Court of Appeal File No. C65861

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in appeal)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in appeal)

- and -

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

Respondents
(Appellants)

- and -

CITY OF TORONTO

Respondent
(Respondent in appeal)

(Title of Proceedings Continued on p.2)

FACTUM OF RESPONDENT IN APPEAL, CITY OF TORONTO

AND BETWEEN:

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

Applicants
(Respondents in appeal)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

- and -

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

Interveners
(Respondents in appeal)

FACTUM OF RESPONDENT IN APPEAL, CITY OF TORONTO

May 6, 2019

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TABLE OF ABBREVIATIONS USED IN TEXT AND CITATIONS

AB	Joint Appeal Book
Aff	Affidavit
COTA	*City of Toronto Act, 2006*
cr-x	Cross-examination transcript
Ex	Exhibit
FEDs	Federal Electoral Districts
MEA	*Municipal Elections Act, 1996*
MR	Motion Record (Proposed fresh evidence of the Appellant)
OMB	Ontario Municipal Board
p	Page
RMR	Responding Motion Record of City of Toronto to Fresh Evidence Motion
SMR	Supplementary Motion Record (Proposed fresh evidence of the Appellant)
TWBR	Toronto Ward Boundary Review
v	Volume
¶	Paragraph

APPELLANT'S PROPOSED FRESH EVIDENCE CITED IN THIS FACTUM

(identified by italic script in the footnotes)

Carbone 2nd Aff – Affidavit of Giuliana Carbone, sworn December 3, 2018, and the exhibits thereto

Cheng cr-x – Transcript of cross-examination of Lily Cheng on her Affidavit affirmed August 21, 2018, held on February 13, 2019, and the exhibits thereto

Padovani cr-x – Transcript of cross-examination of Chiara Padovani on her Affidavit sworn August 21, 2018, held on March 1, 2019 and the exhibits thereto

Sancton Aff – Affidavit of Professor Andrew Sancton, sworn October 30, 2018, and the exhibits thereto

PART I – OVERVIEW

1. This case asks this question: What is a *democratic* election?

2. In 2013, the City of Toronto Council—a democratically elected government—initiated an extensive independent review of the City's ward boundaries and council composition over several years. The goal was to achieve fair elections and effective representation for Torontonians in accordance with constitutional criteria laid down by the Supreme Court of Canada. The City succeeded, and Council's consequent adoption of a 47-ward boundary model was upheld by the Ontario Municipal Board ("OMB") in 2017 and the Divisional Court in 2018.

3. With all of this finished, the City Clerk began extensive preparation for a 47-ward election. Candidates also made plans, spent money, knocked on doors, talked with voters and rearranged their families' lives, all presuming a 47-ward election on October 22. On July 27, nominations closed and the 2018 election was well underway.

4. Then, the Ontario government reconfigured the 47-ward election into a 25-ward election partway through the election. It did so by introducing the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("Bill 5"). This happened in the middle of a Canadian democratic election without warning, consultation or study.

5. When Bill 5 came into force on August 14, the City's election was past the halfway mark. Bill 5 caused unprecedented disruption to candidates, voters and the City. Several affected parties, including the City, gathered themselves with haste to challenge Bill 5 and restore the election to its original structure. The more time passed, the harder it would be to achieve, even if successful. Understandably, the court below set an expedited hearing timetable. The applications were heard by Justice Belobaba on August 31, less than two months before the election.

6. Justice Belobaba rightly intervened on the basis of s. 2(b) of the *Charter*, finding that the

Ontario government ("Ontario" or the "Province") had clearly crossed the line of what is acceptable in our democratic society. He declared the provisions of Bill 5 that reduced the number of City wards to be unconstitutional,[1] and ordered the election to proceed on the basis of 47 wards. The City's position is that Justice Belobaba was correct on freedom of expression and his declaration of invalidity should be upheld.

7. However, the City submits that the outcome below was also justified because Bill 5, by rendering Toronto's democratic election undemocratic, offends the constitutional principle of democracy and was an impermissible use of the Province's powers under s. 92(8) of the *Constitution Act, 1867*.[2]

PART II – THE FACTS

A. BACKGROUND

8. The City of Toronto Council is a democratically elected government which is responsible and accountable.[3] Toronto is the largest city in Canada and the sixth largest government in Canada. Based on 2016 census data, Toronto's population exceeded 2.7 million people[4] and is growing rapidly. In 2017, the City had an operating budget of $10.5 billion dollars and a 10 year capital budget of $26.5 billion dollars.[5]

9. 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

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[1] The City applied for an order declaring that ss 4-7 of Sch 1, and Sch 3 of Bill 5, and O Reg 407/18 and O Reg 408/18 made pursuant thereto, and the companion provisions of O Reg 391/18 amending O Reg 412/00, are of no force and effect, except for the part of s 1 of Sch 3 of Bill 5 that adds ss 10.1(1) and 10.1(10) to the *Municipal Elections Act, 1996*, SO 1996, c 32, Sch [MEA], to the extent that it permits these sections of O Reg 407/18 to remain in force: s 4(1) as it applies to s 23(2) of the MEA, and ss 4(2), 5 and 12 (the "Impugned Provisions").
[2] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [*Constitution Act, 1867*], s 92(8), City Factum, Sch "B".
[3] *City of Toronto Act, 2006*, SO 2006, c 11, Sch A [COTA], s 1(1), City Factum, Sch "B".
[4] Aff of Gary Davidson, Aug 27, 2018 [Davidson Aff], AB v 4, Tab 40, Ex C.
[5] Aff of Giuliana Carbone, Aug 22, 2018 [Carbone Aff], AB v 3, Tab 39, ¶ 2-3.

planning, transportation services including road design and repair, bicycle lanes and traffic signals, tree maintenance and urban forestry, police, paramedics, fire services, sewers, supportive housing and homeless shelters, childcare, recreation centres, business licensing, building permit and inspection services, public health services and more.[6]

10. In order to provide these services the City has a complex administrative structure of approximately 35,000 active employees. City Council has a statutory mandate to exercise the powers of the City.[7] Section 132 of COTA, which was not changed under Bill 5, expressly requires that the powers of the City shall be exercised by City Council.

11. Further, section 131 of COTA, which was not changed under Bill 5, expressly sets out the extensive role of City Council and accordingly Councillors as:

> "(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".[8]

12. In addition to City Council meetings, prior to the 2018 election, there were numerous City boards and committees that Councillors sat on, including four community councils and eight standing committees.[9]

B. TORONTO WARD BOUNDARY REVIEW

13. The *City of Toronto Act, 2006* was an important development in providing the City with a new legislative charter and recognition of its importance as a mature democratic government.

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[6] Carbone Aff, AB v 3, Tab 39, Ex A.
[7] COTA, ss 131-132, City Factum, Sch "B".
[8] COTA, s 131, City Factum, Sch "B".
[9] Carbone Aff, AB v 3, Tab 39, ¶ 4-5, and Ex B.

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.[10]

14. Beginning in 2013, City Council approved an extensive third-party review of its then 44-ward structure, with the goal of adopting a new ward boundary model which would be more reflective of "effective representation". 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 OMB.[11]

15. The City engaged independent outside consultants, who conducted the Toronto Ward Boundary Review ("TWBR") over a period of more than three years. 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.[12]

16. After a first round of public consultation, the TWBR screened out the option of using the federal electoral districts (FEDs) to draw the City's boundaries. The consultants noted that "the idea of having 25 very large wards gained virtually no support during the public process".[13]

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[10] COTA (prior to Bill 5 amendments), ss 1-2, 128, 135, City Factum, Sch "B".
[11] Carbone Aff, AB v 3, Tab 39, Ex J, at pp 1452-1453, 1457. The leading case is *Reference Re Provincial Electoral Boundaries (Sask)*, [1991] 2 SCR 158 [*Carter*].
[12] Davidson Aff, AB v 4, Tab 40, ¶ 9-10; also, City Council approved the use of $800,050.00 to cover the costs of the TWBR: Carbone Aff, AB v 3, Tab 39, Ex K, at pp 1468, 1473.
[13] Options Report, AB v 4, Tab 44, Ex 4, at p 2233.

