

CW-18-00603633-0000
Court File No. _____

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

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

Applicants

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent

APPLICATION under Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing on _____ at _____, at 393 University Avenue, Toronto, Ontario, M5G 1E6

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.



IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date August 20, 2018

Issued by



Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, Ontario M5G 1E6

TO: Ministry of the Attorney General of Ontario
Crown Law Office – Civil
McMurtry-Scott Building
720 Bay Street
8th Floor
Toronto, ON M7A 2S9

APPLICATION

1. THE APPLICANTS MAKE APPLICATION FOR

- a) An order declaring that ss. 5-7 of Schedule 1 and s 1 of Schedule 3 to the *Better Local Government Act, 2018*, SO 2018, c. 11 (the “impugned provisions”) are inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), and that such inconsistency cannot be demonstrably justified in a free and democratic society;
- b) An order declaring that the impugned provisions are inconsistent with s. 2(d) of the *Charter*, and that such inconsistency cannot be demonstrably justified in a free and democratic society;
- c) An order declaring that the impugned provisions are inconsistent with s. 15 of the *Charter*, and that such inconsistency cannot be demonstrably justified in a free and democratic society;
- d) A declaration that the impugned provisions are inconsistent with the unwritten constitutional principles of the rule of law and democracy in their own right and in combination with the violations of the *Charter* plead above;
- e) An order pursuant to s. 52 of the *Constitution Act, 1982*, declaring that the impugned provisions are of no force or effect;
- f) An order pursuant to rule 12.08 authorizing the Applicant Prabha Khosla to bring the herein application on behalf of all members of Women Win TO;
- g) Costs of this application; and
- h) Such further and other relief as counsel may request and this Honourable Court may deem to be just and appropriate.

2. THE GROUNDS FOR THE APPLICATION ARE

A. The Applicants

- a) The Applicant Chris Moise is currently registered as a candidate for Toronto City Council in the 2018 municipal election;
- b) The Applicant Ish Aderonmu is an elector in the City of Toronto in the 2018 municipal election;
- c) The Applicant Prabha Khosla is an elector in the City of Toronto in the 2018 municipal election and a member of Women Win TO, an unincorporated association;

B. The City of Toronto

- d) The City of Toronto (“Toronto”) is a municipality in the Province of Ontario, and is continued as a body corporate pursuant to s 125(1) of the *City of Toronto Act, 2006*, SO 2006, c 11, Sch A (the “*City of Toronto Act*” or the “*Act*”);
- e) Pursuant to the *City of Toronto Act*, Toronto is required to provide good government to its residents, and is a democratic institution that is required to be responsible and accountable. The *Act* recognizes that the Province and Toronto are required to work together “in a relationship based on mutual respect” and to “engage in ongoing consultations with each other about matters of mutual interest”;
- f) The Preamble to the *City of Toronto Act* includes the following:

The Assembly recognizes that the success of the City requires the active participation of governments working together in a partnership based on respect, consultation and co-operation.
- g) Section 1 of the *City of Toronto Act* provides as follows:

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.

(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.

(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.

(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.

- h) As of 2016, Toronto had a population of approximately 2.8 million people. It is the fifth largest municipal government in North America with an annual operating budget of \$12.3 billion in 2017;
- i) Toronto is the most racially diverse city in Canada. According to the 2016 census, Toronto residents include over 1.3 million people who identify as visible minorities or 51.5% of the City's population. Toronto accounts for nearly 44% of the 3,558,585 Ontarians who identified as visible minorities in the 2016 census;
- j) Toronto is governed by a City Council. The City Council is comprised of members – City Councillors – who represent citizens in wards throughout the city. City Councillors are the face of local government in their wards. They are the people Toronto residents call over numerous local issues big and small. These issues include public transit, parks and public spaces, community safety, police relations, affordable housing, and other matters. City Councillors also deal with residents' associations, business improvement areas, and a myriad of other groups and represent their ward's and the City's interest on various committees, boards and commissions;

- k) The members of City Council are currently nowhere near as diverse as the population of Toronto at large. There are very few racialized councillors or women councillors or lesbian, gay, bisexual and transgendered (“LGBT”) councillors, and only one racialized woman who is LGBT, on City Council;

