Motion File No. M49615
Court of Appeal File No. C65861
Superior Court File Nos. CV-18-00603797-00
CV-18-00602494-00
CV-18-00603633-00

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in appeal – Responding Party)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in appeal – Responding Party)

-and-

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

Respondents
(Appellants – Moving Party)

-and-

CITY OF TORONTO

Respondent
(Respondent in appeal – Responding Party)

(Title of Proceedings Continued on p.2)

FACTUM OF RESPONDING PARTY (RESPONDENT IN APPEAL), CITY OF TORONTO

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 – Responding Parties)

-and-

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

-and-

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

Interveners
(Respondents in appeal – Responding Parties)

FACTUM OF RESPONDING PARTY (RESPONDENT IN APPEAL), CITY OF TORONTO

September 16, 2018

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PART I – OVERVIEW

1. On September 10, 2018, Justice Belobaba declared the provisions of Bill 5, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("Bill 5") that reduced the number of wards in the City of Toronto (the "City") from 47 to 25 to be unconstitutional (the "Impugned Provisions"). The Impugned Provisions were declared to be of no force and effect and set aside immediately. The Attorney General of Ontario ("the Province") appeals this decision, and seeks a stay of Justice Belobaba's order.

2. The City opposes the Province's motion for a stay and submits that the Province has not met the test for granting a stay. The City's factum focuses on parts two and three of the test: (i) whether the Province has satisfied the onus on it of establishing irreparable harm to its own interests; and (ii) the balance of convenience.

3. The Province does not benefit from a presumption of irreparable harm where there has been a finding by the court below that the Impugned Provisions are unconstitutional. The Province has not put any evidence forward other than bald statements made in the legislature to justify the Ontario government enacting Bill 5 in the middle of the City's 2018 election. The Province has not met the onus of showing irreparable harm to its own interests when what is at issue is the governance structure of the City and the conduct of a free and fair election in 2018 for Toronto City Council. On the contrary, the context here and the evidence reflects that irreparable harm will be caused to the City, candidates registered to run in an ongoing 47-ward election and the residents and electors of Toronto.

4. For the reasons set out in this factum and Justice Belobaba's decision, the Province has not justified its purported objectives for enacting Bill 5. Its actions are not in the public interest. The reasons of Justice Belobaba in considering section 1 of the Charter are instructive. He found that "the Province's justification of the Impugned Provisions in Bill 5 fails at the first step of the s. 1 analysis. There is simply no evidence that the two objectives in question were so pressing and substantial that Bill 5 had to take effect in the middle of the City's election."[1]

5. The context matters in the review of the balance of convenience component of the *RJR-MacDonald* test. Here, the City conducted an extensive independent review regarding its ward boundaries and council composition over several years. City Council's adoption of the 47-ward boundary model was upheld by the Ontario Municipal Board ("OMB") and the Divisional Court. The OMB found that the 47-ward structure met the test of effective representation laid down by the Supreme Court of Canada. In contrast, the Province did not conduct a study, did no consultation and has no evidence to justify its actions. As described by Justice Belobaba, "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".[2]

6. The balance of convenience clearly favours the City and the other applicants (respondents in appeal). Further, as the outcome of this motion will almost certainly affect how the 2018 City election will be conducted, it is not appropriate to grant a stay when the court below found the Impugned Provisions to be unconstitutional. Granting a stay would effectively grant the Province the remedy it seeks on appeal.

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[1] Decision of the Honourable Justice Belobaba, dated September 10, 2018 ["Reasons of Belobaba J."] at para. 72 (Motion Record of Attorney General of Ontario ["AG Motion Record"], Tab 4).

[2] Reasons of Belobaba J. at para. 70 (AG Motion Record, Tab 4).

PART II – THE FACTS

TORONTO WARD BOUNDARY REVIEW

7. On amalgamation in 1998, City Council was comprised of the mayor and 56 members of council (2 from each of the City's 28 wards). In 2000, after consultation between the Province and the City, legislation was passed to redivide the City into 44 wards, with one councillor per ward.

8. Beginning in 2013, City Council approved an extensive third-party review of its then existing 44-ward structure, with the goal of adopting a new ward boundary model which would be more reflective of "effective representation". Council determined this was necessary as there were significant discrepancies in population amongst Toronto's ward boundaries that warranted a review. The report before Council stressed that the "division of ward boundaries is the very basis of representative democracy" and the review process must be independent and unbiased, include substantial public consultation, and comply with principles set out by the Courts and the Ontario Municipal Board.[3]

9. The City engaged independent outside consultants, who conducted the Toronto Ward Boundary Review ("TWBR") over a period of more than three years. During this time, the TWBR held over 100 face-to-face meetings with members of City Council, school boards and other stakeholder groups and held 24 public meetings and information sessions and produced several substantial reports. The TWBR also drew on the experience of an outside advisory panel

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[3] Affidavit of Giuliana Carbone sworn August 22, 2018 ["Carbone Affidavit"], Exhibit J (Responding Motion Record of City of Toronto ["City Motion Record"], Tab 2-A, pages 68-69, 73).

with expertise in municipal law, business, academe, civil society research and the OMB.[4] City Council approved the use of $800,050.00 to cover the costs of the TWBR.[5]

10. After extensive consultation and review, the consultants wrote their *Final Report*, which was presented to the City's Executive Committee at its meeting of May 24, 2016. Their recommendation was to increase the number of wards from 44 to 47 and redraw the ward boundaries for all but six existing wards.[6]

11. Following receipt of the *Final Report*, the Executive Committee requested additional information from the consultants on several matters, including a request to further consider Toronto ward boundaries for increased consistency with the boundaries of the 25 federal and provincial ridings ("FEDs").[7] The consultants re-examined whether the ward boundaries could be consistent with the FEDs, but ultimately re-confirmed their recommendation for a 47-ward structure, with some further refinements to keep several communities of interest together.[8]

12. The City's consultants thoroughly considered the FEDs scheme. They did not recommend it because it did not provide for voter parity, it divided a number of communities of interest, and it would not accommodate growth in areas of the City that were growing rapidly.[9]

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[4] Affidavit of Gary Davidson sworn August 27, 2018 ["Davidson Affidavit"] at paras. 9-10 (City Motion Record, Tab 3, page 134).

[5] Carbone Affidavit, Exhibit K (City Motion Record, Tab 2-B, page 83).

[6] Carbone Affidavit at para. 49 (City Motion Record, Tab 2, page 62); Davidson Affidavit at para. 24 (City Motion Record, Tab 3, page 140).

[7] Carbone Affidavit at para. 50 (City Motion Record, Tab 2, page 63).

[8] Carbone Affidavit at paras. 50-51 (City Motion Record, Tab 2, page 63).

[9] Davidson Affidavit at paras. 34-41, 47, 51, 56-58 (City Motion Record, Tab 3, pages 144-148, 150-152).

