Court File No.: CV-18-00602494-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROCCO ACHAMPONG

Applicant/Moving Party

-and-

ONTARIO (HON. DOUG FORD, PREMIER OF ONTARIO), ONTARIO (ATTORNEY-GENERAL), and CLERK, CITY OF TORONTO

Respondents

FACTUM

PART I—OVERVIEW

1. The applicant is registered as a candidate for City Councillor in Ward 13, Eglinton-Lawrence, in the 2018 City of Toronto municipal elections, having properly registered on July 27th 2018. The campaign is underway and the election is scheduled to close on October 22nd.

2. On July 27th 2018, the Premier's office announced that the Government of Ontario intended to act urgently and unilaterally to amend the *City of Toronto Act* (the Act) in order to, *inter alia,* reduce the number of wards from 47 to 25, and on July 30th 2018 Bill 5, "the Better Local Government Act" (BLGA) was introduced for first reading.

3. The applicant brings this motion seeking an interlocutory injunction to halt the Premier and Government of Ontario from unilaterally and abruptly changing electoral Ward boundaries and dramatically reducing the size of local council for the 2018 Toronto Municipal election without any public consultation or reasonable notice to registered candidates or to the City of Toronto or its electors.

4. The applicant claims, *inter alia*, that the introduction of the BLGA during the 2018 election has deprived him (and all candidates) of procedural fairness with respect to the conduct of the election, breaching their reasonable expectations with respect to conduct of the election in accordance with the By-Laws and other rules that were in effect at the time they registered for the election; that amendment of the Act and By-Laws other than through the amending formula set out in s.135 of the Act offends the constitutional principle of the rule of law; and further that proceeding without consultations is a breach of both s.1 of the Act and of the basic democratic rights of the candidates and electors of Toronto.

5. The applicant asserts that his claim raises a *prima facie* case with serious issues to be tried; that he (and all candidates for council, as well as the City and its electors) will suffer irreparable harm if the legislation is permitted to come into force during the campaign as intended; that the Government of Ontario will suffer no harm in having the coming into force delayed until after the 2018 election; and that accordingly the balance of convenience overwhelmingly favours the applicant in the seeking and granting of injunctive relief.

PART II—CONCISE STATEMENT OF ISSUES

6. The applicant states that the test for an interlocutory injunction is:[1]

   a. Does the applicant present a serious question to be tried?

   b. Would the applicant suffer irreparable harm if the application is refused?

   c. Does the balance of (in)convenience between the parties favour granting or refusing the remedy pending a decision on the merits?

PART III – CONCISE STATEMENT OF FACTS

7. The applicant is a resident of what is currently Ward 13, Eglinton-Lawrence, and a registered candidate for city councillor for that Ward in the 2018 Toronto elections.[2]

8. On the evening of July 26th 2018, just one day before registrations were set to close, media reports began to circulate that suggested that Premier Doug Ford was intending to reduce the size of Toronto city council from 47 contestable seats to 25 seats.

9. On July 27th, the last day for registration, a press release was issued confirming this sudden plan, which in effect reduced the number of contestable boundaries and elected representatives by nearly half, on average almost doubling the number of electors per representative, and dramatically changing the demographic composition of many wards. This decision was made an immediate legislative priority, although it was not an element of the

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RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, p.334.[1]

Affidavit of Rocco Achampong, dated 13 August 2018, ("Achampong Affidavit") at 1[2]

defendants' campaign and despite the fact that a years-long consultation process had taken place and determined that council was to be increased from 44 to 47 seats in this election.

10. On July 30th, the Government introduced the BLGA, which has already passed first reading. With a super-majority in legislature and a clear intention to maintain the plan to reduce council to 25 seats as publicly stated, the passage of the Bill is in effect a foregone conclusion. This expectation of an as of yet unpassed and uncertain change to the rules of the election has thrown the applicant's campaign (and many others) into confusion.

11. Although the Bill has *not* yet become law, it purports to already give lawful instructions to City staff and electoral officials in holding the 2018 election under the BLGA proposed ward structure, contrary to their obligations under the existing By-Laws.

12. The legislation is proceeding notwithstanding that hundreds of candidates had already obtained requisite signatures, paid their registration fees, begun campaigning utilizing literature that identified themselves and their wards, sought volunteers and donors, signed infrastructure related-contracts, and had completely adjusted their lives in anticipation of putting themselves forward as viable candidates for elected office.

