CITATION: City of Toronto et al v. Ontario (Attorney General), 2018 ONSC 5151
COURT FILES NO.: CV-18-603797
CV-18-602494
CV-18-603633
DATE: 20180910

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF TORONTO

Applicant

and

ATTORNEY GENERAL OF ONTARIO

Respondent

AND BETWEEN:

ROCCO ACHAMPONG

Applicant

and

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

Respondents

AND BETWEEN:

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

INTERVENORS

- **Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi,** supporting the Applicants
- **Toronto District School Board**, supporting the Applicants
- **Canadian Taxpayers Federation**, supporting the Province

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Diana W. Dimmer, Glen K.L. Chu and Philip Chan* for the City of Toronto

Gavin McGrath, Rocco K. Achampong, and Selwyn Pieters for Applicant Rocco Achampong

Howard Goldblatt, Steven M. Barrett, Christina Davies, Heather Ann McConnell and Geetha Philipupillai for Applicants Chris Moise, Ish Aderonmu and Prabha Khosla on her own behalf and on behalf of Women Win TO

Robin Basu, Yashoda Ranganathan and Audra Ranalli for the Respondent Attorney General of Ontario

Donald K. Eady. Caroline V. (Nini) Jones and Jodi Martin for Intervenors Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi

Derek Bell and Ashley Boyes for Intervenor Canadian Taxpayer Federation

Patrick Cotter for Intervenor Toronto District School Board

HEARD: August 31, 2018

Challenge to Provincial Bill 5 - Better Local Government Act, 2018

Reasons for Decision

Justice Edward P. Belobaba:

[1] These applications, brought on an urgent basis, challenge the constitutional validity of Bill 5, also known as the *Better Local Government Act, 2018.*[1] For ease of reference, I will refer to the impugned provincial enactment as Bill 5 and I will refer to the provisions that are being challenged - that is, the provisions that change the number of wards and councillors from 47 to 25 - as the Impugned Provisions.

[2] Given the pressing need for a timely decision, I will forego a detailed analysis of every legal issue raised in this proceeding or the case law that pertains to these issues. I will focus primarily on the issues and authorities that, in my view, are the most determinative.

The unprecedented nature of the case before me

[3] The matter before me is unprecedented. The provincial legislature enacted Bill 5, radically redrawing the City of Toronto's electoral districts, in the middle of the City's election.

[4] The election period for Toronto City Council began on May 1, 2018 and was based on a 47-ward structure. Election day is October 22, 2018. At the end of July, shortly after taking power, the newly elected Ontario government announced that it would enact legislation directed primarily at the City of Toronto, reducing the number of City wards and councillors from 47 to 25 and *de facto* doubling the ward populations from an average of 61,000 to 111,000.

[5] Bill 5 received first reading on July 30, second reading on August 2, 7 and 8 and Royal Assent on August 14, 2018. Bill 5 took immediate effect in the middle of August, by which point some 509 candidates for the October 22 election had been certified, the candidates were in the midst of their campaigns and the City Clerk's preparations for a 47-ward election were well underway.

[6] The enactment of provincial legislation radically changing the number and size of a city's electoral districts in the middle of the city's election is without parallel in Canadian history. Here is how the City of Toronto put it in the opening line of its factum:

> Never before has a Canadian government meddled with democracy like the Province of Ontario did when, without notice, it fundamentally altered the City of Toronto's governance structure in the middle of the City's election.

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[1] S.O. 2018, c. 11.

[7] Most people would agree that changing the rules in the middle of the game is profoundly unfair. The question for the court, however, is not whether Bill 5 is unfair. The question is whether the enactment of Bill 5 is unconstitutional.

Decision

[8] I am acutely aware of the appropriate role of the court in reviewing duly enacted federal or provincial legislation and the importance of judges exercising judicial deference and restraint. It is only when a democratically elected government has clearly crossed the line that the "judicial umpire" should intervene.

[9] The Province has clearly crossed the line.

[10] For the reasons set out below, I find that the Impugned Provisions of Bill 5 substantially interfered with both the candidate's and the voter's right to freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*. I further find, on the evidence before me, that these breaches cannot be saved or justified under section 1.[2]

[11] The Impugned Provisions are unconstitutional and are set aside under s. 52 of the *Constitution Act, 1982*. The October 22 election shall proceed as scheduled but on the basis of 47 wards, not 25. If the Province wishes to enact another Bill 5-type law at some future date to affect future City elections, it may certainly attempt to do so. As things now stand – and until a constitutionally valid provincial law says otherwise - the City has 47 wards.

