



## REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

### Legal Challenge to Bill 5, the Better Local Government Act

**Date:** January 22, 2019

**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**

---

This report provides a status up-date to Council on the legal challenges to Bill 5, the Better Local Government Act, 2018. In addition, this report seeks instructions from Council regarding the Province's appeal of the Superior Court decision dated September 10, 2018 which is scheduled to be heard by the Ontario Court of Appeal on June 10-11, 2019.

#### **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 instructions in Confidential Attachment 1 remain confidential until in the opinion of the City Solicitor they can be made public and the balance of the information contained in Confidential Attachment 1 and Confidential Attachment 2 remains confidential in its entirety, as it relates to litigation against the

City, contains advice which is subject to solicitor-client privilege and settlement privilege.

## **FINANCIAL IMPACT**

---

The financial impact relating to these issues is set out in the confidential attachment.

## **DECISION HISTORY**

---

City Council held a special meeting on September 13, 2018 to consider the reintroduction of a bill to reduce the size of Toronto City Council and the use of s. 33 of the Canadian Charter of Rights and Freedoms. At the meeting City Council considered a report from the City Solicitor dated September 12, 2018 entitled Updated Report on Challenge to Bill 5, the Better Local Government Act, 2018.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.CC47.1>

City Council at its special 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. At this meeting, amongst other instructions, Council directed the City Solicitor to commence an application to challenge the legality of Bill 5, the Better Government Act, 2018.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.CC45.1>

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**

---

### **Toronto Ward Boundary Review**

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 being 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.

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.

### **Bill 5, 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 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 Challenges**

At the beginning of August, 2018 the Province and the City were served with a court application brought by an individual candidate that sought to have the 47 ward election maintained for the 2018 election.

Pursuant to the instructions received from City Council, the City commenced its own application to challenge Bill 5. A third application was also commenced.

The various court applications were heard together on an expedited basis because of the pending municipal election scheduled for October 22, 2018. A court schedule was established and a judge of the Superior Court was assigned to hear the matter on August 31, 2018.

On September 10, 2018 the application judge released his decision. He concluded 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 was guaranteed under s. 2(b) of the Charter of Rights and Freedoms. He further concluded that the reduction from 47 to 25 councillors and a 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 and in particular the right to cast a vote that can result in effective representation.

There were a number of other arguments that the application judge did not deal with that were being advanced by the various applicants including that Bill 5 breached s. 2(d) Legal Challenge to Bill 5, the Better Local Government Act

of the Charter which concerns freedom of association and also breached s. 15, the equality provision of the Charter. In addition the court did not rule on the arguments raised by the City and others that were based on the unwritten constitutional principles. However, the application judge did note he was inclined to agree with the Province's position on these issues but did not make an actual finding.

The application judge found on the evidence that the Province did not justify the enactment of Bill 5 under the s. 1 Charter test commenting that: "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."

As a result the Court granted relief ordering that the 2018 election be conducted on the basis of a 47 ward structure.

### **Stay Motion**

The Province served a Notice of Appeal and brought a motion to the Court of Appeal for a stay of the application judge's decision pending the hearing of the appeal. The Court of Appeal assigned a 3 judge panel to hear the stay motion on September 18, 2018. The Court of Appeal granted the Province's request for a stay and in doing so commented on the merits of the decision below. The Court said that the question in issue was not whether Bill 5 was unfair but rather was it unconstitutional. The court concluded that there is a strong likelihood that the application judge erred in law and that the Province's appeal will succeed.

As a result of the stay decision, the 2018 election was conducted on the basis of a 25 ward model.

### **Timetable**

The Court of Appeal subsequently established a timetable for the hearing of the Province's appeal and for other steps to be completed. The Province has brought a motion seeking to introduce fresh evidence on the appeal taking the position it did not have sufficient time to respond to the evidence of the applicants on the applications.

There is also a schedule for cross-examinations on affidavits, which again will form part of the fresh evidence on appeal if permitted by the Court. These materials will be before the Court but it will need to determine whether it will accept the fresh evidence. Most of the Province's evidence contained in its fresh evidence motion record where it seeks to justify its actions comes from the same expert that was used by Mr. DiCiano and others on the appeal of the ward boundary decision at the Ontario Municipal Board.

## **CONTACT**

---

Diana Dimmer, Director of Litigation, Legal Services, 416-392-7229,  
[diana.dimmer@toronto.ca](mailto:diana.dimmer@toronto.ca)

Glenn K. L. Chu, Solicitor, Legal Services, 416-397-5407, [glenn.chu@toronto.ca](mailto:glenn.chu@toronto.ca)

## **SIGNATURE**

---

\_\_\_\_\_  
Wendy Walberg  
City Solicitor

## **ATTACHMENTS**

---

Confidential Attachment 1 - Legal Challenge to Bill 5, the Better Local Government Act

Confidential Attachment 2 - Letter from the Ministry of the Attorney General dated December 18, 2018