

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF TORONTO

Applicant

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent

APPLICATION UNDER Rule 14.05(3)(d), (g.1) and (h) of the *Rules of Civil Procedure*.

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PART I – OVERVIEW

1. Never before has a Canadian government meddled with democracy like the Province of Ontario did when, without notice, it fundamentally altered the City of Toronto's governance structure in the middle of the City's election.
2. On July 30, 2018, the Ontario government ("Ontario") introduced Bill 5, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("Bill 5"). In relation to the City of Toronto (the "City"), Bill 5 redivides the City into 25 wards, dictates that one councillor will represent each ward, and permanently removes the City's powers to change its wards or council composition. Bill 5 also declares that these changes will be used for the City's 2018 municipal election (the "Election").
3. Bill 5 was rushed through the Legislature and came into force on August 14, 2018, over three months after the City's election began. By this date the list of candidates was certified, candidates had started campaigning, and the City Clerk's preparations for a 47-ward election were well underway. Not only did Ontario trigger these changes mid-election, it did so without consulting the City at all, and in spite of the City's recent multi-year ward boundary review.
4. While Ontario has jurisdiction over municipalities, it must exercise its power in accordance with constitutional principles of democracy and the rule of law and the *Charter*. The City's position is that Bill 5 is unconstitutional. At this time due to the urgency of dealing with the 2018 election, the City applies for, *inter alia*, an order declaring that ss. 4-7 of Schedule 1, and Schedule 3 of Bill 5, and O. Reg. 407/18 and 408/18 made pursuant thereto, and the companion provisions of O. Reg. 391/18 which amend O. Reg. 412/00 made under the *Education Act*, R.S.O. 1990, c. E.2, are of no force and effect, except for the following:

(a) the part of s. 1 of Schedule 3 of Bill 5 that adds ss. 10.1(1) and 10.1(10) to the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch. (the "MEA"), to the extent that it permits the sections of O. Reg. 407/18 referred to in clause 4(b) below to remain in force;

(b) s. 4(1) as it applies to s. 23(2) of the MEA, ss. 4(2), 5 and 12 of O. Reg. 407/18; and

(the "Impugned Provisions"). The City reserves its rights to pursue the balance of the relief sought in its Notice of Application at a later date.

5. This is one of those rare cases which demands judicial intervention because the actions of Ontario have clearly crossed the line of what is acceptable in our democratic society.

PART II – THE FACTS

BACKGROUND

6. The City of Toronto Council is a democratically elected government which is responsible and accountable.¹ Toronto is the largest city in Canada. Based on 2016 census data, Toronto's population exceeds 2.7 million people.² In 2017, the City had an operating budget of \$10.5 billion dollars and a 10 year capital budget of \$26.5 billion dollars.³

7. The City as the local government is the closest to its residents and is responsible for providing a broad range of municipal services that residents rely upon on a daily basis. This includes water supply and treatment, parks, libraries, garbage collection, public transit, land use planning, transportation services including road design and repair, bicycle lanes and traffic signals, police, paramedics, fire services, sewers, supportive housing and homeless shelters,

¹ *City of Toronto Act, 2006*, SO 2006, c 11, Sch A ["COTA"], s 1(1), City's Factum ["City Factum"], Sch "B".

² Affidavit of Gary Davidson, sworn August 27, 2018 ["Davidson Affidavit"], City's Application Record ["City Record"], Tab 5, Exhibit C, page 1051.

³ Affidavit of Giuliana Carbone, affirmed August 22, 2018 ["Carbone Affidavit"], City Record, Tab 4, paras 2-3.

childcare, recreation centres, business licensing, building permit and inspection services, public health services and more.⁴

8. In order to provide these services the City has a complex administrative structure of approximately 35,000 active employees. City Council is the democratically elected government and has a statutory mandate to exercise the powers of the City.⁵ In addition to City Council meetings, there are numerous City boards and committees that Councillors sit on including four community councils and eight standing committees.⁶

9. 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, legislation was passed to redivide the City into 44 wards, with one councillor per ward.

TORONTO WARD BOUNDARY REVIEW

10. The *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A ("COTA") was an important development in providing the City with a new legislative framework and recognition of its importance as a sophisticated democratic government. When COTA was enacted in 2006, City Council was given the power, *inter alia*, to divide or redivide the City into wards, to dissolve existing wards, and to change the composition of council. COTA also expressly recognized that the City must be able to determine its appropriate governing structure in order to provide good government, the very purpose of its existence.⁷

⁴ Carbone Affidavit, City Record, Tab 4, Exhibit A, page 305.

⁵ COTA, ss 131-132, City Factum, Sch "B".

⁶ Carbone Affidavit, City Record, Tab 4, paras 4-5, and Exhibit B, page 312.

⁷ COTA (prior to Bill 5 amendments), ss 1-2, 128, 135, City Factum, Sch "B".

11. 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 (the "OMB").⁸

12. 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 with expertise in municipal law, business, academe, civil society research and the OMB.⁹ City Council approved the use of \$800,050.00 to cover the costs of the TWBR.¹⁰

13. After a first round of public consultation, the TWBR analyzed eight options for drawing new ward boundaries. The conclusion at this stage was that five of the eight options provided for effective representation and should be carried forward for further consultation and review. One of the options that was screened out from further consideration was using the federal electoral districts (FEDs) to draw the City's boundaries. The consultants noted that a 25 ward model

⁸ Carbone Affidavit, City Record, Tab 4, Exhibit J, pages 735-736, 740.

⁹ Davidson Affidavit, City Record, Tab 5, paras 9-10.