Arguments other than s. 2(b) of the Charter

[12] The applicants and intervenors advanced a number of Charter and non-Charter arguments in addition to s. 2(b), namely that the Impugned Provisions breached association and equality rights under ss. 2(d) and 15(1) of the Charter, and the unwritten constitutional principles of the rule of law and democracy.

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[2] I make no ruling in relation to the provisions in Bill 5 that change the selection process for the regional chairs in York, Peel, Niagara and Muskoka from election to appointment. I recognize that Mr. Achampong included a challenge to these provisions in his application and filed a supporting affidavit from the campaign manager of a candidate in York Region. However, the Achampong application asks that Bill 5 be "stayed", a remedy that was not requested by any other applicant and is not being granted here because it requires a very different legal analysis: see *Manitoba (A.G.) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110. A more complete legal and evidentiary basis would be needed before this court could comfortably consider a challenge to the provisions in Bill 5 that deal with the appointment of the four regional chairs.

[13] I am inclined to agree with the Province that none of these additional submissions can prevail on the facts herein. However, I make no actual finding in this regard. The ss. 2(d) and 15(1) submissions, together with the rule of law and democracy submissions, may live another day, perhaps to be litigated in another court. It is sufficient for my decision today to focus only on s. 2(b) of the Charter and the guarantee of freedom of expression.

Analysis

[14] Several preliminary points should be made clear before I explain why the Impugned Provisions infringe s. 2(b) of the Charter.

[15] First, there is no dispute that the Province has plenary authority under s. 92(8) of the *Constitution Act, 1867* to pass laws in relation to "Municipal Institutions in the Province". Assuming the law falls under s. 92(8), or indeed any other provincial head of power, the Province can pass a law that is wrong-headed, unfair or even "draconian."[3]

[16] The only proviso, and it is an important one, is that any such legislation must comply with the Charter (and, arguably, any applicable unwritten constitutional norms and principles). As long as a statute is "neither *ultra vires* nor contrary to the [Charter], courts have no role to supervise the exercise of legislative power."[4] The remedy for bad laws that are otherwise *intra vires* and Charter-compliant is the ballot box, not judicial review.[5]

[17] Second, a federal or provincial legislature is sovereign and cannot bind itself. The provincial legislature can over-rule or contradict a previously enacted law. A subsequent enactment that is inconsistent with an earlier enactment is deemed to impliedly repeal the earlier enactment to the extent of the inconsistency.[6] Thus, the argument that the *City of Toronto Act*[7] somehow imposed an immutable obligation to consult cannot succeed. The

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[3] *Babcock v Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 57.

[4] *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at para. 85.

[5] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at para. 66. Also see *East York v. Ontario (Attorney General)*, [1997] O.J. No. 4100 at para. 12: "[C]ourts can only provide remedies for the public grievances if those grievances violate legal as opposed to political proprieties. What is politically controversial is not necessarily constitutionally impermissible."

[6] Sullivan, *Sullivan on the Construction of Statutes*, (6th ed.) at para 11.64.

[7] S.O. 2006, c. 11, Sch. A., ss. 6(1) and (2). Also see s. 6 of the Toronto-Ontario Cooperation and Consultation Agreement which provides that Ontario shall consult with the City on, among other things, "[a]ny proposed change in legislation or regulation that, in Ontario's opinion, will have a significant … impact on the City". However, s. 14 of the same Agreement provides that a failure to abide by any of its terms does not give rise to any legal remedy.

Province was entitled to enact Bill 5 and ignore completely the promise to consult that was set out in the previous law.

[18] Third, speaking broadly and again absent a constitutional issue, the provincial legislature has no obligation to consult and no obligation of procedural fairness.[8] The doctrine of legitimate expectations, an aspect of procedural fairness, does not apply to legislative enactments.[9]

[19] At first glance, Bill 5 although controversial in content appears to fall squarely within the province's legislative competence. Upon closer examination of the surrounding circumstances, however, one discovers at least two constitutional deficiencies that cannot be justified in a free and democratic society. The first relates to the timing of the law and its impact on candidates; the second to its content and its impact on voters.

