

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

ROCCO ACHAMPONG

Applicant
(Responding Party)

- and -

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

Respondents
(Responding Parties)

**FACTUM OF THE PROPOSED INTERVENOR,
THE CANADIAN TAXPAYERS FEDERATION**

(Motion for Leave to Intervene, Returnable August 21, 2018)

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PART I - OVERVIEW

1. The Canadian Taxpayers Federation (“**CTF**”) moves under Rule 13.02 of the *Rules of Civil Procedure* for leave to intervene as a friend of the court in this proceeding.
2. This proceeding challenges Bill 5, *The Better Local Government Act* (the “**Act**”), a statute passed by a democratically elected, constitutionally-recognized level of government: the provincial legislature of Ontario. While it appears that a number of arguments will be advanced, in materials filed to date, the applicant has stated his intent to rely on “unwritten constitutional principles” to challenge the legislation.

3. Unwritten constitutional principles certainly do exist, and have served in the past as interpretative aids, or sometimes to limit discretionary power of delegated decision-makers. But the unwritten constitutional principle of “democracy” has never been used to invalidate legislation duly passed by a democratic legislature.

4. The CTF seeks leave to intervene to provide submissions with respect to both the content of the unwritten principle of democracy, and the extent to which (if at all) such a principle can be operationalized as a substantive limit on legislated action. If leave to intervene is granted, the CTF will submit that the content of the principle of democracy includes other important aspects not fully acknowledged by the applicant, including, among other things, parliamentary supremacy, separation of powers, constitutionalism and the rule of law. For a number of reasons, unwritten constitutional principles should be rarely, if ever, used to invalidate legislation. There are other far less severe remedies potentially available, although the facts of this case do not give rise to even those remedies.

5. The CTF has a genuine issue in this proceeding. While it is difficult to know exactly what the parties will be arguing, given the speed with which this application is being heard, the CTF believes, and will endeavour to ensure that, its submissions will be substantively different and additive to the submissions of the other parties. As a citizen's taxpayer group, the CTF is uniquely positioned to advance arguments about the content of the democracy principle and the manner in which it might be operationalized, which will differ from that anticipated to be advanced by the Attorney General of Ontario.

PART II - THE FACTS

A. Background and the Mandate of the CTF

6. The CTF was incorporated federally in 1990, as a result of the merger between The Association of Saskatchewan Taxpayers and The Resolution One Association. Today, the CTF maintains a federal office in Ottawa, and has expanded its operations to include regional offices in B.C., Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Atlantic Canada. Its administrative head office is in Regina, Saskatchewan. The CTF presently has approximately 140,000 supporters.

Affidavit of Aaron Wudrick, sworn August 20, 2018 (the "Wudrick Affidavit"), paras 7-8, Motion Record Tab 2.

7. Since its inception, the CTF has been devoted to mobilizing Canadian taxpayers to promote the objectives of budgetary restraint, government transparency, and the democratic accountability of government decision-makers, and to publicly advocate in support of these objectives.

Wudrick Affidavit, para. 9, Motion Record Tab 2.

8. The CTF is a non-partisan organization and has taken institutional steps to ensure that it is non-partisan. This serves to better promote the CTF's goals of ensuring fiscal responsibility and democratic accountability of elected governments across the political spectrum.

Wudrick Affidavit, paras 9-10, Motion Record Tab 2.

9. The mandate of the CTF is:

- a. To act as a watchdog on government spending and to inform taxpayers of governments' impact on their economic well-being;
- b. To promote responsible fiscal and democratic reforms, and to advocate the common interest of taxpayers; and
- c. To mobilize taxpayers to exercise their democratic responsibilities.

Wudrick Affidavit, para. 12, Motion Record Tab 2.

10. The CTF believes that while taxpayers are personally affected by every spending decision that governments make, they are not able to effectively pursue their interests as individuals. Because each individual government spending decision may only have a marginal impact on overall government expenditures, and the effects of government expenditures are widely dispersed throughout the population, taxpayers must organize collectively to have their voices heard with respect to specific spending and policy decisions.

Wudrick Affidavit, para. 13, Motion Record Tab 2.

