Canada's holding in the *Same-Sex Marriage Reference* is an appropriate use of judicial interpretation. As noted by Miller JA in *Toronto v Ontario (ONCA)*, the framers of the Constitution could not have addressed every social or technological development as they could not have seen them arising in 1867.[192] Miller JA further distinguishes this from granting constitutional protection for democratic civic elections noting that "[m]unicipal institutions, including municipal governing bodies, long pre-dated 1867, not only in what is now Canada, but also in the United Kingdom. The decision was made not to constitutionalize these institutions, but rather to put them under the jurisdiction of provincial legislatures."[193] Thus, progressive interpretation is limited by the text of the Constitution, the historical context and precedent and therefore, cannot grant constitutional protection outside of these constraints.

Purposive methodology requires the courts to determine the purpose of a provision of the Constitution at the current time, as opposed to the purpose when the provision was entrenched within the Constitution.[194] Thus, when a court is interpreting what a provision of the Constitution protects or guarantees it is the purpose of the provision that must be considered. For example, in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*,[195] the Supreme Court of Canada employed a purposive interpretation when looking at section 96 of the *Constitution Act, 1867*, which, based on the bare wording, merely codifies the Governor General of Canada's duty to appoint judges to the superior courts of the provinces. The Supreme Court of Canada held that the purpose of section 96 is to protect the inherent jurisdiction of the superior

[191] *Ibid* at para 30.
[192] See *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94.
[193] *Ibid*.
[194] See Miller, *supra* note 189 at 6.
[195] 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers Association*].

courts from interference by Parliament or the provincial legislatures, which extends to protecting access to justice.[196] Therefore, using a purposive methodology, the Supreme Court of Canada struck down hearing fees that unconstitutionally infringed on a litigant's access to the inherent jurisdiction of a Superior Court. The purpose of a provision, however, must be guided by the constraints on constitutional interpretation, otherwise the provisions of the Constitution become "empty vessels" to be filled with purpose as the Supreme Court of Canada desires.

Living constitutionalism does not appear to require Canadian courts to look to the original intent of the framers of the Constitution in determining the meaning or purpose of a provision. This proposition has led to a debate as to the extent that originalism applies to constitutional interpretation in Canada. Ian Binnie, a former puisne justice of the Supreme Court of Canada, stated, "[t]he issue… is not whether the intent of the originating body should be taken into account because no one who expects to be taken seriously would argue that it should not be."[197] In contrast, the ONCA has held that "[o]riginalism is not a part of the Canadian Constitutional tradition".[198] To further add to the confusion, the Supreme Court of Canada has referred to the original intent of the framers of the Constitution in interpreting the provisions thereof.[199] Thus, it appears to be left to the discretion of the presiding justice to determine the extent which the original intent of the framers applies in interpreting provisions of the Constitution. What is unclear, however, is when the failure to consider or place enough emphasis on the original intent of the framers amounts to a reversible judicial error.[200]

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[196] *Ibid* at para 30.

[197] Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada Inc., 2004) at 348 cited by Miller, *supra* note 189 at 9. Ian Binnie also notes that the doctrine of original intent "has never really taken hold in Canada and is... unlikely to do so" (*ibid* at 370).

[198] *The Criminal Lawyers Association of Ontario v Ontario (Public Safety and Security)*, 2007 ONCA 392 at para 119, 86 OR (3d) 259 [*Criminal Lawyers Association*] where the ONCA goes on to state that "[n]evertheless, the legislative history of the *Charter* is admissible to interpret its provisions and the question is what weight a court should give to the evidence in a particular case." See also Iacobucci J.'s dissent in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 409, 107 DLR (4th) 457 where he states that "[t]his court has never adopted the practice more prevalent in the United States as basing constitutional interpretation on the original intentions of the framers of the Constitution. Rather, in Canada, constitutional interpretation rests on giving a purposive interpretation to the wording of the sections."

[199] See e.g. *Vaid, supra* note 146 at para 37 where the SCC relied on the original intent of the framers of the *Constitution Act, 1867* to determine the scope of parliamentary privilege.

[200] See Miller, *supra* note 189 at 9 where Bradley Miller explains that "at least in some cases, failure to engage with either original intentions or original understandings (even to accord them minimal weight) will be straightforward

Lastly, the lack of constraints on constitutional interpretation are, "the chief complaint levelled against living constitutionalism as it allows for ad hoc and unprincipled constitutional interpretation."[201] As explained by David Schneiderman, "[i]f we understand judges as being constrained principally by text, precedent, and history, together with practices of judicial propriety – the traditional legal tools with which judges reason legally – it can be said that high court decision-making operates under few other constraints."[202] Further, constitutional law icon, Peter Hogg, has argued that living constitutionalism must be "anchored in the historical context of the provision"[203] and the Supreme Court of Canada has looked to the historical context of constitutional provisions and the original intent of the framers in interpreting them.[204] For example, the Supreme Court of Canada held that the unwritten constitutional principles identified in the *Secession Reference* have existed since Confederation, therefore, unwritten principles have been rooted in the original intent of the constitutional framers by the Supreme Court of Canada.[205]

judicial failure," but does little to explain in what circumstances this would apply. This proposition, however, when viewed through Miller JA's (who is the Bradley Miller who authored *Beguiled by Metaphors* as cited in footnote 189) decision in *Toronto v Ontario (ONSC), supra* note 3 at para 94, suggests that if the issue could have been contemplated by the original framers, it is not a "gap" to be filled, but rather an intentional decision by the framers. Thus, it would be an error to consider the original intent if the constitutional framers could have considered the issue, such as democratic municipal elections, and it would not be an error if the issue is one the constitutional framers could "not have addressed – like aeronautics or nuclear energy – because they simply could not have seen it coming" (*ibid*).

[201] *Ibid* at 12.

[202] David Schneiderman, "Unwritten Constitutional Principles in Canada: Genuine or Strategic?" Rosalind Dixon & Adrienne Stone (eds), *The Invisible Constitution* (Cambridge University Press, 2018) at 6. See also *Quebec (Attorney General) v 9147-0732 Quebec Inc.*, 2020 SCC 32 at paras 9-10, 451 DLR (4th) 367 [*9147-0732 Quebec*] where the majority holds that the text is the first factor to be considered in the purposive approach required by living constitutionalism. See also *Public Service Employee Reference*, *supra* note 182 at para 151. See also *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 23, [2007] 1 SCR 873 [*Christie*] where the SCC relied on the constraints identified by Schneiderman in holding that "a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law" [emphasis added]. In *Christie*, however, the SCC caveats this holding with "[w]e conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in future and varied situations…" [emphasis added], adding to the uncertainty of the constrains on constitutional interpretation (*ibid* at 27).

[203] Peter Hogg, *Constitutional Law of Canada*, 5th Ed., vol 1. Loose-leaf (Scarborough, ON: Thomson Carswell, 2007) at 19.9(f) cited by Miller, *supra* note 189 at 12.

[204] See *Criminal Lawyers Association, supra* note 198 at 119. See also *Vaid, supra* note 146 at para 37. See also *Secession Reference, supra* note 183 at paras 33 to 48. See also *Christie, supra* note 202 at para 23. See also *Public Service Employee Reference, supra* note 182 at para 151.

[205] See *Secession Reference, supra* note 183 at paras 47, 58, 59, 63, 79, and 81. Specifically regarding democracy, see para 62 of the *Secession Reference, supra* note 183 where the SCC held "[t]he democracy principle can be best understood as sort of a baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated." [emphasis added].

In addition, the proposition that unwritten principles are interpretative aids that cannot fill intentional voids in the text of the Constitution, requires judges to look to the original intent to determine whether a void in the constitutional text was an intentional choice by the framers.[206] Failure to consider the original intent of the framers creates uncertainty in whether unwritten principles are filling "gaps" in the Constitution that flow "flow by necessary implication" from other terms of the Constitution or are creating new protections not intended to be contained within the text of the Constitution.[207] Thus, unconstrained constitutional interpretation results in the provisions of the Constitution being "empty vessels" for the Supreme Court of Canada to fill with the purposes they see fit as opposed to filling legitimate gaps. This is supported by Miller JA who explains that gaps in the text of the Constitution that flow by necessary implication from other provisions of the Constitution are rare.[208] As a result, the "gap-filling" purpose of unwritten principles is rare and is limited by the purpose of the text of the provisions of the Constitution and the other constraints on constitutional interpretation.

3.1.3 Constitutional Interpretation Applied to Civic Democracy

In the context of civic democracy, the current written text of the Constitution is unable to provide the democratic protection necessary. City councils are not included in the written text of section 3 of the *Charter*, nor is the right to democratic municipal elections inherent in section 92(8) of the *Constitution Act, 1867*.[209] The ONCA held, in *Toronto v Ontario (ONCA)*, that:

> Municipal institutions lack constitutional status. Section 3 democratic rights were not extended to candidates or electors with respect to municipal councils. These are

[206] A further example of an intentional void in the constitutional text is the exclusion of property rights from section 7 of the *Charter* which protects life, liberty and security of the person. In this regard, see *Shinkaruk v Neufeld Building Movers Ltd.*, 2014 SKQB 11, 19 MPLR (5th) 307. See also *IBM Canada Ltd. v Canada*, 2001 FCT 1175 at para 50, 212 FTR 70, aff'd 2002 FCA 420, 298 NR 399. See also *Alcoholism Foundation of Manitoba v Winnipeg (City)*, [1998] 6 WWR 440, 46 Man R (2d) 306 (MBQB), rev'd on other grounds [1990] 6 WWR 232, 69 DLR (4th) 69, leave to appeal to SCC refused [1990] SCCA 267 . See also *Bacon v Saskatchewan Crop Insurance Corp*, [1999] 11 WWR 51 at paras 31 to 32, 180 Sask R 29 (Sask CA).

[207] See *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94. See also *Trial Lawyers Association*, *supra* note 195 at paras 26 and 91. See also *Reference re Senate Reform*, 2014 SCC 32 at para 26, [2014] 1 SCR 704. See also *Supreme Court Reference*, *supra* note 180 where the SCC elevated a regular parliamentary statute to constitutional-like status to fill an alleged gap as s 41(d) of the *Constitution Act, 1982* subjects the composition of the SCC to the unanimous consent formal amendment procedure, but the composition of the SCC is not protected within the Constitution, creating significant uncertainty in the constraints on constitutional interpretation.

[208] See *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94.

[209] See Sancton, "Canadian Local Government", *supra* note 37 at 3. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281.

> not gaps in the Constitution – oversights or slips by the framers of the *Constitution Act, 1867* and the *Constitution Act, 1982* that can be addressed judicially. If the Constitution is to be amended, the *Constitution Act, 1982* provides a mechanism for amending it.[210]

I argue that this is the correct interpretation. Constitutional interpretation, even through living constitutionalism, cannot informally amend the purpose or text of the Constitution. Further, the alternatives to a formal amendment discussed in Chapter 5 would allow the Supreme Court of Canada to use unconstrained constitutional interpretation to informally amend the Constitution as the formal amendment procedures contained in the *Constitution Act, 1982* would be disregarded. Notably, section 52(3) of the *Constitution Act, 1982*, states that "[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."[211] Thus, section 52(3) of the *Constitution Act, 1982* renders the amendments by judicial interpretation unconstitutional; however, as the Supreme Court of Canada is the final arbiter of the Constitution pursuant to the *Supreme Court Reference*, the Supreme Court of Canada's interpretation of the Constitution is as supreme as the text of the Constitution itself and therefore, any informal amendment would be deemed constitutional by virtue of the Supreme Court of Canada's interpretation and, of course, not considered to be an amendment.[212]

3.1.4 Conclusion: Constitutional Interpretation

Unwritten constitutional principles and living constitutionalism work together to allow the Constitution to adapt to the changing of times.[213] The Constitution has been held to be a "living tree" and thus, must be interpreted to reflect current reality. Living constitutionalism, however, must have limits and is constrained by precedent, the historical context and, *inter alia*, the written text of the Constitution.[214] Civic democracy does not fit within the current text of the Constitution and the precedent set by the Supreme Court of Canada does not support such an interpretation. As a result, a formal amendment to the Constitution is required. Even if living constitutionalism and unwritten principles could provide constitutional protection for civic democracy through constitutional interpretation, the alternative approaches discussed in Chapter 5 would not provide

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[210] *Supra* note 3**Error! Bookmark not defined.** at para 95.
[211] *Supra* note 1 at s 52(3).
[212] See Albert, "Unconstitutional Constitutional Amendment", *supra* note 181 at 174.
[213] See *Secession Reference*, *supra* note 183 at para 42. See also Miller, *supra* note 189 at 6.
[214] See pages 44-46, *above*, for a further discussion on the constraints on constitutional interpretation.

the legal certainty and predictability of the written Constitution, leaving the constitutional protection of democratic civic elections in the uncertain hands of unconstrained constitutional interpretation.

3.2 Democracy and the Constitution

Canadian democracy is more complex than a simple right to vote.[215] As explained below, Canadian democracy includes effective representation for citizens within government and providing governments the legislative tools to effectively represent their constituents. As well as democratic rights being entrenched in section 3 of the *Charter*, democracy has been identified as one of four unwritten constitutional principles.[216] This subchapter sets out the judicial treatment of democracy, which leads to a discussion of whether the unwritten principles can invalidate provincial laws.

"[T]he democracy principle can be best understood as sort of a baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated."[217] The Supreme Court of Canada explains that democracy is not simply concerned with the process of government, but it accommodates cultural and group identities.[218] Put simply, democracy means that Parliament and provincial legislatures, which are at the core of the system of representative government, are elected by popular franchise.[219] In individual terms, democracy provides the right to vote and to have effective representation within government.[220] My analysis adds to these propositions and argues that democracy also entails providing governments with the necessary tools to effectively represent their constituents.

As mentioned, section 3 of the *Charter* protects the right to vote in Parliament or a legislatively assembly, and the right to be effectively represented therein. The Supreme Court of Canada has noted that democratic principles are affirmed with particular clarity as section 3 of the

[215] See Valverde, *supra* note 43 at 38.
[216] See *Secession Reference*, *supra* note 183 at para 49.
[217] *Ibid* at para 62.
[218] *Ibid* at para 64.
[219] *Ibid* at para 65.
[220] *Ibid*.

Charter is not subject to the notwithstanding clause.[221] Thus, infringements of section 3 of the *Charter* cannot be saved by Parliament or a legislature pursuant to the notwithstanding clause, whereas infringements of other protected *Charter* rights may be. As discussed further below, the alternative approaches to protecting democratic civic elections in the Constitution would leave infringements subject to the notwithstanding clause and would continue to allow interference in civic elections. Democracy, in a sense, is also protected by section 2(b) of the *Charter* - freedom of expression.

The unwritten principle of democracy is an underlying value that has been identified in a section 2(b) *Charter* analysis.[222] Section 2(b) protects the freedom of expression, which the ONCA has held "is one of the features of modern democracy."[223] Thus, any law restricting an expressive activity, including an expression that promotes democracy, would infringe section 2(b) of the *Charter* and would be struck down if it did not survive a section 1 analysis. As voting in a civic election is an expressive activity, it is protected by section 2(b) of the *Charter*, but, as previously mentioned and further discussed below, the protection afforded by section 2(b) differs from section 3.[224]

While both section 3 and section 2(b) of the *Charter* provide protection for voting in certain contexts, there are fundamental differences between these two *Charter* provisions. First, section 2(b), which protects voting as an expressive activity,[225] does not protect effective representation.[226] The ONCA affirmed this position, holding that "the basic structure of the *Charter* must be respected."[227] Thus, while the protection of certain rights may overlap, "the content of one right cannot be subsumed by another, or used to inflate its content."[228] This is a logical conclusion. If section 2(b) and section 3 of the *Charter* provide the same protection for the right to vote, then

[221] *Ibid.*
[222] See *Criminal Lawyers Association*, *supra* note 198 at para 64. See also *McAteer v Canada (Attorney General)*, 2014 ONCA 578 at para 60, 121 OR (3d) 1, leave to appeal to SCC refused, [2014] SCCA No 444 [*McAteer*].
[223] *McAteer*, *supra* note 222 at para 74.
[224] See page 4, *above*, for additional information on this topic.
[225] See e.g. *Haig v Canada*, [1993] 2 SCR 995 at 1042, 16 CRR (2d) [*Haig*]. See also *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at paras 41 and 42, [2003] 1 SCR 6 [*Siemens*]. See also Archer & Sobat, *supra* note 9 at 13.
[226] See *Toronto v Ontario (ONCA)*, *supra* note 3 at paras 73-74; see also *Toronto v Ontario (SCC Leave Decision)*, *supra* note 3 where this issue was granted leave to appeal to the SCC.
[227] *Toronto v Ontario (ONCA)*, *supra* note 3 at para 76.
[228] *Ibid.*

there would be no need for separate provisions. Further, subsuming section 3 into section 2(b) demonstrates the effect of unconstrained constitutional interpretation. In essence, it allows the Supreme Court of Canada to treat the provisions of the Constitution as "empty vessels" for the Supreme Court of Canada to fill as they see fit, contrary to Justice Major's holding in the *Public Service Employee Reference* which, as a precedent, acts as a constraint on constitutional interpretation.[229]

Thus, the ONCA was undoubtedly correct in overturning the decision in *Toronto v Ontario (ONSC)* which extended effective representation to the right to vote as an expressive activity. Section 2(b) protects the *freedom* of expression, but not the *impact* or *effect* of that expression.[230] In addition, the decision of the ONSC is contrary to *Baier*, which acts as a further constraint on constitutional interpretation, where the Supreme Court of Canada held that "it is not for this Court to create constitutional rights in respect to a third order of government where the words of the Constitution read in context do not do so."[231] In *Baier*, a constitutional challenge was brought in relation to Alberta legislation that restricted school employees from running for election as school trustees in the jurisdiction they were employed.[232] The Supreme Court of Canada held that this did not infringe section 2(b) as public school boards have "no constitutional status",[233] like cities and city councils. As a result, the Supreme Court of Canada has previously considered interpreting the Constitution to provide protection to elections outside of those protected by section 3 of the *Charter*[234] and determined it was not the Supreme Court of Canada's place to do so. *Baier* aligns with Justice Major's holding in the *Public Service Employee Reference* and, as constraints on constitutional interpretation, support the conclusion that section 2(b) and section 3 do not provide analogous constitutional protections.

Second, section 2(b) of the *Charter* is subject to the notwithstanding clause, whereas section 3 of the *Charter* is not. Section 33 of the *Charter* codifies the notwithstanding clause and

[229] *Supra*, note 182 at 151. See also *Christie*, *supra* note 202 at 27. See also Schniederman, *supra* note 202 at 9-10.
[230] See Archer & Sobat, *supra* note 9 at 13.
[231] *Baier*, *supra* note 135 at para 39.
[232] *Ibid* at para 4.
[233] *Ibid* at para 48. See also *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15 at paras 57-58, [2001] 1 SCR 470.
[234] See *Baier*, *supra* note 135 at para 39.

allows Parliament or the legislatures to declare that an act or provision of an act shall operate notwithstanding section 2 or 7 to 15 of the *Charter*.[235] Although declarations made pursuant to the section cease to have effect after five years, they may be renewed indefinitely. This is important as section 33 of the *Charter* does not apply to an infringement of section 3. The notwithstanding clause allows provincial legislatures to continue infringing a right to vote protected under section 2(b), even if it is interpreted to protect effective representation. Therefore, treating section 2(b) and section 3 of the *Charter* the same, would not provide the legal certainty and predictability that the written Constitution and civic democracy require. Further, subsuming section 3 into section 2(b) would not provide city councils with the tools they require to effectively represent their constituents.

Mariana Valverde explains that "[e]ven if the Supreme Court were to agree that fair local elections under stable rules are a democratic right enshrined in Canadian law, that guarantee would be <u>just one element</u> of the far larger, more complex, historically-shaped political-legal assemblage that is known worldwide as Canadian democracy."[236] As a result, properly entrenching civic democracy in the Constitution must go beyond the right to vote. Effective representation gives citizens the right to be represented in government, and to do so city councils must be provided with the appropriate tools, including constitutionally protected legislative and revenue raising powers, to give them the ability effectively represent their constituents.

Thus, the right to vote is protected, albeit differently depending on the level of government, by both section 3 and section 2(b) of the *Charter*. The two main differences between section 3 and section 2(b) are that section 3 protects effective representation whereas section 2(b) does not, and that section 3 is not subject to the notwithstanding clause, whereas section 2(b) is. Therefore, interpreting section 2(b) of the *Charter* to protect effective representation is not a sufficient solution to protect civic democracy or recognize the increased and increasing legislative role of city councils in Canada.

[235] *Supra* note 1 at s 33.
[236] Valverde, *supra* note 43 at 38.

3.3 Unwritten Constitutional Principles and Provincial Legislation

As previously mentioned in this Chapter, there is an ongoing debate as to whether unwritten constitutional principles are interpretative aids or have the full effect of the written text of the Constitution.[237] This debate was before the Supreme Court of Canada in *Toronto v Ontario (SCC)* and extends to whether laws can be struck down as unconstitutional based on unwritten principles as opposed to a written provision of the Constitution.

The Supreme Court of Canada has held that unwritten principles are interpretative aids that breathe life into the written provisions of the Constitution.[238] In the very same decision, the Supreme Court of Canada also states that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force'…) which constitute substantive limitations upon government action."[239] Further, unwritten constitutional principles are "invested with a powerful normative force, and are binding upon both courts and governments."[240] In *Imperial Tobacco,* the Supreme Court of Canada has held that the unwritten principle of democracy very strongly favours "upholding the validity of legislation that conforms to the *express terms* of the Constitution."[241] Thus, the conflicting decisions of the Supreme Court of Canada have created uncertainty as to whether unwritten constitutional principles are hardened doctrinal precedent that can invalidate laws, or are merely interpretative aids. To date, the debate over whether unwritten principles invalidating legislation has not yet been settled; however, the Supreme Court of Canada has granted leave on this exact issue. [242]

David Schneiderman's view is that unwritten constitutional principles were not meant to develop into hardened doctrinal precedent but were used strategically to get the Supreme Court of Canada out of a jam.[243] This is supported by the fact that in both the *Secession Reference*, where the four unwritten constitutional principles were identified, and in the *Supreme Court Reference*, where the Supreme Court of Canada elevated a regular parliamentary statute to constitutional

[237] See subchapter 3.2.1, *above*, for further information on this topic.
[238] See *Secession Reference*, *supra* note 183 at para 50.
[239] *Ibid* at para 54.
[240] *Ibid.*
[241] *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 66, [2005] 2 SCR 473 [*Imperial Tobacco*] [emphasis added].
[242] See *Toronto v Ontario (SCC Leave Decision)*, *supra* note 3.
[243] See Schniederman, *supra* note 202 at 13.

status, had a potentially negative effect on the Supreme Court of Canada. In the *Secession Reference*, the government of Quebec refused to recognize the jurisdiction of the Supreme Court of Canada and Schneiderman explains that, "[t]he legitimacy of the Supreme Court of Canada hung in the balance… [t]he Justices would seemingly do whatever it took to maintain, and if need be, restore the Court's reputation."[244] In the *Supreme Court Reference*, the composition of the Supreme Court of Canada hung in the balance. These two cases support the view that the Supreme Court of Canada has generally used unwritten constitutional principles strategically, or disingenuously, as stated by Schneiderman, to get the Supreme Court of Canada out of a jam and were not intended to harden into doctrinal precedent.[245] Schneiderman, however, acknowledges that this "does not mean that unwritten principles will not evolve into something more legally robust having precedential value."[246] While Schneiderman takes the view that unwritten constitutional principles ought not to be able to invalidate otherwise valid laws, he acknowledges that they may evolve to do so, which exacerbates the uncertainty surrounding the power of unwritten constitutional principles.