¹⁰ Carbone Affidavit, City Record, Tab 4, Exhibit K, pages 750, 755.

would have an average 2026 ward population of 123,000 and that "the idea of having 25 very large wards gained virtually no support during the public process".¹¹

14. After further 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. In their report, the consultants noted that:

- i) The increase in wards rebalances the existing ward population discrepancies by enlarging small wards and decreasing large wards;
- ii) It accommodates projected population growth to 2030;
- iii) The new wards achieve effective representation and can be implemented for the 2018 municipal election and will last until the 2030 municipal election.¹²

15. 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.¹³ 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.¹⁴

¹¹ Affidavit of Susan Dexter, affirmed August 21, 2018 ["Dexter Affidavit"], Record of the Individual Intervenors, Tab C, Exhibit 4, page 384.

¹² Dexter Affidavit, Record of the Individual Intervenors, Tab C, Exhibit 5, pages 417, 423.

¹³ Carbone Affidavit, City Record, Tab 4, Exhibit M, pages 856.

¹⁴ Carbone Affidavit, City Record, Tab 4, Exhibit N, pages 874, 884, 936.

16. 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.¹⁵

17. 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.¹⁶

18. Throughout the review process, the public also had an opportunity to express their views when the various staff and consultant reports were presented to the Executive Committee. This was done with notice to the public and allowed for both written communications to be presented by the public and oral deputations at Committee.¹⁷

19. At its November 2016 meeting, City Council debated the recommendations and various possible ward structures set out in the reports. Ultimately, Council adopted the recommended 47-ward structure with one councillor per ward.¹⁸ After an almost four year extensive review process, on March 29, 2017 and April 28, 2017, respectively, Council passed By-law 267-2017

¹⁵ Davidson Affidavit, City Record, Tab 5, paras 34-41, 47, 51, 56-58.

¹⁶ Davidson Affidavit, City Record, Tab 5, paras 37-41.

¹⁷ Carbone Affidavit, City Record, Tab 4, Exhibits M & N.

¹⁸ Carbone Affidavit, City Record, Tab 4, Exhibit N, pages 874-888.

and By-law 464-2017 (the "By-Laws"), which redivided the City's 44 wards into 47 wards with new ward boundaries.¹⁹

20. Under the then s. 128 of COTA, 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, 2017.²⁰ The Minister did not appeal. There is no appeal right to the OMB for decisions by City Council on Council composition.²¹

21. 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.²²

22. 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.²³

¹⁹ Carbone Affidavit, City Record, Tab 4, Exhibits O & P.

²⁰ Carbone Affidavit, City Record, Tab 4, Exhibit Q.

²¹ COTA (prior to Bill 5 amendments), ss 128, 135, City Factum, Sch "B".

²² Carbone Affidavit, City Record, Tab 4, Exhibit Q, pages 978, 998.

²³ Carbone Affidavit, City Record, Tab 4, Exhibit Q, page 991 at para 36.

23. 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. In doing so Justice Swinton noted that the OMB had applied the correct legal test for determining ward boundaries laid down in the *Carter* case. 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. "It considered that communities of 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)."²⁴

2018 ELECTION BASED ON 47 WARD STRUCTURE

24. 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. 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.²⁵

25. 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.²⁶ The certification of candidates is an important milestone in an

²⁴ Carbone Affidavit, City Record, Tab 4, Exhibit R, pages 1016-1017.

²⁵ Affidavit of Fiona Murray, affirmed August 22, 2018 ["Murray Affidavit"], City Record, Tab 3, paras 8, 11-13.

²⁶ Murray Affidavit, City Record, Tab 3, para 11.

election. At that point the candidates running for Councillor in each of the 47 wards is fixed and known to everyone.²⁷

26. There is significant evidence in the materials before this Court from candidates and others that:

- i) Candidates made their decisions to run for Councillor in the Election because of the 47-ward structure;
- ii) Candidates chose a ward to run in based on their involvement and connection to the ward;
- iii) Candidates have already conducted extensive campaigning based on this model;
- iv) Candidates have raised campaign funds based upon the 47-ward structure; and
- v) Campaign materials were prepared in reliance upon the 47 ward structure.²⁸

27. 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 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.²⁹

28. 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

²⁷ Carbone Affidavit, City Record, Tab 4, para 41.

²⁸ Affidavits of Hollett, Cheng and Youssefi, Record of the Individual Intervenors, Tabs A, B & E; Affidavits of Moise, Willson, Padovani, Lewis-Thurab, Moise Application Record, Tabs 3, 11, 12 & 14.

²⁹ Carbone Affidavit, City Record, Tab 4, Exhibits H & I; Affidavits of Hollett, Cheng and Youssefi, Record of the Individual Intervenors, Tabs A, B & E; Affidavits of Moise, Willson, Padovani, Lewis-Thurab, Moise Application Record, Tabs 3, 11, 12 & 14.

staffing, training, communications, accessibility, operations and logistics, procurement and voting technology, among other things.³⁰

BILL 5

29. 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 27, 2018. On July 30, 2018, the same date on which the Clerk certified nominations for the 47-ward election, Bill 5 was introduced in the Ontario Legislature.³¹

30. 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 redivides the City into 25 wards and declares that this ward structure will be used for the Election.³²

31. Bill 5 also eliminates the City's power to set its own ward boundaries and council composition. Every other Ontario municipality still enjoys these powers.

LACK OF CONSULTATION WITH THE CITY

32. Pursuant to s. 1(3) of COTA, both the Province of Ontario and the City recognized that it was in the best interests of both levels of government to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement. That

³⁰ Murray Affidavit, City Record, Tab 3, para 11.

³¹ Carbone Affidavit, City Record, Tab 4, para 36.