11. Put another way, individual taxpayers and voters do not always have the necessary tools or prerequisites - such as access to resources and information, and legal structures promoting government accountability, responsiveness and transparency - that are necessary to meaningfully impact government decision-making. The CTF seeks to fill that logistical and organizational gap, so that taxpayers can more meaningfully and effectively influence government decision-makers to take the long-term interests of the public into account in making spending decisions.

Wudrick Affidavit, para. 14, Motion Record Tab 2.

12. To that end, the CTF is dedicated to informing the public about government decision-making that has an effect on their lives and their pocket books, to supporting measures to improve government accountability and transparency, and to assisting the public in mobilizing grassroots support in favour of policy initiatives that the CTF seeks to advance, including support for balanced budgets and debt reduction, tax relief measures, personal self-sufficiency, as well as democratic transparency and financial accountability.

Wudrick Affidavit, para. 15, Motion Record Tab 2.

13. In this way, the CTF serves a democratic watchdog function, in an effort to keep citizens informed of the financial decisions of the government and the mechanisms through which they may influence that decision-making. This facilitates the ability of citizens to hold their governments accountable, both at the ballot box and between elections.

Wudrick Affidavit, para. 16, Motion Record Tab 2.

B. The CTF's Political and Legal Advocacy

14. The CTF's activities over its history have included advocating to government and regulatory bodies on behalf of its supporters with respect to policy and legislative reform; informing its supporters and the public with respect to changes in legislation affecting government transparency and accountability as well as a wide range of policy initiatives impacting the fiscal and budgetary health of governments; advertising and grassroots mobilization efforts (such as petitions and rallies) in support of both targeted

and wide-ranging policy initiatives; and advocating on behalf of taxpayers and voters with respect to significant public policy decisions.

Wudrick Affidavit, para. 17, Motion Record Tab 2.

15. The CTF's work also includes advocating for large scale legislative reform initiatives that cut across jurisdictions. For instance, the CTF has mobilized its supporters across Canada to seek statutory reform regarding legislators' compensation, to ensure that legislative compensation standards are built around the guiding principles of transparency, fairness and simplicity.

Wudrick Affidavit, para. 18, Motion Record Tab 2.

16. For example, the CTF has campaigned to oppose overly-generous pensions for legislators, and so-called "tax-free allowances" that exempt some legislators' salaries from federal and provincial income taxes. This campaign has contributed to meaningful legislative changes in a number of provinces across the country, as well as reform in legislator's pensions in the federal Parliament.

Wudrick Affidavit, para. 19, Motion Record Tab 2.

17. While the CTF's public advocacy and grassroots organizing often centres around specific policy initiatives or reforms, the CTF also recognizes that issues of government waste and overspending are often symptomatic of larger problems in a modern democracy. The CTF believes that our current political system often fails to be accountable to the people who pay for it, leading to an accountability gap which

undervalues the importance of farsighted and sustainable public sector spending in favour of increasing expenditures beyond the financial means of governments.

Wudrick Affidavit, para. 20, Motion Record Tab 2.

18. Therefore, the CTF has acted on a number of fronts - through commentaries, legislative presentations, reports, campaigns and conferences - to advance the empowerment of voters and everyday Canadians with respect to fundamental democratic choices. While the CTF has in the past, and will continue to in the future, advocate for political changes that result in more participatory democracy, the CTF believes that such changes are usually most appropriately advanced in the realm of politics, not the courts. The CTF believes that where legislatures have been democratically elected, they should be free to govern and carry out their mandates with minimal intrusion by special interest groups and others with vested interests in maintaining the status quo.

Wudrick Affidavit, para. 21, Motion Record Tab 2.

19. In addition, the CTF believes that sound democratic deliberation and decision making cannot take place where voters do not have the information they need to make informed decisions and to promote their interests in the democratic arena. As such, the CTF has consistently promoted the expansion of Freedom of Information laws, and has opposed efforts to curtail the transparency of public decision making through restrictive reforms to these laws.

Wudrick Affidavit, para. 22, Motion Record Tab 2.

20. In addition to its public advocacy and broader democratic accountability and transparency initiatives, the CTF is dedicated to informing the public and playing a more general watchdog function. In furtherance of this objective, representatives of the CTF engage in research on public policy issues, collect information on government expenditures and policy decisions, speak at functions, engage in public advocacy and media promotion, and organize events and campaigns to both inform and mobilize citizens to effect public policy change.

Wudrick Affidavit, para. 23, Motion Record Tab 2.