17. After further consultation and review, the consultants presented their *Final Report* 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:

a) The increase in wards rebalances the existing ward population discrepancies by enlarging small wards and decreasing large wards;

b) It accommodates projected population growth to 2030;

c) The new wards achieve effective representation and can be implemented for the 2018 municipal election and will last until the 2030 municipal election.[14]

18. The Executive Committee requested additional information from the consultants on several matters, including a request to further consider ward boundaries for increased consistency with the 25 federal and provincial ridings.[15] The consultants re-examined this option, but ultimately re-confirmed their recommendation for a 47-ward structure.[16]

19. The City's consultants thoroughly considered the FEDs scheme. They did not recommend it because it did not provide voter parity for multiple elections, divided a number of communities of interest, and would not accommodate growth in areas of the City that were growing rapidly.[17]

20. The consultants were also of the professional opinion that the FEDs model created a problem with the capacity of Councillors to represent their constituents, as it would create wards with an average population of approximately 111,000 people in 2018. 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

[14] Final Report, AB v 4, Tab 42, Ex 3, at pp 1886, 1891.
[15] Carbone Aff, AB v 3, Tab 39, Ex M, at p 1576.
[16] Carbone Aff, AB v 3, Tab 39, Ex N, at pp 1594, 1604, 1656.
[17] Davidson Aff, AB v 4, Tab 40, ¶ 34, 56-61.

ward sizes and result in significantly larger wards than any other Ontario municipality.[18]

21. 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.[19]

22. At its November 2016 meeting, after debate, Council adopted the recommended 47-ward structure with one Councillor per ward.[20] On March 29, 2017 and April 28, 2017, respectively, Council passed By-law 267-2017 and By-law 464-2017 (the "By-Laws"), which redivided the City's 44 wards into 47 wards with new ward boundaries.[21]

23. Justice Belobaba made the following factual findings regarding the TWBR:

> The TWBR considered the "effective representation" requirement and the ward size that would best accomplish this objective. The option of reducing and redesigning the number of wards to mirror the 25 Federal Election Districts was squarely addressed and rejected by the TWBR. . . .
>
> Put simply, the 25 FEDs option was considered by the TWBR and rejected because, at the current 61,000 average ward size, city councillors were already having difficulty providing effective representation.[22]

C. APPEALS TO THE OMB AND DIVISIONAL COURT

24. Under the then s. 128 of COTA, any person, including the Minister, could appeal the By-laws to the OMB. Several appeals were commenced.[23] After an extensive seven day hearing in October of 2017, the majority of the OMB panel approved the 47-ward boundary option with one small amendment to the boundary between two wards. The OMB issued its order on December 15, 2017, in time for the 2018 election. The OMB concluded that the work undertaken by the

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[18] Davidson Aff, AB v 4, Tab 40, ¶ 37-52; Reasons for Decision of Justice Belobaba, Sept 10, 2018, AB v 1, Tab 6 [Reasons of Belobaba J], ¶ 55-56, 58.
[19] Carbone Aff, AB v 3, Tab 39, Exs M & N.
[20] Carbone Aff, AB v 3, Tab 39, Ex N, at pp 1594-1608.
[21] Carbone Aff, AB v 3, Tab 39, Exs O & P.
[22] Reasons of Belobaba J, at ¶ 54-55.
[23] COTA (prior to Bill 5 amendments), ss 128, 135, City Factum, Sch "B".

TWBR was comprehensive and the "ward structure delineated in the By-Laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards".[24] The OMB also found "that communities of interest are best respected with a 47-ward structure, a factor that is a consideration in evaluating effective representation".[25]

25. 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, including that of Andrew Sancton called by the appellants, whom the Province seeks to rely upon in its Fresh Evidence Motion. The OMB concluded 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.[26]

26. The OMB carefully considered the voter parity arguments that the Province appears to be relying on as a purported justification for Bill 5. The OMB (majority) concluded that neither model achieves perfect voter parity and that absolute parity is impossible to achieve. The OMB (majority) also recognized the merit to the City's analysis where the comparison involves different models based on a different number of wards. One should not simply compare the two models based on a +/- 15% variance but should also consider the difference in actual population numbers.[27] In addition, consistent with the principles in *Carter*, the 47-ward model was designed to be used for at least three and perhaps four election cycles. In a rapidly growing City, the FEDs model will continue to grow out of parity as it is based on historical census data.[28]

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[24] OMB Decision, Dec 15, 2017 [OMB Decision], AB v 3, Tab 39, Ex Q, ¶ 51.
[25] OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 36.
[26] OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 36.
[27] For example, a 15% variance to the City's preferred 61,000 average population per ward is a variance of 18,300 people. Whereas a 15% variance in the FEDs model with an average of 111,000 is a variance of 31,863 people, see OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 37-38.
[28] *Carter*, at ¶ 78; OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 26. See also: Davidson Aff, AB v 4, Tab 40, ¶ 34.

27. The Province suggests there was a strong dissent at the OMB, on which they rely. However, the dissenting member focused on voter parity as opposed to effective representation and did not consider voter parity in terms of population differences based on the actual number of people per ward under the two models. The dissenting member also referred to Professor Sancton's evidence that a 25-ward FEDs model would provide a "host of options open to the City, including but not limited to ... four as set out by Dr. Sancton", one of which was "50 councillors with 2 councillors elected per ward",[29] which would be a bigger Council than under the 47-ward model.

28. The same two appellants then sought leave to appeal. 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. All parties at the OMB agreed that the *Carter* case set out the principles to be applied to ward boundary reviews. Justice Swinton stated that the OMB considered relative voter parity as well as other factors. She noted that the OMB "concluded 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 the wards "resulting in a significant impact on the capacity to represent" (at para. 36)".[30]

D. 2018 ELECTION BASED ON 47-WARD STRUCTURE

29. With these proceedings completed, the City proceeded with the 2018 election based upon a 47-ward structure. The City Clerk (the "Clerk") was charged with administering the City's 2018 municipal election (the "Election"). Since as early as January, 2018, the Clerk and her staff began preparing to conduct an election for 47 Councillor positions and 39 school board trustees,

[29] OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 56. This evidence directly contradicts Professor Sancton's position in his affidavit for the Province's fresh evidence motion.
[30] Reasons for Decision of Justice Swinton, Mar 6, 2018, AB v 3, Tab 39, Ex R, ¶ 10.

based on the new 47-ward structure including communicating information to candidates.[31]

30. The municipal election day was fixed for the whole province under the MEA to be October 22, 2018.[32] The nomination period started on May 1 and ended July 27, 2018. As of July 30, the Clerk had certified the nominations of the 509 candidates qualified to run in the Election.[33] The certification of candidates is an important milestone in an election. At that point, the candidates running for Councillor in each of the 47 wards were fixed and known to all.[34]

31. 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 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 based on a 47-ward model that expressly referred to the ward in which they were running.[35]