13. The consultants were also of the professional opinion that the FEDs model created a problem with the capacity of councillors to represent their constituents, due to the fact it would create wards with an average of approximately 111,000 people in them. The TWBR heard from councillors that wards with populations of approximately 61,000 each were desirable. Some councillors stated that they would not be able to represent larger wards, even with additional resources. Also, the City's average ward population was already in the upper part of the range for the most populous Canadian cities. Switching to the FEDs model would nearly double Toronto's ward sizes and result in significantly larger wards than any other Ontario municipality.[10]

14. At its November 2016 meeting, City Council adopted the recommended 47-ward structure with one councillor per ward. After an almost four year extensive review process, on March 29, 2017 and April 28, 2017, respectively, Council passed By-law 267-2017 and By-law 464-2017 (the "By-Laws"), which redivided the City's 44 wards into 47 wards with new ward boundaries.[11]

15. Under the then s. 128 of the *City of Toronto Act, 2006*,[12] any person including the Minister could appeal the ward boundary by-laws to the OMB. Several appeals with respect to the By-Laws were commenced between March and June, 2017.[13] The Minister did not appeal. There is no appeal right to the OMB for decisions by City Council on Council composition.[14]

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[10] Davidson Affidavit at paras. 37-41 (City Motion Record, Tab 3, pages 145-147).

[11] Carbone Affidavit at para. 52 (City Motion Record, Tab 2, page 63).

[12] S.O. 2006, c. 11, Sch. A ["COTA"].

[13] See: Carbone Affidavit, Exhibit Q ["OMB Decision"] (City Motion Record, Tab 2-C).

[14] COTA (prior to Bill 5 amendments), ss. 128, 135 (City Factum, Sch. "B").

16. After an extensive seven day hearing in October 2017, the majority of the OMB panel approved the 47-ward boundary structure option with one small amendment to the boundary between two wards, but otherwise confirmed dividing the City into 47 municipal electoral wards. The OMB issued its order with respect to the By-Laws under appeal on December 15, 2017, in time for the 2018 election. The OMB concluded that the work undertaken by the TWBR was comprehensive and the ward structure delineated provides for effective representation.[15]

17. The OMB considered the position of the two appellants who sought an order dividing the City into 25 wards along the FEDs boundaries. The OMB reviewed the expert evidence. The OMB stated that adopting the FEDS scheme would cause it to impose on the City a structure that could decrease the current 44-ward structure to 25 wards and increase individual ward population, resulting in a significant impact on the capacity of councillors to represent their constituents.[16]

18. These same two appellants moved for leave to appeal the OMB decision. On March 6, 2018, Justice Swinton of the Divisional Court dismissed the motion for leave to appeal.[17] In doing so Justice Swinton noted that the OMB had applied the correct legal test for determining ward boundaries laid down in the Supreme Court of Canada decision of *Reference re Provincial Electoral Boundaries (Sask.)*.[18] Justice Swinton noted that setting electoral boundaries is an exercise that requires a weighing of many policy considerations and that the OMB considered relative voter parity as well as other factors: "[The Board] considered that communities of

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[15] OMB Decision at para. 51 (City Motion Record, Tab 2-C, pages 111-112).

[16] OMB Decision at para. 36 (City Motion Record, Tab 2-C, page 104).

[17] Carbone Affidavit, Exhibit R ["Reasons of Swinton J."] (City Motion Record, Tab 2-D).

[18] Reasons of Swinton J. at para. 5 (City Motion Record, Tab 2-D, page 129). See also: *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (Book of Authorities of City of Toronto ["City BOA"], Tab 1).

interest are best respected in a 47-ward structure (at para. 36). It also noted that a 25-ward structure could increase voter population in wards resulting in a significant impact on the capacity to represent. (at para 36)."[19]

19. Justice Belobaba made numerous findings of fact related to the TWBR and the problems with the 25-ward FEDs option not achieving effective representation:[20]

> [54] The TWBR began in 2013 and concluded in 2017. Over the course of the almost four-year review, the TWBR conducted research, held public hearings, and consulted widely. The TWBR considered the "effective representation" requirement and the ward size that would best accomplish this objective. The option of reducing and redesigning the number of wards to mirror the 25 Federal Election Districts was squarely addressed and rejected by the TWBR. City Council's decision in 2017 to increase the number of wards from 44 to 47 was directly based on the findings and conclusions of the TWBR, which in turn were affirmed on appeal to the Ontario Municipal Board and the Divisional Court.[41]
>
> [55] Put simply, the 25 FEDs option was considered by the TWBR and rejected because, at the current 61,000 average ward size,[42] city councillors were already having difficulty providing effective representation.
>
> [56] Local government is the level of government that is closest to its residents. It is the level of government that most affects them on a daily basis. City councillors receive and respond to literally thousands of individual complaints on an annual basis across a wide range of topics - from public transit, high rise developments and policing to neighbourhood zoning issues, building permits and speed bumps.
>
> [57] Recall what the Supreme Court said in *Saskatchewan Reference* about how effective representation includes "the right to bring one's grievances and concerns to the attention of one's government representative."[43] This right must obviously be a meaningful right. This is particularly relevant in the context of the councillor's role in a mega-city like Toronto.
>
> [58] The evidence before this court supports the conclusion that if the 25 FEDs option was adopted, City councillors would not have the capacity to respond in a timely fashion to the

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[19] Reasons of Swinton J. at para. 10 (City Motion Record, Tab 2-D, page 130).

[20] Reasons of Belobaba J. at paras. 54-58 (AG Motion Record, Tab 4). Citations:

> [41] With the exception of a minor change in one ward boundary. Leave to appeal the decision of the OMB, (now known as the Local Planning Appeal Tribunal) in *Di Ciano v Toronto (City),* 2017 CanLII 85757 (ON LPAT), was denied by the Divisional Court: *Natale v City of Toronto*, 2018 ONSC 1475.
>
> [42] The average ward size in other Ontario cities is 32,600.
>
> [43] *Saskatchewan Reference, supra*, note 23, at para. 49.

"grievances and concerns" of their constituents. Professor Davidson, who filed an affidavit in this proceeding, and also participated in the TWBR as a consultant, provided the following expert evidence:

> It is the unique role of municipal councillors that distinguishes municipal wards from provincial and federal ridings. Boundaries that create electoral districts of 110,000 may be appropriate for higher orders of government, but because councillors have a more involved legislative role, interact more intimately with their constituents and are more involved in resolving local issues, municipal wards of such a large size would impede individual councillor's capacity to represent their constituents.
>
> It is my professional opinion that the unique role of councillors, as well as the public feedback received by the TWBR, and comparison with ward-size in other municipalities, demonstrates that a ward size of approximately 61,000 people provides councillors with capacity to provide their constituents with effective representation and that ward sizes of approximately 110,000 do not.

2018 ELECTION BASED ON 47-WARD STRUCTURE

20. With all of these proceedings completed, the City believed that it could proceed with the 2018 election based upon a 47-ward structure. The City Clerk (the "Clerk") is charged with administering the 2018 election (the "Election"). Since as early as January 2018, the Clerk and her staff began preparing to conduct an election for 47 councillor positions and 39 school board trustees, based on the new 47-ward structure.[21]

21. Election Day is October 22, 2018. The nomination period started on May 1 and ended on July 27, 2018. As of July 30, 2018, the Clerk had certified the nominations of the 509 candidates qualified to run in the Election.[22] The certification of candidates is an important milestone in an

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[21] Affidavit of Fiona Murray affirmed August 22, 2018 ["Murray Affidavit in Application"] at paras. 8, 11-13 (City Motion Record, Tab 1, pages 3-6).

