Court File Nos: **CV-18-00602494-0000**
CV-18-00603797-0000
CV-18-00603633-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF TORONTO

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent

AND BETWEEN:

ROCCO ACHAMPONG

Applicant

-and-

ONTARIO (PREMIER), ONTARIO (ATTORNEY GENERAL), and CITY OF TORONTO

Respondents

AND BETWEEN:

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

-and-

ATTORNEY GENERAL OF ONTARIO and
THE CORPORATION OF THE CITY OF TORONTO

Respondents

FACTUM OF THE ATTORNEY GENERAL OF ONTARIO

THE ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9
Fax: 416-326-4015

Robin Basu (LSO# 32742K)
Tel: (416) 326-4476
Email: robin.basu@ontario.ca

Yashoda Ranganathan (LSO# 57236E)
Tel: (416) 326-4456
Email: yashoda.ranganathan@ontario.ca

Audra Ranalli (LSO# 72362U)
Tel: (416) 326-4473
Email: audra.ranalli@ontario.ca

Of Counsel to the Respondent,
Attorney General of Ontario

TO:

ROCCO K. ACHAMPONG
Barrister & Solicitor
2500-1 Dundas Street West
Toronto, Ontario, M5G 1Z3

Rocco Achampong (LSO# 57837J)
Gavin Magrath (LSO# 51553A)
Selwyn Pieters (LSO# 50303Q)

roccoachampong@gmail.com
gavin@magraths.ca
selwyn@selwynpieters.com

Applicant/Counsel for Applicant
Rocco K. Achampong

AND TO:

THE CITY OF TORONTO
City of Toronto Legal Services
Metro Hall
55 John Street, 26th Floor
Toronto, Ontario M5V 3C6
Fax: (416) 397-5624

Glenn Chu (LSO# 40392F)
Diana W. Dimmer (LSO# 40392F)
Philip Chan (LSO# 68681S)

glenn.chu@toronto.ca
diana.dimmer@toronto.ca
philip.k.chan@toronto.ca

Counsel for the Applicant,
City of Toronto

AND TO: **GOLDBLATT PARTNERS LLP**

20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Howard Goldblatt (LSO# 15964M)
Steven M. Barrett (LSO# 24871B)
Simon Archer (LSO# 46263D)
Geetha Philipupillai (LSO# 74741S)

hgoldblatt@goldblattpartners.com
sbarrett@goldblattpartners.com
sarcher@goldblattpartners.com
gphilipupillai@goldblattpartners.com

Counsel for the Applicants,
Chris Moise, Ish Aderonmu and Prabha Kosla on her own behalf and on behalf of all members of Women Win TO

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Donald K. Eady (LSO# 30635P)
Caroline V. (Nini) Jones (LSO# 43956J)
Jodi Martin (LSO# 54966V)

Counsel to the Intervenors,
Jennifer Hollet, Lily Cheng, Susan Dexter, Geoff Kettel, and Dyanoosh Youssefi

AND TO: **DLA PIPER (CANADA) LLP**

Suite 6000, 1 First Canadian Place
PO Box 367, 100 King St. W.
Toronto, ON M5X 1E2

Derek Bell (LSO# 43420J)
Ashley Boyes (LSO# 74477G)

derek.bell@dlapiper.com
ashley.boyes@dlapiper.com

Counsel for the Intervenor,
The Canadian Taxpayers Federation

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PART I – OVERVIEW

1. Three applications challenge the *Better Local Government Act, 2018* ("Bill 5" or the "Act"): an application by Rocco Achampong (a Toronto candidate), a second by Chris Moise *et al* (Toronto candidates and electors) and a third by the City of Toronto.

2. At issue is Bill 5's reduction of the number of wards in Toronto from 47 to 25 and the resulting reduction in the number of City Council seats in the 2018 election. The purpose of Bill 5 is to achieve greater voter parity among Toronto's wards in 2018, to improve the efficiency and effectiveness of City Council and to save money for Toronto's taxpayers. Bill 5 achieves greater voter parity for the 2018 election than the 47-ward model it replaces. Bill 5 adopts boundaries arrived at by an independent federal Commission and which mirror the federal/provincial electoral boundaries within the City of Toronto.

3. Ontario's 42nd Parliament (convened on July 11, 2018 following the provincial election) moved quickly with the enactment of Bill 5 after its introduction on July 30, so as to preserve the October 22, 2018 date for the municipal election. Bill 5 would not achieve its purpose if it did not apply to the 2018 election. The Province immediately offered assistance to the City to prepare for a 25-ward election under Bill 5.

4. The Moise applicants limit their claim to the impact of the passage of Bill 5 "*during the current election period without notice or consultation*." They do not challenge in this litigation whether the permanent reduction of the number of wards and council seats is itself (apart from the timing) unconstitutional (See Letter, Tab C). The position of the City appears to be different, with counsel advising that he is confining argument to *"the constitutionality [of Bill 5] as it affects the 2018 election only and to adjourn argument on Bill 5's effect on future elections"* (See Letters, Tabs D and E). Mr Achampong's claim appears to be limited

to the Act's impact on his 2018 campaign.

5. Mr Achampong also takes issue with Bill 5's change to the process for selection of four regional chairs. Elections for regional chair were newly mandated in 2016 legislation for the 2018 municipal elections. Bill 5 reverses that change for four regions (York, Peel, Niagara and Muskoka).

6. There is no merit to any of the applicants' claims regarding a failure of the Legislature to consult. The Legislature does not owe a duty of procedural fairness or to consult. Procedure in the Legislature is not subject to judicial review.