C. The Toronto Ward Boundary Review

- l) Prior to the enactment of the impugned provisions, Toronto City Council had the authority to determine its own ward boundaries and the composition of City Council in consultation with the Province;
- m) Since 2000, the City has been divided into 44 wards. Over the years, disparities emerged between wards in terms of their respective populations, and some wards contained more than 130% of the average ward population. In 2013 City Council retained an independent team of consultants to conduct the Toronto Ward Boundary Review. This process was intended to examine the size, shape and number of Toronto’s wards, with the goal of ensuring parity in the population of wards across Toronto. The Boundary Review lasted several years, and followed an extensive 6-step process:
 - 1. Comprehensive research;
 - 2. Round 1 Civic Engagement and Public Consultation;
 - 3. Ward Boundary Option Development;
 - 4. Round 2 Civic Engagement and Public Consultation;
 - 5. Preparation of Preferred Option & Refinement Analysis;
 - 6. Recommendation to Council for New Ward Structure;
- n) The Boundary Review considered numerous ward boundary options, including mirroring the electoral districts used for provincial and federal elections. This

option was soundly rejected. As noted in the Final Report of the Ward Boundary Review (pp. 27-28):

During the consultation process the idea of using the federal/provincial riding boundaries as ward boundaries was suggested, although opinion on this issue was divided. There were two variations on this theme. The first was to use the new 25 federal ridings as Toronto's wards. This would result in 25 wards and 25 Councillors with an average ward size of 123,000 people. Only a very small number of Councillors and the public supported this scenario. The second variation was to use the new federal riding boundaries but split them in half. This approach would lead to 50 wards with an average ward population of approximately 60,500 people. This population average is close to Toronto's current average ward population size. It is worth noting that the federal riding boundaries mostly do not align with the current ward boundaries.

The TWBR team assessed these two suggestions to see if either could lead to a viable option. Neither variation of the federal riding approach meets the tests of effective representation going forward. Specifically, the ward population size spread is too large from a voter parity perspective. For 2026, the range is 96,614 – 135,298 in the 25 ward version and 48,307 – 67,649 in the 50 ward version. There seems to be little appetite for wards as large as the 25 ward version and adjusting boundaries to make the 50 ward version respect voter parity will end up resembling Option 1 but with three additional wards. In addition, federal riding boundaries are reviewed and adjusted every 10 years, which does not deliver a long term solution.

- o) In 2016, City Council ultimately decided to adopt the “minimal change” option, which increased the number of wards from 44 to 47. This would have resulted in an average ward size of approximately 60,000 people, with ward populations ranging from approximately 51,850 to 70,150 people;
- p) Toronto By-laws 247-2017 and 464-2017, which implemented the new 47 ward structure for the 2018 municipal election, were the subject of six appeals to the Ontario Municipal Board (now the Local Planning Appeal Tribunal). With the exception of a minor change in one ward boundary, the bylaws were upheld. Leave to appeal the Board's decision was denied by the Divisional Court;

D. The 2018 Municipal Election

- q) Since 2006, elections in Toronto have been held every 4 years. Since 2010, election day has been held on the fourth Monday of October. The 2018 Toronto election was therefore scheduled for October 22, 2018. As noted above, this election was to take place under the 47 ward structure approved by Council;
- r) The 2018 campaign period began on May 1, 2018. Individuals interested in running for City Council in wards across the City registered as candidates, often making significant life changes, including quitting jobs, or changing residences, in order to do so. They have spent their own money on their campaigns, raised funds in accordance with complex election rules, and established campaign teams;
- s) The field of candidates for the 2018 election was diverse, including a significant number of women and racialized and LGBT persons;

E. Bill 5

- t) On July 30, 2018, three months after the 2018 Toronto campaign had already commenced, the Minister of Municipal Affairs and Housing introduced Bill 5, the *Better Local Government Act, 2018*, S.O. 2018, c. 11. This legislation made significant amendments to the *City of Toronto Act*, the *Municipal Act*, S.O. 2001, c. 25 and the *Municipal Elections Act*, S.O. 1996, c. 32, Sched. all in ways that altered the already in-progress electoral campaign;
- u) In particular, the impugned provisions of Bill 5 operated to force the provincial/federal electoral district model that was rejected by both the Ward Boundary Review and by Toronto's elected City Councillors. The effect of this was to make the average size of a Toronto ward approximately 123,000, more than double the average ward size under the 47-ward model, and to impose this change mid-way through the election period for the 2018 municipal election;
- v) Wards of these sizes are dramatically out of line with the average ward sizes of other municipalities in Ontario. For example, Ottawa has 23 districts for a

population of 895,000 – or a ratio of 38,913 people per councillor; London has 14 districts for a population of 388,615 - or a ratio of 27,758 people per councillor; and Kingston has 12 districts for a population of 129,653 - or a ratio of 10,750 people per councillor;