In *Toronto v Ontario (ONCA),* the Court held that "unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation."[247] In my view, this is the correct position on the use of unwritten constitutional principles.[248] As noted by Richard Albert, the Supreme Court of Canada's interpretation of the Constitution is as supreme and binding as the text thereof.[249] Thus, if the Supreme Court of Canada uses unwritten principles to interpret the text of the Constitution to protect democratic civic elections, the Supreme Court of Canada's interpretation becomes as binding as the text itself. In effect, the *Supreme Court Reference*, in conjunction with unconstrained living constitutionalism, allows the Supreme Court of Canada to treat the provisions of the Constitution as "empty vessels" to interpret and fill with purposes as the

[244] *Ibid* at 3.
[245] *Ibid* at 4.
[246] *Ibid* at 29.
[247] *Toronto v Ontario (ONCA), supra* note 3 at para 89.
[248] See *Imperial Tobacco, supra* note 241 at para 66 where the majority of the SCC states, in part "in a constitutional democracy such as ours, protection from legislation that some might view as unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box." See also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 SCR 3 at 314, 150 DLR (4th) 577 [*Remuneration Reference*] where the SCC states that "[t]he ability to nullify laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution."
[249] Albert, "Unconstitutional Constitutional Amendment", *supra* note 181 at 174.

Supreme Court of Canada sees fit and use its interpretation to strike down otherwise valid laws. Further, unconstrained living constitutionalism would create considerable uncertainty for legislators, the judiciary and citizens.

In contrast, natural law theorists have supported the idea of permitting unwritten constitutional principles to invalidate or strike down laws.[250] As noted by Beverley McLachlin, "the debate is not about whether judges should ever use unwritten constitutional norms to invalidate laws, but rather, about what norms may justify such action."[251] In response to the contention that this grants judges a legislative power, Beverley McLachlin states that "[i]t is not making the law, but interpreting, reconciling and applying the law, thus fulfilling the judge's role as a guarantor of the Constitution."[252] If the constraints on constitutional interpretation are respected, McLachlin's position is reconcilable with my view, as constitutional interpretation would be limited to the purpose of the written provisions of the Constitution, having regard to the text, historical context and relevant precedents. To go further and entrench protected rights, such as democratic civic elections, that do not exist in the text of the Constitution is an unconstitutional amendment pursuant to section 52(3) of the *Constitution Act, 1982*. As discussed in the next Chapter, this is what Toronto is asking the Supreme Court of Canada to do in *Toronto v Ontario (SCC)*.

The application of unwritten principles is limited by the same constraints as living constitutionalism. Thus, whether unwritten principles support an alleged constitutional interpretation is limited by the text, historical context and *inter alia*, precedent. As a result of this, unwritten principles cannot be utilized to fill the provisions of the Constitution as if they are "empty vessels" as the alternative approaches discussed in Chapter 5 do. Extending the application of unwritten principles beyond these constraints, allows the Supreme Court of Canada to re-frame the provisions of the Constitution as they desire, as opposed to informing the interpretation of the written text and filling legitimate, but rare, gaps in the constitutional text.[253] To decide otherwise,

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[250] See Archer & Sobat *supra* note 9 at 11-12 for a further discussion on the arguments made to the SCC on this matter.
[251] Beverley McLachlin P.C."Remarks of the Right Honourable Beverley McLachlin" (Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, 1 December 2005), available at https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx?pedisable=true.
[252] *Ibid*.
[253] See *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94.

creates significant uncertainty in the application of the Constitution and may open the floodgates of constitutional challenges as new constitutional protections would be decided by the Supreme Court of Canada and not Parliament and/or the provincial legislatures as the formal amendment rules contained in Part V of the *Constitution Act, 1982* require.

In contrast, unconstrained constitutional interpretation could result in the Supreme Court of Canada interpreting the Constitution in a manner that would provide protections outside of the written text, which then become as binding as the text of the Constitution. Thus, unwritten principles in conjunction with unconstrained constitutional interpretation, may lead to interpretations that can invalidate laws and arguably render the formal amendment procedures meaningless, allowing the Supreme Court of Canada to determine constitutional rights and protections in place of the democratic process contemplated by the formal amendment rules.[254]

3.4 Conclusion: Chapter 3

Although the Constitution has been held to be a "living tree", constitutional interpretation must be subject to constraints, such as the written text, the historical context and precedent. These constraints do not permit an interpretation to protect democratic civic elections as argued in *Toronto v Ontario*. The exclusion of civic elections from section 3 of the *Charter* is not an oversight that can be addressed judicially, despite the Supreme Court of Canada's identification and application of the unwritten constitutional principle of democracy. To decide otherwise, would rely on unconstrained constitutional interpretation, which creates uncertainty in the application of the Constitution and disregards the democratic process contemplated by the formal amendment rules codified in Part V of the *Constitution Act, 1982*.[255] While candidates and voters in civic elections are guaranteed limited protection under section 2(b) of the *Charter*, freedom of

[254] See Richard Albert "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 230-231 [Albert, "Expressive Function of Amendment Rules"] where Albert explains that the formal amendment rules contained in the *Constitution Act, 1982*, "heighten public awareness, check political branches, promote democracy and pacify constitutional change." [emphasis added]. See also Mullan, *supra* note 182 at 78-79 where Mullan explains "[t]his role is criticized as being too vague, uncertain, open-textured, as having no basis or foundation in the test of the constitution ("the imaginary principles of constitutional law", to borrow a phrase from a colleague), and, in the case of the guarantees of independence for provincial court judges, as involving historical revisionism and rejection of the explicit text and structure of the constitution itself. More generally, what also concerns many of the critics is a sense of further anti-democratic and anti-constitutional power grab by unelected and unaccountable courts." [emphasis added].

[255] *Ibid.*

expression does not adequately protect democracy in civic elections and continues to allow upper levels of government to interfere.

4. INTERFERENCE WITH CIVIC DEMOCRACY

In the previous Chapters, I have explained that civic democracy is not constitutionally protected and that the constraints on living constitutionalism do not support the current provisions of the Constitution being interpreted to do so. As a result, municipal institutions "are subject to the… constant threat of sudden amalgamation, complete restructuring, overturning of locally-elaborated official plans, and, perhaps most scandalous, the replacement of elected leaders by appointed ones."[256] Mariana Valverde goes on to explain that "the province's legal powers continue to hang like swords over all municipalities, and these powers remain available for use by future majority governments".[257] The province's plenary power over cities has allowed provinces to interfere with civic democracy in two ways. First, provinces can interfere with elected city councillors acting in their legislative capacity and second, provinces have interfered with the election process.

4.1 Interference with Elected Officials

Interference with elected city councillors can occur one of two ways. First, provincial legislation in Canada allows certain provinces to interfere with elected city councillors once they are elected to office. Second, interference also occurs by the provincial legislatures plenary power "hanging like swords" over city councillors to influence their "democratic" decision making and deliberations at city council meetings.

4.1.1 Interference by Legislative Powers

Several provinces have passed legislation that grants the provincial cabinet the power to remove a city councillor, or the entire city council, from office. Other provincial legislation allows the provincial cabinet to limit the powers of cities if it is in the provincial interest to do so. These provisions grant provinces the ability to influence city council decisions, despite the broad legislative powers that provincial legislatures have granted to city councils.

In Saskatchewan, the *LGEA* codifies a democratic election process for cities and municipalities, in theory creating a representative democracy. Despite this ostensibly democratic

[256] Valverde, *supra* note 43 at 24.
[257] *Ibid.*

process, *The Cities Act* grants the Lieutenant Governor in Council ("LGIC") the power to remove the Mayor or any other city councillor if it is in the public interest to do so.[258] Once the LGIC has removed the mayor or a city councillor, the LGIC has the option to appoint a person to replace the removed councillor.[259] Notably, clause 358.1(1)(b) of *The Cities Act* allows the LGIC to replace "all of the council for a city" providing the LGIC the express authority to remove the entirety of a democratically elected city council. Any replacements are vested with the same powers and authority of the mayor or councillor and the city must provide remuneration for the replacement.[260] Lastly, if the LGIC makes an order under this section, the minister must also appoint a returning officer and fix a nomination period for replacement of the removed councillors.[261] Thus, the replacements appointed by the LGIC upon removal from office are temporary, until a new councillor, mayor or entire city council can be elected.

Interestingly, clause 358.1(4)(e) of *The Cities Act* states that the *LGEA* does not apply to the replacement election after a councillor is removed. Rather, *The Cities Act* vests the power in the minister to make any order necessary or that the minister considers appropriate to achieve the purposes of the *LGEA*,[262] ensure the election is conducted in accordance with the *LGEA*,[263] or in any manner that the minister considers advisable.[264] While section 358.1 of *The Cities Act* has not yet been utilized, considerable authority is vested in the LGIC and the minister to exercise control over elected city councillors through this provision and the process to replace a removed councillor. As discussed further in this Chapter, this provision could allow provincial government actors to influence city councillors to align their views with the province or risk being removed from office. As a result, city councillors may be prioritizing provincial interests over that of their constituents, defeating the ideal of a representative democracy and effective representation for citizens.

[258] *Supra* note 54 at s 358.1
[259] *Ibid* at ss 358.1(1)(a) and (b).
[260] *Ibid* at ss 358.1(3)(a) and (b).
[261] *Ibid* at s 358.1(4).
[262] *Ibid* at s 358.1(4)(e)(i).
[263] *Ibid* at s 358.1(4)(e)(ii).
[264] *Ibid* at s 358.1(4)(e)(iii).

While *The Cities Act* requires the replacement power to be exercised in the "public interest", the power is vested in the LGIC to remove elected officials. Therefore, the public interest is effectively the provincial interest, as it is a provincial actor who decides what is and is not in the public interest.[265] It is likely that this term was chosen as it is intentionally vague and grants the LGIC, on the advice of the provincial cabinet, considerable authority to determine what the public interest is. In addition, this provision does not mandate any method of investigation, report or hearing prior to removal. In other provinces, the procedure to remove elected city officials is more robust and requires certain inspections or investigations to be undertaken prior to removal.

In Alberta, section 574 of *Alberta's Municipal Government Act* allows the minister to direct city council, the chief administrative officer or a designated officer to do anything the minister considers appropriate if the minister concludes, based on certain inspections, the city is being managed in "an irregular, improper or improvident manner".[266] Prior to such direction, the minister must direct an inspection under section 571 or an inquiry under section 572 of *The Municipal Government Act*.[267] If the minister determines that an order pursuant to subsection 574(1) is not satisfactorily carried out and the city continues to be managed in an irregular, improper or improvident manner, subsection 574(2) permits the minister to, *inter alia*, dismiss the council or a member of it.[268] Further, prior to dismissing council or a member thereof, the minister must attempt all reasonable efforts to resolve the situation,[269] which creates a much more comprehensive dismissal procedure than *The Cities Act* in Saskatchewan.

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[265] See *Constitution Act, 1867, supra* note 1 at s 58 states that each Province shall have a Lieutenant Governor who is appointed by the Governor General in Council on the advice of the Premier. LGIC's generally act, however, on the advice of the provincial cabinet or executive council in the relevant province. See Government of Saskatchewan "The Lieutenant Governor of Saskatchewan" (2021) Online: *Lieutenant Governor of Saskatchewan* <http://ltgov.sk.ca/role/role-responsibilities> which states that the LGIC "…acts on the advice of the Premier and the government, but has the right to advise, encourage, and to warn." See also Government of Alberta "Lieutenant Governor in Council" (2021) Online: *Lieutenant Governor of Alberta* <https://www.lieutenantgovernor.ab.ca/CFCMS/roles-of-the-lieutenant-governor/lieutenant-governor-in-council/> which states that "[t]he term 'Lieutenant Governor in Council' appears in many government documents, such as acts of legislation. Legally, it refers to the Lieutenant Governor acting on and with the advice of the Executive Council or Cabinet. When a Cabinet makes a decision and is has been approved by the Lieutenant Governor, it is said to have been made by the Lieutenant Governor in Council."

[266] *Alberta's Municipal Government Act*, *supra* note 88 at s 574(1). See also similar provisions in *The Municipal Government Act*, RSPEI 1988, c M-12.1 at s 219 and *The Municipal Act*, RSY 2002 c 154 at s 337.

[267] *Ibid.*

[268] *Ibid* at s 574(2)(h).

[269] *Ibid* at s 574(2).

Broadly, section 571 of *Alberta's Municipal Government Act* requires the minister to order an inspection of the "management, administration or operation of any municipality", either on the minister's own initiative,[270] if requested by city council[271] or if the minister receives a petition signed by 20% of the population.[272] The "management, administration or operation of any municipality" includes the affairs of the city,[273] the conduct of a councillor, employee or agent of the city,[274] or the conduct of a person who has an agreement with the city, relating to the conduct of the city or the person pursuant to that agreement.[275] Section 572 of *The Municipal Government Act* allows the minister, on its own initiative, to conduct an inquiry into the same matters as section 571.[276] On top of the rigorous inquiry or inspection procedures, *The Municipal Government Act* also contemplates procedural fairness for city councillors.

Prior to making an order dismissing a city council or a member thereof, and unlike Saskatchewan, the minister in Alberta must give the city notice of the intended order and provide 14-days to respond.[277] While Alberta has many more procedural safeguards in place, the effect remains the same. The terms "improvident, imprudent or irregular" as used in *Alberta's Municipal Government Act* are not defined. This grants considerable leeway to the minister to determine what is and is not "imprudent, irregular or improvident." What is not in the public interest, could also be "improvident, imprudent or irregular" rendering the effect of these two provisions the same. Either way, it grants the province the ability to interfere with city councils that are elected pursuant to a democratic process to represent their constituents.

Ontario has taken a different approach to interfere with elected city councils through provincial legislation. *The City of Toronto Act* allows the LGIC to "make regulations imposing limits and conditions on the power of the City under sections 7, 8 and 267 or Part XII.1 or providing that the City cannot exercise the power in prescribed circumstances", if the LGIC considers it in

[270] *Ibid* at s 571(1)(a).
[271] *Ibid* at s 571(1)(b).
[272] *Ibid* at s 571(1)(c).
[273] *Ibid* at s 571(1.1)(a).
[274] *Ibid* at s 571(1.1)(b).
[275] *Ibid* at s 571(1.1)(c).
[276] *Ibid* at s 572.
[277] *Ibid* at s 574(2.1).

the provincial interest to do.[278] Sections 7 and 8 of *The City of Toronto Act* set out Toronto's natural person power and broad bylaw making powers. Despite the fact that section 2 codifies broad legislative powers for Toronto's city council, Queen's Park has seen fit to grant broad legislative powers but retain the ability to limit those powers by regulation, which does not follow the same democratic process as the passing of legislation.[279] While *The City of Toronto Act* does not have express provisions relating to the removal of elected officials, the LGIC has significant and broad authority to limit the legislative powers of Toronto's city council, overriding the democratic process followed by Toronto's City Council.

As explained by Andrew Sancton, the use of the legislative tools granted to Toronto in *The City of Toronto Act* are ultimately decided by Queen's Park.[280] Like Saskatchewan and Alberta, this has the potential to compromise an elected city councillor's independence in voting for the interests of the electorate, diluting a constituent's effective representation within a city council. Unlike Saskatchewan and Alberta, the LGIC in Ontario does not have the legislative ability to remove elected city councillors but can limit their powers through regulations, which defeats the purpose of providing cities with broad bylaw making powers to act in the interest of their constituents. Further, like the definitions of "public interest" and "improvident, imprudent or irregular", the definition of provincial interest is similarly vague. These terms create a moving target as it vests complete authority for provincial actors to define and apply them. Thus, what is in the provincial interest today, may not be tomorrow. This creates considerable uncertainty for city councils and allows provincial actors to impede the democratic process of city councils through threats to remove autonomy or to reduce revenue sharing or government transfers to cities.

4.1.2 Interference by the "Hanging Sword"

The second form of provincial interference with elected city councillors occurs when provincial actors, through conduct, force city councillors to align their views with the provincial government. This can occur outside of the legislative context or as a result of legislation, as discussed below.

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[278] See *City of Toronto Act*, *supra* note 54 at s 25(1).
[279] *Ibid* at s 2. In addition, *The City of Toronto Act* states that "[t]he City may provide any service or thing that the City considers necessary or desirable for the public" (*ibid* at s 8(1)).
[280] See Sancton, "False Panacea", *supra* note 82 at 1.

On January 20, 2021, a city councillor in Regina, Saskatchewan brought forth a motion to the Executive Committee of City Council to amend the Sponsorship, Naming Rights & Advertising Policy to ban fossil fuel companies from sponsoring civic facilities.[281] The reasoning behind this motion was to support Regina's local value of sustainable energy. At the Executive Committee level, the vote passed 7-4 and was to be voted on at the January 27, 2021 meeting of Regina's City Council.[282] After the Executive Committee meeting, but before the meeting of City Council, the premier of Saskatchewan gave his thoughts on the motion, as follows:

> This motion is a hypocritical attack on the hardworking workers and employers that fuel Saskatchewan's economy and fund important community initiatives through voluntary sponsorships.[283]

And:

> Should this motion pass Regina city council next week, our government will seriously consider the future sponsorships to the City of Regina from provincial energy companies like SaskEnergy and SaskPower.[284]

The Premier also called the motion "absurd"[285] prior to threatening to pull approximately $33 million dollars in funding from Regina; funding that is collected by a provincial crown corporation from Regina's residents and remitted to Regina.[286] On top of the threat to pull funding, Regina City Councillors could also be removed from council pursuant to section 358.1 of *The Cities Act*, although the Premier did not raise this in his comments. Not surprisingly, at Regina's January 27, 2021 meeting of City Council, the motion did not pass.[287]

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[281] See Alec Salloum, *Premier blasts Regina's executive committee for proposing ban on fossil fuel advertisers* (20 January 2021) Online*: Regina Leader Post* < https://leaderpost.com/news/local-news/premier-blasts-regina-executive-committee-for-proposing-ban-on-fossil-fuel-advertisers>.
[282] *Ibid.*
[283] David Giles, *Motion banning fossil fuel advertisements in Regina loses more support* (25 January 2021) Online: *Global News* <https://globalnews.ca/news/7597818/motion-fossil-fuel-advertisements-regina/>.
[284] *Ibid.*
[285] Mickey Djuric, *Regina weighs ban of fossil fuel sponsorships, drawing ire of Sask. Premier*, (21 January 2021) Online: *CBC News* < https://www.cbc.ca/news/canada/saskatchewan/city-of-regina-fossil-fuel-advertised-sponsorship-1.5881378>.
[286] *Ibid.*
[287] See Alec Salloum, *City council rejects fossil fuel ad ban amendment after backlash,* (27 January 2021) Online: *Regina Leader-Post* <https://leaderpost.com/news/local-news/city-council-rejects-fossil-fuel-ad-ban-amendment-after-backlash>.

On top of interference from the Premier of Saskatchewan, an MP also weighed in, stating he was "outraged" and that the motion showed how "out of touch these councillors were."[288] After Regina's City Council voted against the motion, the MP further stated "[i]t's a good thing that they've come to the right position, but it shouldn't have taken a public backlash for them to know how to represent their own constituents."[289] In effect, both the Saskatchewan Premier and the MP imposed their views on what is best for constituents in Regina on Regina's elected officials, amounting to interference with elected city councillors and an intrusion into the democratic process of city council. Rather than supplanting their own views of what is in the best interests of constituents, the Premier and the MP ought to have let the democratic process take its course as opposed to using their political positions to interfere with the democratic process. Ironically, removing millions of dollars of funding is clearly not in the best interest of Regina residents, yet the Premier threatened to do so.

In addition, other municipal legislation limits the authority of city councillors. For example, *The Planning and Development Act*[290] in Saskatchewan states one of its purposes is identifying "provincial interests that guide provincial and municipal planning decisions in the development of communities."[291] Further, section 8 of the *PDA* requires every district plan, community plan, regional plan, subdivision bylaw or zoning bylaw to be consistent with provincial land use policies and statements of provincial interest. Additionally, the minister can direct that a council prepare and adopt an official community plan and allows the minister to direct amendments to the plan that the council *shall* adopt.[292] Ontario's legislation contains analogous provisions that allow a minister to refuse an amendment to a development plan if it is not in the provincial interest.[293] Thus, a city council's autonomy under planning and development legislation is limited to that of the provincial interest as opposed to that of the electorate, diluting effective representation within a city council.

[288] Giles, *supra* note 283.
[289] *Ibid*.
[290] SS 2007 c P-13.2 [*PDA*].
[291] *Ibid* at s 3(b).
[292] *Ibid* at s 30.
[293] See *The Planning and Development Act*, SO 1994, c 23 Sched. A at ss. 6(4).

4.1.3 Conclusion: Interference with Elected Officials

Interference with elected city councillors can occur through provincial governments granting themselves powers to remove city councillors or limit the authority and powers of city councils. Further, interference can occur through the conduct of government actors through threats to remove city funding or to use the legislative powers discussed in this subchapter as "hanging swords" to interfere with the democratic process of city councils. While provincial legislatures have seen fit to grant city councils broad legislative powers to do what is best for their respective jurisdictions, they have also reserved the right to interfere in city council's democratic legislative role. This can be done by the provincial cabinet removing democratically elected city councillors from office and appointing replacements, or by threatening to pull funding if city councils do not align their views with the provincial interest. Thus, while Dillon's rule has been diluted, provincial legislatures have also seen fit to continue keeping a "watchful eye" on city councils and interfere if they so desire. Such interference is a blatant intrusion into civic democracy as upper levels of government are dictating what is best for constituents within cities.

4.2 Interference with the Election Process

Provincial governments have also used their plenary power over cities to interfere with the electoral process. First, this subchapter will discuss the most blatant example of this, being the 2018 civic election in Toronto. Second, this subchapter will discuss other examples of interference which cities have faced.