32. There was significant evidence put together in a truncated timeframe for the applications from candidates and others that:

a) Candidates made their decisions to run for Councillor in the Election because of the 47-ward structure;

b) Candidates chose a ward to run in based on their involvement and connection to the ward;

c) Candidates had already conducted extensive campaigning and communications to residents based on the 47 ward model at the time Bill 5 was enacted;

d) Candidates raised campaign funds based upon the 47-ward structure; and

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[31] Aff of Fiona Murray, Aug 22, 2018 [Murray Aff], AB v 2, Tab 38, ¶ 8, 11-13.
[32] MEA, s 5, City Factum, Sch "B".
[33] Murray Aff, AB v 2, Tab 38, ¶ 11.
[34] Carbone Aff, AB v 3, Tab 39, ¶ 41.
[35] Carbone Aff, AB v 3, Tab 39, Exs H & I; Aff of Jennifer Hollett, Aug 21, 2018 [Hollett Aff], AB v 4, Tab 42; Aff of Lily Cheng, Aug 21, 2018 [Cheng Aff], AB v 4, Tab 43; Aff of Dyanoosh Youssefi, Aug 22, 2018 [Youssefi Aff], AB v 5, Tab 46; Aff of Chris Moise, Aug 20, 2018 [Moise Aff], AB v 1, Tab 25; Aff of Megann Willson, Aug 21, 2018 [Willson Aff], AB v 2, Tab 33; Aff of Chiara Padovani, Aug 21, 2018 [Padovani Aff], AB v 2, Tab 34; Aff of Cheryl Lewis-Thurab, Aug 21, 2018 [Lewis-Thurab Aff], AB v 2, Tab 36.

e) Campaign materials were prepared in reliance upon the 47 ward structure.[36]

E. BILL 5

33. 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, Bill 5 was introduced in the Ontario Legislature.[37] It came into force on August 14, the day it passed third reading and received Royal Assent.[38] Bill 5 redivided the City into 25 wards and declared that this ward structure would be used for the Election.[39] Bill 5 also eliminated the City's power to set its own ward boundaries and council composition. Every other Ontario municipality still enjoys these powers.

F. LACK OF CONSULTATION WITH THE CITY

34. The City was never consulted or even approached by Ontario to discuss the changes to COTA and the MEA that Bill 5 introduced, let alone that these changes would be imposed in the middle of the 2018 Election campaign.[40]

35. The lack of consultation occurred despite s. 1(3) of COTA, pursuant to which both the Province and the City recognized that it is in their best interests to consult with each other about matters of mutual interest in accordance with an agreement. That agreement has been, since 2008, the Toronto-Ontario Cooperation and Consultation Agreement.[41]

G. FEDERAL BOUNDARIES COMMISSION

36. The City does not dispute that the Federal Boundaries Commission for Ontario (the "Commission") is an independent body. However, it has no role or mandate for considering or

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[36] Hollett Aff, AB v 4, Tab 42; Cheng Aff, AB v 4, Tab 43; Youssefi Aff, AB v 5, Tab 46; Moise Aff, AB v 1, Tab 25; Willson Aff, AB v 2, Tab 33; Padovani Aff, AB v 2, Tab 34; Lewis-Thurab Aff, AB v 2, Tab 36.
[37] Carbone Aff, AB v 3, Tab 39, ¶ 36.
[38] Bill 5 was not sent to Committee for consultation and the time for debate was shortened.
[39] Carbone Aff, AB v 3, Tab 39, ¶ 37-38.
[40] Carbone Aff, AB v 3, Tab 39, ¶ 31-33.
[41] Carbone Aff, AB v 3, Tab 39, ¶ 20.

establishing municipal ward boundaries. The *Electoral Boundaries Readjustment Act* provides that the mandate of the Commission is to "report on the readjustment of the representation of the Provinces in the House of Commons required to be made on the completion of each decennial census".[42] The Commission, in carrying out its work after the 2011 census, held only two public meetings in Toronto. This is contrasted with the 24 public meetings and information sessions, amongst other opportunities for public engagement, held by the TWBR.[43]

37. There is no other municipality in Ontario whose ward boundaries match the FEDs. The Province has only imposed this on Toronto despite its allegations of the benefits of using federal boundaries. Furthermore, Bill 5 does not require that any future redivision of Toronto wards by the Commission will apply to future Toronto municipal elections.

38. The City disputes any suggestion that the work carried out by the TWBR was not independent. Independence was a key component of the TWBR. Further, of note is that Council adopted the recommendations of the independent consultants.

H. COUNCIL MEETINGS AND ALLEGED DYSFUNCTION

39. There is no reliable evidence to support the Province's suggestion that Bill 5 was necessary because City Council is dysfunctional. The rhetoric from the Premier or members of the legislature is not reliable evidence. Approximately three months after introducing Bill 5, the Province's evidentiary justification for it comes from an affidavit of Andrew Sancton, who was the same expert witness used by the appellants at the OMB on the ward boundary appeal. The affidavit contained in the Province's fresh evidence motion is substantially similar to the witness statement of Sancton introduced at the OMB.[44]

40. In his affidavit, Sancton makes many general statements but does not describe what he

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[42] *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3, s 3(2), City Factum, Sch "B".
[43] Davidson Aff, AB v 4, Tab 40, ¶ 9.
[44] *Aff of Giuliana Carbone, Dec 3, 2018 [Carbone 2nd Aff], City Responding Motion Record [RMR], ¶ 8 and Ex A.*

means by “dysfunction”, does not give any examples of Toronto City Council's decisions on major issues and has clearly not done his own study to support any general statements made about Toronto Council meetings.[45]

41. In contrast, there is the City's evidence from Ms. Carbone, the Deputy City Manager with over 30 years of senior management experience in municipal government. Ms. Carbone gives detailed information about the significant, effective and efficient work carried out by City Council during its 2014-2018 term including, but not limited to, the planning and delivery of public transportation infrastructure, approval of affordable housing units, expansion of the City's emergency shelter system, billions of dollars in public works and infrastructure investments, and a large number of important planning matters.[46]

42. Ms. Carbone, having extensive experience with Committees and Council, comments that having senior staff attend meetings is efficient for staff as it gives all Councillors an opportunity to hear from City staff at the same time without the need to conduct individual meetings with Councillors. It is also more transparent.[47]

I. OMBUDSMAN ROLE

43. Attending Council meetings is just one of the responsibilities of elected Councillors. They also must fulfill their “ombudsman role” consistent with their statutory mandate and effective representation. There is no justification for the imposition of such large wards resulting in an average population ratio per Councillor of approximately 110,000 people. Wards of this size are nearly double what was supported during the TWBR and are significantly larger than the ward populations in other cities in Ontario. Dr. Davidson, the City's expert who conducted the TWBR, opined that ward sizes imposed under Bill 5 do not provide Councillors with an ability

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[45] *Aff of Professor Sancton, Oct 30, 2018 [Sancton Aff], Ontario Motion Record [MR], Tab 4, ¶ 82, 83, 89.*
[46] *Carbone 2nd Aff, RMR, Tab 1, ¶ 15-34.*
[47] *Carbone 2nd Aff, RMR, Tab 1, ¶ 20.* This is contrasted with Professor Sancton's unsubstantiated criticism.

to provide effective representation at the municipal level.[48]

44. The Province's fresh evidence does not undermine the City's position, the evidence below or the findings and conclusions by Justice Belobaba on this point. Professor Sancton himself describes wards having such a large population as an "evil". He says his preference would be to have each Councillor representing fewer than 80,000 residents.[49]

45. The Province and Professor Sancton appear to rely upon the fact Winnipeg reduced its Council size from 50 members (plus a Mayor) to 15. Based on 2016 census information Winnipeg's population is approximately ¼ (25.8%) of Toronto.[50]

46. Justice Belobaba correctly found on the evidence that, under the FEDs option, Councillors do not have the capacity to respond to the grievances and concerns of their constituents and provide effective representation.[51]

PART III – THE LAW

A. STANDING

47. In its factum, the Province raises for the first time an argument that the City has no standing to assert a breach of s. 2(b) of the *Charter*. Appellate courts generally do not entertain entirely new issues that were not raised below, such as a party's lack of standing to sue.[52] This Court should give no effect to this argument, which is not even found in the Notice of Appeal.