[22] Murray Affidavit in Application at paras. 11, 16 (City Motion Record, Tab 1, pages 3-7).

election. At that point the candidates running for Councillor in each of the 47 wards is fixed and known to everyone.[23]

22. From May 1, 2018, once a candidate was nominated she or he could begin campaigning, which included spending money on their campaigns and receiving donations for their campaigns in accordance with the provisions of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch. (the "MEA"). By the time Bill 5 passed on August 14, 2018, many election candidates had already produced campaign material such as websites and pamphlets that expressly referred to the ward in which they were running.[24]

23. Further, when Bill 5 passed, the Clerk's preparations for the 47-ward Election were well underway, key tasks having been completed or commenced with respect to procedures, voting places, the voters' list, advance vote management, election day management, recruitment and staffing, training, communications, accessibility, operations and logistics, procurement and voting technology, among other things.[25]

24. Justice Belobaba made findings of fact relating to the 2018 Election which was underway:

> [29] The evidence is that the candidates began the election campaign on or about May 1, 2018 on the basis of a 47-ward structure and on the reasonable assumption that the 47-ward

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[23] Carbone Affidavit at para. 41 (City Motion Record, Tab 2, page 59).

[24] See: Carbone Affidavit at para. 41 (City Motion Record, Tab 2, page 59) and Exhibits H & I (Responding Motion Record of the Moise et al. Applicants ["Moise Motion Record"], Vol II, Tab 16, pages 751-1111); Affidavit of Lily Cheng sworn August 21, 2018 (Moise Motion Record, Vol III, Tab 18); Affidavit of Dyanoosh Youssefi sworn August 22, 2018 (Moise Motion Record, Vol III, Tab 19); Affidavit of Chris Moise sworn August 20, 2018 (Moise Motion Record, Vol I, Tab 6); Affidavit of Megann Willson sworn August 21, 2018 (Moise Motion Record, Vol I, Tab 11); Affidavit of Chiara Padovani sworn August 21, 2018 (Moise Motion Record, Vol I, Tab 12); Affidavit of Cheryl Lewis-Thurab sworn August 21, 2018 (Moise Motion Record, Vol I, Tab 14).

[25] Murray Affidavit in Application at para. 11 (City Motion Record, Tab 1, pages 3-6).

> structure would not be changed mid-stream. The 47-ward structure informed their decision about where to run, what to say, how to raise money and how to publicize their views. When Bill 5 took effect on August 14, mid-way through the election campaign, most of the candidates had already produced campaign material such as websites and pamphlets that were expressly tied to the ward in which they were running. A great deal of the candidate's time and money had been invested within the boundaries of a particular ward when the ward numbers and sizes were suddenly changed.[26]

BILL 5

25. On July 27, 2018, the government of Ontario announced for the first time its intention to reduce the number of City of Toronto councillors from 47 to 25 for the Election. On July 30, 2018, the same date by which the Clerk certified nominations for the 47-ward election, Bill 5 was introduced in the Ontario Legislature.[27]

26. Bill 5 came into force on August 14, the day it passed third reading and received Royal Assent. Bill 5 was not sent to Committee for consultation and the time for debate was shortened. Bill 5 redivided the City into 25 wards and declared that this ward structure would be used for the Election.[28]

27. Toronto was singled out; Bill 5 did not affect the ward boundaries or fix the number of councillors for any other Ontario municipality.

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[26] Reasons of Belobaba J. at para. 29 (AG Motion Record, Tab 4).

[27] Carbone Affidavit at para. 36 (City Motion Record, Tab 2, page 58).

[28] Carbone Affidavit at paras. 37-38 (City Motion Record, Tab 2, page 58).

LACK OF CONSULTATION WITH THE CITY

28. The City was never consulted or even approached by the Province to discuss the changes to COTA and the MEA that Bill 5 introduced. There were no discussions whatsoever about any provincial plan to remove the City's powers to establish its own ward boundaries or Council composition, or to impose on the City a specific ward and Council composition structure of Ontario's choosing, let alone that these changes were intended to take effect for the Election and that they would be imposed in the middle of the current election campaign.[29]

CHALLENGE TO BILL 5

29. Three applications were commenced, challenging the constitutional validity of Bill 5 and seeking to strike the Impugned Provisions in the provincial enactment. The applications were heard together by Justice Belobaba on August 31, 2018.

30. On September 10, 2018, Justice Belobaba issued his decision, finding that the Impugned Provisions of Bill 5 substantially interfered with the freedom of expression for both candidates and voters, and that the breaches were not saved or justified under s. 1 of the *Canadian Charter of Rights and Freedoms* (the "Decision").[30]

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[29] Carbone Affidavit at paras. 31-33 (City Motion Record, Tab 2, page 57).

[30] Reasons of Belobaba J. at para. 10 (AG Record, Tab 4).

31. Justice Belobaba found that the timing of Bill 5's change to the number and size of the City's electoral districts—in the middle of the Election—substantially interfered with candidates' freedom of expression.[31] As noted above he found on the evidence before him that:

- candidates began their election campaigns on or about May 1, 2018 on the basis of a 47-ward structure, expecting that the 47-ward structure would not be changed mid-stream;
- the 47-ward structure informed candidates' decisions about where to run, what to say, how to raise money and how to publicize their views;
- when Bill 5 took effect, most candidates had already produced campaign material such as websites and pamphlets that were expressly tied to the ward in which they were running;
- candidates had invested a great deal of their time and money within the boundaries of a particular ward when the ward numbers and sizes were suddenly changed;
- Bill 5 caused confusion for candidates about where to run, how to best refashion political messages and reorganize campaigns, how to attract additional financial support, and what to do about all the wasted campaign literature and other material;
- candidates spent more time with potential voters addressing the confusing state of affairs wrought by Bill 5 than discussing relevant political issues; and
- candidates' efforts to convey their political message about the issues in their particular wards were severely frustrated and disrupted.[32]

32. Justice Belobaba also found that Bill 5 interfered with voters' freedom of expression because it doubled the average ward populations from 61,000 to 111,000, effectively denying voters the right to cast a vote that could result in meaningful and effective representation.[33]

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[31] Reasons of Belobaba J. at para. 38 (AG Record, Tab 4).

[32] Reasons of Belobaba J. at paras. 29-31 (AG Record, Tab 4).

[33] Reasons of Belobaba J. at paras. 59-60 (AG Record, Tab 4).