[20] As I explain in more detail below, the Impugned Provisions breach s. 2(b) of the Charter in two ways: (i) because the Bill was enacted in the middle of an ongoing election campaign, it breached the municipal candidate's freedom of expression and (ii) because Bill 5 almost doubled the population size of City wards from an average of 61,000 to an average of 111,000, it breached the municipal voter's right to cast a vote that can result in effective representation.

[21] Either breach by itself is sufficient to support a court order declaring that the Impugned Provisions are of no force or effect.

(1) Breach of the candidate's freedom of expression

[22] Section 2(b) of the Charter guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Although set out in the Charter, the Supreme Court has made clear that freedom of expression did not originate in the Charter but was entrenched in the Constitution in 1982 as "one of the most fundamental values of our society."[10]

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[8] The obligation of procedural fairness materializes at the level of subordinate legislation and in the judicial review of the administrative actions of agencies and tribunals – not at the level of primary legislation such as Bill 5 herein.

[9] *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 S.C.R. 1170 at para 74; *Canada (A.G.) v Mavi*, [2011] 2 S.C.R. 504 at paras 44, 68-69; and *Reference re Canada Assistance Plan, supra,* note 4, at paras 58-61.

[10] *Libman v Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 28.

[23] The Supreme Court has frequently and consistently held that freedom of expression is of crucial importance in a democratic society.[11] All the more so when freedom of expression is engaged in the political realm. Political expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the Charter.[12] Here is how the Court put it in *Keegstra*:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.[13]

[24] The Supreme Court has encouraged a broad interpretation of freedom of expression that extends the guarantee to as many expressive activities as possible. The Court has made clear that any activity or communication that conveys or attempts to convey meaning (and does not involve violence) is covered by the guarantee in s. 2(b) of the Charter.[14]

[25] It follows from this that the freedom of expression guarantee extends not only to candidates but to every participant in a political election campaign, including volunteers, financial supporters and voters.[15] Each of them would have a genuine s. 2(b) issue with Bill 5. However, for ease of understanding, I will focus only on the candidates.

[26] In a section 2(b) claim, the Court asks two questions: first, whether the activity in question falls within the scope of freedom of expression, and secondly, whether the purpose or *effect* of the legislation is to interfere with that expression.[16]

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[11] *Ibid.*

[12] *Ibid* at para. 29.

[13] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 763-64.

[14] *Libman, supra*, note 10, at para. 29.

[15] *Harper v Canada (Attorney General)*, 2004 SCC 33 at paras 15 and 20; *Vancouver Sun (Re)*, 2004 SCC 43 at para. 26; *Taman v Canada (Attorney General)*, 2015 FC 1155 at para 41.

[16] *Irwin Toy Ltd. V. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 978.

[27] The expressive activity of candidates competing in the City's ongoing election obviously falls within the scope of s. 2(b). The more pertinent question is whether their freedom of expression has been infringed by the enactment of Bill 5. That is, whether the enactment of Bill 5 changing the electoral districts in the middle of the City's election campaign substantially interfered with the candidate's right to freedom of expression.[17]

[28] Perhaps the better question is "How could it not?"

[29] The evidence is that the candidates began the election campaign on or about May 1, 2018 on the basis of a 47-ward structure and on the reasonable assumption that the 47-ward structure would not be changed mid-stream. The 47-ward structure informed their decision about where to run, what to say, how to raise money and how to publicize their views. When Bill 5 took effect on August 14, mid-way through the election campaign, most of the candidates had already produced campaign material such as websites and pamphlets that were expressly tied to the ward in which they were running. A great deal of the candidate's time and money had been invested within the boundaries of a particular ward when the ward numbers and sizes were suddenly changed.

[30] Bill 5 radically altered the City's electoral districts, in most cases doubling both their physical size and the number of potential voters. The immediate impact of Bill 5 was wide-spread confusion and uncertainty. There was confusion about where to run, how to best refashion one's political message and reorganize one's campaign, how to attract additional financial support, and what to do about all the wasted campaign literature and other material. There was uncertainty flowing from the court challenge, the possibility that the court challenge might succeed and the consequences for all concerned if this were to happen.