7. Municipalities are creatures of the Legislature which is free to delegate power to them, and to amend or withdraw the delegation.

8. Unwritten constitutional principles (rule of law, democracy, respect for minorities) have no application here. They do not support the invalidation of legislation.

9. Neither the Act nor its timing breach the *Charter*. The s 3 right to vote and run for office does not apply to municipal elections. The Act does not engage s 2(b), as Bill 5 does not regulate any attempts to convey meaning. The timing of Bill 5's enactment does not interfere with expressive activity. The reduction in the number of Toronto wards and council seats does not prevent anyone from running, campaigning or voting in the election. Section 2(b) does not guarantee that expression will be effective nor does it guarantee a "platform" for expression, such as the existence of an elected municipal council, let alone a council with a minimum number of seats or an elected chair. The Act does not substantially impair any s 2(d)-protected associational activity in the pursuit of shared goals. The Act draws no distinctions on enumerated or analogous grounds protected by s 15. Neither the Act, nor the timing of its enactment, results in any adverse effect upon a group protected by s 15: it applies

equally to all, and all candidates (incumbent or not), organizers and voters are required to adjust to the changes it prescribes. The material proffered as expert opinion is speculative and unsupported by an adequate factual foundation.

10. The Act has pressing and substantial objectives under *Charter* s 1 to ensure greater voting parity for the 2018 election and improve Council efficiency and effectiveness, and achieves its objectives by rational, minimally impairing and proportionate means.

11. No purpose would be served by directing the City to revert to a 47-ward model to vindicate any alleged legal requirement, constitutional right or principle. Toronto's City Clerk is now confident in the ability of the City to run a 25-ward election on October 22 and she is <u>not</u> now confident in the ability to revert to a 47-ward election. Judicial restraint is appropriate in an ongoing electoral process. Where electoral arrangements are concerned "when Parliament prefers, the courts defer."

PART II – FACTS

A. Toronto Ward Boundary Review ("TWBR") and OMB appeal: 47 vs 25 wards

12. By 1997 legislation, the City was amalgamated from the constituent entities of Metropolitan Toronto. In 2000, the federal electoral districts were legislatively prescribed as Toronto's wards with two councillors per ward (a reduction in the size of City Council from 56 to 44 members and a increase in the number of wards from 28 to 44). The authority to determine the structure of Council, including the number of councillors, wards and ward boundaries was delegated to the City under 2006 legislation.

13. By 2014 uneven population growth across Toronto resulted in wards that did not provide parity of voting power. Parity of voting power is determined by the ratio of councillors to voters in each ward. It is a fundamental principle, both under s 3 of the *Charter*, which applies to federal and provincial elections and at the municipal level as a matter of

policy, that electoral districts should aim, primarily, at achieving voter parity (an equal ratio of voters to seats). Otherwise, the votes of individuals in some wards will be more diluted than the votes of individuals in other wards. The City hired a consultant to undertake the Toronto Ward Boundary Review ("TWBR").

14. The 47-ward model proposed by the consultant in the TWBR and adopted by Council was designed to approach voting parity in 2026. The 47-ward model provided far less voting parity for 2018 than a 25-ward model based on Toronto's federal electoral districts ("FEDS").

15. The TWBR's terms of reference were in fact to aim to achieve voter parity for the year 2026, based on population growth projections. The TWBR chose 2026 as the target year for achieving voter parity rather than the next election in 2018 because of a desire to avoid undertaking a further redistricting prior to at least 2030.

16. As set out in the TWBR's interim Options Report*,* it did not initially explore a FEDS model as it was effectively ruled out by the choice of a 2026 target year: the TWBR viewed that the current FEDS (if unchanged) would not offer sufficient parity of voting power in 2026 due to uneven population growth. However, the City's Executive Committee then requested a "ward option that is consistent with the boundaries of the 25 federal and provincial ridings."

17. The TWBR's Supplementary Report indicated that the existing FEDS would not be an appropriate structure due to the 2026 target year and because of negative feedback from sitting councillors and survey results, though the survey results were in fact mixed on the question.

18. The TWBR ultimately recommended that the City's 44 wards be replaced with 47 wards. In November 2016, Council approved the 47-ward structure and in March 2017 passed

By-law Nos. 247-2017 and 464-2017 to give it legal effect.

19. It is uncontroverted that for 2018 the 47-ward model achieves less parity of voting power than the 25-ward FEDS. Only with the population changes assumed in the City's projections for 2026 would the 47-ward model come closer to parity. This issue proved to be the focus of controversy at Ontario Municipal Board ("OMB") hearings when the 47-ward model was challenged by proponents of a 25-ward FEDS model.

20. In late 2017, the OMB heard appeals of the by-laws. Two appellants sought an order dividing the City into 25 wards identical to the FEDS on the basis that the 47-ward regime did not meet the principle of effective representation or achieve voter parity in 2018. The FEDS-model was proposed to ensure a fair election in 2018 and to ensure that future elections would be fair, with boundaries produced regularly through an arm's-length, open process that can be quickly, defensibly and inexpensively adopted by the City on an ongoing basis.

21. The appellants raised concern about the methodology and demographic projections relied upon by the TWBR. They also argued that the approach of designing a ward expecting it to serve unchanged for several election cycles was unrealistic. The crux of the difference between the City and the appellants was the target year for voter parity. The OMB majority stated:

> The opposition argues that the City's approach sacrifices voter parity in the (2018) election and as a result, also sacrifices effective representation. The boundaries of federal electoral districts are reviewed after each 10-year census to reflect changes and movements in population. Dr. Sancton's opinion was that the target year of the boundaries should be drawn so that voter parity is achieved as soon as possible.