Citing the "extensive evidence" before him about effective representation, referring to the findings and conclusions of the TWBR, Justice Belobaba accepted that:

- if the 25-ward FEDS model was adopted, City councillors would not have the capacity to respond in a timely fashion to the grievances and concerns of their constituents;
- boundaries that create electoral districts of 110,000 voters are not appropriate for municipal government because councillors have a more involved legislative role, interact more intimately with their constituents and are more involved in resolving local issues compared to politicians in higher orders of government; and
- ward sizes of approximately 61,000 people provide councillors with capacity to provide their constituents with effective representation, and ward sizes of approximately 110,000 do not provide for effective representation.[34]

33. Having determined that Bill 5 infringed the *Charter*, Justice Belobaba found that the Province failed at the first stage of the s. 1 analysis, as Bill 5 did not respond to any pressing and substantial objective. In the court below the Province relied on two objectives for Bill 5 to justify the *Charter* infringement under the s. 1 analysis: improved efficiency ("better decision-making"; a "more streamlined" City Council) and voter parity.[35] However, the Province's supporting evidence was scant, consisting of one news release and some excerpts from *Hansard*.[36]

34. Justice Belobaba found that there was simply no evidence to support Bill 5's alleged objectives. There was no evidence that City Council is in fact "dysfunctional", or that moving to a 25-ward model would provide voters with more effective representation.[37] And, had he found evidence to merit these objectives, Justice Belobaba also concluded there was no evidence that

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[34] Reasons of Belobaba J. at para. 58 (AG Record, Tab 4).

[35] Reasons of Belobaba J. at para. 68 (AG Record, Tab 4).

[36] Reasons of Belobaba J. at para. 64 (AG Record, Tab 4).

[37] Reasons of Belobaba J. at para. 71 (AG Record, Tab 4).

these objectives were so pressing and substantial that Bill 5 had to take effect in the middle of the 2018 Election.[38]

35. Further, not only did the Province fail to establish any pressing and substantial objective, Bill 5 actually undermined a genuine pressing and substantial concern in a free and democratic society: preserving the integrity of the election process.[39]

36. Even assuming that the Province established pressing and substantial objectives, Justice Belobaba concluded that Bill 5 was not a proportional means to those objectives.

37. In relation to improving efficiency in City Council debates, the Province had not shown why less intrusive but effective measures were not chosen, such as imposing time limits on debate or delaying the Council restructuring until after the Election.[40]

38. On the objective of voter parity or effective representation, Justice Belobaba pointed out that the Province's rationale for moving to a 25-ward structure had been carefully considered and rejected by the TWBR and by City Council just over a year ago, and that the Province's solution imposed by Bill 5 was "far worse" in terms of achieving effective representation.[41]

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[38] Reasons of Belobaba J. at paras. 71-72 (AG Record, Tab 4).

[39] Reasons of Belobaba J. at para. 73 (AG Record, Tab 4).

[40] Reasons of Belobaba J. at para. 75 (AG Record, Tab 4).

[41] Reasons of Belobaba J. at para. 76 (AG Record, Tab 4).

39. The Province proffered no evidence that any other options or approaches were considered or that any consultation took place that could have shown whether less impairing options existed or were explored.[42]

PURPORTED JUSTIFICATION FOR BILL 5

40. The Province offers up three purported objectives for Bill 5 on this stay motion. Again there is no evidence from the Province to support these objectives.

41. One purported objective is "achieving better voter parity for the 2018 election".[43] No evidence has been submitted by the Province to support this objective. Further, as found by Justice Belobaba, the proper test for determining ward boundaries is "effective representation". The OMB found that the 47-ward boundary model achieves effective representation.

42. The second purported objective is making Council more effective and efficient. Once again there is no evidence from the Province that this is a problem or that the 25-ward model would make the City government more effective and efficient. All that there was before Justice Belobaba was rhetoric from members of the government from the legislative debates recorded in *Hansard*. For example, the Premier commented in the legislature that:

> "Good governance in any corporation is seven to nine because you can't get anything done if you have 20 people around the table."[44]

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[42] Reasons of Belobaba J. at paras. 69-70 (AG Record, Tab 4).

[43] Factum of the Attorney General of Ontario, at para. 20.

[44] Legislative Assembly of Ontario, *Hansard*, July 30, 2018, at page 407 (City Motion Record, Tab 4, page 183).

The City government is not a private for-profit corporation but rather a democratically elected government representing over 2.7 million people. Toronto is the largest City in Canada and the sixth largest government in the Country. Democratic institutions by their very nature should provide for transparency and opportunities for public debate. On the Premier's theory, the Provincial legislature (124 MPPs) and the Canadian Parliament (338 MPs) are also inefficient.

43. The evidence from the Interim City Manager reflects that the work carried out by City Council is extensive and efficient.[45] Further, the statutory mandate of City Council is extensive and Councillors need to perform both their legislative and ombudsman functions.[46]

44. The third purported objective advanced by the Province for Bill 5 is "saving taxpayer expense".[47] Firstly, the Province did not seek to justify Bill 5 on this basis before Justice Belobaba. Justice Belobaba noted in his decision that "[t]he Province has indicated to the court that it does not rely on the costs saving objective for the s. 1 analysis".[48] Secondly, the evidence from the Interim City Manager reflects that there will not be the purported savings to the taxpayers.[49]

CITY CLERK'S ADMINISTRATION OF THE 2018 ELECTION

45. The Province has relied heavily for its motion on outdated information from the City Clerk about further steps that would need to be completed to run a 47-ward election.

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[45] Carbone Affidavit at paras. 4-19 (City's Motion Record, Tab 2, pages 50-54).

[46] COTA, ss. 131, 132. (City Factum, Sch. "B").

[47] Factum of the Attorney General of Ontario, at para. 20.

[48] Reasons of Belobaba J. at para. 68 (AG Record, Tab 4).

[49] Carbone Affidavit at paras. 14-19 (City Motion Record, Tab 2, pages 53-54).

46. Much of the work done before Bill 5 to prepare for a 47-ward election was preserved by the City Clerk in order to have contingency plans in place in case the court challenge was successful. The Deputy City Clerk confirms that their office "took measures to ensure that the possibility of running an election using a 47-ward structure would remain a viable option, including retaining and securing all data and information related to the 47-ward structure".[50]

47. As of the date of Justice Belobaba's decision, the City Clerk resumed preparing for the Election based on the 47-ward structure. The City Clerk's election website was updated as a result of the Decision with the following message:

> On September 10, the Superior Court of Justice set aside the provisions in Bill 5, the Better Local Government Act, 2018 that change the number of wards to 25.
>
> The City Clerk will commence preparations to administer the October 22 election under the 47-ward model. Nominations for candidates under the 47-ward model were closed on July 27 and certified.[51]

48. Under Bill 5, candidates who had registered to run in the 47-ward election had until September 14, 2018 at 2:00 pm to indicate in writing to the City Clerk their intentions to run in the 25-ward election, otherwise they would be deemed to have withdrawn their nomination altogether. Candidates who had not previously registered to run in the 47-ward election also had until September 14, 2018 to submit their nominations to run in the 25-ward election.

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[50] Affidavit of Fiona Murray affirmed September 14, 2018 ["Murray Affidavit in Stay Motion"] at para. 19 (Motion Record of Ulli Watkiss, City Clerk, City of Toronto ["City Clerk Motion Record"], Tab 2, page 15).