³² Carbone Affidavit, City Record, Tab 4, paras 37-38.

agreement has been, since 2008, the Toronto-Ontario Cooperation and Consultation Agreement ("T-OCCA").³³

33. T-OCCA captures the spirit and intention of s. 1(3) of COTA by setting out in its preamble, *inter alia*, that "it is in the best interests of the Province and the City to work together in a relationship of mutual respect, ongoing consultation and cooperation on matters of mutual interest; and to do so in accordance with an Agreement between the Province and the City".³⁴

34. Pursuant to s. 6 of T-OCCA, both Ontario and the City agreed that Ontario would consult with the City on, among other things, "[a]ny proposed change in legislation or regulation that, in Ontario's opinion, will have a significant financial or policy impact on the City".³⁵

35. The City was never consulted or even approached by Ontario to discuss the changes to COTA and the MEA that Bill 5 introduces. 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.³⁶

PURPORTED JUSTIFICATION FOR BILL 5

36. The Premier's office issued a news release on July 27, 2018 that, amongst other things, purports to comment on the justification for Bill 5. The Premier suggested that Toronto City

³³ Carbone Affidavit, City Record, Tab 4, para 20.

³⁴ Carbone Affidavit, City Record, Tab 4, para 22.

³⁵ Carbone Affidavit, City Record, Tab 4, para 24, and Exhibits C, D & E.

³⁶ Carbone Affidavit, City Record, Tab 4, paras 31-33.

Council "has become increasingly dysfunctional and inefficient through a combination of entrenched incumbency and established special interests" and that Bill 5 will create an effective municipal government that saves taxpayers.³⁷ The news release criticizes the prior Ontario government for a lack of consultation on regional chairs and commits to a review and consultation process on the long term plan for regional government. The evidence from the City Manager reflects that there will not be the purported savings to taxpayers and that the work carried out by City Council is extensive and efficient.³⁸ Further, a ward structure based on 25-wards will not achieve effective representation.³⁹

PART III – ISSUES AND THE LAW

37. This matter is properly brought as an application because it involves the determination of rights that depend on the interpretation of provisions of the *Constitution Act, 1867*,⁴⁰ the *Canadian Charter of Rights and Freedoms*,⁴¹ COTA, and other statutes related to municipal elections.⁴²

38. The City submits that the issues on the application are the following:

- (1) Do the unwritten constitutional principles of democracy and the rule of law, as well as s. 3 of the *Charter*, limit Ontario's power under s. 92 of the *Constitution Act, 1867* such that the Impugned Provisions are *ultra vires* Ontario?
- (2) Does Bill 5 infringe s. 2(b) of the *Charter*?
- (3) If Bill 5 infringes s. 2(b) of the *Charter*, is the infringement justified under s. 1 of the *Charter*?

³⁷ Affidavit of Rocco Achampong, sworn August 22, 2018 ["Achampong Affidavit"], Achampong Record, Tab 5, Exhibit E.

³⁸ Carbone Affidavit, City Record, Tab 4, paras 4-19.

³⁹ Davidson Affidavit, City Record, Tab 5, paras 37-41, 47-52.

⁴⁰ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 ["*Constitution Act, 1867*"], City Factum, Sch "B".

⁴¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK), 1982, c 11 ["*Charter*"], City Factum, Sch "B".

⁴² *Rules of Civil Procedure*, Rule 14.05(3)(d), (g.1) and (h), City Factum, Sch "B".

(4) If the Impugned Provisions are found to be unconstitutional, what is the appropriate remedy?

(1) **Do the unwritten constitutional principles of democracy and the rule of law, as well as s. 3 of the Charter, limit Ontario's power under s. 92 of the Constitution Act, 1867 such that the Impugned Provisions are *ultra vires* Ontario?**

A. The Role of the Municipality in Modern Canadian Society

39. Municipalities are a form of government. Unlike other types of statutory delegates of the provinces, municipalities exercise a “plenary set of legislative and executive powers, a role that closely mimics that of the provincial government”, and “essentially represent delegated government”.⁴³

40. In fulfilling this role, courts have recognized that municipalities are the level of government best able to address local issues. Accordingly, the modern trend is for courts to interpret municipal powers broadly so that municipalities can more effectively address local issues in a manner suited to the particular municipal context. Further, courts have repeatedly interpreted the City's powers broadly.⁴⁴

(i) *The City of Toronto*

41. In the context of the City of Toronto, this confidence in municipal governance is reflected in the text of COTA itself.

⁴³ *Nanaimo (City) v Rascal Trucking Ltd* ["Nanaimo"], 2000 SCC 13, City's Book of Authorities ["City BOA"], Tab 1, at para 31.

⁴⁴ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, City BOA, Tab 2, at para 3; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, City BOA, Tab 3, paras 6-8; *Nanaimo*, City BOA, Tab 1, at para 18; *Croplife Canada v Toronto (City)*, [2005] OJ No 1896, City BOA, Tab 4, para 37; *232169 Ontario Inc (cob Farouz Sheesha Café) v Toronto (City)*, 2017 ONCA 484, City BOA, Tab 5, at para 21.

42. Section 6 of COTA provides:

The powers of the City under this *or any other Act* shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs *as it considers appropriate* and to enhance the City's ability to respond to municipal issues. (emphasis added).

43. Furthermore, Ontario has declared that the City is a level of government, and a democratically elected one. In s. 1(1) of COTA, it provides that:

The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction and the city council is a *democratically elected government* which is responsible and accountable.

44. The City submits that it is in this context that Ontario's *vires* to pass laws affecting the City should be analyzed, particularly in the context of the conduct of municipal elections and the drawing of the City's ward boundaries.

B. Democracy and the Rule of Law

45. Democracy and the rule of law are fundamental to Canadian society.⁴⁵

46. The Supreme Court of Canada has acknowledged that, "[i]n a democracy such as [Canada's], the power of lawmakers flows from the voting citizens and the lawmakers act as the citizen's proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote".⁴⁶ In other words, democratic institutions must be

⁴⁵ See McLachlin, CJ B, "Unwritten Constitutional Principles: What Is Going On?" (December, 2005), Lord Cooke Lecture, Wellington, New Zealand, City BOA, Tab 6.

