Court of Appeal File No:
Superior Court File Nos: CV-18-00603797-0000
CV-18-00602494-0000
CV-18-00603633-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in appeal)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in appeal)

and

ONTARIO (HON. DOUG FORD, PREMIER OF ONTARIO), ONTARIO (ATTORNEY GENERAL)

Respondents
(Appellants)

and

CITY OF TORONTO

Respondent
(Respondent in appeal)

(Title of Proceeding Continued on p. 2)

NOTICE OF APPEAL

AND BETWEEN:

CHRIS MOISE, ISH ADERONMU, and PRABHA KHOSLA, on her own behalf and on behalf of all members of Women Win TO

Applicants
(Respondents in appeal)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

and

JENNIFER HOLLET, LILY CHENG, SUSAN DEXTER, GEOFFREY KETTEL AND DYANOOSH YOUSSEFI

Interveners
(Respondents in appeal)

NOTICE OF APPEAL

THE APPELLANT, The Attorney General of Ontario **APPEALS** to the Court of Appeal for Ontario from the Order of the Honourable Justice Edward Belobaba of the Superior Court of Justice dated September 10, 2018.

THE APPELLANT ASKS that the Order be set aside and an order be granted as follows:

1. That the appeal be allowed and the applications dismissed with costs;

2. Such further and other relief as counsel may advise and this Court deems just.

THE GROUNDS OF APPEAL are as follows:

3. On August 14, 2018, the *Better Local Government Act, 2018* (the "Act") came into force. The Act, *inter alia*, reduced the number of wards within the City of Toronto from 47 to 25 for

the October 22, 2018 municipal election and changed the composition of Toronto's City Council such that it would consist of 25 Councillors with one Councillor per ward (plus the Mayor).

4. The City Clerk began preparation for the 25-ward election upon the introduction of the Act on July 30, 2018. As of August 20, 2018 the Clerk reported to City Council that she was ready for the election with 25 wards and that reversing course to a 47-ward election would raise concerns regarding the integrity of the election.

5. Between August 7 and 22, 2018, three separate applications were served challenging the constitutionality of the Act. They were heard together on an expedited basis before the Application Judge on August 31, 2018. On September 10, 2018, the Application Judge found that: sections 4 to 7 of Schedule 1 and Schedule 3 of the Act and O Reg 407/18 and O Reg 408/18 made pursuant thereto, subject to specified exceptions[1] (the "Impugned Provisions") infringed s 2(b) of the *Charter* and could not be saved under s 1. He declared the Impugned Provisions to be of no force and effect and ordered a 47-ward election to proceed on October 22, 2018. By his Order dated September 10, 2018, the Application Judge remains seized of the applications to address: (a) any requests for consequential or collateral relief required to allow the election to be carried out in accordance with the Order; (b) certain adjourned issues; and (c) costs. Item (a) is intended to address issues that could arise in the administration of the 47-ward election by the City Clerk in respect of which she may need court-ordered relief. Item (b) concerns issues raised by the applicant City of Toronto (impugning the Province's authority to remove from City Council the power to establish its ward boundaries and composition), which were adjourned by the City because those issues did not need to be addressed prior to the

[1] The exceptions were to: (a) the part of section 1 of Schedule 3 of the Act that adds subsection 10.1(1) and 10.1(10) to the *Municipal Elections Act, 1996*, SO 1996, c 32 Sch ("*MEA*"), to the extent that it is necessary to permits s 4, 5 and 12 of O Reg 407/18 to remain in force; (b) the part of section 1 of Schedule 3 of Bill 5 that adds subsection 10.2 to the *MEA*; and (c) sections 4, 5, 12 of O Reg 407/18.

October 22, 2018 election. None of items (a) through (c) are at issue on the within appeal.

A. Error of law in finding *Charter* s 2(b) breach

6. The Application Judge erred in law in holding that: (1) s 2(b) of the *Charter* was infringed as a result of the timing of the passage of the Act; (2) that s 2(b) was infringed by the change to the number of City wards and includes a right to "effective representation" as that term is understood under s 3 of the *Charter* (which only applies to federal and provincial elections).[2]

1) No right to mid-campaign *status quo*

7. The Act does not limit any attempt to convey meaning in purpose or effect, let alone substantially interfere with the freedom of expression of candidates or any other person.

8. Section 2(b) protects the freedom to engage in political expression. It does not protect a right to "effective" expression. There is no duty on the state under s 2(b) to refrain from conduct or the implication of law that renders someone's speech less persuasive or effective, or to refrain from steps that would result in making a person's prior speech less relevant, or present or future speech less worthwhile.