[31] The evidence is that the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues. The candidates' efforts to convey their political message about the issues in their particular ward were severely frustrated and disrupted. Some candidates persevered; others dropped out of the race entirely.

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[17] The case law is clear that the *Charter* cannot be subdivided into two kinds of guarantees - freedoms and rights. The freedom to do a thing, when guaranteed by the Constitution and interpreted purposively, implies a right to do it. Hence, I say "the right to freedom of expression". See *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 67.

[32] There can be no doubt on the evidence before the court that Bill 5 substantially interfered with the candidate's ability to effectively communicate his or her political message to the relevant voters.

[33] This is not a situation where a provincial law changing the number and size of the City's electoral districts was enacted say six months before the start of the City's election period. Had this happened, the law would not have interfered with any candidate's freedom of expression and no candidate could have alleged otherwise. The Province is right to say that s. 2(b) of the Charter does not guarantee a 47-ward election platform.

[34] Here, the law changing the City's electoral districts was enacted in the middle of the City's election. This mid-stream legislative intervention not only interfered with the candidate's freedom of expression, it undermined an otherwise fair and equitable election process.

[35] Electoral fairness is a fundamental value of democracy.[18] As the Court noted in *Libman,*[19] the principle of electoral fairness flows directly from a principle entrenched in the Constitution: the political equality of citizens. Elections are fair and equitable only if candidates are given a reasonable opportunity to present their positions.[20]

[36] Here, as already noted, because Bill 5 took effect in the middle of the City's election, candidates were not given a reasonable opportunity to present their positions. The enactment and imposition of Bill 5, radically redrawing the electoral districts in the middle of the electoral process undermined the very notion of a "fair and equitable" election.

[37] Once the Province has entered the field and provided an electoral process, it may not suddenly and in the middle of this electoral process impose new rules that undermine an otherwise fair election and substantially interfere with the candidates' freedom of expression. Indeed, as the Supreme Court's decision in *Libman*[21] makes clear, where a democratic platform is provided (in that case a referendum, here a 47-ward election structure), and the election has begun, expressive activity in connection with that

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[18] *Figueroa v. Canada (Attorney General),* 2003 SCC 37, at para. 50.

[19] *Libman, supra*, note 10.

[20] *Ibid* at para 47; *Figueroa, supra*, note 18, at para 51.

[21] *Libman, supra*, note 10.

platform is protected against legislative interference under the traditional *Irwin Toy* analysis which focuses on substantial interference.[22]

[38] I have no difficulty finding on the evidence before me that the enactment of Bill 5 changing the number and size of the electoral districts in the middle of the election campaign substantially interfered with the candidate's freedom of expression. A breach of the municipal candidate's right to freedom of expression under s. 2(b) of the Charter has been established.

[39] I now turn to the municipal voter's right under the same provision of the Charter.

(2) Breach of the municipal voter's right to freedom of expression

[40] I begin with three propositions that are not in dispute. First, the most fundamental of our rights in a democratic society is the right to vote.[23] Absent a right to vote, democracy cannot exist.[24] Second, voting is an expressive activity, indeed the "most important expressive activity" [25] and is fully protected under s. 2(b) of the Charter. Third, the right to vote is, in essence, the right to "effective representation" and not just voter parity.

[41] As the Supreme Court concluded in the *Saskatchewan Reference*:[26]

> [T]he purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. 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".

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[22] *Ibid* at paras. 28 to 37. Also see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815 and *Fraser*, *supra*, note 17, at paras 46 and 69-70.

[23] *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at para. 1.

[24] *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at para. 104.

[25] *Ibid* at para. 158.

[26] *Saskatchewan Reference*, *supra*, note 23, at para. 49.

[42] City councillors obviously function in both roles, legislative and ombudsman – in the former role when debating and passing bylaws or other resolutions; and in the latter role when handling the myriad of constituents' grievances and concerns that find their way to their desks.

[43] The important legal issue is whether the comments by the Supreme Court about effective representation, made in the context of s. 3 of the Charter (which guarantees every citizen's right to vote in a federal or provincial election, but not a municipal election), can also apply in the context of a municipal election. Can the concept of effective representation inform this court's analysis of the municipal voter's rights under s. 2(b) of the Charter?

[44] In my view it can, for the following reasons.