⁴⁶ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, City BOA, Tab 7, para 31.

truly democratic in order for the laws they pass to have legitimacy, and laws passed by democratic institutions are only legitimate if the institution is truly democratic.

47. Maintaining confidence in the electoral process is essential to preserving the integrity of the electoral system, which is the cornerstone of Canadian democracy.⁴⁷

48. The fairness of an election is so fundamental to our democracy that the protection of the integrity of the electoral process has been accepted by the Supreme Court of Canada as a valid pressing and substantial objective when used to justify electoral laws that may otherwise infringe the *Charter*.⁴⁸

49. In *Reference re Quebec Secession*, the Supreme Court of Canada indicated that democracy and the rule of law were two unwritten constitutional principles of the Canadian constitution. Furthermore, the Court had the opportunity to clarify the concepts of democracy and the rule of law.

50. With respect to democracy, it said:

- Democracy is a fundamental value in our constitutional law and political culture;
- The principle of democracy has always informed the design of our constitutional structure, and *continues to act as an essential interpretive consideration*;
- Democracy is commonly understood as being a political system of majority rule;
- Democracy means the process of representative and responsible government and the right of citizens to participate in the political process as voters.⁴⁹

⁴⁷ *Harper v Canada (Attorney General)* ["Harper"], 2004 SCC 33, City BOA, Tab 8, para 103.

⁴⁸ *Figuroa v Canada (Attorney General)* ["Figuroa"], 2003 SCC 37, City BOA, Tab 9, para 72.

⁴⁹ *Reference re Secession of Quebec* ["Quebec Secession"], [1998] 2 SCR 217, City BOA, Tab 10, paras 61-67.

51. The Court commented that the rule of law at its most basic level, "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."⁵⁰

52. The City submits that these unwritten principles of democracy and the rule of law constrain the Province's powers under s. 92, such that they cannot be exercised in a way that undermines these principles, especially in the context of legislation that purports to arbitrarily interfere with an ongoing election and thereby reduce electoral fairness.

C. The interaction between unwritten constitutional principles and s. 92 of the *Constitution Act, 1867*

(i) Generally

53. Other sections of the Constitution and unwritten constitutional principles can be used to impose limits on a province's powers under s. 92. The majority of the Supreme Court of Canada used s. 96 of the *Constitution Act, 1867* and the unwritten principle of the rule of law to limit the scope of s. 92(14) of the *Constitution Act, 1867* to prevent British Columbia from "administer[ing] justice in a way that denies the right of Canadians to access courts of superior jurisdiction."⁵¹

54. Furthermore, in *Quebec Secession*, the Court indicated that the underlying constitutional principles:

assist in the interpretation of the text *and the delineation of spheres of jurisdiction*, the scope of rights and obligations, and the role of our political institutions. Equally

⁵⁰ *Quebec Secession*, City BOA, Tab 10, para 70.

⁵¹ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)* ["*Trial Lawyers Association*"], 2014 SCC 59, City BOA, Tab 11, paras 38-40, 64.

important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”... (emphasis added)⁵²

(ii) With respect to Bill 5

55. Subsection 92(8) of the *Constitution Act, 1867* grants the legislature of a province the exclusive authority to pass laws with respect to “municipal institutions” in the Province. The City does not state that it is not a “municipal institution” within the meaning of s. 92(8). Nor does the City state that Ontario does not, generally, have the power to pass laws affecting the City.

56. Rather the City submits that, like s. 92(14), the scope of s. 92(8) is not limitless. The constitutional principles of the rule of law and democracy (as does s. 3 of the *Charter* discussed below) act as a constraint on Ontario’s power to legislate with respect to municipal institutions under s. 92(8) just as the constitutional principle of the rule of law, as well as s. 96 of the *Constitution Act, 1867*, acted as a constraint on the province of British Columbia’s power under s. 98(14) to legislate with respect to courts and the administration of justice.

57. In this case, the City submits that these unwritten constitutional principles do not permit Ontario to pass laws with respect to the City in such a way that it creates a democratically elected municipal government *and also simultaneously* does not permit a free and fair democratic election.

a. Fair Democratic Elections

⁵² *Quebec Secession*, City BOA, Tab 10, para 52.

58. In this application, the City of Toronto asks this Honourable Court to give primacy to the principle of fairness in democratic elections. As indicated by a unanimous panel of the Supreme Court of Canada in *Libman v Quebec (Attorney General)*,⁵³ the principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions.⁵⁴

59. This result applies regardless of whether the election at issue is constitutionally guaranteed (as in s. 3 of the *Charter* in *Figueroa*) or provided for by statute (as in the *Referendum Act* that was at issue in *Libman*).

b. Interference with the Election

60. It is important to note that there is a long history of democratic municipal elections in the City of Toronto. What is unprecedented, however, is legislation like Bill 5. The Election began on May 1, 2018, when nominations for candidates for councillors and the mayor opened. As it relates to the Election, Bill 5, which only came into force on August 14, 2018, seeks to cancel the election for 47 ward councillors mid-stream, to then redraw the ward boundaries of the City and reduce the number of councillors to be elected to City Council:

- (a) more than three months into the Election;
- (b) without any notice to or consultation with the City or the public;
- (c) without any study justifying the ward structure and City Council composition sought to be imposed;

⁵³ [1997] 3 SCR 569, City BOA, Tab 12 ["*Libman*"].

⁵⁴ *Libman*, City BOA, Tab 12, para 47; *Figueroa*, City BOA, Tab 9, para 51.