2) No right to effective representation in elections protected under s 2(b)

9. Section 2(b) of the *Charter* does not protect effective representation in elections. The right to effective representation is protected under *Charter* s 3, which is expressly confined only to federal and provincial elections. Section 2(b) cannot be used to enlarge the scope of s 3 beyond its ambit. The Supreme Court has repeatedly insisted on the primacy of the text of the Constitution. The omission of municipal elections from the text of s 3 means that such a right

[2] Municipal elections are not protected under s 3 of the *Charter*. Municipalities are creatures of statute. Municipalities operate on power delegated by the Legislature. In delegating power to municipalities, the sovereign Legislature does not abdicate any of its power. The Legislature may revoke a municipality's powers at any time.

should not be read into other provisions, such as s 2(b). Section 2(b) does not guarantee a particular constituent to representative ratio. In any event, even the concept of effective representation under s 3 of the *Charter* does not include any requirement for constituent to Councillor ratios. The Application judge erred in extending the application of the concept of "effective representation" so as to establish a maximum number of constituents per Councillor.

10. Section 2(b) of the *Charter* does not guarantee access to any particular statutory or other platform for expression. The Order of the Application Judge has the effect of constitutionalizing the previous 47-ward municipal electoral regime as a particular platform for expression to which the applicants are entitled.

11. In highly exceptional circumstances, s 2(b) may give rise to a positive right to state assistance, but only if the claimants can meet the stringent test set out in the jurisprudence (e.g. *Baier v Alberta*, 2007 SCC 31). The Application Judge did not apply the test which must be met for there to be any obligation on the Legislature to ensure access to a particular platform for expression. There was no finding that the three elements of the test were satisfied, namely that:

1) the claimants are excluded from a particular statutory regime enabling expression and their claim that the legislation is under-inclusive is grounded in a fundamental *Charter* freedom rather than the desire to access the particular statutory regime;

2) exclusion from the statutory regime substantially interferes with the claimant's freedom of expression or has the purpose of infringing s 2(b); and

3) the state is responsible for the claimant's inability to exercise the fundamental freedom.

B. Error in finding any breach not justified under *Charter* s 1

12. The Application Judge erred in law and made palpable and overriding errors of fact in finding that any *Charter* breach was not justified under section 1. In particular, the Application Judge:

a) gave weight to irrelevant factors and erred in holding that Ontario had not put forward sufficient evidence of a pressing and substantial objective, despite the clearly stated evidence of the Legislature's objectives reflected in the legislative debates and in the record overall, including the Ontario Municipal Board majority and dissenting reasons (in connection to the City's 47-ward model and the 25-ward model later adopted in the Act), which formed part of the record;

b) erred in holding that Ontario had not established minimal impairment because enacting the legislation after the election would have been "less impairing" despite the fact that delaying the intended reforms of Toronto City Council would not have achieved the government's objectives at all, or as effectively.

13. To satisfy minimal impairment, the government is not required to select a measure that will not achieve its objectives, or not achieve them as effectively. Enacting the legislation after the 2018 election would not have achieved the objective of better approaching voter parity for the 2018 election or improving the effectiveness and efficiency of Council for the upcoming term.

C. Error of law in ordering a 47-ward election as remedy

14. The Application Judge erred in law in declaring the impugned provisions of the Act immediately of no force and effect and ordering a 47-ward election. The more appropriate course would have been for the Court to grant a suspended declaration of invalidity to permit the Legislature to decide how best to address the Court's decision.

15. In choosing the appropriate remedy, a court should seek to avoid undue intrusion upon the legislative sphere. The first step in determining the appropriate remedy is to define carefully the extent of any inconsistency between the statute in question and the Constitution, and then to

declare inoperative: (a) only the portions found inconsistent, and (b) any part of the remainder of the legislation which it cannot be safely assumed the Legislature would have enacted without the portions found inconsistent.

16. The Application Judge overstepped what was necessary to remedy the constitutional breach he found, as well as the proper role of the Court, in mandating that the pre-existing 47-ward regime be revived. The *Charter* s 2(b) breach found by the Application Judge, now under appeal, only related to the timing of the Act and the ratio of City Councillors to constituents in each ward. These findings do not support the conclusion that a 47-ward election is constitutionally required.

17. Nor does the s 2(b) breach found by the Application Judge support reviving a pre-existing regime that no longer has the force of law due to a legislative amendment that was not found to be unconstitutional. The 47-ward / 47-Councillor regime that existed before the Act was passed was lawful only by virtue of by-laws passed by the City now deemed not to have been passed, and which were passed under statutory authority that has been removed from the City.

18. The Order directing a 47-ward election is inconsistent with the remedial objective of respecting legislative purpose while addressing the constitutional breach found by the Court. The fact that the Application Judge found that the 25-ward regime was unconstitutional does not render unconstitutional the policy objectives of achieving better voter parity for the 2018 election and improving the efficiency and effectiveness of Council by reducing its size.

19. In addition, the Application Judge erred in failing to provide the Attorney General an opportunity to make submissions regarding remedy, despite having advised the parties at the hearing that he would hear from them on the remedial order after ruling on the question of constitutionality. Had she been given the proper opportunity, the Attorney General would have

sought a suspension of the Court's declaration, consistent with her usual position in constitutional litigation and particularly apt given the impending election.