22. The majority of the OMB held that while it had the ability to amend the by-laws to reflect a different ward structure, it should exercise such power with caution and in the clearest of cases. The majority held there were no clear and compelling reasons to interfere with the decision of Council. Leave to appeal to the Divisional Court was refused on the basis

that the OMB appropriately exercised deference to the City's choices.

23. The OMB decision was not unanimous. The dissenting member stressed that under the City's 47-ward model, 2018's election is treated as less important than future elections. He would have made an order dividing the City into 25 wards consistent with the FEDS because the FEDS would achieve much better voter parity in 2018, with only two wards with a +/- 10% variance and one with a +/- 20% variance. By contrast, under the 47-ward model, 17 wards had variances greater than +/- 10% and two of those with a +/- 30% variance. While the FEDS did not result in "perfect parity" for 2018 it was "far superior" to the 47-ward model.

24. The dissent further found that there was no case for overriding the principle of voter parity on the basis of communities of interest, physical and natural boundaries or ward history. Those criteria, the dissent noted, "are duly considered in the FEDS for both the federal elections and the provincial elections…" The City's consultant acknowledges in his evidence that both the FEDS and the 47-ward model inevitably divide some communities of interest. Both the FEDS and the 47-ward model divide the Jane-Finch and Malvern communities. The FEDS model (being comprised of fewer wards) divides two more communities of interest, St Lawrence and Flemingdon/Thorncliffe Park.

25. Even on the applicants' own evidence, this is not a gerrymandering case where political parties attempt to disenfranchise minority voters by drawing electoral boundaries to "swamp" them in majority communities. On the contrary, as explained below, adoption of the FEDS model actually ensures appropriate ward boundaries for Toronto made by an arms-length federal commission, after consultations and with due regard for communities of interest, including visible and other minorities.

B. The Federal Boundaries Commission established the FEDS

26. The 25 wards in the FEDS model were set by the Federal Boundaries Commission for Ontario (the "Commission"). The Commission is an independent body responsible for readjusting federal electoral boundaries for Ontario. In July 2012, the Commission released a Proposal describing the boundaries of the 121 proposed electoral districts for Ontario. The Commission held 31 public hearings across the province in October and November 2012, including two days of hearings in Toronto.

27. The Commission's work was guided by: (1) s 15 of the federal *Electoral Boundaries Readjustment Act* which states that the Commission shall be primarily governed by the rule that "the population of each electoral district shall be as close as reasonably possible to the electoral quota for the province;" and (2) s 3 of the *Charter* and the "*Carter*" decision in which the Supreme Court held that s 3 guarantees the right to "effective representation," the prime condition for which is relative parity of voting power.

C. Bill 5 intended to adopt the FEDS model in time for the 2018 election

28. Bill 5 adopts the 25-ward FEDS model for Toronto's 2018 election. While the Bill does not include a rolling incorporation of the FEDS (i.e. the electoral districts as determined in the future by the federal Commission) to apply in elections beyond 2018, nothing precludes the Legislature from providing for such updates in the future.

29. Bill 5 reflects a policy choice as to ward boundaries and Council size for 2018 on an issue that was canvassed before the OMB, which reviewed the City's 47-ward model and did not reach a consensus. The majority exercised deference to the City over the objections of the dissent. Unlike the OMB, the Legislature can, through Bill 5, substitute its policy judgment for the City's.

30. At Second Reading, the responsible Minister set out the rationale for Bill 5:

> First, they [councilors 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 Torontonians as a whole. They gave an example of the current 44-member council having 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, and those savings go beyond just the savings of those councillors' salaries. The current 44-member council also creates a huge challenge for the Toronto bureaucracy, which has to respond to motion upon motion, to reports, reports and more reports, and then to deferrals and then more deferrals. [At the] most recent city council meeting, … there were 128 members' motions presented. If we allowed council to grow to 47 and hadn't acted quickly, many believe the situation would have become worse. …
>
> 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.

31. With respect to Bill 5's reversion to an appointment process for regional chairs in four regions for 2018 (leaving the regions with the discretion to determine whether their respective chairs should be appointed or elected in future elections), the Government explained that this reflected preferences of the regions which were disregarded in the 2016 legislative changes.

32. The Minister explained that the intention was to have Bill 5 in place prior to the 2018 municipal election. He described efforts underway to ensure the 2018 election could occur as scheduled: Bill 5 would extend the nomination period to September 14; the Ministry of Municipal Affairs and Housing (the "Ministry") would assist the City Clerk with transitional issues and had already reached out to the Chief Electoral Officer to help the City obtain the newest possible voters list. Quick passage of Bill 5, and (as described below) the prompt action by the City Clerk to implement Bill 5, helped minimize the period of uncertainty as to the rules for the upcoming elections.

D. Report to Council by City Clerk

33. On August 17, 2018, the City Clerk published a Report to City Council titled "Report for Information: The Impact of the *Better Local Government Act, 2018* (Bill 5) on Toronto's 2018 Municipal Election" (the "Clerk's Written Report").

34. The Clerk's Written Report notes that the *Municipal Elections Act, 1996* provides the Clerk with "significant discretion in administering elections and the independence of the municipal clerk for election purposes is a fundamental underpinning of the legislative framework." Council has no authority to direct her as to the conduct of elections.