- w) The Provincial Government's plan to eliminate nearly half of Toronto's wards was never raised as by any candidate during the recent provincial election, nor did the government consult with Toronto pursuant to the relevant consultation provisions of the *City of Toronto Act*;
- x) During the legislative process, the Provincial Government utilized a time allocation motion to bypass any committee hearings or other means of public consultation over Bill 5;
- y) Bill 5 received royal assent on August 14, 2018;
- z) The Provincial Government breached its statutory obligations of respect, consultation, and co-operation with respect to the passage of Bill 5;

F. The Impugned Provisions are Unconstitutional

- aa) As set out in more detail below, the impugned provisions of Bill 5 are unconstitutional. They violate the *Charter* and unwritten constitutional principles, and those violations cannot be saved pursuant to s. 1 of the *Charter*;

Freedom of Expression

- bb) Freedom of expression is one of the most fundamental values of Canadian society, and ought to be interpreted in a large and liberal manner;
- cc) Political expression is one of the core values that is sought to be protected by s. 2(b) of the *Charter*. It is the "lynchpin" of the guarantee. Representative democracy depends on the maintenance and protection of freedom of expression;

- dd) Campaigning for public office, volunteering for political campaigns, communicating with political campaigns, and voting in elections are expressive acts that are protected by s. 2(b). The extent of the protection provided by the provision goes well beyond the bare right to cast a ballot or stand for election, and extends to the right to play a meaningful role in the electoral process;
- ee) The impugned provisions, in both purpose and effect, limit the political speech of Toronto's electors and Council candidates. They do so by virtue of their timing, mid-way through the 2018 campaign period, as well as generally;
- ff) The impugned provisions restrict political expression by imposing barriers on the ability of candidates, their supporters, and politically engaged electors to play a meaningful role in the electoral process. They do so by imposing an unannounced new requirement, mid-way through the campaign period, to organize, campaign, fundraise and operate in materially different areas, and at a scale that is unparalleled amongst Ontario municipalities;
- gg) With respect to the 2018 campaign period, only candidates, groups and individuals who have sufficient resources to engage in political activities on a dramatically expanded scale on effectively no notice can effectively engage in their new ward's boundaries. Many individuals who had planned and made arrangements to engage politically under a more accessible 47-ward structure are unable to effectively participate in the political process where the new boundaries and election rules are changed more than three months into an election campaign, and whose rules still incomplete and unknown, and for which the new "audience" is in excess of 100,000 individuals spread over significantly larger and different geographic areas;
- hh) Effective participation in the 2018 electoral process required candidates to commit financial resources based on the population of a ward. Further, the campaign strategy of candidates and their supporters, including the selection of candidates, is closely tied to the neighbourhoods and communities of interest

forming the municipal ward. The sudden, mid-campaign alteration of Toronto's ward structure undermines the ability of candidates to carry through with their electoral strategies, and has diluted or made irrelevant their expressive political conduct that had occurred prior to the passage of the impugned provisions and the changes to Toronto's ward structure, along with the expressive political conduct of their supporters;

- ii) Because there are no term limits in municipal politics, and because of the difficulty new challengers have to unseating incumbents, political groups have formed seeking to strategically support the nominations and election of new voices in City Council. Their plans for the 2018 election were predicated on the ward structure that was in existence at the time that the campaign commenced. The aspirations of these groups, and their ability to effectively organize, is restricted by the sudden change in Toronto's ward structure;
- jj) Electors and candidates engage in political expression during electoral campaigns by selecting individuals or policies to support; engaging in fundraising, advertising or canvassing; attending local meetings, debates and other events; and engaging with others on political issues well in advance of a vote. All of these activities are protected by s. 2(b), but have been rendered inaccessible or less accessible for the 2018 election due to the impugned provisions;
- kk) While s. 2(b) does not guarantee any particular form or process of elections, once the state has entered the field, any changes it makes to the electoral process cannot be such that it negates, undermines or restricts the expressive actions of individuals by undermining their ability to effectively participate in the electoral process;
- ll) More generally, the impugned provisions dilute the votes of electors to levels that constitute significant impairments of their expressive rights;