48. The City has standing to advance the s. 2(b) claim. As in *Charlottetown (City) v Prince Edward Island*,[53] the City represents its residents and has an "interest in ensuring effective

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[48] Davidson Aff, AB v 4, Tab 40, ¶ 37-52.
[49] *Sancton Aff, MR, Tab 4, ¶ 75-76.*
[50] If one bases the number of Councillors needed according to Winnipeg's ratios, Toronto should have approximately 60 Councillors.
[51] Reasons of Belobaba J, at ¶ 55-56, 58.
[52] *Kaiman v Graham*, 2009 ONCA 77 at ¶ 18; *Midland Resources Holding v Shtaif*, 2017 ONCA 320 at ¶ 109-112.
[53] [1998] PEIJ No 88 (PE SCAD) [*Charlottetown*].

representation for its populace".[54] The City and its residents are also exceptionally prejudiced by Bill 5, which targets Toronto and no other municipality.[55]

49. Moreover, the City ought to be granted public interest standing. In the Supreme Court's leading case, Justice Cromwell emphasized that, in public law cases, Canadian courts take a flexible, discretionary approach on standing, weighing three factors: (1) whether the case raises a serious justiciable issue; (2) whether the party bringing the action has a real stake or genuine interest in its outcome; and (3) whether the proposed suit is a reasonable and effective means to bring the case to court.[56] These are not a strict checklist, but interrelated considerations to be weighed collectively, and courts exercise their discretion in a "liberal and generous manner".[57]

50. Each factor favours the City. First, Bill 5 has already been declared invalid due to an unjustified infringement of s. 2(b) of the *Charter*, so the issue is clearly serious and justiciable.

51. Second, the City has an obvious stake in the s. 2(b) issue. The outcome directly affects the City governance structure including the composition of its Council. The City also has a direct interest in ensuring fair elections and electoral speech for its residents.

52. Third, the City's application is a reasonable and effective means of advancing the s. 2(b) issue. Importantly, without the City, this Court will not receive a "full and complete adversarial presentation"[58] on a case of significant public interest, but only one-sided argument.[59]

53. While Ontario points to other "directly affected" individuals who could argue s. 2(b), the concerns underlying this factor are unfounded. The City is not advancing a diffuse challenge without an adequate factual record, needlessly burdening the court, without capacity to present

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[54] *Charlottetown*, at ¶ 5.
[55] *Smith v Ontario (AG)*, [1924] SCR 331 at ¶ 19.
[56] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 [*Downtown Eastside*], at ¶ 1-2.
[57] *Downtown Eastside*, at ¶ 1-2, 35-37.
[58] *Downtown Eastside*, at ¶ 49.
[59] *Downtown Eastside*, at ¶ 51 (second bullet).

the case, nor undermining the decisions of those with a personal stake to not sue. [60]

54. The Province fails to explain how the City's challenge is less reasonable or effective without the other applicants, or how it conflicts with their interests. Also, the fact that those individuals have settled the appeal may reflect the practical reality that "[m]ost individuals would be daunted by the cost and time to see constitutional litigation to the end of trial and its expected appeals".[61]

55. Finally, the City already has standing on other closely related issues in this appeal, and it would be wasteful to require some other party to pick up the s. 2(b) baton.

B. ROLE OF THE MUNICIPALITY IN MODERN CANADIAN SOCIETY

56. Municipalities are a form of government. 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.[62]

57. 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.[63] (Emphasis added)

58. 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

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[60] *Downtown Eastside*, at ¶ 51.
[61] *Good Spirit School Division No 204 v Christ The Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109 [*Good Spirit*], at ¶ 129. See also: *Good Spirit*, at ¶ 130; *Downtown Eastside*, at ¶ 51 (third bullet).
[62] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, at ¶ 3; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, at ¶ 6-8; *Nanaimo (City) v Rascal Trucking Ltd,* [2000] 1 SCR 342, at ¶ 18; *Croplife Canada v Toronto (City)*, [2005] OJ No 1896, at ¶ 37; *232169 Ontario Inc (cob Farouz Sheesha Café) v Toronto (City)*, 2017 ONCA 484, at ¶ 21. See also s 6 of COTA.
[63] COTA, s 1(1), City Factum, Sch "B" (emphasis added).

drawing of the City's ward boundaries.

C. FREEDOM OF EXPRESSION

59. In the court below, Justice Belobaba correctly determined that Bill 5 infringed s. 2(b) of the *Charter*. He found that it substantially interfered with:

a) candidates' freedom of expression by its change of the number and size of the electoral districts mid-election; and

b) voters' freedom of expression by denying them a vote that can result in meaningful and effective representation.[64]

1) Nature of the Right Claimed

60. Contrary to the Province's characterization, this is not a positive rights case. The City does not argue that its residents require the "government to provide [them] with a particular platform for expression".[65] Rather, they seek "the freedom to express themselves – by means of an existing platform they are entitled to use – without undue state interference with the content of their expression".[66] The City's residents have already been given the right to express themselves by voting in a democratic election for the members of City Council.[67] They seek protection from the government's interference in that expression. *Baier*, *Delisle*, and *Longley* do not apply.

2) Nature of Freedom of Expression

61. Justice Belobaba correctly applied the test for s. 2(b) infringement.[68]

62. He correctly found that freedom of expression is of crucial importance to a democratic society and that political expression is at the very heart of the values protected by s. 2(b).[69]

63. There is no question that the freedom is broadly interpreted and extends to protect as

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[64] Reasons of Belobaba J, at ¶ 47.
[65] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, at ¶ 35.
[66] *Ibid*.
[67] COTA, s 1(1), City Factum, Sch "B".
[68] Reasons of Belobaba J, at ¶ 26; *Irwin Toy Ltd v Quebec (AG),* [1989] 1 SCR 927 [*Irwin Toy*], at ¶ 55.
[69] Reasons of Belobaba J, at ¶ 23; *Libman v Quebec (AG)*, [1997] 3 SCR 569 [*Libman*], at ¶ 28-29.

many expressive activities as possible.[70] Expression has both a content and a form. Activity is expressive if it attempts to convey meaning, and that meaning is its content.[71]

3) Nature of Infringement

i) Mid-election Interference

64. There were many expressive activities and meaning impacted by Bill 5. Although on its face, Bill 5 seeks to redraw ward boundaries, its effect on expression is much broader. It is important to remember the legal and factual context of the expression. It involves the right to convey meaning within the context of a democratic election; the right to convey meaning relevant to a discussion of the issues and problems impacting various communities of interest; and the right to use expression as the legitimate means to influence a specific electoral outcome.

65. These expressive activities included production of campaign literature expressly tied to a ward, discussion with residents with respect to candidates' political messages, decisions related to campaign contributions and spending, and decisions related to campaign strategy.[72] These expressive activities fell within the scope of the s. 2(b) protection.[73]

66. Justice Belobaba correctly found that Bill 5 created confusion and uncertainty about where to run, how to refashion political messages and reorganize campaigns, how to attract additional financial support, what to do with wasted campaign literature and other material,[74] and that it caused candidates to spend more time on doorsteps addressing the confusing state of

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[70] Reasons of Belobaba J, at ¶ 24; *Irwin Toy*, at ¶ 43.
[71] *Irwin Toy*, at ¶ 41.
[72] Moise Aff, AB v 1, Tab 25, ¶ 15-21; Padovani Aff, AB v 2, Tab 34, ¶ 14-17; Aff of Ish Aderonmu, Aug 20, 2018 [Aderonmu Aff], AB v 1, Tab 26, ¶ 6; Aff of Jamaal Myers, Aug 21, 2018 [Myers Aff], AB v 2, Tab 35, ¶ 8-9, 11-12, 22, 24, 27; Cheng Aff, AB v 4, Tab 43, ¶ 15, 18-19; Youssefi Aff, AB v 5, Tab 46, ¶ 15-30; Hollett Aff, AB v 4, Tab 42, ¶ 26-31; Willson Aff, AB v 2, Tab 33, ¶ 11; Aff of Mariana Valverde, Aug 20, 2018 [Valverde Aff], AB v 2, Tab 30, ¶ 15-16, 19-23.
[73] Reasons of Belobaba J, at ¶ 27.
[74] Reasons of Belobaba J, at ¶ 30; Moise Aff, AB v 1, Tab 25, ¶ 23-29; Willson Aff, AB v 2, Tab 33, ¶ 12-15; Padovani Aff, AB v 2, Tab 34, ¶ 15-17; Myers Aff, AB v 2, Tab 35, ¶ 26-27; Aff of Moya Beall, Aug 21, 2018 [Beall Aff], AB v 2, Tab 32, ¶ 20, 22, 24; Youssefi Aff, AB v 5, Tab 46, ¶ 27-33; Aff of Prabha Khosla, Aug 18, 2018 [Khosla Aff], AB v 1, Tab 27, ¶ 35-37.

affairs than relevant political issues, and severely frustrated and disrupted their efforts to convey their political messages in their particular ward.[75] These findings of fact were fully supported by the evidence before Justice Belobaba and should be accepted by this Court.