4.2.1 The 2018 Civic Election in Toronto

By way of background, the 2018 civic election in Toronto began with the drop of the writ on May 1, 2018.[294] On this date, the election period commenced based on a 47-ward electoral platform.[295] Election day was October 22, 2018;[296] however, on August 15, 2018, the *BLGA* was passed, which amended the electoral platform to a 25-ward structure.[297] The *BLGA* took immediate effect, meaning that after August 15, 2018, candidate's campaigns were based on an entirely

[294] See *Toronto v Ontario (ONSC)*, *supra* note 3 at para 4.
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid* at para 5.

different ward structure than when the election period commenced.[298] This increased the number of voters in each ward by approximately 50,000 people.[299]

The rationale for passing the *BLGA* was articulated by the Minister of Municipal Affairs and Housing, who set out three objectives:

> First, they [councillors in support of a 25-ward model] agree that a smaller council will lead to better decision-making at Toronto city hall, which would benefit Toronto as a whole. They gave an example of the current 44-member council have 10-hour debates on issues that would end with the vast majority of councillors voting the same as they would have at the beginning of the debate…
>
> Second, they point out that it will save money…
>
> Third, it would result in a fair vote for residents, which was the very reason Toronto itself undertook a review of its ward boundaries. The Toronto councillors I referred to earlier reminded everyone that the Supreme Court of Canada said that voter parity is a prime condition of effective representation. They gave examples of the current ward system, where there are more than 80,000 residents in one ward and 35,000 in another. They acknowledge that this voter disparity is the result of self-interest, and that the federal and provincial electoral district process is better because it is an independent process which should apply to Toronto as well. … The wards we are proposing are arrived at through an independent process.[300]

The 2018 Toronto election represents another example of the Provincial legislature supplanting their views of what is best for Toronto and its constituents. As noted by Justice Belobaba in *Toronto v Ontario (ONSC)*, "[h]ere, there is no evidence that any other options or approaches were considered or that any consultation ever took place. It appears that Bill 5 was hurriedly enacted to take effect in the middle of the City's election without much thought at all, more out of pique than principle."[301]The lack of formal consultation and consideration of other options in this scenario is especially concerning as subsection 1(3) of *The City of Toronto Act* requires the Province to consult

[298] See Des Rosiers, *supra* note 137 at 62 where the writer explains the impact on candidates as follows, "many had spent money, devised a strategy, and connected with voters in a ward.". On top of this, candidates would have had to explain the ward changes to voters, which would take away from the impact of the message relating to their electoral platform: see *Toronto v Ontario (ONSC)*, *supra* note 3 at para 31.
[299] See *Toronto v Ontario (ONSC)*, *supra* note 3 at para 4.
[300] *Ibid* at para 66.
[301] *Supra* note 3 at para 70.

with Toronto on matters of mutual interest.[302] While some councillors appear to have supported the ward change, support was not universal as evidenced by the constitutional challenge of the *BLGA* to the ONSC, the appeal to the ONCA and the subsequent appeal to the Supreme Court of Canada.

Justice Belobaba of the ONSC struck down the *BLGA* as infringing section 2(b) *Charter* rights "in two ways: (i) because the Bill was enacted in the middle of an ongoing election campaign, it breached the municipal candidate's freedom of expression and (ii) because Bill 5 almost doubled the population size of City wards from an average of 61,000 to an average of 111,000, it breached the municipal voter's right to cast a vote than can result in effective representation."[303] In finding that the *BLGA* infringed freedom expression for candidates, Justice Belobaba noted, "[t]he candidates' efforts to convey their political message about the issues in their particular wards were severely frustrated and disrupted. Some candidates persevered; other dropped out of the race entirely."[304] Justice Belobaba further held that "where a democratic platform is provided…, and the election has begun, expressive activity in connection with that platform is protected against legislative interference".[305] Thus, the *BLGA* substantially interfered with freedom of expression of candidates and was not saved by section 1 of the *Charter*.[306]

In regard to the voter's section 2(b) *Charter* rights, Justice Belobaba imported the concept of effective representation from section 3 of the *Charter* and extended it to the expressive activity of voting protected by section 2(b) of the *Charter* and struck down the *BLGA* as unconstitutional.[307] Justice Belobaba held that the concept of effective representation is not rooted in section 3 of the *Charter* as its origins can be traced back to "Canada's founding fathers".[308] In sum, Justice

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[302] See *The City of Toronto Act*, *supra* note 54 at s 1(3) which requires the Province and City to enter into an agreement relating to consultation. This led to the Toronto-Ontario Cooperation and Consultation Agreement which requires consultation on any proposed legislation that will have a significant policy impact on the City. See also *Toronto v Ontario (ONSC)*, *supra* note 3 at para 107.
[303] *Ibid* at para 20.
[304] *Ibid* at para 31. See also Des Rosiers, *supra* note 137 at 62 where the author explains that the *BLGA* was aimed at achieving voter parity over time based on growth predictions: "[i]n a way, the government was suggesting that voter parity was of a higher order than impact on freedom of political expression of candidates of candidates or the integrity of the electoral period, even if this does not align with the state of the law."
[305] *Toronto v Ontario (ONSC)*, *supra* note 3 at para 37.
[306] *Ibid* at para 37.
[307] *Ibid* at paras 40 and 46.
[308] *Ibid* at para 45.

Belobaba found that, if the province provides a democratic civic election process, then such right must be consistent with the Constitution.[309] Therefore, the *BLGA* also infringed the voters section 2(b) *Charter* rights and was not saved by section 1 of the *Charter*.

Section 1 did not justify the infringement as, according to Justice Belobaba, there was no evidence of a pressing and substantial objective.[310] No other approaches were considered by Ontario and the *BLGA* was, as mentioned above, "hurriedly enacted to take effect in the middle of the City's election without much thought at all."[311] Further, there was no evidence showing why the *BLGA* must be passed in the middle of an ongoing election.[312] Thus, the infringement could not be demonstrably justified in a free and democratic society and the *BLGA* was struck down.

Notably, Justice Belobaba did not consider the democratic legislative role of city councils in extending effective representation to the expressive activity of voting in a civic election. There was no analysis on the current legislative role of cities, living constitutionalism or the constraints thereon. Justice Belobaba merely held that *Charter* rights can overlap[313] and there is no "principled reason why in an appropriate case the 'effective representation' value cannot inform other related Charter provisions such as the voter's right to freedom of expression under s. 2(b)."[314]

Further, by referring to the origins of effective representation, as discussed above, Justice Belobaba relied on the historical context to extend effective representation to section 2(b). However, the historical context of effective representation within city councils does not support Justice Belobaba's conclusion. As previously mentioned, Canadian cities are derivative of cities

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[309] *Ibid* at para 49. See also *Toronto v Ontario (SCC Leave Decision)* (Memorandum of Argument of the Intervenor-The International Commission of Jurists) cited in Archer & Sobat, *supra* note 9 at 11 where the author summarizes the intervenors argument that "[b]ecause the Province adopted a specific model for democratic municipal institutions under section 92(8), the fundamental democratic principles of section 3, as well as the principles of constitutionalism and the rule of law, preclude Ontario from undermining free expression in the electoral process."
[310] See *Toronto v Ontario (ONSC)*, *supra* note 3 at para 78. See also *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 where the SCC set out the test to determine whether a *Charter* infringement can be saved by section 1 of the *Charter*, as follows: (1) a pressing and substantial objective; (2) rational connection; (3) minimal impairment; and (4) balance of convenience.
[311] *Toronto v Ontario (ONSC)*, *supra* note 3 at 70.
[312] *Ibid* at para 76.
[313] *Ibid* at para 46.
[314] *Ibid.*

in the United Kingdom and were not designed to be democratically accountable.[315] In addition, originalism has debatably been rejected by the courts and Justice Belobaba ought to have relied on the purpose of section 2(b), in accordance with living constitutionalism, to determine whether section 2(b) ought to protect the right to effective representation within a city council. Had Justice Belobaba considered the purposive methodology required by living constitutionalism and the constraints thereon, it is likely a different conclusion would have been reached as section 2(b) has been held to protect the *freedom* of expression, not the *impact* or *effect* of that expression.

On appeal, the ONCA convened a five-member panel and overturned the decision of the ONSC in a split 3-2 decision. For the majority, Miller JA made three important conclusions. First, that section 2(b) *Charter* rights do not guarantee effective representation as "sections 2(b) and 3 guarantee distinct rights that must be given independent meaning".[316] Second, that "[s]ection 3 democratic rights were not extended to candidates or electors with respect to municipal councils" and that this is not a "gap" that can be addressed judicially.[317] Third, that unwritten constitutional principles cannot invalidate provincial laws.[318] The result of the majority decision in *Toronto v Ontario (ONCA)* confirms the plenary power of the provincial legislatures over cities.

At the ONCA, Toronto argued that section 92(8) of the *Constitution Act, 1867* contains an unwritten proviso that "the right to democratic municipal elections has been inherent in 92(8) from the time of Confederation."[319] The ONCA rejected this argument holding that section 92(8) merely set out the legislatures' law-making authority with respect to municipal institutions;[320] there is no deeper purpose to such provision. As noted, the ONCA's decision aligns with the history of municipal institutions, including cities, at the time of Confederation as Canadian cities were not originally designed to be democratically accountable and if they were, the original framers of the *Constitution Act, 1867* could have provided constitutional protection, but did not.[321] As mentioned,

[315] See Sancton, "Canadian Local Government", *supra* note 37 at 3. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281.
[316] *Toronto v Ontario (ONCA)*, *supra* note 3 at para 73.
[317] *Ibid* at para 95.
[318] *Ibid* at para 94.
[319] *Ibid* at para 92.
[320] *Ibid* at paras 92-93.
[321] *Ibid* at para 94.

I agree with the decision of Miller JA as he was live to the constraints on constitutional interpretation, being, *inter alia*, the text of the Constitution, the historical context and precedent.[322]

In dissent, Macpherson JA would have struck down the impugned provisions of the *BLGA* as breaching freedom of expression noting that section 2(b) of the *Charter* "safeguards the integrity and stability of the democratic foundation on which elections are based."[323] MacPherson JA further held that the *BLGA* represented a substantial attack on the centrepiece of democracy, "in an established order of Canadian government – an active election in a major Canadian Municipality".[324] MacPherson JA distinguished *Baier* by pointing out that the *BLGA* was enacted mid-election whereas the legislation in *Baier* was not, the *BLGA* did not exclude a class of people from running in an election (as the legislation did in *Baier*) and that *Baier* was a positive rights claim, whereas, in Macpherson JA's view, *Toronto v Ontario* was not.[325] Regarding the use of unwritten principles, MacPherson JA agreed with the majority that they cannot be used to strike down validly passed legislation.[326] Thus, the dissenting opinion found that the *BLGA* infringed the candidate's and voter's freedom of expression and could not be saved by section 1 of the *Charter*; however, the ONCA was unanimous in holding that unwritten constitutional principles cannot invalidate laws.

Since the ONCA decision, leave to appeal to the Supreme Court of Canada has been granted three distinct issues. (1) Does section 2(b) of the *Charter* protect the expression of electoral participants from substantial mid-election changes to the election framework rules? (2) Can the unwritten constitutional principles of democracy or the rule of law be used as a basis for striking down the *BLGA*? (3) Are municipal electors who are given a vote in a democratic election entitled to effective representation?[327] As discussed throughout my analysis, the proper application of living constitutionalism does not allow the Supreme Court of Canada to accept any of the alternative approaches set out in Chapter 5. Should the Supreme Court of Canada accept an

[322] *Ibid* at para 94.
[323] *Ibid* at para 118.
[324] *Ibid* at para 116.
[325] *Ibid* at para 132.
[326] *Ibid* at para 99.
[327] *Toronto v Ontario (SCC Leave Decision), supra* note 3. See also *Toronto v Ontario (SCC)* (Memorandum of the Appellant at para 43) as the leave decision does not set out the grounds of appeal for which leave was granted.

alternative approach, however, the Supreme Court of Canada's interpretation becomes as binding as the text of the Constitution, regardless of whether the constraints on constitutional interpretation are respected. Thus, while not ideal, unconstrained constitutional interpretation may provide some protection for civic democracy in the absence of a formal amendment.

4.2.2 Other Examples of Civic Election Interference

While *Toronto v Ontario* is the most blatant example of provincial interference with the civic election process, it does not exist in isolation. This subchapter discusses other examples of civic election interference that have been challenged through the courts.

In *East York*, the Ontario legislature introduced Bill 103, which created the "megacity" of Toronto.[328] Bill 103 combined the cities of Etobicoke, North York, Scarborough, Toronto, York and the borough of East York into one body corporate under the name of the City of Toronto.[329] Bill 103 further set out that the city council of the new City of Toronto would be comprised of a mayor, elected by general vote, and 56 other members, two from each of the 28-wards.[330] On April 21, 1997, Bill 103 was given Royal Assent and the election was to be held on November 10, 1997.[331] Not surprisingly, an application was brought challenging the constitutional validity of Bill 103. The applicants argued, *inter alia*, that Bill 103 violated section 2(b), 2(d), 7, 8 and 15(1) of the *Charter*. For the purpose of this discussion, the allegations that Bill 103 violated section 2(b) of the *Charter* is important. This argument can be distilled into two parts: (1) that the Ontario legislature failed to consult with the affected polities and citizens; and (2) effective representation was violated.

Regarding consultation, the ONSC noted that, while hearings took place relating to the creation of the "megacity", none of the hearings constituted, "the type of public consultation which should have preceded the introduction of the legislation and in which a democratically elected

[328] See *East York (ONSC)*, *supra* note 47 at 6.
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid.*

government should have engaged."[332] Further, regarding the lack of consultation with city councils, the ONSC explained that:

> The evidence supports the conclusion that Bill 103 simply appeared on the government's legislative agenda with little, or no, public notice and without any attempt to enter into any meaningful consultation with those people would would be most affected by it – the more than 2,000,000 inhabitants of Metro Toronto. Such, however, is the prerogative of the government. The court has made it clear that there is no obligation on government to consult the electorate before it introduces legislation. It may exercise its powers as it sees fit, subject only to constitutional constraints.[333]

Thus, the ONSC's power of review is limited to the legal competence of Bill 103 and not the underlying reasons for Bill 103, unless an infringement is found, leading to a section 1 analysis.

Regarding the constitutional argument, the ONSC upheld Bill 103 as "there is nothing in the Charter which provides constitutional status to municipalities."[334] The democratic rights set out in section 3 of the *Charter* do not apply to cities and as a result, there was no infringement of these provisions.[335] As in *Toronto v Ontario,* the applicants also argued that the legislation violated freedom of expression under section 2(b) as Bill 103 established a council of 56 members, which "is larger than the council of any of the six municipalities; decreases the ratio of representatives to electors; reduces the number of elected officials; and may lead to the establishment of municipal political parties."[336] The ONSC held that, despite Bill 103, citizens remain free to vote and that there is nothing in section 2(b) of the *Charter* that "guarantees, or elevates to constitutional status, the number of members on a municipal council relative to the number of electors."[337] Thus, legislatures are free to alter civic ward boundaries before, during or after a civic election.

This is distinguishable from provincial legislatures amending provincial electoral boundaries within the respective province. First, the ultimate boundaries of the province do not

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[332] *Ibid* at 12.
[333] *Ibid* at 12-13.
[334] *Ibid* at 16.
[335] *Ibid* where the ONSC relies on *Haig, supra* note 225 at 1042.
[336] *Ibid.*
[337] *Ibid.*

change, just the internal boundaries. In *East York*, not only did the wards change, but Toronto grew in size and population substantially. Secondly, provincial legislatures have an opposition which can express concerns relating to any proposed bill. As noted in *East York*, little consultation was done with the impacted cities.[338] Lastly, provincial legislatures are protected by section 3 of the *Charter*. Thus, even if provincial electoral boundaries were to be altered, it must be done so in a way that does not infringe effective representation, whereas cities and the voters therein are subject to whatever the provincial legislature decides to do. Further, and as previously mentioned, Parliament and the provincial legislatures can only be dissolved prior to an election period commencing. As a result of this, the mid-election destruction of electoral platforms cannot occur in federal or provincial elections. Thus, the unique position of cities as "creatures of the province" allows for election interference from upper levels of government and without constitutional protection, such interference is likely to continue to occur.

4.3 Conclusion: Chapter 4

Interference with civic democracy fits into two broad categories. First, provincial legislatures have granted provincial government actors the legislative power to remove or disqualify city councils or a member thereof. Such removal may require inspections or inquiries prior to exercising such power or may merely require the removal to be in the public interest. Further, the Ontario legislature has granted itself the power to limit the authority of Toronto's city council by regulation if it is in the provincial interest to do so. These provisions are broadly worded and give the relevant province complete authority to determine what is in the public or provincial interest.

Second, interference can occur through the conduct of provincial actors. This may include condemning the decision of a city council or a committee thereof or threatening to pull funding sources should a motion pass at city council. Both forms of interference force elected city officials to align their view with the relevant province, potentially to the detriment of their constituents.

Providing democratic processes for civic elections shows the increased autonomy of city councils as they are responsible to their constituents, demonstrating a further dilution of Dillon's

[338] *Ibid* at 12-13.

rule by the provincial legislatures. Provincial legislatures have also granted broad legislative powers to city councils and immunity to the policy decisions of city councils, again diluting Dillon's rule by providing substantial legislative autonomy to city councils. For the time being, however, provincial actors or legislatures may still interfere with that autonomy, for the simple reason that they do not agree with the decision made by city councils. As argued in Chapter 5 and 6, a formal amendment to the Constitution is required to protect the democratic legislative role of city councils.

5. ALTERNATIVES TO A FORMAL AMENDMENT

In the preceding chapters, I have argued that civic democracy requires constitutional protection. The two options to achieve this are either through amending the Constitution of Canada or through alternatives to formal amendment. The former is considered in Chapter 6, and the latter here in this chapter.

In my opinion, Miller JA on behalf of the majority correctly interpreted the Constitution in *Toronto v Ontario (ONCA)* where he held "[t]he decision was made not to constitutionalize [municipal] institutions, but rather to put them under the jurisdiction of provincial legislatures."[339] Since the ONCA decision was reported, scholars and legal professionals have suggested methods in which the Constitution, in their view, could be interpreted to provide protection for democratic civic elections, without a formal amendment. This Chapter argues that these alternatives are insufficient to protect civic democracy and ignore the constraints on constitutional interpretation.

As mentioned, most of the academic focus on constitutional recognition of cities stems from issues relating to revenue raising powers.[340] In my opinion, a formal amendment to the Constitution can serve a much larger purpose than addressing issues related to municipal financing. A formal amendment to the Constitution ought to protect civic democracy, as defined in 1.1, going beyond a citizen's right to vote for and be effectively represented in a city council but also addressing issues relating to legislative and revenue raising powers. In short, entrenching citizens right to vote for and be effectively represented in city councils in the Constitution, must also be accompanied by constitutionally entrenched heads of legislative powers and defined revenue raising powers. Thus, advocating for a formal constitutional amendment to protect civic democracy advances the position that city councils ought to have constitutionally protected revenue raising powers, as they would be required for city council to effectively represent their constituents.

[339] *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94.
[340] See e.g. Dewing, Young & Tolley, *supra* note 8 at 1 where the authors note "[t]he municipalities' quest for constitutional recognition has been largely motivated by their search for practical ways of meeting the demands upon their fiscal resources". See also Meehan, Chiarelli and Major, *supra* note 31 at 9-10.

While a formal amendment to the Constitution of this nature is bold, there is still merit in advocating for such an amendment. An argument could be made that proposed amendments to the Constitution ought to carry positive significance for the purposes of common law interpretation as opposed to negative significance.[341] This principle has become known as a "partial constitutional amendment" and allows judicial interpretation to be influenced by proposed, partially complete or failed constitutional amendments.[342] A full discussion of the benefits of advocating for a formal constitutional amendment is contained in 7.3.

5.1 Formal Amendment Procedure

The Constitution of Canada has been referred to as one of the most difficult constitutions to amend in the world.[343] Part V of the *Constitution Act, 1982* sets out the five formal amendment procedures to amend the Constitution, only three of which are relevant to this analysis. First, is the "general amendment procedure" entrenched in section 38 of the *Constitution Act, 1982*. Second, it has been argued that section 43 of the *Constitution Act, 1982* which allows for an amendment that affects some, but not all provinces, could be used to grant democratic rights to citizens in civic elections on a province-specific basis. Lastly, section 45 of the *Constitution Act, 1982* codifies the amendment procedure for provincial constitutions.

The general amendment procedure applies to any amendment to the Constitution unless a separate amendment provision applies. This procedure requires the approval of both Parliamentary houses and at least two-thirds of the provinces, representing 50% of the population of all provinces.[344] In addition, Parliament and certain provinces have added requirements in situations when the general amendment procedure may be invoked. Federally, Parliament passed the *An Act Respecting Constitutional Amendments,*[345] which has been described in the following terms:

> *The Act Respecting Constitutional Amendments* provides that Parliament should obtain the consent of Quebec, Ontario, British Columbia, two of the Atlantic

[341] See Rosalind Dixon, "Partial Constitutional Amendments" (2011) 13 UPAJCL 643 at 1.
[342] *Ibid* at 2 and 18.
[343] *Ibid* at 158.
[344] See *Constitution Act, 1867, supra* note 1 at s 38.
[345] SC 1996, c 1 [*Regional Veto Law*]. See also Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85 at 97 [Albert, "Difficulty of Constitutional Amendment"] for an in-depth discussion on the *Regional Veto Law*.

> Provinces comprising at least 50% of the region's population, and two of the Prairie provinces comprising at least 50% of the region's population, before proposing a constitutional amendment in accordance with the [general amendment procedure].[346]

Therefore, in addition to the requirements of the general amendment procedure, Parliament arguably must obtain the consent required by this *Regional Veto Law* prior to tabling a proposed amendment.