- mm) Compared with City Councillors in other Ontario municipalities, the 25 ward structure makes effective representation of residents ineffective due to ward populations well in excess of 100,000 residents;
- nn) These restrictions are particularly acute given the unique role City Councillors play as compared to Members of Parliament and Members of Provincial Parliament;

Freedom of Association

- oo) Legislation will violate the constitutional guarantee of freedom of association where its purpose or effect is to penalize, dissuade or interfere with the ability of individuals to associate;
- pp) Freedom of association is broad. It protects the ability of individuals to join together for the purpose of achieving common goals and to redress imbalances in power, and extends to association for the purpose of exercising other constitutionally protected rights and to engage uniquely associational activities including participation in political campaigns;
- qq) The impugned provisions have impeded the ability of electors to form effective associations in order to campaign and fundraise during the 2018 election. Aside from dramatically altering and expanding the size of wards, making the creation of effective political coalitions more difficult, the alteration of the basic ground rules of the campaign while the campaign was ongoing, without notice and without consultation, has rendered previous associational activity predicated on the 47 ward structure moot, and limited the time during which electors are able to form new political coalitions within the context of a 25 ward structure;
- rr) More generally, the impugned provisions interfere with the ability of electors to form effective associations because of the dramatic expansion of the size of the wards;

Equality

- ss) Section 15 of the *Charter* protects equal access to local government and equal participation in the political process for members of groups characterized by the enumerated grounds contained in the guarantee, or grounds analogous thereto;
- tt) With respect to the 2018 election, the impugned provisions have an adverse impact on women and racialized and LGBT candidates, who are already underrepresented in local government and who will have greater difficulty transitioning from a campaign under the 47 ward structure to one under the 25 ward structure mid-way through the campaign period;
- uu) The impugned provisions will also limit the opportunity for women and diverse candidates to meaningfully run for office in 2018 by “packing” incumbents (or several of them) into new, larger wards. Given the significant incumbency advantage that is typical of municipal elections, underrepresented women and racialized and LGBT candidates often only have a realistic chance of being elected in “open” wards. Reducing the number of such wards by having fewer wards than incumbent candidates imposes a disproportionate burden on women and racialized and LGBT candidates;
- vv) Furthermore, as compared to incumbents, women and racialized and LGBT candidates are less able to adapt to changes to ward structures mid-way through the campaign period, and to mount new campaigns based on different and larger wards, because they have fewer resources and additional personal obligations. As a result of the impugned provisions, women and racialized and LGBT candidates are either required to run against incumbents at a significant disadvantage, or withdraw their candidacies;
- ww) The impugned provisions also limit the opportunity for women and diverse electors to volunteer for political campaigns and to express themselves on political issues in the course of the election, including by reducing the number of diverse candidates and/or the number of seats to which women and diverse

candidates may be elected. Furthermore, women and diverse volunteers are less able to contribute more than the amount of time they had previously set aside to volunteer on a campaign because of their additional responsibilities (including domestic/caregiving), and the mid-campaign change to ward boundaries places a burden on their ability to participate in the electoral process effectively;

- xx) The impugned provisions, and their timing mid-way through the campaign period, reinforce and perpetuate the arbitrary disadvantages that women and racialized and LGBT candidates already face in mounting campaigns for elected office, including having difficulty in finding initial support, needing to combat sexist and racial stereotypes, and often wrongly perceiving themselves to be less qualified and therefore less electable than those who have the benefit of prior representation;
- yy) Due to Toronto's high level of visible minority residents as compared to any other municipality in Ontario, the vote dilution imposed by the impugned provisions – which is dramatically greater than other Ontario municipalities – imposes a disproportionate burden on racialized and LGBT persons;
- zz) The process by which Bill 5 was enacted, including the lack of public consultation and the extraordinary legislative process involved, reflects a disregard for the needs, interests, views and aspirations of Toronto's residents, including women and its large racialized population and LGBT persons. This perpetuates their disadvantage and conveys the message that their interests are not worthy of regard by the Provincial government;
- aaa) More generally, the much larger ward structures, which are significantly larger than elsewhere in the Province, have an adverse impact on the ability of women and racialized and LGBT Torontonians to run for office, serve as councillors, participate in the electoral process, and express their views and concerns to political representatives, in violation of the right to equality;