35. The Clerk stated that from the time Bill 5 was introduced, she undertook "emergency contingency planning" with the assistance of resources from "within the City, partnerships with the Municipal Property Assessment Corporation (MPAC), Elections Ontario, the Ministry of Municipal Affairs and Housing, City agencies and others in developing a contingency plan." She stated that "the level of support and cooperation across the Toronto Public Service, partners and vendors has been unprecedented and has been a key factor in enabling the Clerk to prepare for these changes." She concludes:

> The City Clerk is confident that she has the capacity to administer the 2018 municipal election on a 25 ward basis and has taken the necessary steps to develop contingency plans to accommodate these changes in time for October 22, 2018.

36. The Clerk considered the risk to the 2018 election "in the event a challenge to Bill 5 is successful in the courts." With respect to reverting to a 47-ward election, the Clerk stated:

> Reverting back to a 47 ward model so close to election day raises unacceptable levels of risk and undermines the trust and confidence of candidates and voters. The City Clerk is concerned she will be unable to undertake the necessary due diligence required to administer an election while meeting the principles of the [*Municipal Elections* Act].

37. On August 20, 2018, Council held a special meeting styled "Legal Options to Challenge Bill 5, the *Better Local Government Act, 2018*." During the August 20 meeting, in answers to

questions from Councillors, the Clerk and her Deputy confirmed their readiness for a 25-ward election. Answering questions on the ability to prepare two election models concurrently, they stated that "it would be impossible to prepare for both election models going forward…"

38. The Clerk stated that it takes 15,000 to18,000 people to run an election. Reverting to a 47-ward model at this point "will risk confusing the public, confusing candidates, confusing our workers – all of which need to be trained… it simply is not feasible to run systems and do all the preparation work for two elections at the same time." She expressed concern that, if she is required to administer a 47-ward election, there will be a controverted election.

39. When asked what needed to be fixed in the event that the City reverts to a 47-ward election, the City Clerk and her Deputy provided a catalogue of necessary revisions, observing that "none of them are simple fixes."

40. As of August 14, 2018, the City's website was updated with detailed information answering questions on the transition from the 47-ward to the 25-ward election. This material answers the specific complaints and alleged confusion set out in the evidence of the applicant candidates as to the go-forward rules for the election. In this regard, it is important to note that campaign spending limits are based on the number of voters (electors) in each ward. With larger wards, spending limits are correspondingly increased.

PART III – THE LAW

A. The Legislature owes no duty of procedural fairness or to consult

41. A common theme in the applications is criticism of a lack of consultation on the part of the new Government and the 42nd Ontario Parliament in connection with Bill 5. As a matter of law, the Legislature, unlike a court, owes no duty of procedural fairness or to consult.

42. The only procedure due to the public in relation to parliamentary process is that

legislation receive three readings and Royal Assent. Procedure in the Legislature is not subject to judicial review: courts assess the content of legislation once enacted. There is no obligation on government to consult before it introduces legislation for consideration and enactment. The Legislature itself has no duty to consult or follow due process, except its own rules, in respect of which it is the arbiter.

43. There is no merit to the submission that Bill 5 has breached any candidate, organizer or voter's "legitimate expectation" that the municipal election would proceed as previously planned giving rise to an administrative law or other legal remedy. The doctrine of legitimate expectations is an aspect of the duty of procedural fairness. It does not apply to legislative enactments. The process by which individuals hold government to account in its role as legislator is through democratic elections, not judicial review.

44. It is alleged that the Legislature was precluded from enacting Bill 5 (which amends the *City of Toronto Act, 2006* ("COTA")) as a result of COTA, s 1, which speaks to the desirability of consultation and/or cooperation between the City and the Province. Section 1 of COTA permits the City and Crown to enter into agreements on consultation and cooperation. The Toronto-Ontario Cooperation Agreement ("T-OCA") provides at s 14 that failure to abide by any of its terms gives rise to no legal remedy.

45. Nothing in COTA as it existed before Bill 5, or the T-OCA, impairs or limits the ability of the Legislature to enact Bill 5 without advance consultation or notice. There is no inconsistency between s. 1 of COTA and the T-OCA, on the one hand, and Bill 5 or the manner of Bill 5's enactment, on the other. In any event, a subsequent enactment of the Legislature inconsistent with an earlier enactment is deemed to impliedly repeal the earlier enactment to the extent of inconsistency.

46. Parliament is not capable of binding itself (except as to manner and form requirements it expressly prescribes for itself – e.g. parliamentary procedural rules – which it can amend). Otherwise, a past parliament could bind a newly elected or a future parliament, thereby undermining representative democracy. As long as a statute is "neither *ultra vires* nor contrary to the [*Charter*], courts have no role to supervise the exercise of legislative power."

47. When governments enter into agreements (political agreements with other governments or binding legal contracts) they also do not bind the Legislature.

B. Municipalities are creatures of the Legislature

48. Section 92(8) of the *Constitution Act, 1867* gives the provincial legislature exclusive jurisdiction to make laws in relation to "Municipal Institutions in the Province." This provision gives provincial legislatures the right to "create a legal body for the management of municipal affairs." It includes the power to amalgamate such bodies and the power to establish and modify their geographic boundaries.

49. As Abella JA (then in the Court of Appeal) stated in *East York (Borough) v Ontario*, any ambiguity about whether a constitutional norm restricted a province from making changes to municipal institutions without municipal consent was resolved by the Privy Council in 1896 in the *Ontario Liquor License Case (Re)*. No subsequent case has diluted that authority.

50. Ontario municipalities have always been creatures of statute subject to annexation, amalgamation or reform by the Province. Over time, the Province has grown Toronto through annexations, changed its governance, reduced the number of municipalities within the (former) Metropolitan Toronto, amalgamated Toronto with other municipalities, and altered ward boundaries and Council size numerous times.