67. The meaning of the candidates' messages were effectively destroyed by Bill 5. All the pre-Bill 5 expression to convince voters to vote for a candidate in a particular ward in the 47-ward configuration now no longer had any value as that voter could no longer vote for that candidate in that ward. Indeed, the voter might not even be able to vote for that candidate at all.[76] A ward-specific issue raised by a candidate with a voter who was residing in one ward under the 47-ward model would no longer be relevant where that voter's ward changed as a result of Bill 5.[77] Such earlier canvassing would have been rendered moot and irrelevant. Candidates lost endorsements as a result of Bill 5,[78] and, in one case, someone who had previously endorsed a candidate and campaigned with her before Bill 5 became an opponent after Bill 5.[79]

68. Furthermore, Bill 5 did not reset spending limits for candidates. A candidate who had campaigned in a 47-ward election and spent money in that campaign had less money to use on her or his expression in a 25-ward campaign than a candidate who entered the election after Bill 5.[80] This uneven spending limit meant that later candidates could outspend earlier candidates on their chosen forms of expression. Breach of these spending limits had statutory consequences.[81]

69. As well, donation limits were not reset. Someone who had donated to a candidate in a 47-

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[75] Reasons of Belobaba J, at ¶ 31; Padovani Aff, AB v 2, Tab 34, ¶ 15-17, 22; Khosla Aff, AB v 1, Tab 27, ¶ 35-37; Moise Aff, AB v 1, Tab 25, ¶ 22-24, 27-28, 31; Myers Aff, AB v 2, Tab 35, ¶ 24-27; Youssefi Aff, AB v 5, Tab 46, ¶ 27-33; Hollett Aff, AB v 4, Tab 42, ¶ 38-48; Aderonmu Aff, AB v 1, Tab 26, ¶ 14; Cheng Aff, AB v 4, Tab 43, ¶ 18-19, 28; Willson Aff, AB v 2, Tab 33, ¶ 13-14.
[76] Moise Aff, AB v 1, Tab 25, ¶ 23-24.
[77] Moise Aff, AB v 1, Tab 25, ¶ 23-24; Khosla Aff, AB v 1, Tab 27, ¶ 35.
[78] *Transcript of cross-examination of Chiara Padovani on her Affidavit sworn August 21, 2018, held on March 1, 2019 [Padovani cr-x], SMR v 3, Tab 10(B), p 1559, q 297*; *Transcript of cross-examination of Lily Cheng on her Affidavit affirmed August 21, 2018, held on February 13, 2019 [Cheng cr-x], SMR v 1, Tab 2(B), pp 390-391, q 517.*
[79] *Cheng cr-x, SMR v 1, Tab 2(B), p 367, q 383, and p 388, q 506.*
[80] Cheng Aff, AB v 4, Tab 43, ¶ 26-28; Padovani Aff, AB v 2, Tab 34, ¶ 21-22; Aderonmu Aff, AB v 1, Tab 26, ¶14; Youssefi Aff, AB v 5, Tab 46, ¶ 32; Moise Aff, AB v 1, Tab 25, ¶ 28.
[81] MEA, s 88.23, 92, City Factum, Sch "B".

ward campaign and reached their limit could no longer donate.[82] Others could only donate up to the balance left of their limit even though their prior donations were wasted on 47-ward specific materials. Donors to candidates who only entered the 25-ward election were not so affected.

70. It is no answer to say candidates could physically continue to convey the same 47-ward specific messages as before Bill 5 if they chose to (such messages would have no meaning) or that candidates could begin to convey 25-ward specific messages (as the interference had already happened).

71. Bill 5 did not simply require candidates to "make extra effort" to convey their messages, as the Province suggests. No matter how much effort they applied, candidates would no longer be able to have a voter vote for them in a ward that no longer existed.

72. Justice Belobaba also correctly noted that s. 2(b) protection applied not only to candidates but also to every participant in a political election campaign, including volunteers, financial supporters and voters. Many of the above effects of Bill 5 also impacted these other participants and their s. 2(b) rights,[83] including the s. 2(b) right to receive information.[84]

ii) Effective Representation

73. Justice Belobaba found that voting could be considered the most important expressive activity in a democratic society.[85] This is certainly so in a democratic election, as all other expressive activity is directed at how the voter will express herself or himself through that vote.

74. The application judge correctly recognized that *Charter* rights overlap, cannot be pigeonholed, and are interrelated.[86] There is nothing inappropriate then with turning to the value structure of the *Charter* and the Constitution as a whole and the content of other enumerated

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[82] Cheng Aff, AB v 4, Tab 43, ¶ 26.
[83] Reasons of Belobaba J, at ¶ 25.
[84] *Vancouver Sun (Re)*, 2004 SCC 43, at ¶ 26.
[85] Reasons of Belobaba J, at ¶ 40.
[86] Reasons of Belobaba J, at ¶ 46; *Baier v Alberta*, 2007 SCC 31 [*Baier*], at ¶ 58.

rights in exposing or understanding the structure, content and application of any other right or freedom under the *Charter*, especially where, as here, one of the forms of expression at issue is the democratic vote. The fact that s. 3 of the *Charter* does not apply to municipal elections does not mean that it cannot be used to inform the meaning of s. 2(b).

75. To do so does not mean that municipalities have been granted constitutional status, as the Province alleges. It only means that, where the Province has chosen to give residents the right to a democratic vote to elect their representatives in government (as here), that right entails the right to a vote that provides for effective representation.

76. In *Carter*, the Supreme Court of Canada explained that the right to effective representation is not the same as the right to equality of voting power or the right to voter parity. McLachlin, J. (as she then was) explained the concept of representation as follows:

> Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of *the right to bring one's grievances and concerns to the attention of one's government representative* …, elected representatives function in two roles – legislative and what has been termed the "ombudsman role" (emphasis added).[87]

77. Furthermore, she stated that "to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process *as well as of effective assistance from their representatives in their 'ombudsman' role*"[88] (emphasis added).

78. Accordingly, a vote cast for a candidate in a democratic election must be a vote for a democratic representative—someone who can act both as legislator and ombudsman. Justice Belobaba was therefore correct when he held that Bill 5 infringed the s. 2(b) right of voters through the creation of wards that were too big for Councillors to have the capacity to respond in a timely fashion to the "grievances and concerns" of their constituents.[89]

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[87] *Carter*, at ¶ 49.
[88] *Carter*, at ¶ 61.
[89] Reasons of Belobaba J, at ¶ 58.

79. The Province is incorrect to suggest that, because effective representation includes a capacity to represent component (it uses the term "constituent to representative ratio"), the impact of this component will be the same for all three levels of government. The evidence that Justice Belobaba accepted, and to which this Honourable Court should show deference, is that an average ward size of 110,000 residents was too large for City Councillors. The ratios for the other levels of government are permissibly different because they do different work.[90] Even the Province's expert does not support average municipal ward sizes as large as 110,000 residents.