21. The CTF has also produced numerous reports on both discrete and general public policy issues, in an effort to promote a more informed citizenry. The CTF issues a tri-monthly publication, *The Taxpayer*, which informs readers of the issues the CTF has addressed, as well as upcoming initiatives important to the CTF's supporters and voters more generally. The CTF also regularly issues press releases on emerging issues or recent events that are of significance to its supporters and Canadians in general.

Wudrick Affidavit, para. 24, Motion Record Tab 2.

22. The CTF has intervened in cases affecting both the CTF's supporters and the public at large, as well as initiating legal proceedings in an effort to ensure that the government is held accountable and acts within the scope of the law.

Wudrick Affidavit, para. 25, Motion Record Tab 2.

23. For example, the CTF has intervened before the Federal Court and the Federal Court of Appeal in *Benoit v. Canada*, [2002] F.C.J. No. 257, rev'd 2003 FCA 236. This

case involved the circumstances under which treaty rights should properly be understood to exempt individuals covered by the treaty from paying taxes, and provided the CTF with the opportunity to advocate for the principle that all citizens be treated equally in taxation matters before and under the law. In an effort to assist the court in reaching its conclusions in this case, the CTF marshalled a number of arguments based on the principles of federalism, the Charter, and considerations of public policy.

Wudrick Affidavit, para. 26, Motion Record Tab 2.

24. The CTF has also intervened in a Privacy Commissioner inquiry involving an FOI request relating to legislators' compensation, in support of the public interest in the disclosure of legislative members' expense account claims: *Alberta (Legislative Assembly Office) (Re) (Order 97-017)*, [1998] A.I.P.C.D. No. 2.

Wudrick Affidavit, para. 27, Motion Record Tab 2.

25. In addition to these occasional interventions, the CTF initiated proceedings in its own name in *Canadian Taxpayers Federation v. Ontario (Minister of Finance)*, [2004] O.J. No. 5239 (S.C.). This case involved an application brought by the CTF against the Ontario government and various of its representatives, and raised legal issues respecting the enforceability of clear political commitments, and the legal validity of health care premiums in light of legislation requiring a referendum prior to the establishment of new taxes.

Wudrick Affidavit, para. 28, Motion Record Tab 2.

26. In these cases, as in the context of the proposed intervention in this application, the CTF has been guided by its core mandate to ensure fiscal sustainability, government accountability and public sector transparency in furtherance of the protection and promotion of the public interest.

Wudrick Affidavit, para. 29, Motion Record Tab 2.

PART III - THE LAW

A. The Test for Intervention Under Rule 13.02

27. Rule 13.02 of the *Rules of Civil Procedure* stipulates that any person may, with leave of a judge, intervene in a proceeding as a friend of the Court for the purpose of rendering assistance to the Court by way of argument.

Rules of Civil Procedure, RRO 1990, Reg 194, r 13.02.

28. Persons may also apply for leave to intervene in a proceeding as an added party, pursuant to Rule 13.01. The criteria for granting such interventions are more restrictive than those applicable to “friends of the court” under Rule 13.02, because “friends of the court” do not seek to adduce any evidence or have any input into the formation of the record.

Rules of Civil Procedure, RRO 1990, Reg 194, r 13.01-13.02.

Canadian Blood Services v Freeman, [2006] OJ No 1531 at para 23.

29. The overriding criterion for assessing intervener motions under Rule 13.02 is whether the moving party will provide assistance to the Court by way of argument. The moving party’s expertise with respect to the issues in dispute is therefore a relevant

factor. Further, where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base.

Regional Municipality of Peel et al. v Great Atlantic & Pacific Co. et al. (1990), 74 OR (2d) 164 (CA).

Bedford v Canada (Attorney General), 2009 ONCA 669 at para 2.

30. Therefore, in constitutional litigation there is a more relaxed standard when it comes to interventions by public interest groups. This approach “ensures that the court will have the benefit of various perspectives of the historical and sociological context, as well as policy and other considerations that bear on the validity of legislation.”

Toronto Star v Attorney General of Ontario, 2017 ONSC 7525 at para 8.

Authorson (Guardian of) v Canada (Attorney General) [2001] OJ No 2768 (CA) at para 7.