[51] Affidavit of Ralitza Anguelova affirmed September 14, 2018, Exhibit A (City Motion Record, Tab 5, pages 189, 194).

49. Of the 509 certified candidates whose nominations had been certified under the 47-ward structure, 206 of those candidates had not taken steps to run in the 25-ward election by the time the Impugned Provisions were struck down.[52]

50. The Clerk has taken steps to ensure the options of conducting an election on either a 47-ward or 25-ward structure remain open. Producing ballots is a significant undertaking. The certification of nominations permits the Clerk to begin production of ballots. As a result this can be done now for a 47-ward election but not for a 25-ward election.[53]

PART III – THE LAW

GENERAL PRINCIPLES

51. The starting point on an analysis for a stay of proceedings is the general proposition that successful parties are entitled to what are referred to as "the fruits of their judgment"; that is, they are entitled to the benefit of the order under appeal unless, and until, it is set aside.[54]

52. The City submits that there is no reason to depart from this principle in this case. This is consistent with another general proposition of law that an order is presumed to be correct unless and until it is set aside. Thus, as a starting point, the City and the other applicants (responding

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[52] Murray Affidavit in Stay Motion at para. 21 (City Clerk Motion Record, Tab 2, page 16).

[53] Murray Affidavit in Stay Motion at paras. 16, 22 (City Clerk Motion Record, Tab 2, pages 14, 16-17).

[54] *Peter Kiewit Sons Co. v. Perry*, 2006 BCCA 259, at para. 12 (City BOA, Tab 2). See also: *Carter v. Canada (Attorney General)*, 2012 BCCA 336, at para. 8 (City BOA, Tab 3).

parties/respondents in appeal) are entitled to the benefit of the declaration of unconstitutionality subject to the application of the other important principles discussed below.[55]

53. The test to be applied by the court in determining whether to grant a stay pending an appeal is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*:[56]

a) whether there is a serious question to be determined;
b) whether the moving party would suffer irreparable harm if the stay were not granted; and
c) whether the balance of convenience favours granting a stay.

54. Although the *RJR-MacDonald* test is to be applied, unlike that case, here, the legislation has already been declared to be unconstitutional, which is an important factor. Also, in the case of *Harper v. Canada (Attorney General)*, which the Province relies upon, the provisions in issue had not been declared invalid or unconstitutional.[57]

A. Serious Question to be Determined

55. The case law indicates that the threshold to satisfy the first part of the test is a low one. There are no specific requirements to be met, but the judge must make a preliminary assessment of the merits and conclude the appeal is neither vexatious nor frivolous.[58]

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[55] *Carter v. Canada (Attorney General)*, 2012 BCCA 336, at para. 8 (City BOA, Tab 3).

[56] [1994] 1 S.C.R. 311 ["*RJR-MacDonald*"], at para. 48 (City BOA, Tab 4).

[57] *Harper v. Canada (Attorney General)*, 2000 SCC 57, at paras. 4-5 (Book of Authorities of Attorney General of Ontario, Tab 11).

[58] *RJR-MacDonald*, at para. 54 (City BOA, Tab 4).

56. While the City will be vigorously responding to the appeal and submits the Decision is correct, the request for a stay should be refused as a result of the second and third parts of the *RJR-MacDonald* test.

B. Irreparable Harm

57. As noted by Rosenberg J.A. in *Bedford v. Canada (Attorney General)*, in cases involving the constitutionality of legislation, irreparable harm and the balance of convenience tend to blend together and they are often considered together. This blending of the two stages in cases involving the constitutionality of legislation is understandable because the public interest is engaged at both stages.[59]

58. When the Crown is the applicant for a stay, and by implication the legislation has already been found to be unconstitutional, the Crown does not benefit from an assumption of irreparable harm at stage two.[60] The Crown in these circumstances has the onus of establishing irreparable harm.

59. In *RJR-MacDonald*, the Supreme Court commented on irreparable harm: "At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application". [Emphasis added][61]

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[59] *Bedford v. Canada (Attorney General)*, 2010 ONCA 814 ["*Bedford*"], at para. 10 (City BOA, Tab 5). See also: *RJR-MacDonald*, at para. 86 (City BOA, Tab 4).

[60] *Sauvé v. Canada (Chief Electoral Officer)*, [1997] 3 F.C. 628 ["*Sauvé*"], at paras. 11-12 (City BOA, Tab 6).

[61] *RJR-MacDonald*, at para. 63 (City BOA, Tab 4).

60. One needs to ask why a refusal to grant a stay in this case would so adversely affect the Province's own interest. This matter concerns the governance of the City of Toronto. All other municipalities in Ontario, except the City, continue to have the right to determine their own municipal council composition. Why is it that the City's council composition so adversely affects the Province's own interests? Why is it that the Province's own interests will be so adversely affected if the City is simply allowed to continue on and conclude the election for a 47-ward council for 2018?

61. The Province has the onus of proving irreparable harm. The Province can lead evidence of irreparable harm like it has in other cases, but has not done so here. Its evidence does not satisfy the irreparable harm criteria. In particular this case can be contrasted with the *Bedford* case heavily relied upon by the Province. In *Bedford* there was significant evidence filed by the Province and the Attorney General of Canada to support their request for a stay.

i) *No Presumption In Favour of a Stay*

62. The Province argues that, as a public authority, it can almost always show irreparable harm if a stay is refused simply because it has enacted legislation.

63. The City disagrees. There is no presumption in favour of a stay sought by the government particularly when the provisions in issue have been found to be unconstitutional. A court will only grant a stay where it is satisfied, after a careful review of the facts and circumstances of the case, that the public interest and interests of justice warrant a stay.[62]

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[62] *Frank v. Canada (Attorney General)*, 2014 ONCA 485 ["*Frank*"], at para. 16 (City BOA, Tab 7).

64. As Lamer J. held in *RJR-MacDonald,* "the government does not have a monopoly on the public interest".[63] Similarly, in *Bedford*, this Honourable court noted that "[t]he Attorney General does not have a monopoly on the public interest, and it is open to both parties to rely upon the considerations of the public interest, including the concerns of identifiable groups".[64]

65. Here, the public interest does not favour the Province.

66. First, the Province purports to represent the public interest, but the context and evidence do not support that position. Justice Belobaba found that there was no evidence to support Bill 5's alleged objectives or that these objectives were pressing or substantial. Rather, he opined 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".[65]

67. Second, the Province suggests that there would be irreparable harm because the City Clerk cannot revert back to a 47-ward election in time for the October 22, 2018 election date. The evidence on this motion does not support that conclusion. Furthermore, it is disingenuous of the Province to claim that the situation created by its own unconstitutional actions (the mid-election change of ward structure) would cause irreparable harm to the public interest if not maintained.

68. Third, unlike other constitutional challenges and stay cases, there are two governments involved. Although the Province's actions do not represent the public interest here, the City's

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[63] *RJR-MacDonald*, at para. 70 (City BOA, Tab 4).

[64] *Bedford*, at para. 73 (City BOA, Tab 5).