At the provincial level, certain provinces have enacted legislation that requires referendums to be completed prior to the legislature voting on an amendment to the Constitution. For example, in Alberta, *The Constitutional Referendum Act*[347] requires the LGIC to order a referendum before, "a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly."[348] In Saskatchewan, *The Referendum and Plebiscite Act*[349] allows the LGIC to order a referendum where "an expression of public opinion is desirable on any matter of public interest or concern", which may include a proposed constitutional amendment.[350] While Alberta's legislation requires a mandatory referendum for amendment proposals, Saskatchewan's legislation is permissive. Thus, the general amendment procedure has additional extra-textual requirements that are not mentioned in the Constitution but have been passed by Parliament or the legislatures as ordinary statutes. Whether these extra-textual requirements are, in and of themselves, constitutional is open for debate,[351] however, if they are accepted by the Supreme Court of Canada as constitutional, they would become as supreme as the written text of the Constitution.[352] Thus, should the Supreme Court of Canada adopt the legislated extra-textual

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[346] Government of Canada "Intergovernmental Affairs: The Canadian Constitution" (25 July 2018) Online: *Government of Canada* <https://www.canada.ca/en/intergovernmental-affairs/services/about-canada.html> [emphasis added].
[347] RSA 2000, c-C-25 ss. 2(1) and 4 [*Alberta Referendum Act*]. See also *Referendum Act*, RSBC 1996, c 400, s. 4. See also *Constitutional Amendment Approval Act,* RSBC 1996, c 67, s 1; see also *Referendum Act,* SNB 2011, c 23, ss. 12-13. See also *The Referendum and Plebiscite Act*, SS 1990-91, c R-8.01, at 3(1) which provides the Saskatchewan Legislature with the ability to hold a referendum prior to voting on a constitutional amendment, but it is not mandatory.
[348] *Alberta Referendum Act*, *supra* note 347 at s 2(1).
[349] SS 1990-91, c R-8.01.
[350] *Ibid* at s 3(1).
[351] See Albert, "Unconstitutional Constitutional Amendment", *supra* note 181 at 177 where Albert explains that "the Regional Veto Law as well as the provincial and territorial referenda and plebiscite laws are inconsistent with the formal amendment rules insofar as they impose additional requirements for amendment. That inconsistency should be sufficient to invalidate them if they are challenged as unconstitutional."
[352] *Ibid* at 174.

requirements adding to the formal amendment rules codified in Part V of the *Constitution Act, 1982*,[353] the difficulty of formal constitutional amendment would increase as extra-textual requirements would negate a formal amendment if it is not followed.

Another formal amendment procedure is contained at section 43 of Part V of the *Constitution Act, 1982*. This provision follows the same general rules as the general amendment procedure; however, section 43 applies to an amendment "in relation to any provision that applies to one or more, but not all provinces".[354] Under this procedure, only consent of the affected provinces and both Parliamentary houses is required. Thus, if certain provinces were interested in amending the Constitution to add a new provision granting constitutional status to cities, arguments have been made that this can be done. For example, Alexandra Flynn has suggested that section 43 has a great deal of potential in providing constitutional protection for local diversity.[355] Citing Kathy Brock, Alexandra Flynn argues that section 43 acknowledges and recognizes that the "needs and aspirations of all the provinces may vary greatly, and these differences may not be understood by all other provinces."[356] While these arguments have been made, it is unlikely that section 43 can be used in this manner.

As noted above, section 43 applies to "any provision that applies to one or more, but not all provinces". What Alexandra Flynn appears to be arguing for is a <u>new</u> provision in the Constitution, not an amendment to a "provision that applies to one or more but not all provinces". Section 43 contains wording that is distinct from the other amendment procedures contained in Part V of the *Constitution Act, 1982*. For example, the general amendment procedure states that "[a]n amendment to the Constitution of Canada may be made…", which does not specifically refer to an existing provision like section 43 does. Therefore, it is unlikely that section 43 can be used as Alexandra Flynn suggests. Rather, the general amendment procedure would be required to add

[353] The decision in *Siemens*, supra note 225 at para 42, citing *Haig, supra* note 225 at 1042 suggests this is unlikely as the SCC held "[a] government is under no constitutional obligation to extend this platform of expression to <u>anyone</u>, let alone <u>everyone</u>. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law." [emphasis in the original]
[354] *Supra* note 1 at s 43.
[355] See Flynn, "Indigenous Rights and Municipal Autonomy", *supra* note 74 at 119.
[356] Kathy Brock, "Diversity Within Unity: Constitutional Amendments Under Section 43" (1997) 20:1 Can Parliamentary Rev 23 at 24, cited by Flynn, "Indigenous Rights and Municipal Autonomy", *supra* note 74 at 119.

a new provision to the Constitution to recognize civic democracy, even if the new provision does not apply to all provinces.

Lastly, section 45 of the *Constitution Act, 1982* allows provinces to amend their provincial constitutions by ordinary statute.[357] Each province's constitution is different depending on when they joined confederation. Therefore, amendments to provincial constitutions would be province-specific. In my view, section 45 is an option to constitutionally protect civic democracy, however, the provincial constitutions of each province will not be discussed in significant detail. As discussed in 5.2.2 below, arguments have been made that section 45 is a better and more practical option to constitutionally recognize democratic civic elections on a province by province basis; however, provincial constitutions have their own unique challenges, as also discussed in 5.2.2.

5.2 Alternatives to a Formal Amendment of the Constitution of Canada

In previous Chapters, I have argued that civic democracy requires constitutional protection as a result of the increased and increasing legislative role of cities. As discussed in this Chapter, it has been argued that constitutional protection of democratic civic elections could be granted through alternatives to a formal amendment to the Constitution of Canada. These alternatives fit within two broad categories. First, it has been suggested that democratic rights can be "read in" to the current text of the Constitution. Second, it has been proposed that provincial constitutions be amended as opposed to amending the text of the Constitution of Canada. The "reading in" approaches rely solely on constitutional interpretation, largely unconstrained, whereas amending provincial constitutions must be done through the provincial legislature, pursuant to section 45 of the *Constitution Act, 1982*.

5.2.1 The "Reading in" Approaches

The "reading in" approaches suggest that the Supreme Court of Canada could and should reinterpret section 3 of the *Charter* or section 92(8) of the *Constitution Act, 1867* to give them their "proper" scope. Three alternative approaches have been proposed that fit squarely under this heading. The first approach involves injecting a new "rule" into section 3 of the *Charter*, which I refer to as the "delegatee approach". The second approach involves injecting a new rule into

[357] *Supra* note 1 at s 45.

subsection 92(8) of the *Constitution Act, 1867*, which I refer to as the "democratic proviso approach". The third approach involves reading in section 3 rights into section 2(b) of the *Charter*, which I refer to as the "Justice Belobaba Approach".

Determining the "proper" scope of section 3 of the *Charter* and section 92(8) of the *Constitution Act, 1867*, depends heavily on whether the constraints on constitutional interpretation are respected. Unconstrained constitutional interpretation, as mentioned, allows the Supreme Court of Canada to treat the provisions of the Constitution as "empty vessels" to be filled with purpose as the Supreme Court of Canada desires. If the Supreme Court of Canada respects the constraints on constitutional interpretation, the "proper scope" of the aforementioned provisions does not include democratic civic elections. The Supreme Court of Canada is constrained by (1) the text of the Constitution, which does not protect civic elections, (2) precedent, which has held it is not the Supreme Court of Canada's role to create a third order of government,[358] and (3) the historical context, which does not support the assertion that democratic elections have been inherent in municipal institutions since Confederation.[359] Therefore, I conclude that the reading-in approaches are a result of unconstrained constitutional interpretation, circumvent the formal amendment procedures in the *Constitution Act, 1982* and create significant uncertainty in both civic democracy and constitutional interpretation.

5.2.1.1 The Delegatee Approach

Colin Feasby argues that, "[a] better approach than trying to force the square peg of section 3 democratic norms into the round hole of section 2(b) would have been to simply ask the Court to impose a rule as follows:

> *Where a government, Federal or Provincial, delegates a legislative role to a democratically chosen body or where a government, Federal or Provincial, effectively delegates a decision to the electorate in a referendum, section 3 of the Charter applies.*[360]

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[358] See *Baier*, *supra* note 135 at para 39.
[359] See Sancton, "Canadian Local Government", *supra* note 37 at 3. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281.
[360] See Colin Feasby, "City of Toronto v Ontario and Fixing the Problem with section 3 of the *Charter*" *Ablawg* (28 September 2018) Online: <ablawg.ca/2018/09/28/city-of-toronto-v-ontario-and-fixing-the-problem-with-section-3-of-the-charter/>.

As a result of the legislative roles delegated to cities by their respective provincial legislatures, cities would attract the democratic rights contemplated in section 3 of the *Charter* based on this approach. Feasby argues that the unwritten constitutional principle of democracy supports this approach[361] and it aligns with the majority of the Supreme Court of Canada's comments in *Godbout* where the Supreme Court of Canada specifically contemplated that the *Charter* may apply to entities other than the levels of government enumerated therein.[362] In addition to only protecting a portion of civic democracy, Feasby's approach relies solely on unconstrained constitutional interpretation.

In *Godbout* Justice La Forest was interpreting section 32 of the *Charter* which uses substantially different language than section 3 of the *Charter*. Section 3 of the *Charter* specifically lists the "House of Commons or… a legislative assembly".[363] City councils are not a house of commons or a legislative assembly.[364] The purpose of section 32 aims to subject government action to *Charter* scrutiny. Applying the doctrine of living constitutionalism, municipal institutions perform government functions and thus, are covered by the purpose of section 32 of the *Charter*. To find otherwise, would be to ignore the express purpose of section 32 of the *Charter* and allow provincial legislatures to delegate legislative functions to municipal institutions to avoid *Charter* scrutiny. The purpose of the written text of section 3, however, does not purport to protect the right to vote in an election of city councillors. Thus, interpreting section 3 to include city councils would amount to section 3 becoming an "empty vessel" to be filled with purposes as the Supreme Court of Canada sees fit, and would bind lower courts and all levels of government. This interpretation would also be contrary to *Baier*,[365] which acts as a further constraint on living constitutionalism. Lastly, Feasby's approach entirely ignores the historical context, as cities were not originally designed to be democratically accountable.[366] The fact that cities may now be seen as

[361] *Ibid* page 4.
[362] See Archer & Sobat *supra* note 9 at 16 where the author cites Bruce Ryder, "Bill 5, the so-called 'Better Local Government Act, 2018'…" (30 July 2018) Online: *Twitter* <twitter.com/BBRyder/status/1024043534683398149>; Bruce Ryder, "Thoughtful piece by @ColinFeasby…" (28 September 2018), Online: Twitter <twitter.com/BBRyder/status/1045745151342247936> in support of this proposition.
[363] *Supra* note 1 at s 3.
[364] See *East York (ONSC)*, *supra* note 47 at 16.
[365] *Supra* note 135 at para 39.
[366] See Sancton, "Canadian Local Government", *supra* note 37 at 3. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281.

democratically accountable, does not permit the Supreme Court of Canada to re-frame the Constitution; rather, a formal amendment is required.

Further, the "delegatee approach" rests on the assumption that cities will continue to be granted democratic civic elections as it only applies to "democratically chosen bodies". Although this would protect existing civic elections, the plenary power of the provincial legislature over cities allows for the unilateral abolition of democratic processes for civic elections,[367] rendering the "delegatee approach" potentially futile. Another shortcoming of the "delegate approach" is that it does not provide or protect the safeguards cities require to fully exercise their democratic function. City councils would not benefit from any sort of parliamentary privilege or constitutionally protected legislative or revenue raising powers as they would remain "creatures of statute". As city councils are structured differently than Parliament and provincial legislatures, and remain subject to the plenary power of provincial legislatures, properly protecting effective representation in a city council cannot be achieved by merely subjecting city councils to the same *Charter* provision as Parliament or a provincial legislature as discussed in the following paragraph.

The "delegatee approach" accepts the fact that cities would remain subject to their respective provincial legislatures and those provinces would retain the power to restructure civic electoral platforms and the legislative powers of city council; it just must be done so in accordance with section 3.[368] As Canada is a representative democracy which provides citizens with a voice in the deliberations of government,[369] the removal or amendment of legislative powers from city councils may also amount to a breach of effective representation. Thus, the "delegatee approach" may also create issues for provincial legislatures as it would be unclear when removing or modifying revenue raising powers or legislative powers, may amount to unconstitutional interference with effective representation. This concern would be exacerbated if a successful candidate's platform is based on specific election issues requiring certain legislative powers and after the candidate is elected, the provincial legislature repeals or limits the civic legislative power required to fulfill the election promise. Thus, without constitutional protection for legislative or

[367] See *East York (ONSC)*, *supra* note 47 at 16.
[368] See Feasby, *supra* note 360 at 5.
[369] See *Electoral Boundaries Reference*, *supra* note 10 at 183.

revenue raising powers, it becomes uncertain when the removal or limitation of a legislative power would amount to an unconstitutional infringement of effective representation.

Lastly, properly constrained living constitutionalism does not support reading new "rules" into existing provisions of the *Charter* or the Constitution. The "delegatee approach" requires living constitutionalism to adopt, in essence, an entirely new purpose of section 3 that is not supported by the written text thereof, the historical context, or precedent.[370] Not only is this contrary to the constraints on constitutional interpretation, but it is contrary to the statement of Beverley McLachlin who stated the proper role of the court is "interpreting, reconciling and applying the law",[371] not *creating* it.[372] Thus, even if the Supreme Court of Canada holds that unwritten principles can invalidate laws, the "delegatee approach" would go beyond interpreting, reconciling and applying the law and amount to creating new constitutional protections through unconstrained judicial interpretation.

5.2.1.2 The Democratic Proviso Approach

The "democratic proviso approach" argues that the Supreme Court of Canada ought to constitutionalize conventions or provisos and inject them into section 92(8) of the *Constitution Act, 1867*, giving them the ability to invalidate legislation. This approach has been taken in two constitutional challenges, being *Toronto v Ontario* and *East York*, which, as mentioned, relate to the alteration of ward boundaries or amalgamation of cities, respectively. In both cases, these arguments were rejected. Even if accepted, like the "delegate approach" this approach relies on unconstrained constitutional interpretation which does not provide legal certainty and predictability in constitutional protections, unlike the written text of the Constitution.[373]

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[370] See *Public Service Employee Reference*, *supra* note 182 at 151 where the SCC held that "the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure and history of the constitutional text, by constitutional tradition, and by the history, traditions and underlying philosophies of our society."

[371] See McLachlin, *supra* note 251 at 8.

[372] See Millen, *supra* note 182 at 121 which, as mentioned, explains that what one judge sees as amending the Constitution, may be seen by another as merely interpreting it.

[373] See *Secession Reference*, *supra* note 183 at para 53.

In *Toronto v Ontario (ONCA)*, Toronto argued that democratic civic elections have been inherent in section 92(8) since the time of Confederation. The ONCA summarized this argument as follows:

> [t]he argument, essentially, is that "the right to democratic municipal elections has been inherent in s. 92(8) from the time of Confederation" and that s. 92(8), which grants the provincial legislatures exclusive lawmaking authority over "municipal institutions in the province", provides authority to courts to invalidate legislation that infringes "the principle of fair and democratic elections of municipal councils" said to be immanent in this grant of legislative power.[374]

The ONCA rejected this argument stating that section 92(8) of the *Constitution Act, 1867* is merely a lawmaking authority granted to provincial legislatures that does not constitutionalize any particular form of municipal governance.[375] The protection that the "democratic proviso approach" purports to provide is limited to the civic election process. As this approach does not reference section 3 of the *Charter*, it is also unclear whether effective representation would be constitutionally protected. If the Supreme Court of Canada accepts the "democratic proviso approach", it could interpret section 92(8) of the *Constitution Act, 1867* as protecting effective representation; however, it would be the result of the unconstrained constitutional interpretation. Neither the text of section 92(8), the historical context or precedent, specifically *Baier* and *Rheaume*, support the "democratic proviso approach".

In addition, the "democratic proviso approach" ignores the safeguards and legislative tools that city councils require to engage in a full, unfettered democratic process. In Toronto, this is a particular issue as, once city council is elected, Queen's Park can continue to limit city council's legislative decisions if it is in the provincial interest.[376] True constitutionally protected democratic rights would prevent provincial interference during and after a civic election,[377] specifically including interference with the democratic legislative role of city councils.[378] Importantly,

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[374] *Supra* note 3 at para 92.
[375] *Ibid.*
[376] See Sancton, "False Panacea", *supra* note 82 at 1. See also *The City of Toronto Act*, *supra* note 54 at s 25(1).
[377] See Archer & Sobat, *supra* note 9 at 16 where the authors note that the submissions to the SCC in *Toronto v Ontario (SCC)* relating to "gap-filling" would only provide protection for mid-election interference in an ongoing election. This analysis applies equally to the "democratic proviso" approach.
[378] See Valverde, *supra* note 43 at 24.

Ontario's factum to the Supreme Court of Canada seems to support the notion that interference with democratically elected councillors after an election, is more disruptive than interference during the election.[379] Further, as with the "delegatee approach", if the Supreme Court of Canada interprets section 92(8) as protecting effective representation within a city council, it creates significant uncertainty as to when the removal or limitation of a city council's legislative power amounts to an infringement of effective representation. Thus, merely injecting a proviso into section 92(8), a law-making power, relies on unconstrained constitutional interpretation and, as a result, creates significant uncertainty for the future of civic democracy and the application of the Constitution.

Further, the argument that democratic elections have been inherent since Confederation is not accurate.[380] As discussed previously, Canadian cities are derivative from English law and were not designed to be democratically accountable.[381] In *East York (ONSC)*, Andrew Sancton provided evidence, that:

> [T]here are no Canadian local governments that are politically autonomous in any meaningful sense. They have no constitutional protection whatever against provincial laws that change their structures, functions and financial resources without their consent.[382]

Toronto's democratic proviso approach relies on originalism. As previously mentioned, originalism requires the courts to determine the original intent of the framers of the Constitution. While Canadian courts appear to have rejected originalism, it has been held that the historical context continues to play a role in interpreting the text of the Constitution.[383] Regarding democratic

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[379] See *Toronto v Ontario (SCC)* (Factum of the Respondent at para 48) where Ontario argues "[m]oreover, delaying reform until after the election would mean that the government would either: (a) need to wait until the October *2022* municipal election – past even the fixed date for the *next* provincial election in June 2022 – to realize its policy goals of voter parity and a smaller, more effective council; or (b) reduce the size of the council after the election and either determine which councillors would remain in office or provide for a fresh election. The former option involved an unacceptable, lengthy delay for a government seeking to have a new, more functional Toronto council; whereas the latter option would have been more disruptive." [emphasis added].

[380] See *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94.

[381] See Sancton, "Canadian Local Government", *supra* note 37 at 3. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 281. See also *Toronto v Ontario (ONCA)*, *supra* note 3 at para 94. See also pages 11-14, *above*, for an in-depth discussion on this topic.

[382] *East York (ONSC)*, *supra* note 47 at 14.

[383] See *Public Service Employee Reference*, *supra* note 182 at para 151. See also *9147 Quebec*, *supra* note 202 at paras 7, 16 and 41. See also *Criminal Lawyers Association*, *supra* note 198 at 119.

civic elections, the historical context does not support the argument that democratic elections have been inherent in section 92(8) of the *Constitution Act, 1867* since confederation.[384] If Toronto's assertion was historically accurate, the *Charter* ought to have protected the right to vote for and be effectively represented in municipal institutions when democratic rights were entrenched in section 3 of the *Charter* in 1982. As noted by Miller JA, "[t]he decision was made not to constitutionalize [municipal institutions], but rather to put them under the jurisdiction of provincial legislatures."[385] Thus, despite the ongoing debate over whether municipal institutions *ought to be* recognized by the *Charter*, municipal institutions unequivocally remain subject to the plenary power of their respective provincial legislatures and the text of the Constitution does not provide citizens with a protected democratic right to vote, or be effectively represented by, a city council.

The "democratic proviso approach" may be supported by living constitutionalism given the increased and increasing democratic legislative role of city councils. This, however, assumes that there are no applicable constraints on interpreting the Constitution in this way. As mentioned, living constitutionalism is constrained by the written text of the Constitution, the historical context and precedent, as discussed above. The Supreme Court of Canada is not free to add constitutional protections to the existing provisions of the Constitution merely because the "times have changed". Appling living constitutionalism in this unconstrained manner, allows the Supreme Court of Canada to re-frame the Constitution as the justices see fit, and to favour the unwritten Constitution over the written, despite numerous precedents insisting that the written text takes primacy over the unwritten.[386] Therefore, the "democratic proviso approach" appears to be asking the Supreme Court of Canada to create a new protected right, outside of the text of the Constitution, that cannot be supported by the historical context, or precedent. As a result, the "democratic proviso approach" is not a viable interpretive option, as it relies solely on unconstrained constitutional interpretation, which supports the need for a formal amendment to the Constitution.

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[384] See e.g. *Toronto v Ontario (ONCA), supra* note 3 at para 94.
[385] *Ibid*.
[386] See *Secession Reference*, *supra* note 183 at para 53 for the proposition that "[a] written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review." See also *Imperial Tobacco*, *supra* note 241 at para 65. See also *Caron v Alberta*, 2015 SCC 56 at para 36, [2015] 3 SCR 511. See also *9147-0732 Quebec*, *supra* note 202 at para 9 where Brown and Rowe JJ hold that "… constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text." [emphasis in the original].

A similar argument was made in relation to Bill 103, which was challenged in *East York (ONSC)*. The applicants argued that Bill 103 was *ultra vires* the province as it disregarded "the local democratic autonomy of municipalities".[387] The applicants argued that consultation prior to amalgamating cities or altering wards was a constitutional convention that was not followed, rending Bill 103 *ultra vires* the Ontario legislature. The ONSC held that there is no remedy for the failure to follow a constitutional convention[388] and the Supreme Court of Canada has held that conventions do not crystallize into law.[389] While conventions may be used to inform judicial interpretation of democratic understandings at a given time, similar to a partial constitutional amendment, the same constraints on constitutional interpretation must apply,[390] rendering the democratic proviso approach an example of unconstrained living constitutionalism.

5.2.1.3 The Justice Belobaba Approach

Importing the section 3 right to effective representation into section 2(b) of the *Charter* is another suggested alternative to grant voters and candidates in civic elections the equivalent right of those in Federal or provincial elections. This was the gist of Justice Belobaba's decision at the ONSC level of *Toronto v Ontario* as previously discussed in 4.2.1 and need not be repeated here.[391]

This approach fails to recognize the different purposes between section 2(b) and section 3 of the *Charter*. As previously mentioned, Justice Belobaba relied predominantly on originalism in determining that section 2(b) can protect effective representation for voters in civic elections. Originalism is not the prevailing theory of constitutional interpretation in Canada. Instead, living constitutionalism requires the court to ascertain the *purpose* of section 2(b) which protects the *freedom* of expression, not meaningful expression. As noted by the majority of the Supreme Court of Canada, "while Charter rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot), the actual purpose of the right."[392] In order to avoid "overshooting" the purpose of a provision of the Charter, primacy must be given to the written text, respecting its established "significance as the first factor to consider within the

[387] *East York (ONSC)*, *supra* note 47 at page 9.
[388] *Ibid* page 14.
[389] See *Patriation Reference*, *supra* note 94 at 799.
[390] See *9147 Quebec*, *supra* note 202 at paras 28 and 37.
[391] See page 63, *above*, for further discussion of the facts of this case.
[392] See *9147 Quebec*, *supra* note 202 at para 9.

purposive approach".[393] Thus, the "Justice Belobaba approach" not only ignores the constraints on constitutional interpretation but, if accepted, it renders the purpose of section 2(b) uncertain and unpredictable as it may protect only the *freedom* of expression in some cases and both the *freedom* and the *impact* in others.