31. As outlined in detail above, the CTF has both a unique perspective and considerable expertise, such that it can provide valuable assistance to the Court by way of argument in this application. Further, there are important public interest issues involved in this application.

32. In deciding motions under Rule 13.02, courts have sometimes also considered the moving party’s interest in the outcome of the proceeding. Rule 13.01 requires a moving party to demonstrate that it has an interest in the subject matter of the

proceeding or that it may be adversely affected by a judgement in the proceeding, in order to be added as a party on a motion to intervene. The same criteria are not listed under Rule 13.02, but some Courts have nevertheless applied these criteria to intervention motions involving proposed “friends of the court”. To the extent that this Court deems these criteria relevant under Rule 13.01, the CTF satisfies them: the CTF has a substantial interest in the outcome of the proceeding and its members’ rights may be adversely affected by the Court’s judgment.

AG Ontario v Dieleman (1993) 16 OR (3d) 32 (Gen Div) at p 39.

33. The different criteria in Rules 13.01 and 13.02 have lead to the suggestion that interveners who are “friends of the court” should be neutral and/or disinterested parties, who assist the Court by way of *amicus* briefs, without taking any position on the outcome of the litigation. This suggestion was rejected by the Ontario Court of Appeal in *Oakwell Engineering v Enernorth Industries*, where Chief Justice McMurtry ruled:

A friend of the court need not be “impartial”, “objective” or “disinterested” in the outcome of the case and this court has recognized the valid contributions to be made in appropriate cases by classes of intervenors who may advocate a particular interpretation of the law. Such contributions may assist the court in its analysis of the issues for determination by placing them under scrutiny through a different lens or from a different perspective. The fact that the position of a proposed intervenor is generally aligned with the position of one of the parties is not a bar to intervention if the intervenor can make a useful contribution to the analysis of the issues before the court.

Oakwell Engineering Ltd. v Enernorth Industries Inc., [2006] OJ No 1942 (ONCA) at para 9.

B. CTF’s Proposed Intervention

34. This application has been brought on with considerable haste and urgency. As of the time of filing this factum, it is not even known whether the City of Toronto will be

supporting the applicant, as that matter goes to a vote of city council on August 20, 2018. Pursuant to a direction of this Honourable Court, the applicant (and the City of Toronto) will be required to file his application material on August 22, 2018, and supporting factums will be due August 28, 2018. Ontario's factum, along with any factums responding to the applicants' claim, will be due August 29, 2018.

35. As a result, it cannot be said with precision what exactly will be argued on August 31, 2018. Consequently, it is challenging to detail with precision the specific arguments that the CTF will advance in its proposed intervention, in response to an application not yet fully briefed (or, in the City of Toronto's case, even known).

36. Nonetheless, it appears from materials already filed by the applicant, that he intends to argue that the *Act* violates certain unwritten constitutional principles, notably the principle of "democracy". While the notice of application and amended notice of application does not expressly seek a declaration of invalidity, it can be inferred that that will be advanced at the hearing.

37. If granted leave to intervene, the CTF will advance arguments relating to two aspects of the "unwritten constitutional principles" argument:

- a. **Content:** The court will need to consider the content of the constitutional principle of democracy in the context of Canada's parliamentary democracy. Also forming a part of the "democracy" principle are other well-established principles of parliamentary supremacy, separation of powers, constitutionalism and the rule of law.

- b. **Remedies:** Even if the *Act* engages the unwritten constitutional principle of democracy in some way, this Court must then consider whether, and the extent to which, such an unwritten constitutional principle may be operationalized through a remedy. For a number of reasons, unwritten constitutional principles should rarely, if ever, be used to invalidate legislation. There could be, in certain cases, some forms of remedy (shy of invalidation) available, and the CTF will advance argument about those remedies, and why they should not be used in this case.

38. The CTF will submit that the courts have recognized that the unwritten constitutional principles described by the Supreme Court of Canada in the *Secession Reference* do not lead to the conclusion that such principles can be used to invalidate laws. By virtue of their unwritten status which thus requires definition by way of judicial determination, the lack of any governmental protection enshrined elsewhere in the constitution (such as the section 33 notwithstanding clause or the section 1 justification clause), and other reasons, the unwritten constitutional principles should be used sparingly, if ever, in relation to legislation passed by either the federal or provincial government.