51. The *Constitution Act, 1867* envisages municipalities as creatures of the provincial

government with no independent authority. It is not for the courts to create a third order of government within this constitutional architecture.

52. Courts have rejected arguments that any kind of constitutional principle prevents legislative changes to municipal structures. Arguments for a "constitutional principle of municipal autonomy" and a "constitutional convention" requiring municipal consent before a municipal restructuring have been consistently rejected:

> The appellants argued alternatively that the provincial authority under s. 92(8) of the *Constitution Act, 1867* was circumscribed by implicit constitutional conventions (before Borins J), or by implicit constitutional norms (before us) not to effect change to a municipal institution without its consent.
>
> There is, with respect no evidence of the existence of a constitutional norm or of a constitutional convention so restricting provinces. When altering municipal institutions, there are undoubtedly sound political reasons for a provincial government to exercise care in the process of consultation and, ultimately, of reform. The expressions of public disapproval with the methodology employed prior to the passage of the *City of Toronto Act, 1997* confirm this truism. However, courts can only provide remedies for the public grievances if those grievances violate legal, as opposed to political proprieties. What is politically controversial is not necessarily constitutionally impermissible.

53. Nothing in the *Charter* alters these fundamental constitutional principles, nor can the *Charter* give municipalities constitutional status. Arguments for an unwritten constitutional principle or convention protecting municipalities from provincial intrusion cannot be imported through the *Charter* or otherwise to revise the *Constitution Act, 1867*.

C. Municipalities exercise only delegated power which can be revoked at any time

54. The Legislature has the power to delegate to municipalities any authority which it possesses under s 92. Municipalities can therefore exercise any s 92 power delegated to them, such as the power to change their electoral boundaries, as was delegated to Toronto in 2006.

55. The authority of the Legislature to delegate always implies the authority to take back or amend the delegated power. This power can be exercised by the Legislature <u>at any time</u>. To impose timing constraints on the Legislature in this regard (e.g, that a revocation of delegated

power cannot be made during a municipal campaign) would undermine parliamentary supremacy. The Legislature cannot permanently delegate its authority to adjust municipal electoral districts, nor can it be subject to timing or other restrictions on revoking a delegation, as this would unconstitutionally abdicate or impair the Province's power under s 92(8).

56. Applying these principles to the case at hand, it cannot be contended that the Legislature is bound not to change or revoke the electoral system and council-based government that it prescribed for its delegate (the City) or that its delegate established for itself pursuant to authority granted by the Legislature. This is true even in the "midst" of a municipal campaign.

57. The argument that the principles of "democracy" and "rule of law" have changed this state of affairs is unsustainable. The supremacy of the provincial legislature is itself an expression of the principles of democracy and the rule of law. It is the provincial Legislative Assembly, not City Council, which is the relevant elected body under the Constitution that exercises the will of our representative democracy in respect of the powers assigned by s. 92 of the *Constitution Act, 1867*. The enactment of law by the legislature reflects the principle of democracy and the rule of law.

D. Unwritten constitutional principles not an independent basis to strike down statutes

58. Unwritten constitutional principles are not an independent basis to strike down statutes. They may be helpful in resolving cases of ambiguity in the constitutional text, but where there is no ambiguity as to the contours of a right or power, they cannot be used to amend it. They cannot rewrite the Constitution. The principle of respect for minorities has been used to constrain executive action, not to invalidate legislation.

E. Nothing unconstitutional about retroactive legislation

59. The submission that retrospectivity of legislation is unconstitutional has no merit. Except for penal law (where retroactivity is limited by s 11(g) of the *Charter*) there is no general requirement of legislative prospectivity despite the fact that "retroactive legislation can overturn settled expectations and is sometimes perceived as unjust."

F. *Charter* s 3 does not apply to municipal elections

60. Section 3 of the *Charter* does not apply to municipal elections. Section 3 does not alter or limit the Legislature's s 92(8) jurisdiction over municipal institutions, nor bestow upon municipal institutions any constitutional status.

61. In any event, the contention that Bill 5 violates the principle of effective representation encompassed in s 3 is contrary to the evidence. Even if *Charter* s 3 were applicable, there is no basis for the assertion that Bill 5's 25-ward model undermines effective representation. The prime condition for effective representation is parity of voting power. Thus, the allegation that the 25-ward structure does not provide effective representation in 2018 is unsupportable. The 47-ward structure does not achieve parity for 2018; the FEDS, achieves much better parity in 2018.

62. While other conditions can be considered along with parity of voting power in seeking optimal effective representation (such as geography, community history, community interests and minority representation) these considerations were already taken into account by the Commission which established the FEDS in the first place.

63. Further, with respect to voter parity, the ratio of elected officials to constituents in each ward is now equal to that of the federal (and provincial) ridings in Toronto. To hold that the current ratio of councillors to constituents does not provide effective representation would mean either that: (a) the ratio of MPPs/MPs to constituents also does not provide effective

representation; or (b) that municipal government has a constitutional status that requires "more" representation than the provincial or federal legislatures, which is clearly not the case.

G. No s 2(b) *Charter* breach arising from Bill 5 or the timing of its enactment

64. The Supreme Court has set out a two-step analysis for s 2(b) freedom of expression claims. The first step asks whether the regulated activity conveys or attempts to convey meaning. If it does, the activity has expressive content and *prima facie* falls within the scope of s 2(b). Once it is established that the activity is protected, the second step asks if the impugned legislation infringes that protection, either in purpose or effect.