[45] The concept of effective representation is not rooted in s. 3 of the Charter. Its origins can be traced back to Canada's founding fathers and the early debates about the appropriate design of electoral districts. As the Supreme Court explained in the *Saskatchewan Reference*:

> [P]arity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Sir John A. Macdonald in introducing the Act to re-adjust the Representation in the House of Commons, S.C. l872, c. 13, recognized this fundamental fact (House of Commons Debates, Vol. III, 4th Sess., p. 926 (June 1, 1872)):
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> > [I]t will be found that ... while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principle of numbers should not be the only one. [27]

[46] Even if the concept of effective representation is found to have its origins in s. 3 of the Charter, there is no principled reason why in an appropriate case the "effective representation" value cannot inform other related Charter provisions such as the voter's right to freedom of expression under s. 2(b). The Charter of Rights is not comprised of watertight compartments. As the Supreme Court noted in *Baier v. Alberta*,[28] "Charter

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[27] *Ibid* at para. 51.

[28] *Baier v Alberta*, [2007] 2 S.C.R. 673

rights overlap and cannot be pigeonholed."[29] And, as this court noted in *DeJong*,[30] the rights enshrined in s. 3 "have a close relationship to freedom of expression and to the communication of ideas … there is an affinity between ss. 3 and 2(b) (freedom of expression) of the Charter."[31]

[47] If voting is indeed one of the most important expressive activities in a free and democratic society, then it follows that any judicial analysis of its scope and content under the freedom of expression guarantee should acknowledge and accommodate voting's core purpose, namely effective representation. That is, the voter's freedom of expression must include her right to cast a vote that can result in meaningful and effective representation.

[48] The following caution from the Supreme Court in *Haig*[32] has direct application on the facts herein:

> While s. 2(b) of the Charter does not include any right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution.[33]

[49] In other words, even though s. 2(b) does not guarantee a right to vote in municipal elections, if such an expressive right has been provided by the provincial government, then the right so provided must be consistent with and not in breach of the Constitution.

[50] Here, the Province has statutorily provided for a resident's right to vote in municipal elections, including the upcoming election in the City of Toronto.[34] This right, having been provided, must be provided "in a fashion that is consistent with the Constitution."[35] And where it is not, a municipal voter is entitled to allege constitutional infringement, including an infringement of s. 2(b) based on the denial of her right to cast a vote that can result in effective representation.

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[29] *Ibid* at para. 58.

[30] *De Jong v. The Attorney General of Ontario*, (2007) 88 O.R. (3d) 335 (S.C.J.)

[31] *Ibid* at para. 25. Also see *Baier, supra,* note 28, at para. 57.

[32] *Haig, supra*, note 24.

[33] *Ibid* at para 84.

[34] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 135(2) and *Municipal Elections Act, 1996*, S.O. 1996, c. 32, s. 17(2).

[35] *Haig, supra*, note 24, at para. 84.

[51] A finding that Bill 5 has infringed the municipal voter's freedom of expression by abridging her right to cast a vote that can result in effective representation does not constitutionalize a third level of government. Nor does it constitutionalize a right to vote at the municipal level. The finding of Charter infringement flows from the application of the Supreme Court's caution in *Haig*[36] to the facts of this case – once provided, a right to vote in a municipal must comply with the Charter, and in particular s. 2(b).

[52] This very approach was taken by the Court of Appeal in the "mega-city" amalgamation case.[37] The amalgamation legislation was challenged on the ground that the resulting voter/councillor ratios were too high and denied meaningful access to one's elected representative. The applicants' challenge was based in part on s. 2(b) of the Charter. The Court of Appeal noted that it was "mindful"[38] of the caution in *Haig*[39] and proceeded to consider the s. 2(b) argument. The Court of Appeal found no breach of s. 2(b) because in that case there was no suggestion of "any curtailment of the right to vote" and no "evidence" that the size of the electoral districts post-amalgamation infringed the concept of effective representation.[40]

[53] Here, however, the applicants before this court allege a clear curtailment of the right to vote and have filed extensive evidence about effective representation. I refer, of course, to the findings and conclusions of the Toronto Ward Boundary Review.