A further difference between section 2(b) and section 3 of the *Charter* is that section 2(b) is subject to the notwithstanding clause whereas section 3 is not. The notwithstanding clause is set out in section 33 of the *Charter* and allows parliament or the legislature to "expressly declare… that [an] Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of [the] Charter".[394] Therefore, to use *Toronto v Ontario* for example, if effective representation exists within section 2(b) of the *Charter* as held by Justice Belobaba, Queen's Park could expressly declare that the *BLGA* will operate notwithstanding the infringement of section 2(b). Civic democracy would not be protected in this instance as the *BLGA* would still have served its purpose for the 2018 election in Toronto, and despite the operation of the notwithstanding clause expiring after 5-years, it is renewable indefinitely. An argument could be made that a convention against invoking section 33 of the *Charter* when civic democracy is concerned would provide some protection; however, the Supreme Court of Canada has held that constitutional conventions do not crystallize into law and, therefore, leaving civic democracy in an uncertain state as cities would continue to subject to the plenary power of provincial legislatures.

Second, protecting democratic civic elections through section 2(b) of the *Charter* would limit the protection to certain forms of interference. At the ONCA, the dissenting opinion would have found that the *BLGA* infringed section 2(b) and could not be saved by section 1 of the *Charter*. MacPherson JA's dissenting opinion was limited to mid-election destruction of the electoral wards: "[f]ree expression in this context would be meaningless if the terms of the election, as embodied in the legal framework, could be upended mid stream."[395] Thus, this approach is limited to mid-election interference, although it could be extended to other forms of interference through constitutional interpretation in subsequent and unrelated cases. As a result of this, every potential

[393] *Ibid* at para 10.
[394] *Supra* note 1 at s 33(1).
[395] *Toronto v Ontario (ONCA)*, *supra* note 3 at para 123.

infringement would have to be dealt with through court processes on a case-by-case basis. There would be no legal certainty or predictability in relation to what is and what is not protected unless interference was constitutionally challenged in court. [396] This could have the undesirable effect of the court limiting civic democracy in future court challenges by finding other forms of interference do not infringe section 2(b) or by identifying limitations pursuant to section 1 of the *Charter*. A further discussion of this issues continues in Chapter 6.[397]

Third, as with the first two alternative approaches, the provinces would remain entirely in control of cities. Provinces could remove the democratic election process for cities altogether to avoid constitutional challenges. MacPherson JA's dissenting opinion held that "a government is generally not required to provide platforms for expression, but where it chooses to provide one, it must do so in a manner that complies with the *Charter*."[398] Thus, freedom of expression would only be breached if provincial governments continue to provide cities with a democratically elected city council. Thus, the Justice Belobaba approach could have the unintended consequence of setting the autonomy and democratic legislative role of city councils back as opposed to protecting it within the Constitution.

Merely reading effective representation into section 2(b) of the *Charter* does not grant city councils the safeguards required to truly exercise their democratic function. Cities would continue to be creatures of the province in every other regard. Parliamentary privilege or an equivalent thereof would not exist and the powers of cities could continue to be limited or abolished by provinces.[399] In addition, this approach would not stop provincial actors from threatening to remove funding from cities if the city council's views do not align with the provincial interest as city councils would not have constitutionally protected legislative or revenue raising powers.

[396] See e.g. *Secession Reference*, *supra* note 183 at para 53.
[397] See page 93, *below*, for this further discussion.
[398] *Toronto v Ontario (ONCA)*, *supra* note 3 at para 123. See also *Haig*, *supra* note 225 at 1041 and *Siemens*, *supra* note 225 at paras 41-42.
[399] See e.g. Valverde, *supra* note 43 at 24. See also *East York (ONSC)*, *supra* note 47 at 14.

5.2.1.4 Conclusion: Reading in Approaches

While these three reading-in approaches are an attempt to take a step in the right direction, they may not serve the purpose which they intend. These approaches may have the adverse and unintended effect of provinces limiting the autonomy of cities to retain control, reverting back to an undiluted application of Dillon's rule. To properly protect civic democracy from interference, a formal amendment to the Constitution is required to avoid the application of the notwithstanding clause and the ability of provinces to entirely abolish city councils or reduce their autonomy. Further, these approaches are not supported by living constitutionalism as they are not designed to ascertain the purpose of the relevant provisions, but rather to add an additional purpose not protected by the written text of the Constitution or the *Charter* – protecting the right to vote for and be effectively represented by a city council.

Should the Supreme Court of Canada adopt one of the reading in approaches discussed in this subchapter, its interpretation becomes as binding and supreme as the text of the Constitution. Such a decision would allow the Supreme Court of Canada to re-frame the Constitution as it sees fit, based on unconstrained judicial interpretation. Consequentially, adopting one of the reading in approaches could open the floodgates to constitutionally protected rights that exist outside the text of the Constitution, causing significant uncertainty in the text application constitutional provisions. As a result, Canadian democracy would be diluted as the difficult, but democratic, formal amendment procedures would be subordinated to constitutional challenges to identify new protected rights.

5.2.2 Amending Provincial Constitutions

Provincial constitutions are subject to the amendment procedure set out in section 45 of Part V of the *Constitution Act, 1982*. It has been suggested by Kristin Good, an Associate Professor at the Dalhousie University Department of Political Science, that constitutional status could be granted to cities through amending provincial constitutions. While amending provincial constitutions can be characterized as an amendment to the Constitution, provincial constitutions would not provide the same level of constitutional protection as the Constitution of Canada. Therefore, amending provincial constitutions is, in my opinion, an inferior alternative approach to amending the Constitution of Canada.

Provincial constitutions are not well developed in Canada. Generally, they do not entrench rights for citizens in addition to those set out in the Constitution. Nelson Wiseman has stated that "[p]rovincial constitutions barely dwell in the world of the subconscious. They are too opaque, oblique, and inchoate to rouse much interest, let alone passion."[400] Despite Nelson Wiseman's statement which is, in my view, accurate, the Saskatchewan Court of Appeal has held that protections contained within provincial constitutions are "as much a part of the Constitution of Canada as is the *Charter*."[401] Thus, if civic democracy was protected through provincial constitutions, those protections would be as much a part of the Constitution as the *Charter,* which protects democratic rights for citizens in Parliament and legislative assemblies. Pursuant to section 45 of the *Constitution Act, 1982,* however, provincial constitutions remain at subject to amendment by the relevant provincial legislature by majority vote.

To date, no provincial legislatures have amended their constitution to protect civic democracy; however, provincial constitutions have been amended by regular legislation,[402] and it is indeed a possible approach. Kristen Good has argued that this option is preferable to a formal amendment of the Constitution because it is feasible, flexible, respects provincial autonomy, and it would permit interference if it is warranted.[403] This approach argues that, because cities are constituted through provincial laws, it is more appropriate to entrench democratic rights into provincial constitutions.[404] The gist of this approach is that Canadian provinces could declare that municipal acts and city charters are part of their provincial constitutions.[405] Among other concerns with this approach, amending provincial constitutions still leaves cities vulnerable to provincial interference. As provincial constitutions can be amended by a simple majority vote of the provincial legislature, it would be difficult to classify civic democracy as "entrenched" in the Constitution. All this approach creates is a minor hurdle for provincial legislatures to overcome if they want to pass legislation that effects, or interferes with, civic democracy.

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[400] Nelson Wiseman "Clarifying Provincial Constitutions" (1996) 6:2 National J of Constitutional L 269 at 270.
[401] *Saskatchewan v Good Spirit School Division No. 204*, 2020 SKCA 34 at para 9, 445 DLR (4th) 179 [*Good Spirit*].
[402] See Kristen R. Good, *The Fallacy of the "Creatures of the Provinces" Doctrine: Recognizing and Protecting Municipalities' Constitutional Status* (Toronto: University of Toronto IMFG Papers on Municipal Finance and Governance No. 46, 2019) at 27.
[403] *Ibid* at 27-28.
[404] *Ibid* at 15.
[405] See Flynn, "Indigenous Rights and Municipal Autonomy", *supra* note 74 at 120 where the author alludes to this argument that constitutional status for Toronto could be obtained by creating a City Charter which "would be enshrined in the *Constitution* [*sic*] and would require both federal and provincial amendment going forward."

This approach further argues that "manner and form" provisions could be used secure the constitutional status of cities in provincial constitutions.[406] "Manner and form" provisions are self-imposed limitations on a legislative body's authority.[407] The argument here is that provincial legislatures could use a "manner and form" provision to ensure consultation with city councils occur prior to amending the relevant provisions of the provincial constitution or the ordinary statute that amends the provincial constitution.[408] Archer and Sobat explain that manner and form provisions can be circumvented through a two step process.[409] First, the legislature would repeal the manner and form provision and the section subject to the manner and form provision. Second, the legislature subsequently makes the substantive amendment it desires.[410] Speculation has arisen that subjecting a manner and form provision to a manner and form provision may fore-close this two step option;[411] however, whether these provisions are valid remains uncertain.[412] As a result, the effectiveness of a "manner and form" provision in provincial constitutions is uncertain and may not protect cities from the plenary power of provincial legislatures.

Quebec's failed Bill 196, which proposed an amendment formula for Quebec's provincial constitution, is illustrative. While the Bill failed, there was uncertainty as to whether the proposed amending formula would bind the legislature and future legislators. Nelson Wiseman explained that the, "evolving consensus among constitutional authorities is that special majority and other rules, particularly concerning human and minority rights, may indeed be legally binding. This is still, however, a disputable notion and not free from doubt".[413] Further uncertainty is created as, generally, a legislature attempting to bind a future legislature or government is considered impermissible under the British Parliamentary system.[414] To some extent, manner and form provisions allow legislatures to get around binding future legislatures, however, as Wiseman notes,

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[406] See Good, *supra* note 402 at 20.
[407] *Ibid.*
[408] See Archer & Sobat, *supra* note 9 at 17 where the author explains that "[m]anner and form refers to a statutory requirement that one legislature seeks to impose on future legislatures in the form of either preconditions to inhibit, or permissions to facilitate, the enactment, amendment, or repeal of certain statutes.
[409] *Ibid.*
[410] *Ibid.*
[411] *Ibid.*
[412] See Des Rosiers, *supra* note 137 at 43 where the author explains that manner and form provisions can also be mandatory or directory and the court must determine whether the manner and form provision is mandatory or not.
[413] Nelson Wiseman "The quest for a Quebec constitution" (2010) 40:1 American Rev of Can Studies 56 at 59 [Wiseman, "Quest for a Quebec Constitution"]. See also Good, *supra* note 402 at 22.
[414] See Good, *supra* note 402 at 23 and 25.

this is not free from doubt.[415] Thus, there is no certainty in the rights granted to candidates and voters in civic elections based on this approach. Should this approach be employed, and civic democracy be interfered with, it is likely to suffer through a long court battle as in *Toronto v Ontario*, ultimately rendering the interference moot through the passage of time.

Further, such an approach creates many uncertainties which in turn, raise questions as to whether civic democracy would truly be protected. First, simply elevating municipal acts to provincial constitutional status also entrenches the provisions that allow certain provinces, or agents thereof, to interfere with elected officials. Given that the law has not changed, but merely been "elevated" to provincial constitutional status, it is likely that the same forms of interference would continue to be constitutional absent an amendment to municipal acts removing these provisions. Therefore, the effect of this approach may also include constitutionalizing interference with civic democracy in the relevant province.

In addition, while the LGIC of each province acts on the advice of the provincial cabinet, they are appointed by the Governor General pursuant to sections 58 and 59 of the *Constitution Act, 1867*. Further, section 41 of the *Constitution Act, 1982*, which sets out the unanimous formal amendment procedure, states that an amendment to the Constitution in relation to the Lieutenant Governor "may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province."[416] Despite the fact that the role of the LGIC is set out in provincial legislation, the unanimous consent procedure must be followed to constitutionalize the role of the LGIC as set out in provincial legislation. Thus, if provincial legislatures were to merely ascend municipal legislation to constitutional status, section 45 would not be the only amendment procedure that applies, increasing the unlikelihood or desire of provincial legislations to amend their provincial constitutions. In addition, provincial legislatures may remove the role of the LGIC in removing city councillors and invest that power in a minister, or the legislative assembly, in order to avoid section 41 of the *Constitution Act, 1982*, while continuing to allow interference with democratic civic elections or elected city councillors.

[415] See Wiseman, "Quest for a Quebec Constitution", *supra* note 413 at 59.
[416] *Supra* note 1 at s 41(a).

Gerald Frug has explained that, in the context of the unrestrained power of American states over cities, "most state constitutions have been amended to grant cities 'home rule,' but local self determination free of state control is still limited even in those jurisdictions to matters 'purely local' in nature. These days, little if anything is sufficiently 'local' to fall within such a definition of autonomy. State law, in short, treats cities as mere 'creatures of the state.'"[417] Further, "[f]irm state control of city decision making is supplemented by federal restrictions on city power. The Federal Constitution… has been construed to limit city power."[418] Thus, granting protections in provincial constitutions may still limit the democratic legislative role of city councils through the text of the provincial constitution or through the Supreme Court of Canada interpreting the provisions of the Constitution of Canada to limit a city council's powers as codified in a provincial constitution.[419]

While Gerald Frug made this proposition in 1980, it is still relevant in the American and Canadian constitutional context. For example, New York's constitution provides New York City with "home rule" status and the ability to pass its own legislation.[420] The legislation passed by New York City's city council, however, can be "repealed, diminished, impaired or suspended only by an enactment of a statute by the legislature with the approval of the governor."[421] As in Canada, this allows the state to repeal or limit the powers of city councils if it is in the state interest. Thus, given the provincial legislatures' jealous guarding of city councils,[422] it is likely that amending provincial constitutions would continue to allow them to limit or repeal the legislative powers of a city council.

[417] Frug, *supra* note 75 at 1062-63.
[418] *Ibid* at 1063.
[419] See *Good Spirit, supra* note 401 at para 9 where the Saskatchewan Court of Appeal holds that "one part of the constitution cannot be used to invalidate another part of the constitution" and that the protections afforded to separate schools in Saskatchewan's provincial constitution are "as much a part of the Constitution of as is the *Charter*." Thus, provincial constitutions must be consistent with the *Constitution Act, 1867* and *Constitution Act, 1982* as they can not invalidate, or amend based on section 52(3) of the *Constitution Act, 1982*, provisions of the Constitution.
[420] See N.Y. CONST. art IX s. 2(b)(1). Further, see s 1 of article IX for the provision constitutionalizing democratic civic elections in New York State (*Ibid*).
[421] *Ibid.*
[422] See Dewing, Young & Tolley, *supra* note 8 at 1. See also Valverde, *supra* note 43 at 38.

5.3 Conclusion: Alternative Approaches

The alternative approaches discussed in this chapter are laudable and a step forward in attempting to constitutionally protect civic democracy; however, they fall short. While they might assist in some aspects of civic democracy, namely democratic civic elections, provinces would continue to have plenary power over cities and could remove democratic civic elections and limit the legislative powers of city councils. As mentioned, this could have the opposite effect of the intention, reverting back to an undiluted application of Dillon's rule and abolishing or limiting the autonomy of city councils. In addition, even if effective representation is protected by section 2(b) the notwithstanding clause would permit provinces to continue to interfere with civic democracy.

In addition, the proper application of living constitutionalism does not support the reading in approaches. Instead of ascertaining the purpose of the relevant provision through living constitutionalism, the reading in approaches ask the Supreme Court of Canada to read in a new purpose that is not reflected in the text of the Constitution or the *Charter*, respectively. As a result, living constitutionalism is constrained and is not a panacea for future constitutional protections. Thus, a formal amendment to the Constitution is required to protect civic democracy from provincial interference.

Further, as with New York State's constitution, even if provincial legislatures are willing to amend their constitutions to protect civic democracy, it is likely they would continue to jealously guard their plenary power over city councils and constitutionalize provisions that allow interference with the deliberations and decision making of city councils. Thus, while amending provincial constitutions is an option, it would not provide the required legal certainty and predictability as would a formal amendment to the Constitution of Canada.

6. A FORMAL AMENDMENT IS REQUIRED

On top of relying on unconstrained constitutional interpretation and circumventing the formal amendment procedure contained in the *Constitution Act, 1867*, there are other reasons why alternatives to a formal constitutional amendment would not serve their intended purpose. First, alternative approaches do not provide the certainty and predictability that civic democracy requires, and the written Constitution provides.[423] Second, a formal amendment to the Constitution expresses constitutional values whereas the alternative approaches do not. Lastly, the constitutional theory of the principle of subsidiarity, which the Supreme Court of Canada has adopted, supports a formal amendment to the Constitution. In this chapter, I will elaborate on each of these three arguments, in turn, in order to further support my thesis that seeking a constitutional amendment is the preferable course of action to address the legislative role of cites and the councils thereof.

6.1 Civic Democracy: Uncertainty and the Supreme Court of Canada

"The Supreme Court of Canada in the past few years has demonstrated a remarkable willingness to review its own decisions and to reach different conclusions."[424] For example, if Toronto is successful in *Toronto v Ontario (SCC)* and democratic civic elections are protected by the Constitution through the Supreme Court of Canada's interpretation, there is little assurance that those rights would not be limited in the future as a result of subsequent, unrelated constitutional challenges. Based on previous cases, there are two ways the Supreme Court of Canada could dispose of or limit protection of civic democracy within the Constitution. The first involves new evidence that might be presented in the context of a subsequent constitutional challenge and the second relates to unrelated cases that may limit the rights originally articulated by the Supreme Court of Canada. Both of these result in significant uncertainty in relation to how

[423] See *Secession Reference*, *supra* note 183 at para 53.

[424] Thomson Irvine "Changing Course or Trimming Sails? The Supreme Court Reconsiders" in David A Wright and Adam M. Dodek (eds), *Public Law at the McLachlin Court* (Toronto, Ontario: Irwin Law, 2011) at 1. For some examples see: (1) *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 which revisits *Reference re ss 193 and 195.1(1)(C) of the criminal code (Man)*, [1990] 1 SCR 1123, 68 Man R (2d) 1; (2) *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 which revisits *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342; and (3) *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 which revisits *RWSDU v Saskatchewan*, [1987] 1 SCR 460, 56 Sask R 227 which was released concurrently with the *Public Service Employee reference*, *supra* note 182.

civic democracy will be treated by the Supreme Court of Canada in the absence of a formal amendment of the Constitution.

Below, I set out two instances where the Supreme Court of Canada has meaningfully modified their previous decisions. The cases of *RJR-MacDonald Inc. v Canada (Attorney General)*[425] followed by *Canada (Attorney General) v JTI-Macdonald Corp*[426] and the *Remuneration Reference* followed by *Provincial Court Judges' Association of New Brunswick v New Brunswick (Minister of Justice)*[427] are used to demonstrate how, even if the Supreme Court of Canada were to interpret the Constitution to protect democratic civic elections, there would still be a danger that the Court would subsequently release a decision effectively overturning their previous interpretation. Therefore, a formal amendment to the Constitution is preferable due to the certainty and predictability it would create for citizens, provincial legislatures and the judiciary.

The Supreme Court of Canada has, in the past, come to different conclusions as to whether an infringement of section 2(b) can be saved by section 1 of the *Charter* depending on the factual record and the historical context of the litigation. *RJR* and *JTI* are illustrative. In *RJR*, the Supreme Court of Canada struck down federal advertising regulations that "broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required unattributed warning labels by affixed on tobacco product packaging".[428] The regulations were held to be a violation of section 2(b) and could not be saved under section 1 of the *Charter* as a blanket prohibition was not minimally impairing, nor had the government adduced evidence to show that less intrusive regulations "would not achieve its goals as effectively as an outright ban".[429] As a result, the federal tobacco regulations were struck down.

Twelve years later, in *JTI*, the Supreme Court of Canada held that section 1 saved the section 2(b) *Charter* infringement as a result of similar tobacco regulations. Thomson Irvine explains the differences between *RJR* and *JTI* came down to the evidentiary record:

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[425] [1995] SCJ No 68, 127 DLR (4th) 1 [*RJR*].
[426] 2007 SCC 30, [2007] 2 SCR 610 [*JTI*].
[427] 2005 SCC 44, [2005] 2 SCR 286 [*Provincial Court Judges Association*].
[428] *JTI*, *supra* note 426 at para 6.
[429] *RJR*, *supra* note 425 at para 152.

> In addition to the technical difference between the first and second federal tobacco acts, a key difference was the factual records before the Court in each case. In the first case in 1995, the sufficiency of evidence to provide justification under section 1 was very much in issue. In the second case in 2007, the federal Attorney General at trial had produced a voluminous evidential record all aimed at proving the harm that tobacco causes, the fact that young people are particularly susceptible to picking up the habit, and the clear linkage between tobacco advertising and inducing young people and other vulnerable people to start smoking.[430]

Thus, government action that was found to infringe a *Charter* right that was not saved under section 1 may be saved under section 1 of the *Charter*, in a subsequent challenge based on the factual record in a subsequent constitutional challenge. While *JTI* does not overrule substantive *Charter* rights, the evidentiary record in *Toronto v Ontario* raises the same concern as the Supreme Court of Canada's decisions in *RJR* and *JTI.*

In *Toronto v Ontario (ONSC)* Justice Belobaba noted that the Ontario government tendered little evidence establishing why the *BLGA* must be passed in the middle of an election period. Summarizing Justice Belobaba's finding on minimal impairment cannot do it justice:

> [76] Dealing with the second objective, voter parity, and giving the Minister the benefit of the doubt that he understood the primary concern is not voter parity but effective representation, there is no evidence of minimal impairment. The Province's rationale for moving to a 25-ward structure had been carefully considered and rejected by the TWBR [Toronto Ward Boundary Review] and by City Council just over a year ago. If there was a concern about the large size of some of the City's wards (by my count, six wards had populations ranging from 70,000 to 97,000) why not deal with these six wards specifically? Why impose a solution (increasing all ward sizes to 111,000) that is far worse, in terms of achieving effective representation, than the original problem? And, again, why do so in the middle of the City's election?
>
> [77] Crickets.
>
> [78] I am therefore obliged to find on the evidence before me that the breaches of s. 2(b) of the Charter as found above cannot be demonstrably justified in a free and democratic society and cannot be saved as reasonable limits under s. 1.[431]

[430] Irvine, *supra* note 424 at para 5.
[431] *Toronto v Ontario (ONSC)*, *supra* note 3 at paras 76-78.