D. Error of law in failing to provide procedural fairness to the Attorney General of Ontario in a manner that materially prejudiced Ontario's constitutional defence

20. The Application Judge erred in ordering, at a case conference on August 21, 2018, the hearing of the merits in all three applications to proceed on August 31, 2018 before the Moise *et al* applicants and the Hollet *et al* interveners had served all their evidence and before the City had commenced its proceeding or filed any evidence. At that time, the Application Judge ordered the hearing to proceed over the objection of the Attorney General of Ontario that Ontario was being provided insufficient time to meaningfully respond to (or conduct cross-examinations on) the affidavit evidence served by the applicants and interveners, including evidence tendered as expert opinion, which were served on August 20, 21 and 22, 2018. Over those three days, Ontario was served with thousands of pages of evidence, including three expert affidavits, and many affidavits from non-experts (some of which also included opinion evidence). Under the schedule, Ontario's responding material was due August 27, 2018, the applicants and supporting interveners' facta were due August 28, 2018 and the Attorney General's and supporting intervener's facta were due August 29, 2018. The schedule provided no time at all for cross-examination. The applicants later insisted on and received the right to file reply facta on August 30, 2018.

21. The August 31, 2018 date, and the aggressive schedule for the exchange of evidence and facta, had been set at Civil Practice Court on August 14, 2018 when Rocco Achampong's claim was the only extant application and the City had not yet decided whether to bring an application. The Achampong application was not supported by any expert evidence and only made bald

allegations of a breach of *Charter* s 7 and unwritten constitutional principles in connection with an alleged failure to consult on the enactment of the Act. Mr Achampong sought only "interim relief". At the August 14, 2018 Civil Practice Court attendance, August 31, 2018 was contemplated as a date for the hearing on the merits of the Achampong claim as well as an application by the City, if it brought one, but the Attorney General's agreement to that date (and the schedule for the exchange of materials) was expressly subject to a caveat that the Attorney General did not yet know if the City would put facts into issue. In the circumstances, at the request of both the City and the Attorney General, the matter (as to both the August 31, 2018 hearing date and the schedule) was ordered spoken to again at a Civil Practice Court on August 21, 2018 (to address any issues that might impact timing).

22. At the Civil Practice Court of August 21, 2018, the Moise *et al.* applicants and Hollett *et al.* proposed interveners first appeared, raising *Charter* ss 2(b), (d) and 15 for the first time. They, the City (which had decided the previous day to bring a claim) and Mr Achampoing insisted that all three applications be heard on the merits on August 31, 2018, and that the Attorney General should be bound to the schedule established on August 14, 2018, regardless of the dramatic change in the scope of the evidence and the nature of the claims to which the Attorney General would have to respond. In light of the disagreement among the parties, the Civil Practice Court transferred the matter to be spoken to before the Application Judge who, the parties were later informed, had been assigned to hear the merits. The Application Judge acknowledged that the Attorney General was facing an "avalanche" of new material, but he declined the Attorney General's request to adjourn the matter to Civil Practice Court on August 28, 2018 or to a further case conference before him on or about August 24 or 27, 2018, after counsel for the Attorney General could review and digest the material that was being served on

August 20 to 22, 2018.

23. The Application Judge stated he might consider adjusting the schedule by "a day or two" if counsel for the Attorney General convinced him that cross-examinations were absolutely necessary, but he indicated that he would be extremely reluctant to accede to such a request. In the result, the Attorney General was not able, in the space of a few days, to engage an expert to respond to the opinion evidence proffered by the applicants or to assist counsel in conducting any cross-examination of the affiants tendered by the applicants as experts. The schedule could not accommodate any cross-examinations and an adjustment of a day or two would not have made a meaningful difference.

24. The Application Judge compounded this grave breach of procedural fairness in his decision by finding that the Attorney General had failed to put forward sufficient evidence to meet its onus under *Charter* s 1 and finding on the basis of the applicants' expert evidence a failure of effective representation, when the Attorney General was not provided with any meaningful opportunity to respond to or test this evidence.

25. The Attorney General of Ontario will be seeking by way of motion before this Court to adduce fresh evidence on appeal and/or to conduct cross-examinations to cure this failure of procedural fairness which had a decisive impact on the findings of the Application Judge on what he considered, in his reasons, critical issues in the case.

THE BASIS FOR THE APPELLATE COURT'S JURISDICTION IS:

1. Clause 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c C43 ("*CJA*");

2. The Order is a final order of a Judge of the Superior Court of Justice, that is not an order referred to in clause 19(1)(a) of the *CJA*; and

3. Leave to appeal is not required.

September 12, 2018

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CHRIS MOISE *et al.* Applicants (Respondent in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellants)	and	CITY OF TORONTO Respondent (Respondent on Appeal)

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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