[65] Reasons of Belobaba J. at para. 70 (AG Record, Tab 4).

actions clearly do. The evidence and context shows that the City's actions in studying and establishing a 47-ward boundary model for its Council were justified and achieve the principle of effective representation. In contrast, the Province's purported justification for its actions are unsupported by any evidence and clearly appear to be arbitrary and discriminatory.

69. As a consequence, this Honourable Court should find, as the Federal Court did in *Sauvé*,[66] that the Province has not met its onus at stage two of the test.

C. Balance of Convenience

70. The balance of convenience clearly favours the refusal of a stay.

71. The Supreme Court of Canada has commented that the factors which should be considered in assessing the balance of convenience are numerous and will vary in each case. There may be special factors to be taken into consideration because of the particular circumstances of the individual case.[67]

72. In other words, the context matters. The context here involves these important facts:

a) the City conducted the TWBR from 2013 to 2017 based upon its then powers under COTA;
b) the TWBR conducted research, held numerous public hearings and consulted widely;
c) City Council adopted the TWBR's recommendations to establish a 47-ward structure with new boundaries for the 2018 election;
d) the Ontario Municipal Board after a lengthy hearing and the Divisional Court upheld this decision by Council;

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[66] *Sauvé* was a similar case in that it concerned a request by the Crown for a stay pending appeal in an election case after certain impugned provisions had been declared unconstitutional.

[67] *RJR-MacDonald*, at para. 68 (City BOA, Tab 4).

e) the City Clerk, candidates and others have all made decisions and taken steps, based on a 47-ward election being held in 2018;

f) the nomination period for the 47-ward election started on May 1 and ended on July 27, 2018. The City Clerk has certified the nominations for the 509 candidates qualified to run in the election;

g) by the time Bill 5 passed on August 14, 2018 the election was well underway, candidates had produced campaign materials and established websites, candidates had raised campaign funds, voters had received campaign information and materials all in reliance upon a 47-ward structure; and

h) there is no justification from the Province for taking the action it did in the middle of an election.

ii) *Status Quo*

73. The City submits that if the "status quo" is a factor, then it favours the refusal of a stay. The City disagrees that the following passage from the *Frank v. Canada (Attorney General)* case assists the Province: "this is not the typical case where a complex statutory scheme or administrative apparatus has to be dismantled or constructed in order to give effect to the trial judgment".[68] All the City is asking is that it be permitted to continue on and complete the 47-ward election that had already started and was well underway.

74. This is essentially a contest between two election regimes, one of which has been declared unconstitutional because it infringes the freedom of expression of candidates and voters, and the other which was established after years of public consultation and was upheld by the Ontario Municipal Board and the Divisional Court.

75. The rules for the 2018 election in the City of Toronto were changed in the middle of the election. Justice Belobaba's order simply restores the original rules.

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[68] *Frank*, at para. 27 (City BOA, Tab 7).

76. The 47-ward election was running between May 1, 2018 and August 13, 2018 (3.5 months), before Bill 5 became law. The 25-ward regime Bill 5 imposed was only in place from August 14, 2018 to September 9, 2018 (less than 1 month), when the Impugned Provisions were struck down. The Clerk has been running a 47-ward election since September 10, 2018. The *status quo* is therefore the 47-ward election, not the 25-ward election.

iii) *Stay Equals Final Relief*

77. Further, another reason the balance of convenience favours a refusal of the stay is that granting the stay would effectively grant the moving party (the Province) the remedy sought in the appeal.[69]

78. This is contrary to the principle that a party should not be allowed to achieve the ultimate remedy by means of an interlocutory motion.[70]

iv) *Harm to Candidates and Voters*

79. There is ample evidence of the harm that the 25-ward regime has imposed on candidates and voters since it came into force.[71] In contrast, there is not a single candidate or voter that has come forward with evidence of harm if the election proceeds on a 47-ward model.

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[69] *Sauvé*, at para. 7 (City BOA, Tab 6).

[70] *Sauvé*, at para. 13 (City BOA, Tab 6).

[71] Reasons of Belobaba J. at paras. 29-31, 58 (AG Record, Tab 4).

v) *Impact on the City Clerk*

80. The Clerk retained and secured the data based on a 47-ward structure that had been developed prior to the introduction of Bill 5 to ensure running an election using a 47-ward structure remained a viable option. When the Impugned Provisions were struck down, the Clerk reverted back to administering a 47-ward election as per Justice Belobaba's Order.[72]

81. It would be all the more disruptive to, once again, direct the Clerk to stop work on the current 47-ward election model and switch back to the 25-ward model, a model that was found to be unconstitutional, than it would be to allow the Clerk to continue to administer the 47-ward election.

vi) *Legislative Void*

82. This is not a case like *Bedford* where the trial judgment creates a legislative void in an area of activity that needs to be regulated in the public interest. Allowing Justice Belobaba's decision to operate does not create a void or gap in the City of Toronto's election law or process. Rather, the old regime will be reinstated, was in place for longer, is more familiar to candidates and voters, and was the result of years of public consultation.

83. As there will be no legislative gap, the stay should not be granted.

84. By contrast, if the stay is granted, there will be a gap in the law unless rectified in some way, for those candidates under the 47-ward election who had not yet registered for the 25-ward

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[72] Murray Affidavit in Stay Motion at paras. 19, 25 (City Clerk Motion Record, Tab 2, pages 15, 17).

election, but now can no longer do so because the deadline had expired during the days that the Impugned Provisions had been of no force and effect.

85. As well, O. Reg. 391/18 was made and filed on July 30, 2018. It realigned the school board ward boundaries in the City of Toronto with the 25-ward boundaries under Bill 5.

86. The Toronto District School Board (the "TDSB") raised the issue that the power to make O. Reg. 391/18 under s. 58.1(2) of the *Education Act*[73] is limited by ss. 58.1(3) and (4),[74] and the limit is such that O. Reg. 391/18 cannot apply to the Election. If the TDSB is correct, then the school board ward boundaries in Toronto will be based on a 47-ward structure for the Election regardless of the constitutionality of Bill 5.

87. It was unnecessary for Justice Belobaba to rule on this interpretation of the regulation making power under the *Education Act*, given his decision to strike down the Impugned Provisions because the result was that both the municipal election and the school board elections in Toronto would be based on a 47-ward structure.

88. However, if a stay is granted, then it remains unclear whether the school board trustee elections in Toronto must still be based on a 47-ward structure, even though the municipal election would then be based on a 25-ward structure.

89. Avoidance of such continued confusion therefore also favours refusing the stay.

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[73] R.S.O. 1990, c. E.2.

[74] *Education Act*, R.S.O. 1990, c. E.2, ss. 58.1(2), (3), (4) (City Factum, Sch. "B").

vii) *Impact on the Public Interest*

90. In this case, the public interest in protecting freedom of expression guaranteed under the *Charter* outweighs any alleged public interest in maintaining the Impugned Provisions which have been held to be unconstitutional.[75]

91. The Province states that there will be irreparable harm to the public interest if the stay is refused. But such alleged harm to the public interest does not stand scrutiny.

92. First, the Impugned Provisions have been found by a court to be unconstitutional, which significantly undermines any assumption that there is irreparable harm simply because legislation is at issue.