Given the lack of evidence justifying an infringement of section 2(b) under section 1 of the *Charter* in *Toronto v Ontario*, there is a strong possibility that better and thorough evidence may render a different conclusion on a subsequent *Charter* challenge if the Supreme Court of Canada finds in favour of Toronto. Thus, while *RJR* and *JTI* did not come to different conclusions on the substantive *Charter* right argument, the effect of the evidence tendered for a section 1 analysis may protect democratic civic elections in some contexts, while not in others. For example, Macpherson JA's dissenting opinion in *Toronto v Ontario (ONCA)* would have found that the *BLGA* infringed section 2(b) and could not be saved under section 1 in the specific context of mid-election interference.[432] Thus, while mid-election interference would be constitutionally protected based on MacPherson J's dissent, it may not be in other subsequent constitutional challenges that do not involve mid-election interference. In my view, such context specific interpretation does not provide legal certainty or predictability in democratic civic elections and therefore, civic democracy.

Second, the Supreme Court of Canada has provided significant deference to judicial compensation commissions only to scale that deference back in subsequent cases. In the *Remuneration Reference*, Chief Justice Lamer held that, "governments were constitutionally required to set up commissions on a regular basis to hear submissions on the appropriate level of compensation."[433] Justice Lamer went on to hold that the decisions of these commissions were to have a "meaningful effect" on the judicial compensation process.[434] This means that governments would be required to follow the recommendations of the committees unless there was a rational basis for departing from the commission's recommendation.[435] If government did not follow the commission's recommendation, it would be required to justify its decision in a court of law and show that the government had a legitimate reason for not following the recommendation of the committee and that the reason relied on a reasonable factual foundation.[436]

[432] See *Toronto v Ontario (ONCA)*, *supra* note 3 at para 114.
[433] *Remuneration Reference*, *supra* note 248 at para 147. See also Irvine, *supra* note 424 at 7.
[434] *Ibid* at para 175. See also Irvine, *supra* note 424 at 7.
[435] *Ibid* at para 183. See also Irvine, *supra* note 424 at 7.
[436] See *Remuneration Reference*, *supra* note 248 at para 147. See also, Irvine, *supra* note 424 at 7.

Thomson Irvine explains that Chief Justice Lamer's strong wording "suggested that only very exceptional circumstances could justify a government in refusing to follow the recommendations of a judicial compensation commission."[437] Further, Irvine explains that "[i]t appeared that the commissions might in practice amount to a form of binding arbitration, which governments could only refuse to follow in very rare cases."[438] Lamer J's hope was that this process would depoliticise the issue of judicial compensation.[439] In subsequent cases, however, the Supreme Court of Canada has pulled back from this deferential approach to judicial compensation.

In *Provincial Court Judges' Association*, the Supreme Court of Canada, unanimously, made it clear that the commission process is consultative in nature and that "[g]overnments retain the ultimate authority to determine if they will accept the recommendations of a commission."[440] Further, the Supreme Court of Canada noted that the process set out in the *Remuneration Reference* had not depoliticised the judicial compensation process and, in several provinces, had in fact exacerbated friction between the government and judges, leading to litigation.[441] Thomson Irvine explains that, "[t]he court identified uncertainty about the scope of the powers of government under the principles set out in the [*Remuneration Reference*] as the cause of the litigation."[442] In the end, the Supreme Court of Canada held that exceptional circumstances were not required to depart from the commission's recommendation and although the Supreme Court of Canada stated it was following the principles set out in the *Remuneration Reference*, "…the net effect of the decisions was to return considerable discretion to the elected branch of government in determining judicial compensation."[443] Thus, the Supreme Court of Canada fundamentally scaled back the deference owed to judicial compensation commissions based on the uncertainty caused by the decision in the *Remuneration Reference*.

Notably, in the *Remuneration Reference*, the Supreme Court of Canada also relied on the unwritten constitutional principle of judicial independence, holding that the Constitution has

[437] Irvine, *supra* note 424 at 8.
[438] *Ibid.*
[439] *Ibid* at 7 citing *Remuneration Reference*, *supra* note 248 at para 147.
[440] Irvine, *supra* note 424 at 8.
[441] See *Provincial Court Judges Association*, *supra* note 427 at para 12.
[442] *Ibid* at para 22.
[443] Irvine, *supra* note 424 at 10.

evolved over time and "judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country."[444] Further, the Supreme Court of Canada held that "judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*."[445] Additionally, the Supreme Court of Canada noted that "an unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication"[446] infringing judicial independence, an unwritten constitutional principle. Therefore, the Supreme Court of Canada relied, at least in part, on an unwritten principle to limit government conduct, as Toronto has requested in *Toronto v Ontario*, only to scale back the limitations, and arguably the power of unwritten principles, in *Provincial Court Judges Association.* Further, and as previously mentioned, since the *Remuneration Reference* the Supreme Court of Canada has constrained the use of unwritten constitutional principles in, *inter alia*, *Imperial Tobacco*, *Christie* and *9147 Quebec*. Thus, in a sense, *Toronto v Ontario* has revived a fairly well-settled debate over the use of unwritten principles and constitutional interpretation, which, as a result of the Supreme Court of Canada's willingness to review and overturn its own decisions, creates uncertainty as to whether or not the Supreme Court of Canada will uphold those constraints, or accept a broader, unconstrained interpretation of the application and effect of unwritten principles.

As mentioned, applying the alternative approaches discussed in Chapter 5 would cause considerable uncertainty in the written text of the Constitution. If the democratic right to vote in a civic election, including effective representation within a city council, is read into section 3 of the *Charter* or section 92(8) of the *Constitution Act, 1867*, provincial legislatures would continue to have plenary power over municipal institutions. Like the decision in the *Remuneration Reference*, the uncertainty around what provincial legislatures can and cannot do would be likely to lead to further litigation surrounding civic democracy. For example, and as mentioned, the repeal or limitation of a legislative power may amount to an infringement of a citizen's effective representation within a city council, particularly when the repeal or limitation affects a city councillor's ability to fulfil an election promise. As in *Provincial Judges Association*, it is entirely

[444] *Supra* note 248 at 106.
[445] *Ibid* at 109.
[446] *Ibid* at 145.

possible that the Supreme Court of Canada could detract from the rights previously granted to citizens, investing further discretion in the provincial governments to govern city councils and the civic election process, diluting effective representation.

Thus, the Supreme Court of Canada's willingness to review, reconsider and disagree with their previous decisions creates significant uncertainty for civic democracy in the absence of a formal amendment to the Constitution. Past decisions of the Supreme Court of Canada show that this is a real concern and that more thorough evidence may result in an infringement of civic democracy being saved by section 1 even if effective representation is protected by section 2(b). Further, if Toronto is successful at the Supreme Court of Canada, subsequent cases could limit citizens right to effective representation based on the uncertainty or effect of the Supreme Court of Canada's decision in *Toronto v Ontario*.

6.2 Expressive Function of Formal Amendments

Richard Albert argues that formal amendment rules "serve the underappreciated function of expressing constitutional values."[447] An informal amendment to the Constitution, or developing provincial constitutions to include civic democracy, does not express the same values as a formal amendment to the Constitution. As argued below, formally amending the Constitution to protect civic democracy recognizes cities as valuable, or even fundamental, to Canada's national identity and secures the position of cities as a recognized and important level of government.

Albert's analysis is limited to the formal amendment rules expressing constitutional values, and not formal amendments themselves.[448] In my view, entrenching new provisions protecting civic democracy in the Constitution through a formal amendment clearly expresses the constitutional value thereof. Coupled with the difficulty of the general formal amendment procedure, a formal amendment articulates an important message to society at large. In essence, a formal amendment shows that written provisions of the Constitution contain significant value as they are protected by the formal amendment rules, whereas the alternative approaches discussed in Chapter 5 are not. An argument could be made that provincial constitutions are protected by a

[447] Albert, "Expressive Function of Amendment Rules", *supra* note 254 at 227
[448] *Ibid* at 229.

formal amendment rule, however, as discussed, section 45 of part V of the Constitution allows provinces to amend their constitutions through ordinary statutes, which may express value in civic democracy, but does little to protect it.

The proposition in the preceding paragraph is supported by Tom Ginsburg who explains that "[t]he symbolic or expressive function of constitutions emphasizes the particularity of constitution-making. It is We the People that come together, and so the constitution embodies our nation in a distinct and local way different than other polities."[449] Ginsburg goes on to explain that:

> The mode by which constitutions carry out these functions is familiar. Constitutions work through entrenchment, providing an enduring set of foundational rules, structuring and facilitating normal politics in a particularistic way that reflects local values.[450]

Thus, the written text of the Constitution codifies a society's fundamental ideals and structures.[451] With living constitutionalism as the primary constitutional interpretation doctrine in Canada, the written text may broaden to give meaning and purpose to provisions of the Constitution; however, it is the written text that expresses Canada's values. To properly respect the democratic legislative role of cities in Canada and the right of citizens to vote and be effectively represented by a city council, a formal amendment to the Constitution is required.

In contrast, Mark Tushnet, a Professor of constitutional law at Harvard Law School, has noted that "constitutions, both in their entrenched institutional arrangements and in the doctrines that emerge from their interpretation, 'are ways in which a nation goes about defining itself.'"[452] Based on this position, the alternative approaches based on unconstrained constitutional interpretation would express the same value as a formal amendment. I argue that it is the role of Parliament and the legislative assemblies, whose members are democratically elected by Canadian citizens, to define Canada's national values. To decide otherwise, grants the Supreme Court of

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[449] Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law" in Susan Rose-Ackerman & Peter L Lindseth, eds, *Comparative Administrative Law* (Cheltenham: Edward Elgar, 2010) at 118. See also Albert, "Expressive Function of Amendment Rules", *supra* note 254 at 238.
[450] Ginsburg, *supra* note 449 at 118.
[451] See Albert, "Expressive Function of Amendment Rules", *supra* note 254 at 239.
[452] *Ibid* at 237.

Canada a legislative ability that is fundamental to defining Canada's national values that it should not possess.[453] In conjunction with the uncertainty of the alternative approaches as discussed in Chapters 5 and the willingness of the Supreme Court of Canada to overturn its previous decisions, informal constitutional amendments based on judicial interpretation do not express the same constitutional values as a formal amendment. In the context of civic democracy, a formal amendment not only provides legal certainty and predictability in the application of the Constitution but also the certainty required to allow city councils to properly exercise their democratic legislative function and effectively represent their constituents. Ironically, should the Supreme Court of Canada provide constitutional protection for democratic civic elections in *Toronto v Ontario*, it ignores the democratic process that the formal amendment rules contemplate,[454] arguably obstructing democracy.

6.3 The Principle of Subsidiarity

The principle of subsidiarity was adopted by the Supreme Court of Canada in a 2001 case relating to environmental protection.[455] In the writer's opinion, to properly respect the principle of subsidiarity, a formal amendment to the Constitution is required. This subchapter will begin with a brief explanation of the principle of subsidiarity, followed by an explanation of why a formal amendment is needed.

In *Spraytech* the Supreme Court of Canada described the principle of subsidiarity as "the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, local distinctiveness, and to population diversity."[456] The Supreme Court of Canada further

[453] See *Baier*, *supra* note 135 at para 39.
[454] See Albert, "Expressive Function of Amendment Rules", *supra* note 254 at 230-231
[455] See *114957 Canada Ltee (Spraytech, Societe d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*].
[456] *Ibid* at para 3. See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 276 where the author describes this principle as "the smallest possible social or political entities should have all the rights and powers they need to regulate their own affairs freely and effectively" quoting Eugénie Brouillet, *Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?: Proceedings from Osgoode's Annual Constitutional Cases Conference, Toronto, 2011* (Toronto: Supreme Court Law Review in association with Osgoode Hall Law School, 2011) at 605 and as a "principle of social organization that prescribes that decisions affecting individuals should, as far as possible, be made by the level of government closest to the individuals affected" quoting Peter Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, 2002) at 114 (*ibid*).

states that *Spraytech* arose in an era where governance was often viewed through the lens of this principle.[457] Since *Spraytech* was decided in 2001, the legislative and national role of cities have only expanded.[458] This raises the important question of how the principle of subsidiarity applies when interpreting the text of the Constitution.

The Supreme Court of Canada has held that the principle of "subsidiarity does not override the division of powers in the *Constitution Act, 1867*."[459] The Court added that "[s]ubsidiarity might permit the provinces to introduce legislation that complements the *Assisted Human Reproduction Act*, but it does not preclude Parliament from legislating on the shared subject of public health."[460] These holdings limit the principle of subsidiarity to an interpretative tool in determining which constitutionally recognized level of government can pass legislation pursuant to the division of powers contained in sections 91 and 92 of the *Constitution Act, 1867*.[461] For example, in the *Human Reproduction Reference* Justices LeBel and Deschamps explained that, "[i]f subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power."[462] Therefore, the principle of subsidiarity does little to entrench the role of city councils within the Constitution without a formal amendment and applying the principle of subsidiarity without constitutional recognition of cities may have unintended consequences, as discussed below.

Without constitutional recognition and protection of legislative powers for city councils, the realistic effect of the subsidiarity principle is increased decentralization or offloading of regulation to city councils which may create significant problems. [463] First, the offloading or

[457] See *Spraytech*, *supra* note 455 at para 3.
[458] See Dewing, Young & Tolley, *supra* note 8 at 1. See also *United Taxi*, *supra* note 100 at para 6.
[459] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 72, [2010] 3 SCR 457 [*Assisted Human Reproduction Reference*].
[460] *Ibid.*
[461] *Ibid* at para 273 where Justices LeBel and Deschamps explains that "the principle of subsidiarity could apply, not as an independent basis for the distribution of legislative powers, but as an interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power".
[462] *Ibid.*
[463] See Hirschl, "Constitutionalism and the Megacity", *supra* note 27 at 222-223 where the author explains that "[t]he most powerful argument for subsidiarity as it applies to urban agglomeration and city power is the principle of decentralization. As Wallace Oates has written, 'public policy and its implementation should be assigned to the lowest level of government with the capacity to achieve its objectives. The theoretical underpinning here is twofold:

downloading of regulation to cities is not often accompanied by increased revenue raising powers.[464] The only current option for cities to raise revenue is increasing property tax rates or utility rates or beg for additional funding from upper levels of government. This is not a sustainable solution as cities are the closest level of government to roughly 81% of the population and national issues have a larger effect on cities than their smaller counterparts. Increasing the legislative role of city councils without granting them the tools required to effectively perform this role (or without a corresponding agreement by provincial governments to forego tax room), may overburden that tax base of cities. Thus, the principle of subsidiarity, in the writer's opinion, would only benefit city councils if the Constitution is formally amended to recognize the legislative role of city councils.

It may be argued that the principle of subsidiarity could be used as an unwritten constitutional principle to aid in interpreting the text of the Constitution; however, this argument suffers from a fatal flaw. Cities are not a constitutionally recognized level of government, resulting in subsidiarity applying only to Parliament and the legislative assemblies based on sections 91 and 92 of the *Constitution Act, 1867*. [465] Alexandra Flynn explains that " the idea that power should reside at the 'closest' level possible cannot be perceived in a technical or absolute manner; it is, instead, a substantive term that seeks to find the right 'fit' between the activity in question and the governing unit."[466] As city councils do not have constitutionally protected heads of legislative power, they can not be a "governing unit" that is considered in constitutional interpretation, unless the text of the Constitution, and therefore a constraint on living constitutionalism, is ignored. Constitutional recognition of city councils would therefore allow the principle of subsidiarity to

efficiency based (essentially, the idea that local government is best suited to do the job), and democratic governance (decision-making power should be allocated to a democratic unit that can successfully legislate in a way that is accountable and located as close as possible to those affected)'."

[464] See Dewing, Young & Tolley, *supra* note 8 at 17 which states: "[s]ince 1986, the provinces have been faced with cuts to federal funds and, as a result, they have tended to push the burden downward to the municipalities, which in turn pass the costs on to the consumers. This practice is often referred to as downloading. Graham, Phillips and Maslove argue that downloading may occur through one of two ways: either the government mandates that another level of government provide a specific service and does not provide compensation for doing so; or the government simply discontinues the provision of a service, leaving another level of government to fill the gap." See also Meehan, Chiarelli & Major, *supra* note 31 at 8, 9 and 31. See also Valverde, *supra* note 43 at 38.

[465] See Hirschl, "Constitutionalism and the Megacity", *supra* note 27 at 50 where the author explains that "[c]onstitutional concepts such as subsidiarity … are confined to constitutionally recognized polities." See also Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 276-277 for support for this proposition, as the author explains that, "federalism 'does not theorize cities' leaving them the responsibility of each individual province".

[466] Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 277.

operate as a useful interpretative tool in a division of power analysis. A prerequisite to this, however, is a formal amendment to constitutionally recognize city councils as a level of government.

As Canadian democracy is more complex than just the right to vote, a formal amendment could address numerous constitutional issues that city councils face such as: (1) limited revenue raising powers; (2) unenumerated heads of power; (3) the plenary power of provinces over cities; and finally, (4) the lack of democratic protection.[467] As mentioned, if the democratic rights of citizens to vote for and be effectively represented by their city councils are to be recognized by the Constitution, then city councils require the tools to properly exercise that democratic legislative function. If constitutional status for city councils is achieved, the principle of subsidiarity could determine the right fit for cities in the existing governmental structure based on a federalism analysis.

In addition, the alternative approaches discussed in Chapter 5 would provide limited and uncertain democratic protection for voters and candidates in civic elections but would not constitutionally recognize cities as a third level of government with constitutionally protected heads of legislative power. Thus, for the principle of subsidiarity to assist in interpreting jurisdiction to enact legislation, a formal amendment to the Constitution is required. As mentioned, constitutional interpretation is subject to constraints and ought not be used to read new purposes, or levels of government,[468] into the written text of the Constitution. To do so, would allow the Supreme Court of Canada to continually interpret the purpose of constitutional provisions to protect new rights which are not contained in the written text of the Constitution.

6.4 Conclusion: Requirement of Formal Amendment

As a result of the Supreme Court of Canada's willingness to review, reconsider and disagree with previous decisions the alternative approaches to a formal amendment create significant uncertainty for the future of civic democracy. The Supreme Court of Canada could find a previous infringement to be justified in the future, if better evidence is tendered in a subsequent

[467] See Valverde, *supra* note 43 at 38.
[468] See *Baier*, *supra* note 135 at para 39.

challenge. In addition, the Supreme Court of Canada could limit the right of civic democracy in future cases. A formal amendment to the Constitution would express to Canadian society that cities are a part of the nations governmental structure and identity, as well as solving numerous issues that cities face.

The alternative approaches discussed in Chapter 5 may provide protection, albeit limited and uncertain protection, for civic democracy but they do not address the other issues that a formal constitutional amendment can address. To properly exercise their democratic legislative function, city councils also require the tools necessary, such as constitutionally protected heads of legislative power and sufficient revenue raising powers and autonomy to effectively represent their constituents. While the principle of subsidiarity has the potential to play an interpretative role in finding the right fit for cities, a formal amendment of the Constitution is first required.

7. PROPOSAL TO AMEND THE CONSTITUTION AND OBSTACLES THEREOF

Formally amending the Constitution to recognize civic democracy is, admittedly, an ambitious goal. As discussed, the general amendment procedure requires provincial consent and provinces may not want to give up their power over cities. This Chapter discusses the issues faced in pursuing a formal amendment to the Constitution and outlines a proposed constitutional amendment that would grant democratic rights to city councils and their constituents. As effective representation requires city councils to possess the necessary tools, ancillary amendments to the Constitution would also be required, increasing the difficulty of a formal amendment.

While a wholesale amendment to the Constitution is, in my opinion, the only way to truly protect civic democracy, I go on to discuss the potential benefits of advocating for a formal amendment even if it is ultimately unsuccessful. In this regard, advocating for a formal amendment may result in civic democracy becoming an issue for the ballot box or in the alternative, may influence judicial interpretation similar to the principle of partial constitutional amendment. As previously mentioned, a proposed, partially complete or failed constitutional amendment has been considered as relevant information relating to democratic understandings that may influence judicial interpretation.[469] Thus, advocating for a formal amendment, even if it is unsuccessful, may influence judicial interpretation to protect civic democracy and, if constitutional protection for civic democracy is identified by the Supreme Court of Canada, protect that interpretation from being overruled in subsequent cases. In 7.1 of this Chapter, I set out a proposed amendment to the Constitution to, in my view, adequately protect civic democracy. Following my proposed amendment, in 7.2 of this Chapter I discuss the difficulty of formal amendment and the obstacles that may be faced in attempting to formally amend the Constitution.

7.1 Proposed Amendment

While an amendment to the provisions contained in the *Charter* is one method of entrenching civic democracy in the Constitution, I argue that, given the unique position of cities in Canada, other provisions in the Constitution provide analogous protection that would be more

[469] See Dixon, "Partial Constitutional Amendment", *supra* note 341 at 1.

beneficial for cities and their constituents. First, this subchapter will look at section 96 of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982* to propose an amendment to the Constitution to protect the right of citizens to vote for and be effectively represented in a city council.[470] Lastly, this subchapter will briefly discuss the ancillary amendments required to ensure city councils have the required tools to effectively act as an autonomous constitutionally recognized level of government.

7.1.1 Proposed Provision re Democratic Rights of Citizens

As previously discussed, section 96 of the *Constitution Act, 1867* grants the Governor General the right to appoint judges to the Superior Courts of the provinces.[471] In *Trial Lawyers Association*, the Supreme Court of Canada interpreted the purpose of this provision as protecting the inherent jurisdiction of the Superior Courts, and access to justice. In my opinion, section 96 of the *Constitution Act, 1867* and the drafting characteristics of section 35 of the *Constitution Act, 1982* could be used to inform a constitutional provision that protects democratic civic elections.

As mentioned, representative democracy provides citizens with one seat in the deliberations of government.[472] Thus, interference in the deliberations of a city council would infringe a citizen's right to be effectively represented therein. As the provision proposed below protects effective representation of civic voters within a city council, it has the added benefit of rendering provincial interference with city council decisions and the removal of elected city councillors unconstitutional. In addition, provincial legislatures would not be able to entirely remove the democratic civic election process as there would be a constitutional right for citizens to elect city councillors. Citizens would be effectively represented by their elected city officials, and if provincial actors threatened to pull funding as a result of a certain bylaw or resolution, a strong argument could be made that the provincial government has infringed the voters' right to be represented by their city councillor. Thus, entrenching this proposed provision would not only

[470] While outside the scope of this paper, there is no reason to believe that constitutional recognition of cities as a level of government would affect crown-indigenous relationships. In fact, recognizing cities as a level of government in the Constitution may have a positive impact as it may have the effect of settling the law on whether cities have a duty to consult. Regarding the uncertainty of the law in this area see *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at para 66-73, 354 DLR (4th) 696 and *Kwikwetlem First Nation v British Columbia*, 2021 BSCS 458 at para 22.