- (d) in the face of a four year study commissioned by the City that said the contrary; and
- (e) despite appeals to the OMB and a further attempted appeal to the Divisional Court confirming that the existing 47-ward structure was reasonable and complied with constitutional criteria for the drawing of electoral boundaries.

61. If Bill 5 stands, the election of City Council will have taken place under a significant cloud calling into question the legitimacy of the future actions of the City government. For example, in order for City by-laws to have legitimacy and be seen to have legitimacy, the people of the City of Toronto must have confidence in the process by which the members of the democratically elected City Council, as a government, were elected. The City submits that, as in *Harper* in the context of federal elections, here, the cornerstone of that legitimacy is the election that selects the members of City Council.⁵⁵

62. The impugned provisions cause confusion, unfairness and call into question the legitimacy of the resulting election, which then undermines democracy and the rule of law. Such interference strikes at the very heart of the democratic process. If such interference were permitted, it would allow a government to change the rules of an election to its own advantage while the election were underway. The City submits that such changes would not be constitutionally permitted if either a province or Parliament passed laws affecting a provincial or federal election *in the middle of such an election*. These principles apply with equal force here.

63. There is no question that this interference has caused confusion to voters and candidates. Numerous candidates have indicated the impact that such a change has had and will continue to have on their campaign, if permitted to stand, such as:

⁵⁵ *Harper*, City BOA, Tab 8, para 103.

- confusion about campaign spending limits;
- wasted resources that cannot be used under the new ward structure;
- wasted campaigning effort;
- inability to raise further funds;
- confusion among voters over the change in ward boundaries;
- discussion with voters about ward boundaries changes instead of other issues; and
- outdated campaign strategy.⁵⁶

The City submits that there can be nothing more prejudicial to democracy and the rule of law than for there to be such a fundamental change to the election rules *in the middle of an election* of a democratically elected government.

64. Electoral fairness is fundamental to democracy. It by necessity requires that elections cannot be interfered with once they have begun. The City submits that this prohibition on interference includes, for example, a prohibition on changing candidate eligibility conditions mid-election, changing campaigning rules mid-election, and, where the elections are based on a ward system, changing the ward structure mid-election. Any legislation, like Bill 5, that seeks to interfere with such an election is, in the words of the Supreme Court of Canada, “inconsistent with ... the underlying principle[s] of [democracy] and the rule of law [and] ... therefore falls outside the Province’s jurisdiction under s. [92(8)].”⁵⁷

65. Where Ontario has determined that the City of Toronto is to be a democratically elected form of government with elections based on a ward structure (which it clearly has), it does not

⁵⁶ See, for example: Affidavit of C. Moise, sworn August 20, 2018, Moise Application Record, Tab 3, paras 22-31; Affidavit of P. Khosla, sworn August 18, 2018, Moise Application Record, Tab 5, paras 35-44; Affidavit of M. Willson, sworn August 21, 2018, Moise Application Record, Tab 11, paras 12-15; Affidavit of C. Padovani, sworn August 21, 2018, Moise Application Record, Tab 12, paras 14-20; Affidavit of C. Lewis-Thurab, sworn August 21, 2018, Moise Application Record, Tab 14, paras 16-18; Affidavit of J. Hollett, affirmed August 21, 2018, Record of the Individual Intervenors, Tab A, paras 38-47; Affidavit of L. Cheng, affirmed August 21, 2018, Record of the Individual Intervenors, Tab B, paras 25-28; Affidavit of D. Youssefi, affirmed August 22, 2018, Record of the Individual Intervenors, Tab E, paras 27-37.

⁵⁷ Following *Trial Lawyers Association*, City BOA, Tab 11, para 64.

simultaneously have the power to pass laws that interfere with the municipal election while it is underway.

D. Section 3 of the *Charter* and the Right to Vote

(i) Generally

66. The Supreme Court of Canada has consistently held that the purpose of s. 3 of the *Charter* is effective representation.⁵⁸ In the context of electoral boundaries, the goal of effective representation led to the development of various criteria to be used when determining whether proposed electoral boundaries achieve effective representation. These criteria include:

- Voter parity;
- Capacity to Represent;
- Communities of interest;
- Natural Geographic Boundaries.⁵⁹

67. Although *Carter* was decided in the context of provincial electoral district boundaries, the *Carter* criteria have been used by the OMB and the Divisional Court in the context of the determination of municipal ward boundaries.⁶⁰

68. The principle of “capacity to represent” essentially refers to the ability of the elected representative to actually be effective in representing the concerns of the electors in his or her ward.⁶¹

⁵⁸ *Reference Re Provincial Electoral Boundaries (Sask) ["Carter"]*, [1991] 2 SCR 158, City BOA, Tab 13, para 49; *Figuroa*, City BOA, Tab 9, para 21.

⁵⁹ *Carter*, City BOA, Tab 13, paras 55-61.

⁶⁰ *Milani v Vaughan (City)*, [2009] OMBD No 932, City BOA, Tab 14, para 38; *Teno v Lakeshore (Town)*, [2005] OMBD No 1245, City BOA, Tab 15, paras 22-25; *Natale v Toronto (City)*, [2018] OJ No 1180 (Div Ct), City BOA, Tab 16.