[54] The TWBR began in 2013 and concluded in 2017. Over the course of the almost four-year review, the TWBR conducted research, held public hearings, and consulted widely. The TWBR considered the "effective representation" requirement and the ward size that would best accomplish this objective. The option of reducing and redesigning the number of wards to mirror the 25 Federal Election Districts was squarely addressed and rejected by the TWBR. City Council's decision in 2017 to increase the number of wards from 44 to 47 was directly based on the findings and conclusions of the TWBR,

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[36] *Ibid.*

[37] *East York, supra,* note 5.

[38] *Ibid* at para. 2.

[39] *Haig, supra,* note 24, at para. 84.

[40] *East York, supra,* note 5. at paras. 4 and 8.

which in turn were affirmed on appeal to the Ontario Municipal Board and the Divisional Court.[41]

[55] Put simply, the 25 FEDs option was considered by the TWBR and rejected because, at the current 61,000 average ward size,[42] city councillors were already having difficulty providing effective representation.

[56] Local government is the level of government that is closest to its residents. It is the level of government that most affects them on a daily basis. City councillors receive and respond to literally thousands of individual complaints on an annual basis across a wide range of topics - from public transit, high rise developments and policing to neighbourhood zoning issues, building permits and speed bumps.

[57] Recall what the Supreme Court said in *Saskatchewan Reference* about how effective representation includes "the right to bring one's grievances and concerns to the attention of one's government representative."[43] This right must obviously be a meaningful right. This is particularly relevant in the context of the councillor's role in a mega-city like Toronto.

[58] The evidence before this court supports the conclusion that if the 25 FEDs option was adopted, City councillors would not have the capacity to respond in a timely fashion to the "grievances and concerns" of their constituents. Professor Davidson, who filed an affidavit in this proceeding, and also participated in the TWBR as a consultant, provided the following expert evidence:

> It is the unique role of municipal councillors that distinguishes municipal wards from provincial and federal ridings. Boundaries that create electoral districts of 110,000 may be appropriate for higher orders of government, but because councillors have a more involved legislative role, interact more intimately with their constituents and are more involved in resolving local issues, municipal wards of such a large size would impede individual councillor's capacity to represent their constituents.

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[41] With the exception of a minor change in one ward boundary. Leave to appeal the decision of the OMB, (now known as the Local Planning Appeal Tribunal) in *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (ON LPAT), was denied by the Divisional Court: *Natale v City of Toronto*, 2018 ONSC 1475.

[42] The average ward size in other Ontario cities is 32,600.

[43] *Saskatchewan Reference, supra*, note 23, at para. 49.

> It is my professional opinion that the unique role of councillors, as well as the public feedback received by the TWBR, and comparison with ward-size in other municipalities, demonstrates that a ward size of approximately 61,000 people provides councillors with capacity to provide their constituents with effective representation and that ward sizes of approximately 110,000 do not.

[59] On the basis of the evidence before me, I find that the Impugned Provisions (that impose a 25-ward structure with an average population size of 111,000) infringe the municipal voter's right under s. 2(b) of the Charter to cast a vote that can result in meaningful and effective representation. Once the Province has provided for a right to vote in a municipal election, that right must comply with the Charter.

[60] In sum, I have found two distinct breaches of s. 2(b) – the first, that the Impugned Provisions substantially interfered with the candidate's right to freedom of expression when it changed the City's electoral districts in the middle of the election campaign; the second, that the Impugned Provisions substantially interfered with the voter's right to freedom of expression when it doubled the ward population size from a 61,000 average to a 111,000 average, effectively denying the voter's right to cast a vote that can result in effective representation.

[61] I further find, for the reasons that follow, that neither of these breaches can be justified or "saved" under s. 1 of the Charter.

Breaches of s. 2(b) not saved under s. 1

[62] Section 1 of the Charter provides that the rights and freedoms guaranteed therein are subject to "such reasonable limits … as can be demonstrably justified in a free and democratic society."

[63] The analytic approach that a court must take under s. 1 has been repeated and refined in numerous Supreme Court decisions since it was first set out in *Oakes.*[44] Here is the prevailing articulation:

> [T]he Court must first ask whether the objective the statutory restrictions seek to promote responds to pressing and substantial concerns in a democratic society, and then determine whether the means chosen by the government are proportional to that objective. The proportionality test involves three steps: the restrictive measures chosen must be rationally connected to the objective, they must constitute a minimal impairment of

[44] *R. v. Oakes*, [1986] 1 S.C.R. 103.