65. The applicants claim s 2(b) is engaged (i.e. that the first step is met). However, they make different submissions regarding the infringement of s 2(b). The City appears to claim that it is the Act itself (specifically, the actual reduction in the number of wards and councillors) that infringes s 2(b) by impairing effective representation or in some other way. The Moise applicants do not make this claim but assert that the impugned legislation violates s 2(b) in its effect as a result of its enactment in the midst of an ongoing campaign.

66. Contrary to all the applicants' claims, the Act does not regulate activity that conveys or attempts to convey meaning. The regulated activity is municipal governance, and, in particular the boundaries and composition of Council. These are not activities "which convey or attempt to convey a specific meaning or message" within the meaning of s 2(b). The Act does not regulate voting, campaigning or political expression of any kind. Citizens remain free to run, campaign and vote, and to communicate with candidates and councillors on any and all matters. The applicants, therefore, have not met the first step of the s 2(b) test.

1) Section 2(b) does not protect effective representation

67. The City claims the Act offends s 2(b) by failing to provide for effective representation.

The jurisprudence is clear that s 2(b) does not protect effective representation in elections. The right to effective representation is protected under *Charter* s 3, which, as explained above, relates only to federal and provincial elections. The Supreme Court has held that s 2(b) cannot be used to enlarge the scope of s 3 beyond its ambit. There is no jurisprudential support for the argument that s 2(b) guarantees a particular voter/representative ratio.

2) Section 2(b) does not guarantee a number of seats or ward structure, or immunize them from change

68. There is no s 2(b) right to a particular number of seats for elected office or a particular ward structure. To support the argument that a 47-ward Council is a constitutional imperative, the City in effect claims that there is a right under s 2(b) to a particular platform for expression (the right to run in a 47-ward election for 47 seats) and to have that structure remain unchanged. In *Haig*, the Supreme Court considered whether freedom of expression includes a right to be provided with a specific means of expression. In rejecting the claim, the majority noted that freedom of expression has typically been conceptualized in terms of negative rather than positive rights: it "does not compel the distribution of megaphones."

69. The arguments advanced here are similar to those rejected in *Native Women's Assn of Canada*. The federal government funded the participation of four national Aboriginal organizations in the midst of the Charlottetown Accord constitutional reform initiative, earmarking some funds for women's issues. The Native Women's Association ("NWAC") claimed the failure to fund it separately violated s 2(b), arguing that funding NWAC was necessary to provide "an equal voice for the rights of women." The Supreme Court held that to find a s 2(b) violation required evidence that funding NWAC's participation was *essential* to provide an equal voice for women and evidence that the funded groups advocate a male-dominated form of self-government.

70. In *Baier*, the Court reiterated that s 2(b) does not impose an obligation on the state to provide a particular platform for expression except in unusual circumstances where the applicants can demonstrate that: (a) they 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 a desire to access the statutory regime; (b) exclusion from the statutory regime substantially interferes with their freedom of expression or has the purpose of infringing s 2(b); and (c) the state is responsible for the inability to exercise the fundamental freedom. The decision in *Criminal Lawyers Association* does not relax this test, but merely restates it with a different formula in a different context: meaningful discussion of matters of public interest must be "effectively precluded" without access to information in the government's hands.

71. The applicants do not meet any of the above grounds for the exception to the general rule that s 2(b) only protects against state interference with freedom of expression. First, no one has been excluded by the new statutory regime. Anyone is free to run as a candidate in the larger wards adopted under the Act. Second, there is no interference with expression at all, let alone a substantial interference attributable to the state. Third, meaningful discussion of matters of public interest is not precluded by the Act.

3) Section 2(b) does not guarantee the mid-campaign status quo

72. The Moise applicants claim that the timing of the Act has the effect of rendering "many individuals" unable to effectively participate in the political process, unable to "carry through with their electoral strategies" and has diluted or made irrelevant their expressive political conduct and that of their supporters, that had occurred prior to the passage" of the Act.

73. There is no merit to the submission that the timing of the Act infringes s 2(b) as a result of diluting (or making irrelevant or "meaningless") the political expression of candidates and

supporters. Section 2(b) protects the right to engage in political expression, it does not protect a right to a particular effectiveness of such expression. As a general principle, there is no duty on the state to refrain from rendering someone's speech less persuasive or effective. In fact, government often enters the "marketplace of ideas" protected by s 2(b) to offer its own messaging to the public that renders less effective the speech of others (e.g. product safety warnings, "buy local" and tourism campaigns). This also occurs with political speech, when the government answers criticism of its policies. This does not render the freedom of the speakers opposed to the government's messaging less "meaningful" under s 2(b), though it may make their speech less effective. Provincial government actions undertaken "mid-campaign" may mean that municipal candidates need to make extra effort in their campaigns or may even undermine their messages (e.g. if the government cancels a provincial program that the candidate advocates expanding at the local level). This does not engage s 2(b) or render the candidates' freedom of expression less "meaningful." Thus, while geographically larger and more populous wards under the Act may mean that candidates who want to be successful in the 2018 election need to redouble their political expressive activity and other efforts to increase their chances of success, this does not infringe freedom of expression.

74. The Moise applicants argue that the impact of Bill 5 on campaign spending unjustifiably infringes s 2(b). Their submission is based on a misapprehension of law. They say that: "[t]he campaign funds expended to date for materials that are no longer usable nevertheless count against candidates' spending limits going forward for the remainder of the campaign, even while the territory where they must communicate has expanded dramatically." What they misunderstand is that, while campaign expenditures incurred under the 47-ward model continue to count in the new regime, the spending limit also increases as it

is based on the number of electors in the ward.