93. Second, the judge found that there is no evidence that there was a pressing and substantial objective behind Bill 5.[76] He also found that Bill 5 "undermines the overall fairness of the election".[77] To claim that there will be irreparable harm to the public interest if an election law that actually undermines electoral fairness is not restored is an untenable argument.

94. Third, there was no evidence that any kind of consultation took place. It appeared to the judge that Bill 5 was enacted "more out of pique than principle".[78] Again, under these circumstances, the Province's claim to irreparable harm to the public interest is indefensible.

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[75] *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2007 BCCA 221, at paras. 23, 25 (City BOA, Tab 8).

[76] Reasons of Belobaba J. at para. 72 (AG Record, Tab 4).

[77] Reasons of Belobaba J. at para. 73 (AG Record, Tab 4).

[78] Reasons of Belobaba J. at para. 70 (AG Record, Tab 4).

95. By contrast, the 47-ward regime established by the City's By-Laws was a result of a 4-year study by an independent third party consultant with extensive public consultation, and was upheld on appeal to the Ontario Municipal Board and a further motion for leave to appeal to the Divisional Court. There would be irreparable harm to the public interest to allow all of that work to be thrown out—again—by granting the stay.

96. Finally, there is absolutely no evidence why it is imperative that the 2018 election in the City of Toronto must be run with 25 wards. If an appeal is ultimately successful, the 25-ward structure can be in place for the next City of Toronto election and future elections. On the other hand, to insist that a stay be granted would continue to cause chaos and confusion with respect to the Election for no good reason.

97. The City submits that the balance of convenience clearly favours refusing the stay. The City and the applicants should be entitled to proceed with the Election on the basis of the 47-ward model. If a stay is granted, the Election will have been interrupted and interfered with once again. The City Clerk is currently proceeding with the 47-ward structure for the 2018 Election. The list of candidates is certain, candidates have been campaigning for several months and this election should proceed.

98. For all of these reasons, the balance of convenience strongly favours refusing the stay.

PART IV – ORDER SOUGHT

99. The City respectfully requests that the motion for a stay pending appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16th day of September, 2018.

Diana W. Dimmer | Glenn K.L. Chu | Philip Chan

Of counsel for the City of Toronto

SCHEDULE "A" – LIST OF AUTHORITIES

1 *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158

2 *Peter Kiewit Sons Co. v. Perry*, 2006 BCCA 259

3 *Carter v. Canada (Attorney General)*, 2012 BCCA 336

4 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

5 *Bedford v. Canada (Attorney General)*, 2010 ONCA 814

6 *Sauvé v. Canada (Chief Electoral Officer)*, [1997] 3 F.C. 628

7 *Frank v. Canada (Attorney General)*, 2014 ONCA 485

8 *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2007 BCCA 221

SCHEDULE "B" – RELEVANT STATUTES

1. *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A [pre-Bill 5]

[...]

Changes to wards

128 (1) Without limiting sections 7 and 8, those sections authorize the City to divide or redivide the City into wards or to dissolve the existing wards. 2006, c. 11, Sched. A, s. 128 (1).

Conflict

(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 or section 129, a conflict with a provision of any other Act or a conflict with a regulation made under any other Act, the by-law prevails. 2006, c. 11, Sched. A, s. 128 (2).

Notice

(3) Within 15 days after the by-law is passed, the City shall give notice of the passing of the by-law to the public specifying the last date for filing a notice of appeal under subsection (4). 2006, c. 11, Sched. A, s. 128 (3).

Appeal

(4) Within 45 days after the by-law is passed, the Minister or any other person or agency may appeal to the Local Planning Appeal Tribunal by filing a notice of appeal with the City setting out the objections to the by-law and the reasons in support of the objections. 2006, c. 11, Sched. A, s. 128 (4); 2017, c. 23, Sched. 5, s. 12 (1).

Notices forwarded to Tribunal

(5) Within 15 days after the last day for filing a notice of appeal under subsection (4), the City shall forward any notices of appeal to the Local Planning Appeal Tribunal. 2006, c. 11, Sched. A, s. 128 (5); 2017, c. 23, Sched. 5, s. 12 (2).

Other material

(6) The City shall provide any other information or material that the Tribunal requires in connection with the appeal. 2006, c. 11, Sched. A, s. 128 (6); 2017, c. 23, Sched. 5, s. 12 (3).

Tribunal decision

(7) The Tribunal shall hear the appeal and may, despite any Act, make an order affirming, amending or repealing the by-law. 2006, c. 11, Sched. A, s. 128 (7); 2017, c. 23, Sched. 5, s. 12 (4).

Coming into force of by-law

(8) The by-law comes into force on the day the new city council is organized following,

(a) the first regular election after the by-law is passed if the by-law is passed before January 1 in the year of the regular election and,

(i) no notices of appeal are filed,

(ii) notices of appeal are filed and are all withdrawn before January 1 in the year of the election, or

(iii) notices of appeal are filed and the Tribunal issues an order to affirm or amend the by-law before January 1 in the year of the election; or

(b) the second regular election after the by-law is passed, in all other cases except where the by-law is repealed by the Tribunal. 2006, c. 11, Sched. A, s. 128 (8); 2017, c. 23, Sched. 5, s. 12 (5).

Election

(9) Despite subsection (8), where the by-law comes into force on the day the new city council is organized following a regular election, that election shall be conducted as if the by-law was already in force. 2006, c. 11, Sched. A, s. 128 (9).

Notice to assessment corporation

(10) When a by-law described in this section is passed, the clerk of the City shall notify the assessment corporation,

(a) before January 1 in the year of the first regular election after the by-law is passed, if clause (8) (a) applies;
(b) before January 1 in the year of the second regular election after the by-law is passed, if clause (8) (b) applies. 2009, c. 33, Sched. 21, s. 4 (6).

[...]

Changes to city council

135 (1) Without limiting sections 7 and 8, those sections authorize the City to change the composition of city council. 2006, c. 11, Sched. A, s. 135 (1).

Conflict

(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. 2006, c. 11, Sched. A, s. 135 (2).

Requirements

(3) The following rules apply to the composition of city council:

1. There shall be a minimum of five members, one of whom shall be the head of council.
2. The members of council shall be elected in accordance with the *Municipal Elections Act, 1996*.
3. The head of council shall be elected by general vote.
4. The members, other than the head of council, shall be elected by general vote or wards or by any combination of general vote and wards. 2006, c. 11, Sched. A, s. 135 (3).

Coming into force

(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. 2006, c. 11, Sched. A, s. 135 (4).

Exception re by-law passed before 2018 regular election

(4.1) Despite clause 135 (4) (b), if a by-law changing the composition of city council is passed on or after January 1, 2018 and on or before June 30, 2018, the by-law may, if it so provides, come into force as early as the day the new council is organized after the 2018 regular election. 2018, c. 8, Sched. 2, s. 1.