Democracy, the Rule of Law and Obligation to Consult

- bbb) The impugned provisions undermine the unwritten constitutional principles of democracy and the rule of law;
- ccc) The impugned provisions are inconsistent with the principle of democracy because they fail to respect any consultative obligations to Toronto's electors with respect to the means by which they are to govern themselves, alter an on-going electoral process, dilute voting power to an unprecedented extent, and undermine Torontonians' ability to effective access and obtain support from their elected representatives;
- ddd) The impugned provisions are inconsistent with the rule of law because they disrupt the settled expectations of all participants in the 2018 political process in Toronto, through special legislation targeting them alone;
- eee) These aspects of the impugned provisions violate both of these unwritten constitutional principles in their own right;
- fff) The impugned provisions also violate the above noted sections of the *Charter* as they are informed by the principles of democracy, the rule of law, and the obligation to consult;

Section 1 of the *Charter*

- ggg) The above-noted violations, taken individually or in combination, cannot be demonstrably justified in a free and democratic society;
- hhh) The impugned provisions do not pursue any pressing and substantial objective;
- iii) In the alternative, the impugned provisions are not proportional in their restriction of *Charter* protected rights, in that they
 - 1. Are not rationally connected to any legitimate objective that Bill 5 may pursue;

2. Do not minimally impair the rights of Torontonians; and
3. Have no salutary effects, or alternatively that any salutary effects do not outweigh the deleterious effects on the *Charter* rights of individuals;

G. Other Grounds

- jjj) The *Canadian Charter of Rights and Freedoms*, ss. 1, 2(b), 2(d), 15;
- kkk) The *Constitution Act, 1982*, s. 52;
- lll) The *City of Toronto Act, 2006*, SO 2006, c 11, Sch A;
- mmm) The *Better Local Government Act, 2018*, SO 2018, c 11;
- nnn) The *Rules of Civil Procedure*, RRO 1990, Reg 194, rr. 12.08, 14, 38, 39; and
- ooo) Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION

- ppp) The affidavit of Chris Moise, sworn August 20, 2018;
- qqq) The affidavit of Ish Aderonmu, sworn August 20, 2018;
- rrr) The affidavit of Prabha Khosla, sworn August 18, 2018;
- sss) The Affidavit of Jamaal Myers, to be sworn;
- ttt) The Affidavit of Moya Beall, to be sworn;
- uuu) The affidavit of Mariana Valverde, to be sworn;
- vvv) Such further and other material as counsel may advise and this Honourable Court may permit.

August 20, 2018

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

Howard Goldblatt (LSO No. 15964M)
Steven M. Barrett (LSO No. 24871B)
Simon Archer (LSO No. 46263D)
Geetha Philipupillai (LSO No. 74741S)

Tel: 416-977-6070

Fax: 416-591-7333

hgoldblatt@goldblattpartners.com

sbarrett@goldblattpartners.com

sarcher@goldblattpartners.com

gphilipupillai@goldblattpartners.com

Lawyers for the Applicants

CHRIS MOISE, et al.
Applicants and Respondent

ATTORNEY GENERAL OF ONTARIO

Court File No.:

CN-18-00603633-0000

SERVICE OF A TRUE COPY

ADMITTED THIS *20* DAY OF *Aug*, 20*18*

ATTORNEY GENERAL FOR ONTARIO

Per *D. Davis* *B. Bous* Time *4:12*

Constitutional Law Branch
720 Bay Street 4th Floor
Toronto, Ontario M5G 2K1

SERVICE OF A COPY

ADMITTED THIS *20* DAY OF *August* 20*18*

Crown Law Office (Civil Law)

MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO

Per *Manjiv* Time *4:22pm*

720 BAY STREET
TORONTO, ONTARIO M7A 2S9

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

NOTICE OF APPLICATION

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

**Howard Goldblatt (LSO No. 15964M)
Steven M. Barrett (LSO No. 24871B)
Simon Archer (LSO No. 46263D)
Geetha Philipupillai (LSO No. 74741S)**

Tel: 416-977-6070

Fax: 416-591-7333

hgoldblatt@goldblattpartners.com

sbarrett@goldblattpartners.com

sarcher@goldblattpartners.com

Lawyers for the Applicants