(ii) With respect to Bill 5

69. In 2013, the City began a four year long process to review its ward boundaries before finally voting on a 47-ward model. This model was designed specifically taking into account the *Carter* criteria.⁶²

70. During this process, the 25-ward structure that Bill 5 seeks to impose was specifically studied and rejected, primarily for two reasons: lack of voter parity going forward, and an unacceptable effect on a councillor's capacity to represent if there were only one councillor per ward.⁶³

71. The 25-ward configuration with one councillor per ward does not provide for capacity to represent. Municipal governance is different than that at the provincial or federal levels. Municipal councillors deal with more issues from their constituents than their provincial or federal counterparts because they deal with the local issues, the issues that affect residents the most.⁶⁴ COTA expressly mandates a broad list of what City Council must do and that the powers of the City shall be exercised by City Council.⁶⁵

72. Under the 25-ward structure provided by Bill 5, each ward would have an average ward population of approximately 110,000 people and only one councillor. The TWBR consultants

⁶¹ Davidson Affidavit, City Record, Tab 5, para 36.

⁶² Carbone Affidavit, City Record, Tab 4, paras 43-52.

⁶³ Davidson Affidavit, City Record, Tab 5, paras 24, 28.

⁶⁴ Davidson Affidavit, City Record, Tab 5, paras 36, 41-46.

⁶⁵ COTA, ss 131, 132, City Factum, Sch "B".

determined that an appropriate average ward size was 61,000 people.⁶⁶ Indeed, no other municipality in Ontario would have as large an average ward population as Bill 5 imposes.⁶⁷

73. The City submits that councillors would not have the capacity to represent the constituents in wards the size of those created by Bill 5. As well, the 25 wards created by Bill 5 both breaks up communities of interest and combines too many communities of interest with one another, the effect of which is to dilute the voting power of those communities.⁶⁸

74. The City acknowledges that s. 3 of the *Charter* does not expressly apply to municipal institutions. However, the City submits that s. 92(8) of the *Constitution Act, 1867* must be interpreted in light of the principles underlying s. 3 of the *Charter* insofar as Ontario seeks to establish a democratic election for City Council. If the ward structure for a statutorily mandated municipal election does not comply with these *Carter* criteria, then it is submitted that the election will not be a true democratic election as understood in Canadian jurisprudence.

75. Specifically, where Ontario has determined that the City of Toronto is to be a democratically elected form of government with elections based on a ward structure, it does not simultaneously have the power to pass laws that impose a ward structure that does not comply with the principles under s. 3 of the *Charter*.

76. For all the reasons set out above, the City submits that Bill 5 does not comply with the constitutional principles of democracy and the rule of law, nor s. 3 of the *Charter*, as it interferes

⁶⁶ Davidson Affidavit, City Record, Tab 5, at para 51.

⁶⁷ Davidson Affidavit, City Record, Tab 5, Exhibit D, page 1052.

⁶⁸ Davidson Affidavit, City Record, Tab 5, paras 56-61.

with an ongoing democratic election and establishes a 25-ward structure that does not provide for effective representation in the City.

77. Accordingly, the City submits that s. 92(8) of the *Constitution Act, 1867* does not permit Ontario to legislate with respect to Toronto City Council in such a way and therefore the Impugned Provisions are *ultra vires* the Province.

(2) Does Bill 5 infringe s. 2(b) of the Charter?

A. Voters' and Candidates' Political Expression

78. Everyone has the right to freedom of expression.⁶⁹ The purpose of this guarantee is to permit free expression to promote truth, political and social participation, and self-fulfillment.⁷⁰

79. The Supreme Court of Canada has consistently held that "expression" under s. 2(b) should be given a large and liberal interpretation. In *Irwin Toy Ltd v Quebec (Attorney General)*, the Court explained that "expression" includes all activities that convey or attempt to convey a meaning.⁷¹ In *Libman v Quebec (Attorney General)*, the Supreme Court reiterated that the *Charter* guarantee should extend to as many expressive activities as possible.⁷²

80. Political expression is at the core of the values sought to be protected by the s. 2(b) *Charter* guarantee.⁷³

⁶⁹ *Charter*, s 2(b).

⁷⁰ *Irwin Toy Ltd v Quebec (Attorney General)* ["*Irwin Toy*"], [1989] 1 SCR 927, City BOA, Tab 17, para 53.

⁷¹ *Irwin Toy*, City BOA, Tab 17, para 41.

⁷² *Libman*, City BOA, Tab 12, para 31.

⁷³ *Libman*, City BOA, Tab 12, para 29.

81. The electoral process is the primary means by which the average citizen participates in the public discourse that shapes society.⁷⁴

82. Voters and candidates both engage in politically expressive acts covered by s. 2(b) of the *Charter*. Candidates convey meaning by communicating to the electorate why they should be chosen to represent them in government.⁷⁵ Citizens communicate their choice as to which councillors they wish to have represent them by voting, which is also a form of expression.⁷⁶

83. Consistent with the large and liberal interpretation discussed above, voters' and candidates' activities constitute political expression, promote participation in social and political decision-making, and therefore lie at the core of the guarantee of free expression.

B. Bill 5 Infringes Voters' and Candidates' Expression

84. For voters to express their political choices, they must be informed. Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if candidates are given a reasonable opportunity to present their positions.⁷⁷

85. Bill 5 impairs the ability of voters to be reasonably informed because it changed the parameters of the Election after it had already started. This will lead to confusion amongst

⁷⁴ *Harper*, City BOA, Tab 8, paras 1, 11; *Figueroa*, City BOA, Tab 9, para 29.

⁷⁵ *Libman*, City BOA, Tab 12, paras 31-32.

⁷⁶ *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, City BOA, Tab 18, para 82.

⁷⁷ *Libman*, City BOA, Tab 12, para 47.

voters. Candidates have already campaigned for several months, but the information and literature they have provided to electors will be obsolete if Bill 5 stands.⁷⁸

86. Voters are also limited in being able to make informed decisions because Bill 5 impairs candidates' abilities to effectively communicate with voters. Many candidates are unfamiliar with the communities and issues in the new, larger wards. Candidates also now have larger areas to canvass, with much less time to campaign. The effect of Bill 5 is that many candidates no longer have a reasonable opportunity to present their positions to voters.⁷⁹

(3) If Bill 5 infringes s. 2(b) of the *Charter*, is the infringement justified under s. 1 of the *Charter*?