75. The Moise applicants also argue that Courts are sensitive to legislative action that has the effect of favouring established political actors, citing the dissent in *Harper*. There is no evidence that Bill 5 has such an impact. In any event, both the majority and dissent in *Harper* subscribed to the "egalitarian" model of elections. Under the egalitarian model, campaign finance restrictions are seen as a means to level the playing field and preventing the wealthy from controlling the electoral process to the detriment of others with less economic power.

76. The evidence shows that impediments to electoral success for the applicant candidates, or the applicant electors' preferred candidates, which they attribute to the Act and a claimed impact on s 2(b), is not a result of the Act and has nothing to do with their freedom to convey expressive content. Most notably, according to the opinion evidence, it is incumbency and a lack of term limits that affect the applicants' efforts to secure a greater proportion of Council seats for themselves or their preferred candidates. (See discussion below under s 15.) The Act does not regulate these matters which are unrelated to s 2(b).

H. No *Charter* s 2(d) breach

77. Section 2(d) of the *Charter* is infringed "where the State precludes activity <u>because of its associational nature</u>, thereby discouraging the collective pursuit of common goals."

78. Outside the labour context, none of the Supreme Court's s 2(d) jurisprudence countenances *Charter* protection of the objects or effectiveness of an association. The applicants have to show that Bill 5 substantially impairs their freedom to establish, belong to and maintain an association and pursue its lawful goals and to be free from compelled association where ideological conformity is mandated. Nothing supports the conclusion that the Act (or the timing of its enactment) substantially impairs the ability to collectively pursue

a lawful goal. Bill 5 only means that the goal of winning an election under the 47-ward model is no longer legally available.

79. The Moise applicants allege Bill 5 has had the effect of making their previous associational activity predicated on the 47-ward structure “meaningless” and limited the time during which electors are able to form new political coalitions under the 25-ward structure. In essence, they complain their pre-Bill 5 associations may be less effective in achieving their campaign goals because of the enactment of the Bill. The same impact could be alleged with respect to any associational activity that is affected by new legislation, but this does not impair freedom of association. Nothing in the Act precludes the applicants’ associational efforts in pursuit of their electoral goals.

80. The claim does not meet the threshold of demonstrating that the ability of any individual to form associations has been substantially impaired by the Act or the timing of its enactment, as is required to establish a s 2(d) breach.

I. No *Charter* s 15 breach

81. Under s 15(1), the onus is on the applicants to demonstrate that: (1) the law creates “a distinction based on an enumerated or analogous ground”; and (2) the distinction is substantively discriminatory because it perpetuates arbitrary disadvantage.

82. The Act creates no distinction on its face. It redraws the electoral boundaries of Toronto for all candidates (incumbent or non-incumbent), organizers, volunteers and voters.

83. The Moise applicants allege that although the Act is facially neutral, the timing of its enactment midway through the campaign period has had an “adverse impact” on women and minority candidates and will result in poorer turnout from women and minority voters.

84. To prove an adverse effects discrimination claim, the applicants must not only show

that there are groups that are adversely impacted, but that the adverse impact is caused by the law itself (not the result of other factors). It may be more challenging in general for women and minorities to be elected to municipal office because of a variety of factors. The Moise applicants' evidence refers to the effect of incumbency, the lack of term limits, socio-economic conditions, and the lack of political parties at the municipal level as factors posing alleged barriers to electoral success for such candidates. However, none of this establishes that the Act itself, or its timing, has an adverse effect under s 15. As stated in *Symes v Canada*: "If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exit independently of such a provision."

85. There is no evidence of an adverse impact on women and minorities as a result of the enactment of the legislation during the campaign period. Rather, what the applicant and intervener evidence amounts to is:

- speculation regarding whether minority/women candidates will run (or continue to run) given the change in ward boundaries;
- speculation that minority/women candidates will not have as good a chance of success because allegedly they need more time to prepare than other groups;
- speculation regarding voter turnout;
- claims about the difficulties faced by minorities and women (such as child care or economic disadvantage) unrelated to the Act; and
- speculation regarding the ability of the current City Council to address issues of relevance to women and minorities.

86. For example, Ms Khosla asserts women and racialized people tend to have less access to financial resources, and that because of this and women's caregiving roles, they are less

likely to absorb greater commitments on short notice. This is the "adverse effect" alleged to be created by the timing of the Act. Such claims are premised on a well-known statistical fallacy – what *may* be true for a broader group (women and racialized persons) is not necessarily true for a subset (women and racialized *election participants*).

87. The evidence of Professors Valverde and Siemiatycki is speculative and anecdotal. It is not supported by a factual foundation relevant to the specific question raised in this case – whether the timing of the enactment of the legislation in the middle of the campaign period has resulted in an adverse impact on women and visible or sexual minorities who are running for office or those helping them, as compared to others. Bald claims are made without any statistical or other empirical support: candidates who previously registered to run "will likely" now withdraw; the new ward structure "no longer makes a campaign viable" for minority identities and "likely fewer" people from these groups will achieve office; Bill 5 will cost "the strong likelihood of" a second LGBTQ councillor; under the 47-ward system one gay and one lesbian contender were "likely to be" elected, but now are "likely to drop out"; one minority candidate "could well fail" in his re-election bid because of the "possible competition" from another councillor in his new ward, meaning the Tamil community's representation on city council "could be fleeting"; Bill 5 will "likely" negatively impact voter turnout "particularly in wards with higher racialized minority populations and higher immigrant populations" and that as a result of low voter turnout "there could be consequences" for minority communities. This Court cannot rely on bald opinion evidence not based on a sound factual foundation.