80. The City states that Justice Belobaba was correct when he found that Bill 5 infringed the s. 2(b) rights of candidates and voters.

D. UNWRITTEN CONSTITUTIONAL PRINCIPLE OF DEMOCRACY AND LIMITS ON S. 92(8)

81. It is clear that Canada's "Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority".[91] Such principles can "constitute substantive limitations upon government action"[92] and are "binding upon both courts and governments".[93] Such unwritten constitutional principles can be considered as a basis for striking down legislation (both primary and secondary) as unconstitutional.[94] Unwritten constitutional principles can also be used to assist in the interpretation of the limits on the scope of a constitutional head of power.[95] Either way, unwritten constitutional principles can act as a limit on Ontario's competence to pass laws.

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[90] Davidson Aff, AB v 4, Tab 40, ¶ 41-46.
[91] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession*], at ¶ 148.
[92] *Quebec Secession*, at ¶ 54.
[93] *Quebec Secession*, at ¶ 54.
[94] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, [*Provincial Court Judges Reference*]; *Mackin v New Brunswick*, 2002 SCC 13 [*Mackin*]; *Masters' Association of Ontario v Ontario*, 2011 ONCA 243 [*Masters' Assn*], *Ell v Alberta*, 2003 SCC 35 [*Ell*], *British Columbia (AG) v Christie*, 2007 SCC 21 [*Christie*]; *Polewsky v Home Hardware Stores Ltd*, [2003] OJ No 2908 (Div Ct) [*Polewsky*], leave to appeal allowed [2004] OJ No 954 (CA) (It appears as if the Province did not pursue the appeal and instead amended the Small Claims Court Rules.).
[95] *Trial Lawyers Association of British Columbia v British Columbia (AG),* [2014] 3 SCR 31 [*Trial Lawyers*].

82. In the case at bar, Bill 5 offends the unwritten constitutional principle of democracy and Ontario does not have the legislative competence under s. 92(8) to enact the Impugned Provisions because they purport to make Toronto's democratic election undemocratic.

83. As such, Justice Belobaba was correct in striking down Bill 5 and the appeal must be dismissed.

1) Ability to Strike down Legislation

84. Courts, including the Supreme Court of Canada, have, on different occasions, accepted the use of unwritten constitutional principles as a basis to strike down legislation. For example:

a) "judicial independence" was used to strike down legislation that purported to remove supernumerary judges from office;[96]

b) "judicial independence" was used to support a challenge to legislation affecting the qualifications of justices of the peace;[97]

c) "judicial independence" was used to support a challenge to legislation affecting the remuneration and tenure of masters;[98]

d) the "rule of law" was used to support a challenge to the Small Claims Court tariff fees;[99] and

e) the "rule of law" was used to support a challenge to legislation imposing a tax on legal services.[100]

85. In the above cases where the legislative regime under attack was not ultimately struck down, the reason was because the applicant was unable to demonstrate that the legislation in question offended the unwritten constitutional principle at issue, not that unwritten constitutional principles in general could not be used to strike down legislation.

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[96] *Mackin*.
[97] *Ell*.
[98] *Masters' Assn*.
[99] *Polewsky*.
[100] *Christie*.

2) The Unwritten Constitutional Principle of Democracy

86. Democracy is fundamental to Canadian society.[101] The Supreme Court of Canada has acknowledged that democracy is an unwritten constitutional principle.[102] The full scope of this principle has not yet been judicially determined.

87. That said, s. 3 of the *Charter* and the jurisprudence related to that section are informative in determining some of the aspects underlying this unwritten constitutional principle because s. 3 of the *Charter* deals with democratic rights.

88. The Supreme Court of Canada has not yet ruled on the use of s. 3 to inform the content of the unwritten principle of democracy, but an analogy can be made to the interpretation and evolution of the principle of judicial independence.

89. In that context, Justice Major, for the Supreme Court of Canada in *Ell*, explained the evolution of judicial independence this way:

> The principle finds explicit constitutional reference in ss. 96 to 100 of the *Constitutional Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*. The application of these provisions is limited: the former to judges of superior courts, and the latter to courts and tribunals that determine the guilt of those charged with criminal offences … The respondents [justices of the peace] do not fall into either of these categories. *Nonetheless, as this Court has recognized, the principle of judicial independence extends beyond the limited scope of the above provisions*.[103] (Emphasis added)
>
> …
>
> The scope of the unwritten principle of independence must be interpreted in accordance with its underlying purposes. In this appeal, its extension to the office held by the respondents depends on whether they exercise judicial functions that relate to the bases upon which the principle is founded.[104]
>
> …
>
> It is obvious the respondents were constitutionally required to be independent in the exercise of their duties.[105]

90. In the earlier case of the *Provincial Court Judges Reference*, sections 96 and 100 of the

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[101] See McLachlin, CJ B, "Unwritten Constitutional Principles: What Is Going On?" (December, 2005), Lord Cooke Lecture, Wellington, New Zealand.
[102] *Quebec Secession*, at ¶ 49.
[103] *Ell*, at ¶ 18.
[104] *Ell*, at ¶ 20.
[105] *Ell*, at ¶ 26.

Constitution Act, 1867, and s. 11(d) of the *Charter* were seen by the Supreme Court as merely express "elaborations" of the unwritten principle of judicial independence,[106] but the existence of express provisions did not prevent judicial independence from being used to permit an attack on legislation in circumstances to which those express provisions did not apply (such as in *Ell*).

91. Similarly, s. 3 can be seen as an elaboration of the unwritten principle of democracy and that principle can be used to attack legislation even in circumstances where s. 3 does not apply.

92. The City acknowledges that s. 3 of the *Charter* does not apply directly to it.[107]

93. However, that does not end the matter. Where Ontario has established a democratic election for a municipality[108] (just as where a province establishes a particular provincial court to adjudicate disputes), it must do so in a manner that respects democracy (just as the provincial court so created must be judicially independent) and therefore that election must respect the principles set out below.

94. It is submitted that the unwritten constitutional principle of democracy, as it applies to democratic elections, embraces at least the following:

a) the right to effective representation;[109]

b) elections should be free and fair without state interference, such as where the interference "*affects the conditions* in which citizens exercise those rights" (emphasis added);[110]

c) participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections;[111]

d) the right to run for office, which "provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option";[112]

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[106] *Provincial Court Judges Reference*, at ¶ 84-87, 107.
[107] *Haig v Canada; Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995.
[108] COTA, s 1(1), City Factum, Sch "B".
[109] *Carter*, at ¶ 49.
[110] *Figueroa v Canada (AG),* [2003] 1 SCR 912 [*Figueroa*], at ¶ 33, 36.
[111] *Figueroa*, at ¶ 29.
[112] *Figueroa*, at ¶ 29.

e) the right to vote, which "provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses";[113]

f) a right to play a meaningful role in the selection of elected representatives, who in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate;[114]

g) a right to meaningful participation in that process;[115] and

h) the right to exercise a citizen's vote in an informed manner, which requires the citizen to have the ability to weigh the relative strengths and weaknesses of each candidate.[116]

95. Accordingly, legislation which runs afoul of such rights offends the principle of democracy. This is such a case.

3) Imperial Tobacco is not an Obstacle

96. The decision of the Supreme Court of Canada in *Imperial Tobacco*[117] is used to argue that unwritten constitutional principles cannot be used to strike down legislation. This is not a correct interpretation of this case.

97. In *Imperial Tobacco*, the Court explained that the rule of law embraced at least three principles: (1) everyone must obey the law; (2) there must be a set of positive laws; and (3) state action must be authorized by law, but none of these could be used to strike down legislation.