13. Moreover, the defendants have proceeded with this plan notwithstanding the fact that the City Clerk had already set in place clear rules and obligations pertaining to the conduct of the election, rules that candidates were entitled to rely upon and had reasonable expectations to

believe would remain in place for the duration of this current election cycle without consultation or due process and contrary to principles of fundamental justice and the rule of law.

14. The Applicant will suffer irreparable harm if this injunction is not granted. Expenses pertaining to literature pieces identifying the Wards being contested, office-lease contracts, advertising expenses, outreach strategies, as well as professional and personal sacrifices have already been made in anticipation of this current election. While some of these can be compensated, others are intangible and cannot be compensated; in any event the BLGA does not consider any compensation for registered candidates who do not or cannot run in the new ward boundaries, whose nominations although properly completed, accepted, and registered, will be considered to be abandoned.

15. Further, the applicant is also an elector and a donor in this election, and asserts that donors like him are at risk of having donated to candidates who do not proceed under the new regime, or who are not viable candidates in the new boundaries, or who are no longer their preferred candidate when the proposed nomination period closes, threatening their effective democratic participation in the election, and the BLGA contains no provisions to address the risk of loss of campaign donors. Electors will not know who their candidates are until September 14th, five weeks before the election closes, and this provides insufficient time for candidates to campaign and for electors to make informed decisions.

16. The applicant states that the defendants will suffer no hardship or inconvenience whatsoever if the application is granted and the coming into force of the BLGA is delayed until

after this electoral cycle. On the contrary, this will provide additional opportunity for consultation and review, which is both required by the Act and by the fundamental democratic principles underpinning our Constitution.

PART IV – CONCISE STATEMENT OF LAW

17. The applicant states that the test for an interlocutory injunction as set down in *American Cyanamid* has been adopted by the Supreme Court and has been consistently applied as the law of Canada:[3]

a. Does the applicant present a serious question to be tried?

b. Would the applicant suffer irreparable harm if the application is refused?

c. Does the balance of (in)convenience between the parties favour granting or refusing the remedy pending a decision on the merits?

The applicant raises numerous, serious questions deserving to be tried.

18. While the applicant acknowledges that s.3 of the *Charter* applies specifically to Parliament and the provincial Legislatures, "[t] The Constitution also "embraces unwritten, as well as written rules"… and includes "the global system of rules and principles which govern the exercise of constitutional authority in the whole <u>and in every part of the Canadian state</u>." <emphasis added> These unwritten supporting principles include Democracy, Constitutionalism, and the Rule of Law.[4] The applicant alleges serious deprivations of procedural fairness in the alteration of the electoral rules during the campaign, and argues that both the timing and manner of introduction are contrary to the basic principles of democracy and the rule of law. To be clear,

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RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, p.334.[3]
Reference re: Secession of Quebec [1998] 2 SCR 217 at 32.[4]

the applicant argues that the timing and manner in which the BLGA was introduced, and not its specific content, is the subject of his application. These are serious justiciable issues which should be tried.

19. The BLGA does not amend section 1 of the Act, which is and will remain in force and effect, and which sets out the following principles:

> s.1 (1) The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and the city council is a democratically elected government which is responsible and accountable.
>
> (2) The Province of Ontario endorses the principle that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation.
>
> (3) For the purposes of maintaining such a relationship, it is in the best interests of the Province and the City to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City.

20. The applicant states that the timing and manner of introduction of the BLGA during an election contravenes the basic principle at s.1(1) that council is <u>responsible and accountable</u>, as this change is being made in spite of the ongoing consultative process that resulted in the increase of wards from 45 to 47, revoking council's responsibility under the Act and accountability in this Election for the most significant change to City governance since

amalgamation. It similarly breaches the principle at (2) of working together in a relationship based on mutual respect, consultation, and co-operation, as none of these principles have been exhibited in the introduction of the BLGA, and the principle at (3) requiring ongoing consultations and for action in areas of mutual interest to be done so with an agreement between the Province and City. The applicant asserts that there exists a remedy for the defendants' breaches of these provisions, which is the sought delay in coming into force of the BLGA until after the 2018 election, and that this also presents a serious issue to be tried.