[471] See analysis starting on page 43 of this Thesis.

[472] See page 29, *above*, for a discussion of Canada's representative democracy.

protect democratic civic elections, but also elected city councillors from interference by upper levels of government outside of the election period.

As a result of the Supreme Court of Canada's interpretation of section 96 in *Trial Lawyers Association*, Parliament or the legislatures cannot pass laws that interfere with the inherent jurisdiction of the Superior Courts and access to justice. A similar constitutional provision could be adopted for city councils and to give meaning to the purpose of this provision, effective representation would be protected in the same manner that section 96 protects the inherent jurisdiction of Superior Courts and the judges thereof. Thus, any federal or provincial laws that unreasonably limits a citizen's right to vote in a civic election, and be effectively represented by the elected councillor, would be unconstitutional. This proposed provision would protect the right of citizens to vote in civic elections and the right of candidates to be elected through a democratic process similar to how section 96 of the *Constitution Act, 1867* protects the Governor General's ability to appoint Super Court Judges and protects the independence of those judges. In sum, entrenching democratic civic elections in the Constitution would have no purpose if Parliament or the provincial legislatures could "legislate away" effective representation within a city council, the same way that section 96 would have no purpose if Parliament or provincial legislatures could "legislate away" the inherent jurisdiction of Superior Court judges.

Of course, there may be pragmatic and reasonable limits on such a provision, but there are also pragmatic limits that have been read into section 3 of the *Charter*, such as jurisdictional limitations on who may vote in a provincial election.[473] This provision would also allow provinces to retain some control over civic elections by determining who is a registered voter and provide a process for civic elections that is consistent with democracy. As city councils are structured differently than Parliament or a legislative assembly, some provincial control over civic elections may still be desirable. As mentioned, there is no opposition or government-in-waiting to provide a check and balance on elected city councillors. Thus, absent the restructuring of city councils in their entirety, this provision respects the democratic rights of citizens and provides the provincial legislature with enough control over the civic election process to ensure city councils do not pass

[473] See *Frank v Canada*, *supra* note 131 at 61.

"self-serving" bylaws, while respecting the democratic rights of citizens to be effectively represented by a city council.

Further, an argument could be made that protection akin to parliamentary privilege is implicit in effective representation and therefore, to give effect to this proposed provision's purpose, privilege would be inherently protected. This argument is supported by Iacobuci J. of the Supreme Court of Canada who held that the central purpose of section 3, which protects effective representation, was to grant every citizen the right to "play a meaningful role in the selection of elected representatives, who, in turn, will be responsible for making decisions embodied in legislation."[474] Thus, in order to be effectively represented in a city council, elected city councillors must benefit from parliamentary privilege, or an equivalent thereof, free from civil or criminal liability and without the potential of being removed from a city council by the LGIC. Thus, constitutional interpretation may be used to fill a "gap" relating to parliamentary privilege that "flows by necessary implication" from the proposed provision discussed in this subchapter. Otherwise, the purpose of effective representation could be defeated.

Thus, section 96 of the *Constitution Act, 1867* provides an example of the constitutional provision that could influence and support a provision protecting a citizens' right to vote and be effectively represented within their respective city council. That being said, this proposed provision must be supplemented with further amendments to ensure that city councils have the necessary tools to act as a constitutionally recognized democracy. In addition, the effectiveness of this proposed provision would be dependent on future judicial interpretation. Regarding this, the drafting characteristics of section 35 of the *Constitution Act, 1982* provides analogous guidance.

While the purpose of section 35 is not directly applicable to civic democracy, in my opinion, the drafting characteristics of section 35 ought to inform the proposed provision protecting democratic civic elections in the sense that it would be open to further judicial interpretation. By way of background, section 35 of Part II of the *Constitution Act, 1982* recognizes the "…existing aboriginal treaty rights of the aboriginal peoples of Canada." This section was

[474] See *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 19 and 39-41, [2003] 1 SCR 912. See also *Fletcher v The Government of Manitoba*, 2018 MBQB 104 at paras 36-37, [2018] 10 WWR 352.

included in the Constitution in a manner that left the details for later interpretation as it does not refer to any specific rights held by aboriginal peoples in Canada other than those that "exist". Richard Ogden argues that "the enactment of section 35 in 1982 was a reconstitutive moment in the relationship between Indigenous and non-Indigenous legal systems in Canada, and that this enactment resulted in newly recognized rights."[475]

Richard Ogden further explains that the effect of section 35 goes beyond existing rights and has resulted in newly recognized rights.[476] Richard Ogden's position is supported by the Supreme Court of Canada decision in *Delgamuukw v British Columbia*[477] where the Lamer CJC held that "the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1)".[478] The Supreme Court of Canada has further held that "[a]lthough s. 35 protects "existing" rights, it more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities."[479] Thus, if a formal amendment to the Constitution to entrench the right to vote and be effectively represented in a city council is successful, many of the details, such as the application of parliamentary privilege, for example, could be left for later interpretation much like section 35 of the *Constitution Act, 1982*.

As with section 35, this proposal leaves significant room for judicial interpretation while protecting the fundamental purpose of the provision, being the democratic right for citizens to vote for and be effectively represented by their city council. With living constitutionalism as the prevailing principles of constitutional interpretation, this provision would allow democratic civic elections to change with time and allow the Supreme Court of Canada to determine what is and is not an infringement. Therefore, the judiciary may impose certain limits on the democratic rights held by citizens pursuant to this proposed provision but those limits cannot infringe on the underlying purpose of the provision, which is to protect the democratic rights of citizens to vote

[475] Richard Ogden, "'Existing' Aboriginal Rights in Section 35 of the *Constitution Act, 1982*" (2009) 88:1 Can Bar Rev 51 at 52.
[476] *Ibid*.
[477] [1997] 3 SCR 1010 at para 136, 153 DLR (4th) 193 [*Delgamuukw*].
[478] *Ibid* at 1093. See also *Mitchell v Minister of National Revenue,* 2001 SCC 33 at para 11, [2001] 1 SCR 911 where the SCC held, "the protection offered by section 35(1) also extends beyond the aboriginal rights recognized at common law." see also Ogden, *supra* note 475 at 53.
[479] *R v Powley*, 2003 SCC 43 at 282, [2003] 2 SCR 207.

for and be effectively represented in a city council. Further, this proposed provision would have the added benefit of not being subject to the notwithstanding clause or section 1 of the *Charter*. Thus, if a law infringes this proposed provision, it cannot operate notwithstanding the infringement or be saved pursuant to section 1.

Therefore, based on the drafting characteristics of section 35 of the *Constitution Act, 1982* and section 96 of the *Constitution Act, 1867*, the Constitution could be amended to grant citizens the right to a democratically elected city council and effective representation within a city council. Of course, the interpretation of the provision would be left to the courts, which could create uncertainty in civic democracy. However, employing a purposive and progressive interpretation, as the Supreme Court of Canada did in *Trial Lawyers Association* and solidified in *9147-0732 Quebec*, would protect the underlying purpose of the provision which is to protect citizens' right to a democratically elected city council and effective representation within that city council. For a city council to effectively carry out their democratic function and effectively represent their constituents, however, further amendments would be required. These are discussed next.

7.1.2 Required Ancillary Amendments: A Limited Discussion

As stated by Mariana Valverde, civic democracy is more complex than just the right to vote.[480] Many ancillary amendments to the Constitution would be required to allow cities to effectively operate as an autonomous and democratic level of government. Sufficient revenue raising powers and enumerated heads of power would also be required.

While my view is that ancillary amendments would be required, the democratic right to vote and be effectively represented by a city council could exist independently of these ancillary amendments. Without the ancillary amendments discussed in this subchapter, however, city councils would not be able to fully exercise their democratic legislative function as: (1) they may not have sufficient revenue raising powers to do so;[481] and (2) they would still be susceptible to interference from upper levels of government.[482] An argument could further be made that the

[480] See Valverde, *supra* note 43 at 38.
[481] See Meehan, Chiarelli & Major, *supra* note 31 at 31.
[482] See Valverde, *supra* note 43 at 24.

removal of legislative or revenue raising powers may result in an infringement of effective representation, causing uncertainty for provincial legislatures in amending municipal legislation. Thus, entrenching the rights discussed in Chapter 7.2.1 is a laudable step in the right direction, but to fully operate as an independent and democratic level of government, the ancillary amendments discussed below would be necessary.

7.1.2.1 Enumerated Heads of Power

Should civic democracy be constitutionally recognized, city councils would require the necessary tools to exercise their democratic function properly and effectively as an autonomous level of government. To define these enumerated heads of power, all levels of government in Canada must engage in consultation and collaboration to find the right fit for each constitutionally recognized order of government.

Entrenching heads of legislative power for city councils within the Constitution provides certainty for city councils, citizens and provincial legislatures.[483] If only the right to democratic civic elections is protected such as in the "delegatee approach", effective representation would be protected as well since section 3 would apply to city councils. As the "delegatee approach" maintains the plenary power of provincial legislatures over municipal institutions pursuant to section 92(8) of the *Constitution Act, 1867*, uncertainty may be created for provincial legislatures in amending the legislative powers codified in municipal legislation. For example, should a provincial legislature remove a legislative or revenue raising power contained in municipal legislation an argument could be made that removing that power infringes the right to effective representation by not providing city councils the necessary tools to effectively represent their constituents. In addition, this could open the floodgates to constitutional challenges in amending municipal legislation.

[483] While many heads of provincial legislative power in section 92 of the *Constitution Act, 1867* have significance for cities and city councils, the common law has developed various doctrines to address overlap in legislative powers, such as: (1) the doctrine of paramountcy; (2) the double aspect doctrine; and (3) the principle of subsidiarity which, in my view, would be applicable if cities were granted constitutionally recognized heads of legislative power.

As explained by the Supreme Court of Canada in the *Electoral Boundaries Reference*, effective representation provides voters with a voice in the deliberations of government,[484] which in this case would be a city council. Therefore, an amendment or interpretation solely relating to democratic civic elections, may increase the potential for interference in city council matters as there would be an additional right that provincial legislatures may infringe – effective representation. For example, like all politicians, city councillors run based on a platform. Should a candidate be elected as a result of an election promise based on a specific legislative power granted to cities and subsequently, after that candidate is elected, the provincial legislature amends the relevant municipal legislation to remove that specific legislative power, an argument could be made that effective representation has been infringed as the *impact* of the expression, in voting and running as a candidate, has been defeated by the legislative amendment. If the legislative powers of city councils relating to election issues, or other civic issues, are removed from a cities legislative purview after a councillor is elected, it is difficult to argue that a citizen has a voice in the deliberations of a city council. [485]

In the alternative, effective representation within a city council may be interpreted by the Supreme Court of Canada as protecting certain legislative powers of city councils, without a formal amendment to the Constitution. This interpretation, however, would leave provincial legislatures in a state of uncertainty as to what legislative powers they may or may not abolish or amend without infringing effective representation. Thus, a wholesale amendment to codify heads of legislative power within the written text of the Constitution would provide legal certainty and predictability in the text of the Constitution.[486] The division of legislative powers between Parliament, provincial legislatures and city councils would be subject to a "federalism" analysis, as opposed to constitutional challenges to determine whether an amendment to a city councils legislative powers set out in provincial legislation infringes effective representation. The latter lacks legal certainty and predictability as there would be no constitutional text to constrain

[484] See *Electoral Boundaries Reference*, *supra* note 10 at 184.
[485] *Ibid.*
[486] See *Secession Reference, supra* note 183 at para 53 where the SCC holds that "[a] written constitution promotes legal certainty and predictability, and provides a foundation and a touchstone for the exercise of constitutional judicial review."

constitutional interpretation, rendering the constitutional protection of effective representation and the legislative powers of city councils uncertain.

Entrenching enumerated heads of power for city councils in the Constitution allows all levels of government to redefine their obligations in areas of intergovernmental regulation and effectively utilize the financial resources of all levels of government. For example, Valverde and Levi point out that increased poverty and the lack of social housing in cities was caused or contributed to by all levels of government.[487] Redefining the heads of powers could address the root problem of many of these issues, and make better use of taxpayer dollars. What these enumerated heads of power would look like is much larger discussion that is outside the scope of this analysis. It could involve merely taking the current jurisdiction of cities set out in the relevant legislation and entrenching it in the constitution or it may result in certain powers of the provincial legislature being curtailed or repealed and placed in a city councils legislative arena. The scope of this analysis is limited to acknowledging that defining enumerated heads of power for city councils would be a significant undertaking that could dissuade the upper levels of government from consenting to a formal amendment to the Constitution, while arguing that a formal amendment relating to legislative powers is required to meet the goal of constitutionally entrenched civic democracy and to provide legal certainty and predictability.

In the further alternative, an argument could be made that the proposed provision discussed in 7.1.1 leaves it open for the court to reinterpret section 92(8) of the *Constitution Act, 1867* in light of the new provision granting citizens democratic rights to vote for and be effectively represented in a city council. This was the gist of Justice Lebel's reasons in *R v Demers*,[488] where he stated "the scope of the criminal procedure power under s. 91(27) needs to be re-evaluated in light of the evolution in our constitutional culture since the entrenchment of the *Charter*."[489] Section 91(27) of the *Constitution Act, 1867* sets out Parliament's power of criminal procedure and this section was re-evaluated after the *Charter* was promulgated in 1982. Thus, if the Constitution is amended to adopt the proposed provision discussed in 7.1.1, the Supreme Court of

[487] See Levi & Valverde, *supra* note 27 at 440.
[488] 2004 SCC 46, [2004] 2 SCR 489 [*Demers*]
[489] *Ibid* at para 90.

Canada may re-evaluate section 92(8) of the *Constitution Act, 1867* in light of that new provision. Such a re-evaluation would require section 92(8) to be interpreted in a manner that is consistent with the proposed provision discussed above, which arguably could remove the ability of provincial legislatures to interfere with the legislative function of elected city councillors. As mentioned previously, however, constitutionally entrenched legislative powers for city councils provide certainty and support effective representation within a city council as legislated heads of power could not be amended or abolished by provincial legislatures, which may lead to significant constitutional challenges, taxing judicial resources.

7.1.2.2 Revenue Raising Powers

While the revenue raising powers of Canadian cities differ slightly, most cities raise revenue through property taxes and user fees.[490] In contrast, section 91(3) of the *Constitution Act, 1867* grants Parliament the legislative authority to raise revenue by "any Mode or System of Taxation". Section 92(2) of the *Constitution Act, 1867* grants provincial legislatures with the legislative authority to raise revenue by "Direct Taxation within the Province" for provincial purposes and section 92(9) permits provinces to raise revenue for provincial, local or municipal purposes through licenses.

Without sufficient revenue raising powers, city councils would continue to be vulnerable to interference from upper levels of government and potentially unable to effectively represent their constituents.[491] Provincial actors or the legislature could hang funding over city councils head, so to speak, in an effect to influence city council discussions or decision making. As a result, a formal amendment entrenching revenue raising powers for city councils in the Constitution provides the legal certainty and predictability contemplated in the *Secession Reference* and allows city councils to effectively represent their constituents.

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[490] Slack & Kitchen, "New Finance Options", *supra* note 69 at 2224 where the authors note "[p]roperty taxes and user fees have been the backbone of municipal finance in Canada for many decades, but the past few years have seen increasing concern and growing skepticism about the ability of the municipal sector to continue to meets its expenditure requirements with existing revenues." See also pages 38-39, *above*, for a brief discussion on the current revenue raising powers cities possess.

[491] See Meehan, Chiarelli & Major, *supra* note 31 at 31.

Determining the sufficient magnitude or scope of revenue raising powers of city councils would depend on the enumerated heads of legislative power granted to cities. This discussion must begin with the upper levels of government recognizing cities as legally, economically and socially distinct from their smaller counterparts.[492] Thus, the appropriate revenue raising powers for cities, and all levels of government, are contingent on the redistribution of legislative powers. In other jurisdictions, where municipal institutions are constitutionally recognized, cities have significant revenue raising powers.

In Scandinavia, municipal institutions are constitutionally recognized, which provides them with significant political and financial autonomy.[493] Cities in these jurisdictions levy income taxes, on top of a federal income tax. Despite the higher taxes in Scandinavia, citizens are generally much more satisfied with their governments than Canadian citizens. For example, Sweden has one of the highest tax rates in the world, and the Swedish Tax Agency has the ninth best reputation out of 40 major polities in Scandinavia.[494] While Scandinavia's culture is substantially different than North America's, the Sweden example shows how a formal amendment to the Constitution could grant cities an income or sales taxation power to allow them to exercise as an autonomous and democratic level of government while maintaining satisfaction of its citizens.

As mentioned in the preceding paragraphs, enhancing city revenue raising powers is part of a much larger discussion which may involve the redistribution of legislative and revenue raising powers for all levels of government.[495] It is not as simple as merely adding additional city taxation powers on top of the current taxation powers of upper levels of government. A redistribution of taxation powers may involve a "give and take" where upper levels of government may forego certain taxation income in light of new city revenue raising or legislative powers, or providing abatements to those paying similar taxes to multiple levels of government, such as corporate

[492] See Levi & Valverde, *supra* note 27 at 415.
[493] See John Loughlin, Anders Lidstrom & Chris Hudson, "The Politics of Local Income Tax in Sweden: Reform and Continuity*"* (June 2005) 31:3 Local Government Studies 351 at 352.
[494] See Toivo Sjoren & Johan Orbe "Anseendet For Svenska Myndigheter 2019" (1 July 2019) Online (pdf): *Kantar Sifo* <www.kantarsifo.se> at 4.
[495] See generally Flynn, "Operative Subsidiarity and Municipal Authority", *supra* note 13 at 277.

taxes,[496] to multiple levels of government. Such a redistributive undertaking, in my view, would allow all levels of government to collaboratively determine the best use of taxpayer dollars and enhance effective representation of Canadian citizens in all levels of government.

Higher tax rates in cities, however, may result in citizens moving to municipalities to avoid the higher tax rates. New York City, while not constitutionally recognized, has the legislated ability to charge an income tax on its residents.[497] New York City imposes a local income tax on its residents with progressive rates from 3.078% to 3.876% on top of State and Federal Income tax.[498] Therefore, cities with a sufficient population may be able to impose a local income tax without having to worry about a population decrease, whereas as their smaller counterparts may not.

Providing city councils with enumerated legislative powers and revenue raising powers within the Constitution is supported by the principle of subsidiarity and the contentions of Meehan, Chiarelli and Major who explain that:

> Modern municipalities are much more than agents of service provision – they also play an essential role in meeting the needs, concerns and aspirations of the citizens who live within their boundaries. For many individuals, local government is the most important level of government, dealing with matters of direct and immediate concern, and providing the most direct and accountable political institution. Municipal governments are truly agents of democracy – they are the level of government closest to the people and most able to represent local aspirations and needs.[499]

Thus, enumerated heads of legislative and revenue raising powers, in conjunction with the principle of subsidiarity, allows city councils to effectively represent their constituents as the most

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[496] See e.g. *The Income Tax Act*, (RSC, 1985, c. 1 (5th Supp)) at s 124 which allows a corporation to deduct "from the tax otherwise payable by the corporation under this Part [Part 1: Income Tax] for a taxation year in an amount equal to 10% of the corporations taxable income earned in the year in a province". A similar arrangement could be employed if cities are given income taxation powers.

[497] See New York State's Consolidated Tax Law, art 30 s. 1301.

[498] See "Instructions for Form IT-201, Full-Year Resident Income Tax Return" (2019) Online (pdf): *New York State Tax Website* <tax.ny.gov> at 69.

[499] *Supra* note 31 at 12-13. Meehan, Chiarelli & Major also state that "because the results of local decisions are readily apparent in the local community, citizens can actually evaluate the effectiveness of their government and the degree to which their representative actually fulfill their obligations/pledges. Through their elected local representatives, citizens of a municipality are provided with the power to influence and determine the range of services made available in their community (*ibid* at 11-12). This provides for a more accountable local government or city council which allows city councils to give "effect to democratic ideals" (*ibid* at 11).

accountable level of government. Given the constraints on constitutional interpretation, however, the only way for a city council to effectively represent its constituents as a constitutionally recognized order of government, and to provide legal certainty and predictability, is through a formal amendment to the Constitution.

What revenue raising powers are appropriate for cities will depend on the division of powers amendment, or lack thereof. As mentioned, the scope of this analysis is limited to acknowledging that constitutionally entrenched revenue raising powers for city councils are required for civic democracy to truly exist. The redistribution of tax dollars and government financing is outside the scope of this analysis; however, other jurisdictions such as Scandinavia and New York may be a starting point for this discussion.

7.2 A Formal Amendment is Unlikely

As previously discussed, the Constitution of Canada is one of the most difficult to amend in the world and a formal amendment to the Constitution to recognize civic democracy is unlikely.[500] There are two main reasons why obtaining the requisite consent to formally amend the Constitution is unlikely. First, the provincial legislatures must consent and second, entrenching civic democracy into the Constitution requires several amendments to various provisions of the Constitution, which may increase the difficulty of obtaining the required consent.

7.2.1 Obtaining Provincial Consent

First, obtaining provincial consent would be a significant hurdle. As mentioned previously, the general amendment procedure in the *Constitution Act, 1982* requires the consent of all provincial legislatures and the Parliamentary House of Commons and Senate. Mariana Valverde explains:

> Amending *The Constitution Acts* to recognize not only the municipal right to vote but also the general right of communities to govern themselves for many, if limited, purposes would certainly be desirable. Such a legal modernization is of course highly unlikely, not at least because the constitutional amendment process is

[500] See page 73, *above*, for more information on this topic.

> monopolized by the very entities whose powers would be affected, perhaps negatively, by any change.[501]

Further, Dewing, Young and Tolley explain:

> The provinces will jealously guard the constitutional arrangements that give them exclusive control over their municipalities. Any injection of the municipal question into the national constitutional discussions has, in the past, provoked a reaction that has jeopardized even the *ad hoc* relationship between federal and municipal governments. [502]

In *Toronto v Ontario* and *East York*, the provincial government caused the interference complained of and the Ontario government has defended its interferential actions all the way up to the Supreme Court of Canada on both occasions. This supports Dewing, Young and Tolley's assertion that provinces will jealously guard their plenary power over municipal institutions.[503] This alone demonstrates the unlikeliness that the Ontario legislature would consent to an amendment granting constitutional protection for civic democracy. As a result of the *Regional Veto Law* Ontario alone could veto the amendment before it is proposed, and it would be left to cities to challenge the constitutionality of the *Regional Veto Law*. The same can be said for other provinces that have reserved the legislative power to remove elected city councillors or to limit the powers of cities if it not in the provincial interest. Therefore, constitutional status through the general amendment procedure is unlikely as it requires provincial consent and the conduct of provinces, as discussed above, leads to the inevitable conclusion that they will not consent.