98. This approach is not hard to understand because these aspects of the rule of law are necessarily "content-neutral". The Court was not saying that unwritten constitutional principles could never be used to invalidate legislation, just that these aspects of the rule of law could not.

99. Indeed, this is made ever clearer in *Christie*. The majority of the B.C. Court of Appeal found that the legislation at issue (a tax on legal services) violated the aspect of the rule of law that required litigants to have the right to be represented by a lawyer in certain court proceedings.

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[113] *Figueroa*, at ¶ 29.
[114] *Harper v Canada (AG)*, 2004 SCC 33 [*Harper*], at ¶ 69. See also COTA Preamble, ss 1(1), 2¶4, 212(1)¶5.
[115] *Harper*, at ¶ 69.
[116] *Harper*, at ¶ 71.
[117] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49.

Before the Supreme Court of Canada, the Court rejected the challenge to the legislation, not because the rule of law could not be used to invalidate legislation, but rather because it found that the rule of law did not encompass the requirement of a right to legal counsel.

If courts were forbidden from using unwritten constitutional principles to strike down legislation, then the Court would have simply said so in *Christie*, and it would have been unnecessary for it to determine whether the rule of law embraced access to legal services.

4) Limit on Section 92(8) of the Constitution Act, 1867

100. Unwritten constitutional principles can also be used as a constraint on a legislature's power to enact laws under its heads of power pursuant to s. 92 of the *Constitution Act, 1867*.

101. In the *Provincial Court Judges Reference*, the Court indicated that a province's jurisdiction over courts, "as that term is used in s. 92(14) of the *Constitution Act, 1867* contains with it an implied limitation that the independence of those courts cannot be undermined".[118]

102. In *Trial Lawyers Association*, the Supreme Court of Canada found that a province's power to administer justice set out in s. 92(14) is constrained by the unwritten constitutional principle of the rule of law[119] that protects access to the superior courts of a province.

103. Similarly, a province does not have the power pursuant to s. 92(8) of the *Constitution Act, 1867*, to enact legislation that makes the election of a democratically elected municipal government undemocratic.

5) Application to the Facts of this Case

104. The City states that Justice Belobaba was correct when he struck down the Impugned Provisions and this appeal should be dismissed.

105. However, in addition to the s. 2(b) *Charter* grounds that Justice Belobaba used to support

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[118] *Provincial Court Judges Reference*, at ¶ 108.
[119] *Trial Lawyers*, at ¶ 36, 65.

his decision, the City also submits that Bill 5 should be struck down as offending the unwritten constitutional principle of democracy and, in the alternative, because the Province did not have the competence under s. 92(8) to pass Bill 5.

106. As explained above, Bill 5 interfered with Toronto's 2018 democratic election so that it did not provide for effective representation.[120] As well, Bill 5 altered Toronto's 2018 democratic election so that the election process itself was unfair when it changed the rules in the middle of the election.[121] Both violate the unwritten constitutional principle of democracy.

E. THE INFRINGEMENTS CANNOT BE SAVED UNDER S. 1 OF THE *CHARTER*

107. Section 1 of the *Charter* can only be used to justify *Charter* infringements: it does not apply where legislation violates an unwritten constitutional principle.

108. The burden of justifying an infringement of the *Charter* falls to the government that committed the infringement.[122] Justice Belobaba correctly concluded that the Province has not met that burden. The test for justifying an infringement is well settled. The government must demonstrate that:

a) The legislative objective is pressing and substantial;

b) The infringement is rationally connected to the legislative objective;

c) The infringement impairs the right or freedom no more than reasonably necessary to accomplish the legislative objective; and

d) There is proportionality between the effects of the infringement and the legislative objective in terms of the greater public good.

1) No Pressing and Substantial Objective

109. In its factum the Province has identified two objectives it claims to be pressing and substantial: voter parity, and improved efficiency/effectiveness of decision making.

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[120] See ¶ 76 to 79 of the City Factum.
[121] See ¶ 66 to 72 of the City Factum.
[122] *R v Oakes,* [1986] 1 SCR 103, at ¶ 66.

i) Objective: Voter Parity

110. Achieving greater voter parity was scarcely adverted to by the responsible Minister, and not at all by the Premier, in the course of debate. The focus was on saving taxpayers money—an objective on which the government does not rely for the purposes of s. 1—and on "streamlining" Council to make it less "dysfunctional".[123]

111. Even if voter parity is said to be an objective of Bill 5, it is not pressing and substantial, as Justice Belobaba correctly found.

112. As noted above, in *Carter*, the Supreme Court held that the principles underlying a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity",[124] with effective representation including "the right to bring one's grievances and concerns to the attention of one's government representative"[125] To insist on voter parity may "deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their ombudsman role".[126]

113. An objective that is antithetical to the values of a free and democratic society, as Justice Belobaba found,[127] cannot possibly be characterized as pressing and substantial, and thus cannot justify a *Charter* breach.

ii) Objective: Efficiency and Effectiveness

114. The Province bears the burden of demonstrating—not simply asserting—the harm it purports to address.[128] The Province has not adduced reliable evidence of this alleged harm,

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[123] Reasons of Belobaba J, at ¶ 65-68.
[124] *Carter*, at ¶ 62.
[125] *Carter*, at ¶ 49.
[126] *Carter*, at ¶ 61.
[127] Reasons of Belobaba J, at ¶ 72-73.
[128] See *R v Bryan*, 2007 SCC 12, at ¶ 67 (*per* Fish J).

namely the ineffectiveness and inefficiency of City Council, nor has it even explained what it means by "dysfunctional" or "inefficient". This is not a pressing and substantial objective.

2) No Rational Connection

115. Even if Bill 5's objectives were pressing and substantial, there is no rational connection between the objective of greater voter parity and the imposition of the FEDs 25-ward structure. As the OMB found, the difference between the FEDs and the 47-ward model is insignificant when variances are considered in terms of number of people rather than percentages.[129]

116. Equally, there is no evidence of a rational connection between increased effectiveness of Council functioning and a decreased number of Councillors.

3) No Minimal Impairment

117. Neither is the imposition of the FEDs minimally impairing, given that the government could have made more carefully tailored adjustments to ward boundaries in areas of concern while leaving the remainder of the 47-ward model intact.[130]

118. Nor is there evidence that a *mid-election* reduction is the only reasonable way to achieve the objective of increased effectiveness, or that in the rush to legislate, the government averted to any other options. They clearly did not.

4) No Proportionality

119. The Province also cannot establish this part of the test. The alleged benefits consist of a questionable improvement[131] in voter parity as between Toronto wards and whatever undefined efficiency gains *might* be achieved through reducing the number of Councillors.

120. The deleterious effects, in contrast, are both extensive and profound. As set out above,

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[129] OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 38-39.
[130] See *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, at ¶ 160.
[131] Discrepancies between FEDS will only increase as the population of Toronto continues to change: Davidson Aff, AB v 4, Tab 40, ¶ 34; OMB Decision, AB v 3, Tab 39, Ex Q, ¶ 26.

Ontario emphasizes voter parity at the price of effective representation, and a fair and democratic election. Bill 5 undermines expressive participation and trust in the electoral process[132] and deprives Torontonians of effective representation.

PART IV – ORDER SOUGHT

121. In the underlying application, pursuant to s. 52(1) of the *Charter*, Justice Belobaba granted a declaration of invalidity of the Impugned Provisions on the grounds that they violated s. 2(b) of the *Charter*.[133]

122. The City asks that this Honourable Court dismiss the Province's appeal. However, because Justice Belobaba's order was stayed[134] and the current City Council has already been elected pursuant to a 25-ward structure, the City asks that this Court declare the Impugned Provisions to be of no force and effect and that the By-laws apply, but to suspend that declaration of invalidity until the next regular City of Toronto election in 2022. This is a reasonable remedy that is within the Court's discretion.[135]

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this Sixth day of May, 2019.