87. The Province's interference in the electoral process breaches s. 2(b) of the *Charter*, and is not saved by s. 1. Where the Court finds that a law infringes a *Charter* right, the burden shifts to the Province to justify the infringement under s. 1 of the *Charter*.⁸⁰ If the Province fails to meet its burden under s. 1, then the law will be declared of no force and effect.

88. Since political expression is at the heart of freedom of expression, the Court must apply a high standard to any justification put forth by the Province for the infringement.⁸¹

A. No Pressing and Substantial Objective

⁷⁸ Affidavits of Hollett, Cheng and Youssefi, Record of the Individual Intervenors, Tabs A, B & E; Affidavits of Moise, Willson, Padovani, Lewis-Thurab, Moise Application Record, Tabs 3, 11, 12 & 14.

⁷⁹ Ibid. Affidavits of Hollett, Cheng and Youssefi, Record of the Individual Intervenors, Tabs A, B & E; Affidavits of Moise, Willson, Padovani, Lewis-Thurab, Moise Application Record, Tabs 3, 11, 12 & 14.

⁸⁰ *R v Oakes* ["Oakes"], [1986] 1 SCR 103, City BOA, Tab 19, para 66.

⁸¹ *Libman*, City BOA, Tab 12, para 60.

89. To justify the infringement under s. 1, the Province must show that the law has a pressing and substantial objective and that the means chosen by the Province to achieve that objective are proportional.⁸²

90. Bill 5 has no pressing and substantial objective. The Premier's stated purpose is to achieve savings and greater efficiency in local government by reducing the size of Toronto City Council, which "has become increasingly dysfunctional and inefficient".⁸³

91. Budgetary considerations cannot be used to justify a violation under s. 1 unless they can be demonstrated to have a significant impact.⁸⁴ This is not the case here.

92. Further, the Province has advanced no evidence to establish that City Council is "dysfunctional" or "inefficient", or how this is assessed. In contrast, the record indicates that City Council deals with a significant volume of matters, evidenced by the reports considered and by-laws enacted.⁸⁵

B. Conclusion on s. 1

93. Bill 5 has no pressing and substantial objective, is not minimally impairing, and has no salutary effects that could outweigh its deleterious impact on voters' and candidates' freedom of expression. Therefore the infringement is not justified under s. 1 of the *Charter*.

(4) If the impugned provisions are found to be unconstitutional, what is the appropriate remedy?

⁸² *Oakes*, City BOA, Tab 19, paras 69-71.

⁸³ Achampong Affidavit, Achampong Record, Tab 5, Exhibit E.

⁸⁴ *Figueroa*, City BOA, Tab 9, para 65.

⁸⁵ Davidson Affidavit, City Record, Tab 5, para 50, and Exhibit F, page 1085.

94. Section 52(1) of the *Constitution Act, 1982* provides that:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

95. The Supreme Court has established a test to determine the appropriate remedy under s. 52(1) of the *Constitution Act, 1982* when legislation is found to be inconsistent with the Constitution. First, the extent of the inconsistency must be determined. Second, the remedy that best addresses the inconsistency should be selected. Third, the Court should determine whether the remedy should be temporarily suspended.⁸⁶

96. In this case, with respect to the Election, the inconsistency of Bill 5 with the Canadian Constitution is two-fold: interference with an existing election, and the redistribution of the City's wards in a way that does not provide for effective representation. It is also submitted that Ontario has not provided a pressing or substantial objective to justify Bill 5's infringement of the *Charter*.

97. As such, the appropriate remedy should be the removal of the interference and restoration of the 47-ward structure. In other words, the Impugned Provisions should be declared to be of no force and effect as they apply to the Election. This is the remedy that was ordered in the *Trial Lawyers Association* decision.

98. Furthermore, because the nature of the inconsistency, at this stage of the proceedings, is Bill 5's impact on the upcoming election on October 22, 2018, a suspension of the remedy is clearly inappropriate and the declaration of invalidity should have immediate effect.

⁸⁶ *Schachter v Canada*, [1992] SCR 679, City BOA, Tab 20, para 84.

99. However, the City also recognizes the challenge that this interference has caused the Clerk, as the chief electoral official for the Election. As such, the City has specifically tailored the impugned provisions to be struck down in order to maximize the ability for the Clerk to run a 47-ward election. This requires preservation of certain regulatory provisions under O. Reg. 407/18 that exempt the Clerk from deadlines under the MEA that will have passed while this proceeding was being heard or that may be too short after this Honourable Court makes its ruling, as well as maintaining the regulation-making power for these preserved regulations contained in section 1 of Schedule 3 of Bill 5.

100. The provisions of O. Reg. 407/18 that should be preserved are:

- (a) s. 4(1) [there was an error in the Notice of Application that omitted this reference], insofar as it applies to s. 23(2) of the MEA because September 1 is a deadline that will have been missed by the time this matter is adjudicated;
- (b) s. 4(2), which removes the burden on the Clerk to prepare an interim list of changes to the voter's list before Sept. 15, 2018 [the requirement to provide a final list of approved changes to the voters' list remains];
- (c) s. 5, which confirms that any previous decisions by the Clerk to certify or reject a candidate nomination made under the MEA before any Bill 5 amendments remain valid; and
- (d) s. 12, which provides protection from challenges to the results of the elections because of steps taken by the Clerk as a result of Bill 5.

101. The City submits that, as part of the remedial relief, the Court should issue declarations that facilitate the Clerk's ability to return to a 47-ward election. It is submitted that these declarations merely remove any doubt as to the existing state of affairs caused by the striking down of the Impugned Provisions as they apply to the Election, and would simply confirm what the striking down of the Impugned Provisions would have already done.