39. In respect of the content of the unwritten constitutional principle of democracy, to the extent it relates to municipal elections at all, the CTF will submit that there are aspects of the democratic process that are closer to the “core” of the constitutional principle, and aspects that are more peripheral. Core aspects of the constitutional principle include the right of citizens to vote, and the right of citizens to run for office as

a candidate. The CTF will submit that the matters at issue in this proceeding do not relate to the core aspects of the constitutional principle of democracy.

C. The Difference between the CTF and Ontario

40. Particularly given the speed with which this proceeding is being advanced, the CTF is mindful that the Court will want to ensure that positions are not duplicated or repeated. The CTF repeats the challenges in detailing the arguments to be made in advance of an application not yet fully briefed.

41. However, even at this early stage, it is anticipated that the CTF and Ontario will be advancing different (yet complimentary) positions in material respects.

- a. First, with respect to the content of the principle, the CTF will focus on the importance of parliamentary democracy from the vantage point of the voting public, and the extent to which utilizing constitutional principles to thwart the will of the legislature of a democratically elected government, ultimately *reduces* democracy. The CTF will rely on, among other things, the recent decision of the Federal Court of Appeal in *Canada (Governor General in Council) v. Mikisew Cree First Nation*, [2017] 3 FCR 298, in this respect.
- b. Second, with respect to the operationalization of the principle in the form of remedies, the CTF and Ontario will also likely part company. Ontario will likely argue, with good reason, that unwritten constitutional principles should never be used to invalidate legislation passed by Parliament or a

legislature. The CTF supports that proposition, but will also argue that, in a proper case, some form of remedy shy of invalidation could be available, but which remedy would reflect the proper role of the court in the constitutional separation of powers.

D. Conclusion

42. This application is important, but not for the reasons stated by the Applicant. The Applicant submits that the application is significant because of the importance of municipal “democracy” and that a municipal election is underway. The more important aspect of this case is the extent to which individuals and public interest groups can use the court process to invalidate laws duly passed by a democratic legislature. There are restraints on legislative power, notably the constitutional division of powers in the *Constitution Act 1982*, and the *Charter*. But to go one step further, and use judge-made unwritten constitutional principles, to strike down legislation, constitutes a fundamental change to the constitutional order in Canada. This is important.

43. In light of the potential consequences of the relief sought by the Applicant, it is submitted that the Court would benefit from having additional submissions by an intervenor that has a genuine interest in the proceeding, and that can offer additional submissions that may assist the Court in its deliberations.

44. The CTF respectfully submits that it meets the test for intervention under Rule 13.02, and that it can provide meaningful assistance to this Court in considering constitutional arguments of significant importance. The CTF will not augment the record

in any way, nor raise any new issues, and as such, will have minimal interference with the conduct of the application.

PART II - REQUESTED ORDERS

45. The CTF requests an order granting leave to the CTF to intervene in this proceeding on the following terms and conditions:

- a. CTF shall be entitled to serve and file a factum not exceeding twenty (20) pages in length on or before August 29, 2018;
- b. CTF shall be granted permission to present oral submissions not to exceed twenty (20) minutes in length at the return of this hearing;
- c. CTF shall not be entitled to raise new issues or adduce further evidence or otherwise supplement the record of the parties; and
- d. Costs of this motion and the application shall not be awarded to or against the CTF.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED this 20th day of August, 2018



Derek J. Bell
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DLA Piper (Canada) LLP

Lawyers for the Moving Party,
The Canadian Taxpayers Federation

Schedule "A"

Tab	Case
1.	<i>Authorson (Guardian of) v Canada (Attorney General)</i> [2001]
2.	<i>Bedford v Canada (Attorney General)</i> , 2009
3.	<i>Canadian Blood Services v Freeman</i> , [2006]
4.	<i>Oakwell Engineering Ltd v Enemorth Industries Inc</i> , [2006]
5.	<i>Ontario (Attorney General) v Dieleman</i> (1993)
6.	<i>Regional Municipality of Peel et al v Great Atlantic & Pacific Co et al</i> (1990)
7.	<i>Toronto Star v Attorney General of Ontario</i> , 2017

Schedule "B"

Rule 13.02 of the *Rules of Civil Procedure*

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE CANADIAN TAXPAYERS FEDERATION
(MOTION FOR LEAVE TO INTERVENE)**

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