Diana W. Dimmer	Glenn K.L. Chu	Fred Fischer	Philip Chan

Of counsel for the City of Toronto

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[132] As the Organization for Security and Cooperation in Europe [OSCE] observes in its *Guidelines for Reviewing a Legal Framework for Elections*: "Electoral legislation enacted at the "last minute" has the potential to undermine trust in the process and diminish the opportunity for political participants and voters to become familiar with the rules of the electoral process in a timely manner.": OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework for Elections, 2d ed.* (Warsaw: OSCE/ODIHR, 2013) at p 11.
[133] Reasons of Belobaba J, at ¶ 85.
[134] ONCA Stay Decision, Sept 19, 2018, AB v 1, Tab 8, ¶ 23.
[135] *Schacter v Canada*, [1992] 2 SCR 679, at ¶ 79; *Sinclair v Quebec (AG)*, [1992] 1 SCR 579 at ¶ 33.

Court of Appeal File No. C65861

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in appeal)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in appeal)

- and -

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

Respondents
(Appellants)

- and -

CITY OF TORONTO

Respondent
(Respondent in appeal)

(Title of Proceedings Continued on p.2)

CERTIFICATE

AND BETWEEN:

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

Applicants
(Respondents in appeal)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant)

- and -

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

Interveners
(Respondents in appeal)

CERTIFICATE

I, Philip Chan, counsel for the Respondent, certify:

a) An order under subrule 61.09(2) is not required; and

b) The City of Toronto estimates that three (3) hours will be required for its oral argument, not including reply.

May 6, 2019

Philip Chan

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SCHEDULE "A" – LIST OF AUTHORITIES

1 *Reference Re Provincial Electoral Boundaries (Sask),* [1991] 2 SCR 158

2 *Kaiman v Graham*, 2009 ONCA 77

3 *Midland Resources Holding v Shtaif*, 2017 ONCA 320

4 *Charlottetown (City) v Prince Edward Island*, [1998] PEIJ No 88 (PE SCAD)

5 *Smith v Ontario (AG)*, [1924] SCR 331

6 *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524

7 *Good Spirit School Division No 204 v Christ The Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109

8 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40

9 *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19

10 *Nanaimo (City) v Rascal Trucking Ltd,* [2000] 1 SCR 342

11 *Croplife Canada v Toronto (City)*, [2005] OJ No 1896

12 *232169 Ontario Inc (cob Farouz Sheesha Café) v Toronto (City)*, 2017 ONCA 484

13 *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31

14 *Irwin Toy Ltd v Quebec (AG),* [1989] 1 SCR 927

15 *Libman v Quebec (AG)*, [1997] 3 SCR 569

16 *Vancouver Sun (Re)*, 2004 SCC 43

17 *Baier v Alberta*, 2007 SCC 31

18 *Reference re Secession of Quebe*c, [1998] 2 SCR 217

19 *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3

20 *Mackin v New Brunswick*, 2002 SCC 13

21 *Masters' Association of Ontario v Ontario*, 2011 ONCA 243

22 *Ell v Alberta*, 2003 SCC 35

23 *British Columbia (AG) v Christie*, 2007 SCC 21

24 *Polewsky v Home Hardware Stores Ltd*, [2003] OJ No 2908 (Div Ct)

25 *Trial Lawyers Association of British Columbia v British Columbia (AG),* [2014] 3 SCR 31

26 McLachlin, CJ B, "Unwritten Constitutional Principles: What Is Going On?" (December, 2005), Lord Cooke Lecture, Wellington, New Zealand

27 *Haig v Canada; Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995

28 *Figueroa v Canada (AG),* [2003] 1 SCR 912

29 *Harper v Canada (AG),* [2004] 1 SCR 827

30 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49

31 *R v Oakes,* [1986] 1 SCR 103

32 *R v Bryan*, 2007 SCC 12

33 *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199

34 OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework for Elections, 2d ed.* (Warsaw: OSCE/ODIHR, 2013)

35 *Schacter v Canada*, [1992] 2 SCR 679

36 *Sinclair v Quebec (AG)*, [1992] 1 SCR 579

SCHEDULE "B" – RELEVANT STATUTES

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

Preamble

The Assembly recognizes that the City of Toronto, as Ontario's capital city, is an economic engine of Ontario and of Canada. The Assembly recognizes that the City plays an important role in creating and supporting economic prosperity and a high quality of life for the people of Ontario.

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.

The Assembly recognizes the importance of providing the City with a legislative framework within which the City can build a strong, vibrant and sustainable city that is capable of thriving in the global economy. The Assembly recognizes that the City is a government that is capable of exercising its powers in a responsible and accountable fashion.

The Assembly recognizes that it is in the interests of the Province that the City be given these powers.

PART I
INTERPRETATION

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.

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.

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.

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.

[. . .]

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.

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.

[. . .]

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.

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.

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).

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.

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.

Other material

(6) The City shall provide any other information or material that the Tribunal requires in connection with the appeal.

Tribunal decision

(7) The Tribunal shall hear the appeal and may, despite any Act, make an order affirming, amending or repealing the by-law.

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.

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.

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.

[. . .]

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.

Powers of city council

132 (1) The powers of the City shall be exercised by city council.

Same

(2) Anything begun by one council may be continued and completed by a succeeding council.

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.

Scope

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

[…]

Changes to city council

135 (1) Without limiting sections 7 and 8, those sections authorize the City to change the composition of city council.

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.

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.

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.

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.

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.

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.

Term unaffected

(6) Nothing in this section authorizes a change in the term of office of a member of council.

[...]

Adoption, etc., of policies
City policies

212 (1) The City shall adopt and maintain policies with respect to the following matters:

...

5. The manner in which the City will try to ensure that it is accountable to the public for its actions, and the manner in which the City will try to ensure that its actions are transparent to the public.

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.

5. *Electoral Boundaries Readjustment Act*, RSC, 1985, c E-3

Commissions to be established

3 [. . .]

Duties of the commissions

(2) The ten commissions established pursuant to subsection (1) shall consider and report on the readjustment of the representation of the provinces in the House of Commons required to be made on the completion of each decennial census.

6. *Municipal Elections Act, 1996*, SO 1996, c 32, Sch

Voting day

5 Voting day in a regular election is the fourth Monday in October, subject to section 10.

[. . .]

Effect of default by candidate

88.23 (1) A candidate is subject to the penalties listed in subsection (2), in addition to any other penalty that may be imposed under this Act,

. . .

(c) if a document filed under section 88.25 shows on its face that the candidate has incurred expenses exceeding what is permitted under section 88.20; or

. . .

Penalties

(2) Subject to subsection (7), in the case of a default described in subsection (1),

(a) the candidate forfeits any office to which he or she was elected and the office is deemed to be vacant; and

(b) until the next regular election has taken place, the candidate is ineligible to be elected or appointed to any office to which this Act applies.

[. . .]

Offences re campaign finances
Offences by candidate

92 (1) A candidate is guilty of an offence and, on conviction, in addition to any other penalty that may be imposed under this Act, is subject to the penalties described in subsection 88.23 (2),

(a) if the candidate incurs expenses that exceed the amount determined for the office under section 88.20; or

(b) if the candidate files a document under section 88.25 or 88.32 that is incorrect or otherwise does not comply with that section.

Exception, action in good faith

(2) However, if the presiding judge finds that the candidate, acting in good faith, committed the offence inadvertently or because of an error in judgment, the penalties described in subsection 88.23 (2) do not apply.

Additional penalty, candidates

(3) If the expenses incurred by or under the direction of a candidate exceed the amount determined for the office under section 88.20, the candidate is liable to a fine equal to the excess, in addition to any other penalty provided for in the Act.

Court of Appeal File No. C65861

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

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

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