7.2.2 Obtaining Consent for Multiple Amendments

Assuming provincial legislatures were interested in granting cities democratic rights, an omnibus amendment proposal may increase the difficulty of obtaining the unanimous consent required to satisfy the general amendment procedure. Richard Albert explains that:

> [t]he failure of both the Meech lake and Charlottetown Accord is attributable in large part to the choice of political actors to present their proposed amendments in an omnibus package for wholesale constitutional renewal. The many components

[501] *Supra* note 43 at 38. See also, page 73-74, *above*, for more information on this topic.
[502] *Supra* note 8 at 1.
[503] *Ibid.*

> in each of the Accords made it difficult to secure widespread agreement across the country from the various political actors whose support was required under the rules of formal amendment.[504]

Thus, a proposed amendment to entrench democratic civic elections, parliamentary privilege, heads of power and sufficient revenue raising powers for cities, would increase the difficulty of securing the required consent. In Canada, the majority of the debate around constitutional status for cities has stemmed from limited revenue raising powers.[505] Thus, a comprehensive proposal to amend the Constitution to recognize civic democracy has not been attempted. [506] In other countries, such as Australia, constitutional amendments to recognize cities have been attempted.

In 2010 Australia's commonwealth government proposed the third attempt to grant local governments recognition in Australia's federal constitution.[507] AJ Brown and Paul Kildea explain that "amending the constitution to recognize local governments …should only be pursued as a part of a more holistic package of reform and renovation to the federal system as a whole. Local governments function and financial position in the federal system remains a fundamental question for Australian intergovernmental relations".[508] While more difficult than a narrow amendment relating solely to democratic civic elections, constitutional status for cities would not be fully effective without further amendments relating to the financial and legislative position of cities within Canada's existing governmental structure.

Realistically, the proper recognition of cities within the Constitution requires "wholesale constitutional renewal" to borrow Richard Albert's term.[509] For city councils in Canada to properly exercise their democratic function and effectively represent their constituents, many issues must be addressed. The proper fit of city councils within the Constitution must be determined. It is not as simple as entrenching city councils into section 3 of the *Charter* or adopting a different

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[504] Albert, "Difficulty of Constitutional Amendment", *supra* note 345 at page 96, footnote 84. See also AJ Brown & Paul Kildea, *The Referendum that Wasn't: Constitutional Recognition of Local Government and the Australian Federal Reform Dilemma*, (2016) 44:1 Federal L Rev 143 at 144-145 for the contrary position.
[505] *Supra* note 8 at 1.
[506] *Ibid* where the authors take the position that "the municipalities have never formulated a specific set of constitutional proposals, and their demands have not dealt with the need to differentiate between constitutional recognition and constitutional powers."
[507] See Brown & Kildea, *supra* note 504 at 143
[508] *Ibid* at 144 to 145. See also Valverde, *supra* note 43 at 38.
[509] See Albert, "Difficulty of Constitutional Amendment", *supra* note 345 at page 96, footnote 84.

alternative approach as discussed in Chapter 5. Other issues such as the lack of sufficient revenue raising powers and provincial control over the legislative powers of city councils must be addressed.

7.2.3 Conclusion: Obtaining Consent

Granting citizens constitutionally entrenched democratic rights to vote for and be effectively represented by a city council, without providing city councils the tools to properly exercise their democratic function, would not sufficiently protect civic democracy. Leaving cities at the plenary power of provinces creates significant uncertainty and limits the ability of cities to effectively represent their constituents. Further, cities will have to formulate a comprehensive and specific set of constitutional proposals, which would amend the Constitution in several aspects, which may lead to difficulty securing provincial consent. This leads to a discussion of what a formal amendment to the Constitution might look like and, acknowledging the difficulty of a formal amendment, the potential benefits that may stem from a failed amendment proposal.

7.3 Why Advocate for a Formal Amendment?

As stated by Justice Major, "in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in amorphous underlying principles of our Constitution, but in its text and the ballot box."[510] As a result, advocating for a formal amendment to the Constitution may result in civic democracy becoming an election issue, providing citizens the ability to vote for MPs or MLAs who incorporate a formal amendment to protect civic democracy in their election platform. In turn, electing officials who expressly support constitutional protection for civic democracy would increase the potential of proposing an amendment to the Constitution, which, in the absence of a formal amendment, may increase the likelihood of influencing constitutional interpretation through a partial constitutional amendment.

As mentioned, even if a formal constitutional amendment is unsuccessful, granting democratic rights to citizens could change the interpretation of the provision that renders municipal institutions "creatures of the province".[511] As explained by Rosalind Dixon, even a partially

[510] *Imperial Tobacco*, *supra* note 241 at para 66 [emphasis added].
[511] See page 72, *above*, for more information on this topic.

complete or failed amendment proposal may provide relevant information about democratic constitutional understandings relating to the division of legislative powers.[512] Thus, there is merit in advocating for formal amendments to the Constitution. On the other hand, a failed constitutional amendment may also weigh against the interpretation that the formal amendment is advocating for.[513] As mentioned, this was the gist of Justice Lamer's decision in *Demers*, where section 91(27) of the *Constitution Act, 1867* was revisited in light of the *Charter*.[514]

In the United State of America, the Supreme Court nearly unanimously agreed that proposed, partially complete or failed amendments "provide relevant information about democratic constitutional understandings", but "disagreed sharply as to whether such information should be treated as weighing in favour of – or against – a decision to interpret the Constitution in a parallel direction."[515] Referring to the United States Supreme Court decision in *Frontiero v Richardson*,[516] Rosalind Dixon explains that :

> Justice Brennan held for four Justices that the ERA [Equal Rights Amendment of 1972] provided clear affirmative support for a decision by the Court to apply struct scrutiny to sex-based classifications under the Equal Protection Clause… Justice Powell, by contrast, held for three Justices that an amendment not yet ratified by the states, at least for some period, the ERA pointed in exactly the opposite direction – namely, against, rather than in favor, of a decision by the Court to apply any form of heightened scrutiny to based on sex or gender.[517]

Thus, the Equal Rights Amendment of 1972, which was partially complete at the time *Fronterio* was heard as it was passed by the House and Senate but failed to be ratified by three-fourths of the states, was held to be relevant to the democratic understandings of that time period.[518] The debate, however, centred around whether a proposed, partially complete, or failed amendment ought to weight in favour or against a certain interpretation. As noted by Dixon, a proposed amendment is likely to carry the least *positive* weight, whereas a partially complete amendment or an amendment

[512] *Supra* note 341 at 1.
[513] *Ibid.*
[514] See pages 113-114, *above*, for more information on the *Demers* case.
[515] *Ibid* at 1.
[516] 411 US 677 (1973) [*Fronterio*].
[517] *Supra* note 341 at 1 and 2.
[518] See Dixon, *supra* note 341 at footnote 3.

that passed through the House and the Senate, but failed to be ratified, would carry more *positive* significance surrounding the democratic understandings at a given time.[519]

In Canada, it has been suggested that failed constitutional amendment proposals have influenced constitutional interpretation. For example, the Meech Lake accord was ultimately unsuccessful; however, Sujit Choudhry and Jean-Francois Gaudreault-DesBiens explain that the Meech Lake Accord may have influenced the Supreme Court of Canada's decision in the *Secession Reference*:

> Toward the end of our interview, Iacobucci suggested in passing that the failure of Meech led to a string of events that included the *Secession Reference*. The comment was highly suggestive. Iacobuci was a member of the Court that heard the *Secession Reference*. There is no doubt that his first-hand experiences gave him a deepened awareness of the political-legal context within which the case arose. But what we want to suggest by way of conclusion is that they may have shaped the Court's judgment.[520]

Thus, while not stated definitively in the *Secession Reference*, it is entirely possible that failed amendment proposals such as the Meech Lake Accord may influence constitutional interpretation. Such themes and understandings not only influence constitutional interpretation but, may influence the conduct of provincial legislatures and actors. Should provincial legislatures or actors continue to interfere with civic elections and elected city councillors, a formal amendment may become increasingly politically desirable, causing concern that provincial legislatures may lose their

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[519] *Ibid* at 14 where the author notes "[b]y varying the level of positive weight given to particular proposed amendments, according to the degree of support they receive at a state level, a principle of partial constitutional amendment also further helps promote the role of state legislatures in the overall process of constitutional change and dialogue." And that "A proposed amendment would clearly have weakest force, under such a principle, where it enjoyed only majority support in Congress. In cases of actual super-majority support, or support at a state level, it would enjoy increased significance" (*ibid* at 2).

[520] Sujit Choudhry & Jean-Francois Gaudreault-DesBiens, "Frank Iacobucci as Constitution Maker: From the Quebec Veto Reference to the Meech Lake Accord and the Quebec Secession Reference" (2007) 57:2 U Toronto LJ 165. at 187. Choudhry & Gaudreault-DesBiens further explain that "For nearly a decade - from the Patriation Round through the Quebec Round and the Meech Lake Accord, and the Canada Round and the Charlottetown Accord - Canada was consumed by a debate over the constitutive question of what the basic terms of the Canadian political community should be. As Iacobucci himself said to us in an interview for this article, the failure of Meech led 'to a string of consequences' including the 1995 Referendum and the Secession Reference itself. So situating the Secession Reference against the backdrop of the constitutional politics that gave rise to it should advance our understanding of the judgment. Given Iacobucci's central role in both episodes, his personal experience in the Meech process must have affected how he understood the politics that set the stage for the Secession Reference and, indeed, may have shaped the judgment." [emphasis added] (*ibid* at 166).

plenary power over city councils. Therefore, seeking such an amendment may still promote civic democracy by way of the common law similar to a partial constitutional amendment by providing relevant information or evidence relating to the democratic understandings at a given time. While I am critical of protecting civic democracy through constitutional interpretation,[521] the difficulty of formal amendment in Canada may render this the only realistic method to protect civic democracy other than the ballot box.

In addition, the Supreme Court of Canada has accepted that international norms can influence constitutional interpretation as part of the historical context of the relevant provision as long as the court recognizes the non-binding nature of these norms.[522] Since international norms may influence constitutional interpretation in Canada, there is no principled reason why the democratic understandings relating to civic democracy in Canada could not. Regarding international sources, the Supreme Court of Canada has noted that their "role has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights."[523] Applying this reasoning to a domestic source, such as a failed constitutional amendment, would render the constraints on constitutional interpretation applicable to partial or failed constitutional amendments. Thus, while a failed or partially complete amendment proposal may influence judicial interpretation, it does not appear to be a standalone basis to provide constitutional protection outside of the text of the Constitution. As mentioned, however, the text of the Constitution is the first, but not only, factor to be considered in the purposive approach.[524]

Regarding the expressive function of formal constitutional amendments, Richard Albert explains that formal amendment rules express constitutional values,[525] transform constitutional

[521] See Dixon, *supra* note 341 at 3 where the author acknowledges that "[t]here are, of course, a number of potential objections to a principle of partial constitutional amendment – most notably that it ignores the text". In *Fronterio, supra* note 516 at 692, Justice Powell held "[t]here are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes".
[522] See *9147 Quebec, supra* note 202 at paras 102-104.
[523] *Ibid* at para 28.
[524] See 3.1, *above*, for an in-depth discussion on constitutional interpretation.
[525] See Albert, "Expressive Function of Amendment Rules", *supra* note 254 at 227.

values[526] and promote democracy.[527] While a successful formal amendment to the Constitution would clearly express the same values, I further argue that a proposed constitutional amendment, even if it is ultimately unsuccessful, also expresses important societal values and democratic understandings, similar to a partial constitutional amendment. As previously mentioned, it has been speculated by Choudhry and Gaudreault-DesBiens that failed constitutional amendments have influenced constitutional interpretation in Canada.[528] Therefore, there is no principled reason why advocating for a formal constitutional amendment to protect civic democracy could not influence constitutional interpretation. The concern would not be whether a failed or proposed amendment is relevant, it would be whether the proposed amendment is interpreted as supporting constitutional recognition of civic democracy or not.

In my view, advocating for a formal amendment would be increasingly important if Toronto is unsuccessful in *Toronto v Ontario (SCC)*, as, should the issue of democratic civic elections reach the Supreme Court of Canada subsequently, the same conclusion is likely unless there is evidence that the democratic understandings have changed with the time. Therefore, advocating for a formal amendment may support or influence a juridical finding that the Constitution of Canada protects democratic civic elections in a subsequent constitutional challenge if constitutional protection is not identified in *Toronto v Ontario (SCC)*, or alternatively, to prevent such constitutional protection from being overturned in subsequent cases.

For example, in *Christie*, the Supreme Court of Canada did not interpret the unwritten principle of the rule of law to include a general right to counsel. However, the Supreme Court of Canada further held that the constraints on constitutional interpretation may support the opposite interpretation in subsequent constitutional challenges.[529] Thus, in future challenges, the constraints on constitutional interpretation may allow for an interpretation protecting mid-election interference, even if they do not in *Toronto v Ontario (SCC)*. In the alternative, if the Supreme Court of Canada identifies constitutional protection for democratic civic elections within the

[526] See Albert, "Unconstitutional Constitutional Amendment", *supra* note 181 at 152.
[527] See Albert, "Expressive Function of Amendment Rules", *supra* note 254 at 231.
[528] *Supra* note 520 at 165
[529] See *Christie*, *supra* note 202 at 27.

Constitution, continuing to advocate for a formal amendment may prevent such interpretation from being overruled in the future.

Further, and in my view, living constitutionalism supports the application of partial constitutional amendments as long as the purpose of the written provision of the Constitution, and other constraints on constitutional interpretation are respected.[530] In this regard, it would be difficult to determine what provision of the Constitution would protect civic democracy as there are no provisions within the Constitution that *prima facie* aim to do so. That being said, the Supreme Court of Canada has demonstrated a willingness to flexibly interpret the provisions of the Constitution and despite the criticisms of accepting alternative approaches to a formal amendment set out in this Chapter, it is impossible to predict whether the Supreme Court of Canada will accept one of the alternatives raised by the parties in *Toronto v Ontario*. Should the Supreme Court of Canada accept an alternative approach, it would be a result of unconstrained constitutional interpretation. However, the Supreme Court of Canada's interpretation is as supreme as the text of the Constitution,[531] which would effectively grant constitutional protection, or limited constitutional protection, to civic democracy.

Thus, continuing to advocate for a formal amendment to the Constitution may influence constitutional interpretation to provide protection, or limited protection, for civic democracy should the Supreme Court of Canada ignore the constrains on living constitutionalism. While I am critical of the alternative approaches discussed in Chapter 5, the Supreme Court of Canada's interpretation of the Constitution is binding. As a result, an informal amendment to the Constitution may be the only viable option to constitutionally protect civic democracy, despite the concerns I have raised in this thesis, other than civic democracy becoming an issue for the ballot box, which may lead to a formal amendment to the Constitution to protect civic democracy. Further, and as mentioned, if constitutional protection for democratic civic elections is not identified in *Toronto v Ontario (SCC)*, advocating for a formal amendment may influence judicial interpretation in subsequent constitutional challenges related to civic democracy, or, in the alternative that such constitutional protection is identified, continuing to advocate for a formal

[530] See *9147 Quebec*, *supra* note 202 at paras 9, 37 and 47.
[531] See Albert, "Unconstitutional Constitutional Amendment", *supra* note 181 at 174.

amendment to protect civic democracy, as opposed to merely democratic civic elections, may prevent *Toronto v Ontario (SCC)* from being overturned by the Supreme Court of Canada in a future case.

7.4 Conclusion: Chapter 7

While a formal amendment to the Constitution is difficult and unlikely, it is the only method that, in my view, can provide adequate constitutional protection for civic democracy. A formal amendment to the Constitution limits the ability of the judiciary to scale back civic democracy and provides certainty for the future of civic democracy. Section 96 of the *Constitution Act, 1867* and the drafting characteristics of section 35 of the *Constitution Act, 1982* provide an example of what a formal amendment may look like; however, ancillary amendments would also be required to truly protect civic democracy.

To prevent interference with civic democracy, city councils require constitutionally entrenched heads of legislative power and revenue raising powers. Without these amendments, provincial actors or legislatures could continue to use the threat to revoke funding as a method to align city council's decisions with the province. Further, without constitutionally entrenched heads of power, provinces could arguably abolish or limit a city council's legislative function, defeating the purpose of a formal amendment to the Constitution to recognize civic democracy. In the alternative, constitutional protection of effective representation within a city council may lead to an increase in interference, as the repeal or limitation of a legislative power may amount to an infringement of effective representation, especially in the context of an election promise which relies on a specific legislative power.

Despite the difficulty of formal amendment, there is merit in continuing to advocate for a formal amendment to the Constitution to protect civic democracy for three reasons. First, there is a small chance it may be successful. Second, if a formal amendment to protect the democratic right to vote for and be effectively represented within a city council is successful, the Supreme Court of Canada may revisit section 92(8) of the *Constitution Act, 1867* in light of the formal amendment and scale back the provinces plenary power over cities based on *Demers*. Lastly, and in my opinion, a proposed, failed or partially complete constitutional amendment may influence judicial

interpretation based on the democratic understandings at a given time. While a formal amendment to the Constitution is ideal, it is admittedly unlikely and an informal amendment through judicial interpretation is likely the only realistic method to provide constitutional protection of civic democracy, other than civic democracy becoming an issue for the ballot box and leading to a formal amendment.

8. CONCLUSION

Attempts have been made by provincial legislatures to accommodate the distinct and nationally significant legislative role of city councils in Canada through city charters or city-specific litigation. The consensus is that these attempts have failed. Cities remain subject to the plenary power of provincial legislatures and as a result, remain creatures of the province. However, city councils do and will continue to legislate in areas of national significance and this legislative role has been recognized by the upper levels of government and the judiciary. Although cities were not originally designed to be democratically accountable, modern provincial legislation has codified democratic election processes and broad legislative powers for city councils. Further, provincial legislatures have codified provisions granting significant deference to the policy decisions of city councils and the judiciary has upheld these provisions. Despite this dilution of Dillon's rule, provincial interference with civic democracy continues to occur.

As cities remain creatures of the province pursuant to section 92(8) of the *Constitution Act, 1867*, their constituents lack democratic rights and city councils lack constitutionally protected rights, such as parliamentary privilege, enumerated heads of legislative power and revenue raising powers. This lack of constitutional protection allows upper levels of government to interfere in civic democracy in two ways. First, provincial legislatures have codified the ability to remove elected city councillors from office and limit the powers of city councils if they are not in the public interest. In addition, provincial actors can hang their plenary power over cities like a sword and threaten to reduce or remove city funding to force city councillors to align their views with the province. Second, provincial legislatures have interfered with the election process, by altering or destroying ward boundaries outside of election periods and more recently, in the middle of an election period. As a result of the provincial interference in the 2018 Toronto Election, academics and legal professionals have proposed numerous interpretations of the current Constitution to protect democratic civic elections.

Many alternatives to a formal amendment to the Constitution have been proposed, such as, in various ways, "reading-in" democratic civic elections into the current text of the Constitution and amending provincial constitutions. The "reading-in approaches" rely on unconstrained constitutional interpretation and do not provide the legal certainty and predictability that the

written Constitution ensures, and that civic democracy requires. Further, such unconstrained interpretations grant the Supreme Court of Canada complete interpretative authority over the right to civic democracy, and the Constitution generally, which could limit or abolish constitutional protection for civic democracy in the future. Further, provincial constitutions in Canada are not well-developed and amending provincial constitutions to protect civic democracy leaves the rights of citizens and city councils with the plenary power of the provincial legislatures. While "manner and form" provisions have been proposed to protect provisions within a provincial constitution, their effectiveness is not free from doubt. Should the Supreme Court of Canada accept an alternative approach, the provisions of the Constitution will effectively become "empty vessels" for the Supreme Court of Canada to fill with meaning or purpose as they see fit, contrary to Supreme Court of Canada's own decision in the *Public Service Employee Reference*.

Whether or not a formal amendment will be required is not dependent on the forthcoming decision by the Supreme Court of Canada in *Toronto v Ontario*, as any alternative approach would not adequately protect civic democracy as the alternative approaches only address one aspect of civic democracy – democratic civic elections. Ancillary constitutional amendments would also be required to ensure interference with civic democracy does not persist. These ancillary amendments include constitutionally protected legislative powers for city councils and the appropriate revenue raising tools to allow city councils to exercise their legislative function autonomously. While an argument could be made that protection of effective representation may provide protection for certain legislative powers possessed by city councils, this remains uncertain and may lead to increased infringements and constitutional challenges as the level of protection that effective representation might provide for legislative powers is neither certain, nor predictable.

Section 96 of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982* provide examples of what a formal amendment to the Constitution may look like. Regarding this, a provision similar to section 96, using the drafting characteristics of section 35, would protect democratic civic elections and effective representation in the same manner that section 96 protects the inherent jurisdiction of the superior courts and allow room for judicial interpretation to accommodate the complexities of civic democracy. While a separate amendment would be required to entrench enumerated heads of power for city councils, these provisions provide

examples of how the Constitution may be amended to protect civic democracy. Although the provision proposed in Chapter 7.2.1, like all constitutional provisions, are subject to judicial interpretation, living constitutionalism requires the judiciary to protect the fundamental purpose of the provision. Thus, while there may be some pragmatic and realistic limitations, the fundamental right to civic democracy would be protected assuming the constraints on constitutional interpretation are respected. As city councils are structured differently than Parliament or legislative assemblies, in the sense that there is no opposition government to provide a check and balance, the proposal in Chapter 7.2.1 allows limited provincial control over civic elections, to ensure city councils do not pass legislation or bylaws in their self-interest.

Despite the difficulty of formal constitutional amendment in Canada, there continues to be merit in advocating for a formal amendment to the Constitution to protect civic democracy. Partially complete or failed amendment proposals provide relevant information relating to democratic understandings and, while not the ideal, may influence the judiciary to adopt one of the alternative approaches discussed in Chapter 5. Should the Supreme Court of Canada accept an alternative approach, it would be the result of unconstrained constitutional interpretation, creating significant future uncertainty; however, the *Supreme Court Reference* renders the Supreme Court of Canada's interpretation as binding as supreme as the text of the Constitution. Thus, the Supreme Court of Canada's interpretation could invalidate laws that infringe democratic civic elections, as interpreted by the Supreme Court of Canada.

While I have been critical of the alternative approaches to a formal amendment to the Constitution of Canada as they rely on unconstrained constitutional interpretation, they may be the only realistic method to provide constitutional protection for civic democracy in Canada, other than through the ballot box. Should formally amending the Constitution to protect civic democracy become an election issue, it has the added benefit of potentially influencing judicial interpretation, even if a formal amendment is unsuccessful. As a result, advocating for a formal amendment to the Constitution to protect civic democracy remains crucial to advancing constitutional protection of civic democracy, whether through judicial interpretation, or ideally, the ballot box.

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