102. Specifically, and in tandem with s. 5 of O. Reg. 407/18 remaining in force, the City seeks a declaration that all nominations certified by the Clerk as of 4:00 pm on July 30, 2018 should apply to the Election, notwithstanding any actions done in the interim.

103. Furthermore, the City seeks a declaration that any actions taken by the Clerk or the school boards affected by the 25-ward structure, prior to the coming into force of Bill 5, should continue to apply to the Election, regardless of what may have happened after the passage of Bill 5. This would assist the Clerk and school boards in not having to redo steps that they had already taken prior to the passage of Bill 5.

104. Finally, given the urgency of this matter, the City requests that this Honourable Court make a ruling as soon as possible in order to allow the Clerk as much time as possible to revert back to a 47-ward model for the Election, should this application be granted. In particular, a ruling prior to September 14, which is the nomination deadline under Bill 5 for the 25-ward structure, will assist in providing certainty to the Clerk and candidates for the Election.

PART IV – ORDER SOUGHT


105. For the reasons set out above, the City requests:

- (a) an order declaring that the Impugned Provisions are of no force and effect;
- (b) an order that the 15 day notice period pursuant to s. 109(2.2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for the delivery of the Notice of Constitutional Question with respect to this application to the Attorney Generals of Ontario and Canada be reduced to the notice period actually provided and that delivery of such notice be validated;
- (c) an order declaring that all actions taken by the Clerk and school boards affected by the 25-ward structure, prior to the date Bill 5 came into force, continue to apply to the Election;
- (d) an order that all nominations certified by the Clerk as of July 30, 2018 at 4:00 pm,

shall continue to apply to the Election, notwithstanding any actions that may have been taken pursuant to the Act or the regulations thereto after Bill 5 came into force and before certain portions of it were declared to be of no force and effect; and

- (e) an order that the balance of the relief sought by the City in its Notice of Application, which is not urgent, be adjourned.


ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 28th day of August, 2018.



for **Diana W. Dimmer**



Glenn K.L. Chu



Philip Chan

Of counsel for the Applicant, City of Toronto

SCHEDULE “A” – LIST OF AUTHORITIES

- 1 *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342
- 2 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*), [2001] 2 S.C.R. 241
- 3 *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485
- 4 *Croplife Canada v. Toronto (City)*, [2005] O.J. No. 1896
- 5 *232169 Ontario Inc. (c.o.b. Farouz Sheesha Café) v. Toronto (City)*, [2017] O.J. No. 3042
- 6 McLachlin, C.J. Beverley, *Unwritten Constitutional Principles: What is Going On?* (December, 2005), Lord Cooke Lecture, Wellington, New Zealand.
- 7 *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519
- 8 *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827
- 9 *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912
- 10 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217
- 11 *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31
- 12 *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569
- 13 *Reference Re Provincial Electoral Boundaries (Sask)*, [1991] 2 S.C.R. 158
- 14 *Milani v. Vaughan (City)*, [2009] O.M.B.D. No 932
- 15 *Teno v. Lakeshore (Town)*, [2005] O.M.B.D. 1245
- 16 *Natale v. Toronto (City)*, [2018] O.J. No. 1180
- 17 *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927
- 18 *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995
- 19 *R v Oakes*, [1986] 1 S.C.R. 103
- 20 *Schachter v Canada*, [1992] 2 S.C.R. 679

SCHEDULE "B" – RELEVANT STATUTES

1. *City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A., s. 130 [pre-Bill 5]*

Governing Principles

1(1) The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and the city council is a democratically elected government which is responsible and accountable.

Relationship with the Province

(2) The Province of Ontario endorses the principle that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation. 2006, c. 11, Sched. A, s. 1 (2).

Consultation

(3) For the purposes of maintaining such a relationship, it is in the best interests of the Province and the City to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City. 2006, c. 11, Sched. A, s. 1 (3).

Agreements with the federal government

(4) The Province acknowledges that the City has the authority to enter into agreements with the Crown in right of Canada with respect to matters within the City's jurisdiction. 2006, c. 11, Sched. A, s. 1 (4).

Purposes of this Act

2 The purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:

1. Determine what is in the public interest for the City.
2. Respond to the needs of the City.
3. Determine the appropriate structure for governing the City.
4. Ensure that the City is accountable to the public and that the process for making decisions is transparent.
5. Determine the appropriate mechanisms for delivering municipal services in the City.
6. Determine the appropriate levels of municipal spending and municipal taxation for the City.
7. Use fiscal tools to support the activities of the City. 2006, c. 11, Sched. A, s. 2.

[...]

Scope of powers

6 (1) The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues. 2006, c. 11, Sched. A, s. 6 (1); 2006, c. 32, Sched. B, s. 2.

Ambiguity

(2) In the event of ambiguity in whether or not the City has the authority under this or any other Act to pass a by-law or to take any other action, the ambiguity shall be resolved so as to include, rather than exclude, powers the City had on the day before this section came into force. 2006, c. 11, Sched. A, s. 6 (2).

[...]

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).

[...]

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).

[...]

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. *Constitution Act, 1867 (UK), 20 & 31 Victoria, c. 3*

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

8. Municipal Institutions in the Province

3. *Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, being Sch. B to the Canada Act 1982 (UK), 1982, c. 11*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

[...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

**4. *Rules of Civil Procedure, Rule 14.05(3)(d), (g.1) and (h)*
Notice of application**

14.05 [...]

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

[...]

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

[...]

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

B E T W E E N:

CITY OF TORONTO
Applicant

and

ATTORNEY GENERAL OF ONTARIO
Respondent

Court File No. CV-18-00603797-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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