



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Update Report on challenge to Bill 5, the Better Local Government Act, 2018

Date: September 12, 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 and contains advice which is subject to solicitor-client privilege.

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

SUMMARY

This report provides a status up-date to Council on the City's successful challenge to Bill 5, the Better Local Government Act, 2018. In addition, this report provides information and advice about the use of section 33 of the Canadian Charter of Rights and Freedoms ("Charter"), known as the "notwithstanding clause", by the Province of Ontario.

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

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council receive this report for information.
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 of August 20, 2018 considered a report from the City Solicitor dated August 15, 2018 entitled [Legal options to challenge Bill 5, the Better Local Government Act, 2018](#).

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

Bill 5, the Better Local Government Act, 2018 ("Bill 5"), came into force on August 14, 2018. Bill 5 eliminated the City's authority to establish, divide, re-divide or configure its wards or determine council composition and it set the number of councillors at 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.

At its August 20, 2018 meeting, City Council instructed the City Solicitor to challenge the legality of Bill 5. Applications by the City and other parties, were heard by Justice Edward P. Belobaba on August 31, 2018 and a decision was issued on September 10, 2018.

In his decision, Justice Belobaba held that the relevant provisions of Bill 5 "substantially interfered with" voters' and candidates' right to freedom of expression (guaranteed by s. 2(b) of the *Charter of Rights and Freedoms*) in a manner that had not been justified by the Province of Ontario under section 1 of the Charter. Consequently, Justice Belobaba held that the relevant provisions of Bill 5 were unconstitutional and declared them of no force and effect, effective immediately. The decision required the Clerk to recommence preparations for a 47 ward election on October 22, 2018 in accordance with the law as it stands as of the date of this report.

In its submissions to the Honourable Court, the City stated that "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."

On the same day as Justice Belobaba's decision was released, Premier Ford announced the Provincial government's intent to appeal the decision and to call the Ontario Legislature back into session to introduce a new Bill to again reduce the number of Toronto wards to twenty-five.

On September 12, 2018 the Province served all parties with a Notice of Appeal to appeal Justice Belobaba's decision and a Notice of Motion for a stay of the decision. The stay motion will be heard by a single judge of the Court of Appeal on September 18, 2018. The Province is seeking a stay to allow the election to proceed on the basis of a 25 ward model. That same day, the Province introduced Bill 31, Efficient Local government Act, 2018.

Bill 31 invokes section 33 of the Charter (commonly referred to as the "notwithstanding clause"). The effect of the use of section 33 is limited to a maximum period of 5 years, at which point it may be re-enacted for additional 5 year periods.

The full wording of section 33 is set out below:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

The text of Bill 31, Efficient Local Government Act, 2018 ("Bill 31"), is attached to this report as Attachment 2.

This override of fundamental Charter rights has been used very rarely by any Canadian jurisdiction since its inception at the time of the patriation of the Canadian Constitution. Indeed, the Province of Ontario has never before invoked the notwithstanding clause to override the protection of rights under the Charter.

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

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SIGNATURE

Wendy Walberg, City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Update report on Better Local Government Act

Attachment 2 - Bill 31, Efficient Local Government Act, 2018 ("Bill 31")