88. A common thread in the Khosla, Valverde and Siemiatycki evidence is that the difficulty of displacing incumbents, i.e. not the Act, is the real challenge facing those seeking office or who hope to make Council more diverse. This is a challenge faced equally by all

non-incumbents and their supporters. The disappointment of the applicants with Bill 5 stems from the fact that, as a matter of mere contingency, with 47 wards available and the departure of some incumbents, up to 13 wards might not have had an incumbent running in the 2018 election. Bill 5 means, according to the applicants, that there will be fewer such opportunities. On another view, however, all 25 wards are in fact vacant: even incumbents now must compete for votes in new territory.

89. In the end, the number of women or minority candidates who will run, their success rate, and voter turnout will not be known until the September 14 nomination deadline and the October 22 election. Only then (and in fact only after repeated election cycles under different models) will there be an empirical basis to draw the kinds of conclusions that are asserted by the applicants as to the effects traceable to the Act or the timing of its enactment.

90. To prove a s 15 adverse effects claim, it is not enough to assert or even prove that women, minorities or other disadvantaged groups in general have disadvantages that make it harder for them to rapidly adapt to legislative changes that impose burdens on everyone. In the end, that is all that the applicants' evidence aims to show.

J. Any limitation of *Charter* rights is justified under s 1

91. The objectives of the Act to ensure, for the 2018 election, greater voter parity among wards than would be the case under the 47-ward model and to improve the efficiency and effectiveness of Council decision-making are pressing and substantial under s 1. There is a rational connection between these objectives and the Act.

92. The Act is minimally impairing. The 47-ward model does not achieve an acceptable level of parity for 2018. Nor does it achieve the Council effectiveness and efficiency sought by the Legislature. The Legislature need not select less impairing means (such as the 47-ward

model or to put off the reform to a later date) if to do so would not achieve its objectives.

93. The Legislature's policy judgments are supported on the issue of voter parity for 2018 by the TWBR's own work and the majority and dissenting reasons at the OMB, and on the issue of Council effectiveness and efficiency by common sense and experience, upon which the Legislature is entitled to rely. There is no obligation on government to conduct empirical research to support every policy measure adopted prior to implementation. The Divisional Court commented on the potential unwieldiness of a larger council for the City of London: "From a practical point of view and bearing in mind the salaries of members of City Council and the fact that a greatly enlarged City Council may prove unwieldy, it may indeed be appropriate to decide upon one councillor per ward."

94. The Act minimally impairs the rights of electors and candidates. Given that the FEDS model was designed by an independent commission taking into account voter parity and communities of interest in Toronto, any *Charter* breach is minimal. Individuals remain free to vote, run for Council, organize, and reach out to their elected representatives. The City Clerk is able to administer the 2018 election under the Act fairly without adverse impact on the integrity of the electoral process.

95. Delaying Bill 5 so it only applies to the 2022 and subsequent elections does not achieve the legislative objectives, especially with respect to parity for 2018. Waiting for the next election cycle would mean that the imbalance in voter parity under the 47-ward model would continue for the next four years and, as the OMB dissent noted, these imbalances would permeate every decision that Council makes during its term. Meanwhile, waiting until after the October 22 election and then enacting legislation reducing the size of Council once 47 councillors take office would be far more disruptive than the choice of the Legislature (itself

elected only weeks before) to enact Bill 5 before the 2018 election was in full swing.

96. While the OMB majority exercised deference to Council's decision to adopt the 47-ward model, the Legislature is under no requirement to defer to Council's preferences in establishing its own legislative policy. Moreover, the effectiveness of Council was not a criterion considered by TWBR, nor by the OMB in its review, as that was a matter beyond the remit of either body. It is, by contrast, an issue well within the Legislature's authority.

97. The Act meets the s 1 test for overall proportionality, which involves a consideration of the benefits to society accruing from the adoption of the measure against the actual harm caused to the individuals' *Charter* rights. The salutary effects of the Act are improved voter parity in 2018 and improved efficiency and effectiveness of City Council. Meanwhile, any *Charter* breach is minimal and proportional to these objectives.

98. Lastly, it must be stressed that the City Clerk has stated that it would not be possible to go back to a 47-ward model at this time without concerns for the integrity of the election. This Court should be particularly cautious about intervening in an ongoing electoral process.

PART V – ORDER REQUESTED

99. Ontario seeks an order dismissing the applications with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th OF MARCH 2018.

____________________	____________________	____________________
Robin Basu	Yashoda Ranganathan	Audra Ranalli

Of counsel for the Respondent, the Attorney General of Ontario

ROCCO ACHAMPONG Applicant	and	ONTARIO *et al.* Respondents	Court File No.: CV-18-00602494-0000
THE CITY OF TORONTO Applicant	and	ATTORNEY GENERAL OF ONTARIO Respondent	Court File No.: CV 18-00603797-0000
CHRIS MOISE *et al.* Applicants	and	ATTORNEY GENERAL OF ONTARIO *et al.* Respondents	Court File No. CV-18-00603633-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

FACTUM OF THE
ATTORNEY GENERAL OF ONTARIO

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Robin Basu (LSO#32742K)
Tel: 416-326-4476
Email: robin.basu@ontario.ca

Yashoda Ranganathan (LSO#57236E)
Tel: 416-326-4456
Email: yashoda.ranganathan@ontario.ca

Audra Ranalli (LSO#72362U)
Tel: 416-326-4473
Email: audra.ranalli@ontario.ca

Of Counsel for the Attorney General of Ontario