



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Legal options to challenge Bill 5, the Better Local Government Act, 2018

Date: August 15, 2018

To: City Council

From: City Solicitor

Wards: All

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City of Toronto.

Confidential Attachment #1 to this report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

There have been very few occasions when my office has been asked to report on a matter that will have such a profound impact on the City and its governance.

This report responds to Council's request that the City Solicitor "consider the validity and constitutionality of [Bill 5], including its potential violation of the rights of the citizens of Toronto to fair and effective representation, the practicality of conducting the election, the Clerk's capacity to implement the changes, and any errors or flaws in the legislation."

The government of Ontario announced its intention to reduce the number of City of Toronto councillors from 47 to 25 for the 2018 municipal election on July 27, 2018. Bill 5, the Better Local Government Act, 2018 ("Bill 5"), was introduced in the Ontario Legislature on July 30, 2018. Bill 5 came into force on August 14, 2018, the day it had Third Reading and received Royal Assent.

Bill 5 eliminates the City's authority to establish, divide, re-divide or configure its wards and it sets the number of Councillors at 25 with one Councillor per ward. The introduction of Bill 5 came without any prior notice to or consultation with the City of Toronto. Bill 5 was proclaimed into force more than three months after the date upon which candidates were permitted to file nomination papers and commence campaigning for election to Toronto City Council in the 2018 regular municipal election campaign.

Confidential Attachment #1 provides further information and advice regarding this matter.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council consider Confidential Attachment 1 from the City Solicitor and provide any instructions as it determines are appropriate.
2. City Council direct that the confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege and is about litigation or potential litigation that affects the City of Toronto.

FINANCIAL IMPACT

There is no financial impact resulting from the adoption of the recommendations in this report.

DECISION HISTORY

City Council at its meeting on July 23, 24, 25, 26, 27 and 30, 2018 considered item MM44.128, Urgent Consideration of the Provincial Government's Plan to Reduce the Size of City Council - by Mayor John Tory, seconded by Councillor Mary-Margaret McMahon.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.MM44.128>

City Council at its meeting on November 8 and 9, 2016 adopted item EX18.2, which established 47 wards for the City of Toronto for the 2018 election.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.EX18.2>

COMMENTS

The City of Toronto conducted the Toronto Ward Boundary Review (TWBR) over a period commencing with the establishment of the terms of reference for the retainer of consultants in 2013 and concluding with the Divisional Court refusing to grant the Appellant's Leave to Appeal motion on March 9th of 2018. From start to finish, the undertaking took close to five years and ended with the 47 ward option upheld.

The 47 ward option was found by the Ontario Municipal Board (OMB) to be a reasonable number and configuration of ward boundaries which met the test of effective representation as set out in the Supreme Court of Canada's *Carter* decision. The following is a brief summary of the chronology of the TWBR process.

TWBR Process

The TWBR project commenced with the request for proposals from qualified consultants in 2013. The City's chosen consulting team was retained in 2013 and began the review in accordance with the Council adopted Terms of Reference. The consultants held over 100 face-to-face meetings with Members of Council, school boards and other stakeholder groups, 24 public meetings and information sessions, and produced 7 substantial reports. The project team prepared a Background Research Report ("Research Report"), Options Report and a Final Report. A draft of each report was reviewed by a 5-person Advisory Panel. Following direction from the Executive Committee, an Additional Information Report from the City Manager and a Supplementary Report from the consultants were also issued.

All of this work culminated in Council's decision to adopt the 47 Ward option at its meeting of November 8 and 9, 2016.

The Research Report examined other ward reviews undertaken in other jurisdictions, the legislative framework, Ontario Municipal Board decisions, ward history in the City, projected development and electoral issues and incorporated comments from the Advisory Panel.

The Options Report (August 2015, revised October 2015) analyzed eight options for drawing new ward boundaries. The purpose of the report was to discuss a new preferred ward system with the public, stakeholders and Council. The methodology used for the development of the options addressed the need to ensure effective representation plus: Toronto's population growth; a ward structure that will last for multiple elections; balanced ward population size; and effective new boundaries. The conclusion reached at this stage of the review was that five of the eight options provided for effective representation should be carried forward. These were termed: minimal change; 44 wards; population per ward at 50,000 (small wards); population per ward at 75,000 (large wards); and wards drawn on natural and physical boundaries.