> the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those restrictions.[45]

[64] The onus of justification under s. 1 is on the government. The standard of proof is the civil standard, namely proof on a balance of probabilities.[46] Normally, the defending government files extensive evidence attempting to provide a justification for the breach under s. 1 of the Charter. Here, either because of time constraints or because there was little in the way of supporting evidence, the Province only filed one news release and some excerpts from *Hansard* setting out what was said by the Premier and others when Bill 5 was debated in the legislature.

[65] The news release that was issued by the Premier's office on July 27, 2018 provided two rationales for Bill 5, improved efficiency and overall cost savings. The Premier observed that Toronto City Council "has become increasingly dysfunctional and inefficient through a combination of entrenched incumbency and established special interests" and that Bill 5 would create an effective municipal government that saves taxpayers money.

[66] On August 2, 2018 at the second reading of Bill 5, the Minister of Municipal Affairs and Housing set out three objectives for the legislation:

> First, they [councillors in support of a 25-ward model] agree that a smaller council will lead to better decision-making at Toronto city hall, which would benefit Torontonians as a whole. They gave an example of the current 44-member council having 10-hour debates on issues that would end with the vast majority of councillors voting the same as they would have at the beginning of the debate. …
>
> Second, they point out that it will save money …
>
> Third, it would result in a fair vote for residents, which was the very reason Toronto itself undertook a review of its ward boundaries. The Toronto councillors I referred to earlier reminded everyone that the Supreme Court of Canada said that voter parity is a prime condition of effective representation. They gave examples of the current ward system, where there are more than 80,000 residents in one ward and 35,000 in another. They acknowledge that this voter disparity is the result of self-

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[45] *Libman, supra,* note 10, at para. 38.

[46] *Ibid* at para. 39.

> interest, and that the federal and provincial electoral district process is better because it is an independent process which should apply to Toronto as well. … The wards we are proposing are arrived at through an independent process.

[67] It is important to note that, in the debate that followed, the Premier and the MPPs who spoke in support focused on two rationales for Bill 5: improved efficiency and cost savings, and did not refer to voter parity. The Premier added some anecdotal evidence from his days as a City councillor:

> I can tell you that I was there numerous times for a 10-hour debate on getting Mrs. Jones' cat out of the tree. We would sit there and debate about anything for 10 hours. After 10 hours and thousands of pieces of paper going around, nothing got done. Nothing got done. And guess what. At the end of 10 hours, we all agreed to go get Mrs. Jones's cat out of the tree. That's a waste of time … That is why it is time to reduce the size and cost of municipal government.

[68] During the debate on second reading, the MPPs who spoke in support of Bill 5 focused on two objectives – improved efficiency and saving taxpayers money. Other than the brief reference by the Minister (in the excerpt set out above) nothing more was said about voter parity. The Province has indicated to the court that it does not rely on the costs saving objective for the s. 1 analysis. This leaves two objectives: improved efficiency ("better decision-making", a "more streamlined" City Council) and voter parity (barely mentioned).

[69] The Supreme Court noted in *Health Services*[47] that it can be useful in the context of the s. 1 analysis to ask whether the government considered other options or engaged in consultation with the affected parties before enacting the challenged legislation:

> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged in consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.[48]

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[47] *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

[48] *Ibid* at para. 157.

[70] Here, there is no evidence that any other options or approaches were considered or that any consultation ever took place. It appears that Bill 5 was hurriedly enacted to take effect in the middle of the City's election without much thought at all, more out of pique than principle.

[71] In any event, the constitutional problem here is two-fold: (i) there is no evidence (other than anecdotal evidence) that a 47-seat City Council is in fact "dysfunctional" or that more effective representation can be achieved by moving from a 47-ward to a 25-ward structure; and (ii) even if there was such evidence, there is no evidence of any urgency that required Bill 5 to take effect in the middle of the City's election.

[72] In my view, the Province's justification of the Impugned Provisions in Bill 5 fails at the first step of the s. 1 analysis. There is simply no evidence that the two objectives in question were so pressing and substantial that Bill 5 had to take effect in the middle of the City's election.

[73] The Supreme Court has stated time and again that "preserving the integrity of the election process is a pressing and substantial concern in a free and democratic society."[49] Passing a law that changes the City's electoral districts in the middle of its election and undermines the overall fairness of the election is antithetical to the core principles of our democracy.