Same

(4.2) If a by-law referred to in subsection (4.1) is passed, a determination shall not be made under subsection 83 (1) of the *Municipal Elections Act, 1996* by reason only of the clerk of the City doing anything, before the by-law is passed, in relation to the conduct of the 2018 regular election,

(a) as if the by-law were not already in effect; or

(b) as if the by-law were already in effect. 2018, c. 8, Sched. 2, s. 1.

Election

(5) The regular election held immediately before the coming into force of the by-law shall be conducted as if the by-law was already in force. 2006, c. 11, Sched. A, s. 135 (5).

Term unaffected

(6) Nothing in this section authorizes a change in the term of office of a member of council. 2006, c. 11, Sched. A, s. 135 (6).

2. *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A

Role of city council

131 It is the role of city council,

(a) to represent the public and to consider the well-being and interests of the City;
(b) to develop and evaluate the policies and programs of the City;
(c) to determine which services the City provides;
(d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
(e) to ensure the accountability and transparency of the operations of the City, including the activities of the senior management of the City;
(f) to maintain the financial integrity of the City; and
(g) to carry out the duties of council under this or any other Act. 2006, c. 11, Sched. A, s. 131.

Powers of city council

132 (1) The powers of the City shall be exercised by city council. 2006, c. 11, Sched. A, s. 132 (1).

Same

(2) Anything begun by one council may be continued and completed by a succeeding council. 2006, c. 11, Sched. A, s. 132 (2).

By-law

(3) A power of the City, including the City's capacity, rights, powers and privileges under section 7, shall be exercised by by-law unless the City is specifically authorized to do otherwise. 2006, c. 11, Sched. A, s. 132 (3).

Scope

(4) Subsections (1) to (3) apply to all of the City's powers, whether conferred by this Act or otherwise. 2006, c. 11, Sched. A, s. 132 (4).

3. *Education Act*, R.S.O. 1990, CHAPTER E.2

[...]

Regulations: district school boards

58.1 (1) In this section,

"English-language instruction" means instruction in the English language or in American Sign Language and includes instruction provided under a program of the type described in paragraph 25 of subsection 8 (1); ("enseignement en anglais")

"French-language instruction" means instruction in the French language or in Quebec Sign Language but does not include instruction provided under a program of the type described in paragraph 25 of subsection 8 (1); ("enseignement en français")

"school" does not include a school under the jurisdiction of a school authority or an educational institution operated by the Government of Ontario. ("école") 1997, c. 31, s. 32.

Same

(2) The Lieutenant Governor in Council may make regulations providing for,

(a) the establishment of,

(i) English-language public district school boards, to govern the provision of elementary and secondary English-language instruction in schools other than Roman Catholic separate schools,

(ii) English-language separate district school boards, to govern the provision of elementary and secondary English-language instruction in Roman Catholic separate schools,

(iii) French-language public district school boards, to govern the provision of elementary and secondary French-language instruction in schools other than Roman Catholic separate schools, and

(iv) French-language separate district school boards, to govern the provision of elementary and secondary French-language instruction in Roman Catholic separate schools;

(b) the establishment of the areas of jurisdiction of district school boards;

(c) the assignment of names to district school boards;

(d) the alteration of the area of jurisdiction of a district school board;

(e) the dissolution of a district school board;

(f) the dissolution of a school authority the area of jurisdiction of which is to be included in the area of jurisdiction of a district school board;

(g), (h) Repealed: 2009, c. 25, s. 8 (1).

(i) the amalgamation or merger of one or more school authorities with a district school board to continue as a district school board;

(j) the amalgamation or merger of two or more district school boards to continue as a district school board;

(k) representation on and elections to district school boards, including but not limited to regulations providing for,

(i) the determination of the number of members of each district school board,

(ii) the establishment, for electoral purposes, of geographic areas within the areas of jurisdiction of district school boards,

(iii) the distribution of the members of a district school board to the geographic areas referred to in subclause (ii),

(iv) appeals to any person or body relating to anything done under a regulation made under subclause (i), (ii) or (iii),

(v) nomination procedures for the election of members of district school boards,

(vi) the duties to be performed by municipal clerks, officials of district school boards and others in respect of any matter relating to representation on or elections to district school boards,

(vii) Repealed: 2009, c. 25, s. 8 (3).

(viii) the date in a regular election year before which a resolution under subsection (10.1) may be passed;

(l) the holding in trust, transfer and vesting of assets, including but not limited to real and personal property, the transfer of liabilities and the transfer of employees among district school boards or school authorities or both, in connection with,

(i) the establishment, continuation or dissolution of a district school board,

(ii) the dissolution of a school authority the area of jurisdiction of which is to be included in the area of jurisdiction of a district school board, or

(iii) the merger or amalgamation of a school authority the area of jurisdiction of which is to be included in the area of jurisdiction of a district school board with the district school board;

(m) the deeming, for any purpose, including but not limited to purposes related to elections and taxation, of any territory without municipal organization that is within the area of jurisdiction of a district school board,

(i) to be a district municipality, unless and until the territory becomes or is included in a municipality, or

(ii) to be attached to a municipality, unless and until the territory becomes or is included in a municipality;

(n) the recovery of some or all of the costs incurred by a district school board in meeting any requirements under this section relating to elections in territory without municipal organization or elections to a school authority;

(o) the conduct of elections to a school authority the area of jurisdiction of which is entirely or partly the same as the area of jurisdiction of a district school board;

(p), (q) Repealed: 2009, c. 25, s. 8 (4).

(r) such other matters, including transitional matters, that the Lieutenant Governor in Council considers necessary or advisable in connection with the establishment, merger, amalgamation, continuation or dissolution of one or more boards under this section, or with the alteration of the area of jurisdiction of a board under this section, including but not limited to transitional matters relating to,

(i) representation, by election or appointment, on a board pending the next regular elections,

(ii) the rights of pupils to continue to attend schools that they were enrolled in and entitled to attend immediately before the establishment, merger, amalgamation, continuation, dissolution or alteration. 1997, c. 31, s. 32; 2002, c. 18, Sched. G, s. 6 (1); 2009, c. 25, s. 8 (1-4).

Provisions in regulations: effect for electoral purposes

(3) A regulation made under subsection (2) may provide that it shall be deemed to have come into force and taken effect on the day of filing or at such earlier or later time as is stated in the regulation, for any purpose related to representation on or elections to a district school board or school authority. 1997, c. 31, s. 32.

Same

(4) Subsection (3) applies only to the extent necessary to permit the next regular election after the regulation is made, or any by-election preceding that next regular election, to be held in a way that takes account of the provisions of the regulation. 1997, c. 31, s. 32.

[...]

Motion File No. M49615
Court of Appeal File No. C65861

CITY OF TORONTO Applicant (Respondent in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellant)			Superior Court File No. CV-18-00603797-00
ROCCO ACHAMPONG Applicant (Respondent in appeal)	and	ONTARIO Respondents (Appellants)	and	CITY OF TORONTO Respondent (Respondent in appeal)	Superior Court File No. CV-18-00602494-00
CHRIST MOISE et al. Applicants (Respondents in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondents (Appellants)	and	CITY OF TORONTO Respondent (Respondent in appeal)	Superior Court File No. CV-18-00603633-00

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

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