The prospect of using the Federal Electoral Districts (FEDS), which are also used provincially, to draw new ward boundaries was addressed in the Options Report. The City's consultants commented in that report that during Round One of the civic engagement and public consultation process the idea of using the boundaries of the 25 Federal and Provincial ridings was discussed in some detail. The TWBR stated that with 25 wards each would have a population of about 123,000 people, resulting in very large wards. It stated that while there was little public support for this outcome, there was considerable support for an option that would divide the population in each federal riding in half, resulting in 50 wards with an average population of about 62,000 people per ward. The TWBR average population target per ward was determined to be 61,000.

The City's Executive Committee considered the Final Report on May 24, 2016. The recommendation from the TWBR was to increase the number of wards from 44 to 47. It recommended addressing existing voter parity issues with a minimum number of changes to the existing boundaries. The TWBR's report recommended minimally increasing the number of wards to accommodate projected population growth, retain an average ward size of 61,000 people to ensure a manageable capacity for councillors to

represent their constituents, achieve effective representation in all wards by 2026, and be workable through to the 2030 election.

The Executive Committee requested additional information on several matters, including a "ward option that is consistent with the boundaries of the 25 federal and provincial ridings". An Additional Information Report (August 2016) responded to several suggestions for ward specific refinements and re-examined whether the ward boundaries could be consistent with existing federal and provincial boundaries.

Thereafter the TWBR submitted its [Supplementary Report](#) (October 2016) and confirmed its recommendation of a 47 ward structure (with refinements) as the new ward boundaries, effective for the 2018 election.

Appeals of Council's decision

Council adopted the recommended 47 ward structure at its November 2016 meeting. The By-laws to implement the 47 ward structure were enacted by Council in March and April 2017 and there were six appeals of the By-laws to the OMB. The Board held a two week hearing in October of 2017.

The Ontario Municipal Board issued its decision on December 15, 2017. The Board found that the City's preferred option of 47 wards provided for effective representation in Toronto, consistent with the legal test used by the OMB and set out by the Supreme Court of Canada in the Carter Case. The timing of the decision meant that the new ward structure would be implemented by the City for the 2018 municipal election.

The Board thoroughly considered the evidence in support of the City's preferred 47 ward structure and the 25 FEDS wards supported by certain appellants. The OMB concluded that:

Effective representation is the primary goal and the Board finds that the 47 Ward structure, reflected in the By-laws, does achieve that goal. The Board rejects that public consultation was inadequate.

OMB Decision para. 40

Leave to appeal this OMB decision was sought by the proponents of the 25 ward option on the basis that the OMB had made an error in law in finding that the City's 47 Ward option achieved comparable voter parity to the 25 ward FEDS option. On March 9, 2018, the Divisional Court, applying the Carter criteria for effective representation, held that the OMB's decision to approve the City's 47 Ward option was reasonable and that there were no obvious legal errors in the Board's decision. As such, the Court refused the Appellants' request for Leave to Appeal and the City's 47 Ward option approved by the OMB was therefore allowed to stand.

2018 Election

As a result of the ward boundary review decisions, the City Clerk began implementing the 47 ward structure for the 2018 election. May 1, 2018 was the first day for candidates

to file a nomination paper for the office of mayor, councillor or school board trustee. Potential candidates were advised that there would be 47 wards in the 2018 election. Nominations were open until 2:00 p.m. on July 27, 2018. There are over 500 candidates registered for the municipal election. Candidates were permitted to campaign as soon as they registered as a candidate.

Bill 5, Better Local Government Act, 2018

Bill 5 came into force on August 14, 2018. Bill 5 eliminates the City's authority to establish, divide, re-divide or configure its wards or determine council composition and it sets the number of councillors to 25 with one Councillor per ward for the 2018 election. The introduction of Bill 5 came without any prior notice to or consultation with the City of Toronto. Bill 5 was proclaimed into force more than three months after the 2018 municipal election campaign began. The Municipal Act, 2001, continues to provide other municipalities with the authority to establish, divide, re-divide or configure their wards and determine council composition.

Court Challenge

The Province and the City were served with a court application brought by an individual candidate that seeks to have the 47 ward election maintained for the 2018 election. The applicant and lawyers for the City and the Province as respondents attended at Scheduling Court on August 14, 2018 and were granted a court date on August 31, 2018 for the hearing of Mr. Achampong's application and the City's application if instructed to do so by City Council.

Confidential Attachment #1 provides further information and advice regarding this matter.

CONTACT

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SIGNATURE

Wendy Walberg, City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Legality of Bill 5, the Better Local Government Act, 2018
Attachment 2 - Bill 5, the Better Local Government Act, 2018