[74] Even if the Province could establish that the two rationales that were provided to explain Bill 5 were so pressing and substantial as to justify its enactment in the middle of the City's election, the Province could not establish proportionality, and in particular minimal impairment. As the Supreme Court noted in *RJR-MacDonald*,[50] "[I]f the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[51]

[75] Dealing with the first objective, improved efficiency in City Council debates, the Province has not shown why a significantly less intrusive and equally effective measure was not chosen, such for example, imposing time limits on debate, or more to the point, delaying the coming into force of the City Council restructuring law until *after* the City's election.

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[49] *Figueroa, supra*, note 18, at para. 72.

[50] *RJR-MacDonald Inc. v Canada (Attorney General),* [1995] 3 S.C.R. 199.

[51] *Ibid* at para. 160.

[76] Dealing with the second objective, voter parity, and giving the Minister the benefit of the doubt that he understood that the primary concern is not voter parity but effective representation, there is no evidence of minimal impairment. The Province's rationale for moving to a 25-ward structure had been carefully considered and rejected by the TWBR and by City Council just over a year ago. If there was a concern about the large size of some of the City's wards (by my count, six wards had populations ranging from 70,000 to 97,000) why not deal with these six wards specifically? Why impose a solution (increasing all ward sizes to 111,000) that is far worse, in terms of achieving effective representation, than the original problem? And, again, why do so in the middle of the City's election?

[77] Crickets.

[78] I am therefore obliged to find on the evidence before me that the breaches of s. 2(b) of the Charter as found above cannot be demonstrably justified in a free and democratic society and cannot be saved as reasonable limits under s. 1.

Is it too late to return to the 47-ward structure?

[79] The Province's final submission is that it's too late to return to the 47-ward structure. The Province points to the City Clerk's candid admission at the August 20, 2018 council meeting that she is not "confident" that the City could now return to the 47-ward structure.

[80] The City Clerk may not feel confident about a 47-ward election but she is not saying that the hurdles are insurmountable. In any event, the City itself is asking explicitly for a return to the 47-ward structure and it is entitled to do so. I must assume that the City has considered the attendant logistical challenges and has concluded that an October 22 election based on the 47-ward structure can indeed be achieved in the short time that remains.

Conclusions

[81] I find that the Province's enactment of Bill 5 in the middle of the City's election substantially interfered with the municipal candidate's freedom of expression that is guaranteed under s. 2(b) of the Charter of Rights.

[82] I find that the reduction from 47 to 25 in the number of City wards and the corresponding increase in ward-size population from an average of about 61,000 to 111, 000 substantially interfered with the municipal voter's freedom of expression under s. 2(b) of the Charter of Rights, and in particular her right to cast a vote that can result in effective representation.

[83] I further find on the evidence filed by the parties that these breaches of s. 2(b) cannot be demonstrably justified in a free and democratic society and cannot be saved as reasonable limits under s. 1 of the Charter of Rights.

Disposition

[84] The applications filed by the City of Toronto, Rocco Achampong, Chris Moise, Ish Aderonmu and Prabha Khosla (on her own behalf and on behalf of Women Win TO) asking this Court to set aside the Impugned Provisions in Bill 5 that purport to reduce the number of wards from 47 to 25 are granted.

[85] The Impugned Provisions have no force and effect and are set aside immediately.

[86] It follows from this decision that the City's election on October 22, 2018 shall proceed as scheduled but on the basis of 47 wards and not 25 wards. If the provincial government wishes to enact another Bill 5-type law at some future date to affect future City elections, it may certainly attempt to do so. As things now stand - and until a constitutionally valid provincial law says otherwise - the City has 47 wards.

[87] I shall remain seized of this matter to fashion the appropriate draft Order, including any related remedies being sought by the Toronto District School Board with regard to TDSB school board elections and recently enacted provincial regulations.

[88] If the parties cannot agree on costs, they may forward brief submissions to my attention. The applicants shall file their costs submissions within 21 days and the Province within 21 days thereafter.

[89] I am very much obliged to all counsel for their co-operation and assistance.

(Signed) Justice Belobaba

Justice Edward P. Belobaba

Date: September 10, 2018