21. The Applicant further submits that s.135 of the Act sets out the <u>primacy</u> of the Act and By-Laws with respect to City governance, as well as rules governing the making and timing of amendments:

> 135 (1) Without limiting sections 7 and 8, those sections authorize the City to change the composition of city council.
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> (2) In the event of a conflict between a by-law described in subsection (1) and any provision of this Act, other than this section, a conflict with a provision of any other Act or a conflict with a regulation made under any other Act, the by-law prevails.
>
> […]
>
> (4) A by-law changing the composition of city council does not come into force until the day the new council is organized,
>
> (a) after the first regular election following the passing of the by-law; or
>
> (b) if the by-law is passed in the year of a regular election before voting day, after the second regular election following the passing of the by-law.

s.135(2) acts to specifically restrain interference with the City By-Law respecting the composition of City Council by any other Act or any regulation under any other Act, while (4)(b) acts to specifically prevent changes to the composition of counsel during the year of the election. Read together, the applicant states that these sections amount to clear guarantees of procedural fairness in terms of the constitution of council generally, the deference of the Legislature to Council in respect of By-Laws governing council composition, and in the conduct of municipal elections consistent with known rules set well in advance as required by the rule of law and basic democratic principles. The applicant asserts that this is a serious issue worthy of trial.

22. The BLGA in its current form purports to issue lawful instructions to City staff and officials in the conduct of the ongoing election – that is, it purports to have *already* been in effect since July 30th, although it has not yet passed second reading. This places City staff and other officials in direct conflict with their obligation to follow the existing Act and By-Laws, which remain in force as they were properly passed by the Legislature and the Council, respectively. This is contrary to the rule of law and should be remedied through the granting of the sought order, which will cure the prospective retroactivity of the BLGA and enable them to continue to manage the 2018 election consistent with their legal obligations and not by fiat of the defendants.

The applicant will suffer Irreparable Harm if the order is not granted

23. The applicant has extended significant efforts in the gathering of signatures and support, the registration of candidacy, obtaining promotional materials and campaign space, and recruiting volunteers and donors, all of which are now at risk. The applicant registered to be a candidate in his home ward where he has extensive history and roots within the community, and

now must re-evaluate whether his candidacy is appropriate and viable in a much larger ward with different demographics and communities. The applicant had to make decisions prioritizing his campaign over his professional life as a practicing lawyer, which must now be re-evaluated. Donors and volunteers are also thrown into uncertainty, damaging the campaign. Efforts have already been expended in areas and on issues that may no longer be significant in the prospective ward. While some of these could be compensated there is no plan for any compensation under the BLGA, and investments of time and professional sacrifices made cannot be quantified or adequately compensated.

24. The applicant states further that breaches of procedural fairness and legislative interference in local democracy contrary to the Act as well as basic principles of democracy, the rule of law, and procedural fairness, cannot be adequately compensated except by the granting of the sought order.

25. Of course, if the order is not granted but the application is successful in the result, the election will have already been substantially completed (or actually completed) under the cloak of confusion and presumably in accordance with the proposed ward structure under the BLGA, and the inability to contest the election as intended in the ward boundaries as approved and constituted at the outset of the campaign cannot be addressed or compensated.

26. While the applicant brings this proceeding in his own name, he submits further that a large number of potential candidates as well as Toronto's nearly 2 million electors all suffer damage to their ability to understand and participate effectively in our democracy when last

minute changes to governance are imposed without any notice or consultation during a campaign contrary to basic democratic and constitutional principles.

Balance of (in)convenience strongly favours applicant

27. It is not clear that there is any damage that will be suffered by the defendants if the sought order is granted. The delaying of the coming into force of the BLGA will not impact on the Province, the Provinces government, or the agenda of the Premier, rather, it will only result in those changes coming into force for the next election, rather than the current one.

28. As the refusal of the sought order would allow to continue breaches of the applicants fundamental and constitutional rights that will cause irreparable harm to not only the applicant but dozens of candidates and nearly 2 million electors, while the granting of the order will not impose any material cost or inconvenience on the defendants, the balance of convenience overwhelmingly favours the applicant.

PART V – ORDER SOUGHT

29. The applicant seeks an Order delaying the coming into force of the BLGA until after the 2018 election and confirming that city and electoral staff shall comply with the existing legislation and by-laws properly passed and in force.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated at Toronto, Ontario, this 13th day of August, 2018

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