



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Legal Challenge to Bill 5, the Better Local Government Act

Date: September 25, 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 and the recent Ontario Court of Appeal decision dated September 19, 2019

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council receive this report for information.
2. City Council direct that Confidential Attachment 1 to the report of the City Solicitor remains confidential in its entirety, as it relates to litigation involving the City and contains advice which is subject to solicitor-client privilege.

FINANCIAL IMPACT

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

DECISION HISTORY

City Council at its meeting held on January 30 and 31, 2019 considered a report from the City Solicitor entitled Legal Challenge to Bill 5, the Better Local Government Act that reported on and sought instructions on the Province's appeal before the Ontario Court of Appeal. At that meeting Council instructed the City Solicitor to oppose the Province's appeal at the Court of Appeal and to pursue a leave to appeal application to the Supreme Court of Canada in the event the Province is successful on its appeal at the Court of Appeal.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2019.CC2.2>

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 Legal Challenge to Bill 5, the Better Local Government Act

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 period 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.

Superior Court Decision

Pursuant to the instructions received from City Council, the City commenced its own application to challenge Bill 5 along with other applications.

The various court applications were heard together on an expedited basis because of the pending municipal election scheduled for October 22, 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 candidates' freedom of expression that was guaranteed under s. 2(b) of the Charter of Rights and Freedoms (the Charter). 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.

The application judge found on the evidence that the Province did not justify the enactment of Bill 5 under the s. 1 "reasonable limit" 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 whether it was unconstitutional. The court concluded that there was a strong likelihood that the Province's appeal would succeed.

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

Ontario Court of Appeal Decision

The appeal was heard on June 10-11, 2019. The decision from the court was released on September 19, 2019 and is available here: [{link}](#) All of the original applicants, except the City settled with the Province prior to the appeal being heard. The Province sought to introduce fresh evidence on the appeal consisting of fresh affidavit evidence and transcripts from cross-examinations. There were a number of intervenors who participated on the appeal including the following who supported the City's position: the Federation of Canadian Municipalities and the David Asper Centre for Constitutional Rights.

The majority of the Court of Appeal (3 judges) allowed the Province's appeal concluding that Bill 5 was constitutional. The majority decision acknowledged that Bill 5 involved a substantial change and disrupted campaigning and the candidates' expectations. The Court commented that "the question before this court is not whether the legislation is good or bad policy, was fair or unfair; the question is whether it violates the Charter or is otherwise unconstitutional."

The majority concluded that Bill 5 did not infringe candidates' s. 2(b) freedom of expression rights under the Charter. The majority characterized the Charter claim as a "positive rights claim" and found that it did not satisfy the factors necessary to make out a Charter infringement. The court said that a "challenge to legislation that modifies a platform for expression is an assertion of a positive right" and that the "frustration of candidates in facing altered electoral circumstances- unanticipated rivals, losing allies, and needing to reach new voters- did not prevent them from saying anything they wished to say about matters in issue in the election or in promoting their candidacies."

The majority also overturned the application judge's decision that there was a s. 2(b) Charter infringement due to the 25 ward model not providing for effective representation. The majority concluded that one cannot expand the scope of s. 2(b) to include the principle of effective representation for the purpose of overcoming the fact that s. 3 of the Charter dealing with voting rights, applies to the Federal and Provincial but not municipal governments. As the majority did not find a Charter infringement they did not deal with whether the Province could justify the legislation under s. 1 of the Charter and also did not allow the motion for fresh evidence.

Legal Challenge to Bill 5, the Better Local Government Act

The majority also rejected the City's arguments framed around the unwritten constitutional principles of democracy and the rule of law concluding that "unwritten constitutional principles do not invest the judiciary with a free-standing power to invalidate legislation."

Despite the Province's request at the appeal hearing for substantial costs, the court ordered no costs.

There was a dissenting judgment from Justices MacPherson and Nordheimer. They would have dismissed the Province's appeal. The minority justices agreed with the majority on several of their conclusions. However, the minority found that there was an infringement of candidates and others freedom of expression rights. The minority decision found that by reducing the size of City Council from 47 to 25 and changing the boundaries of all city wards mid-election, the Act interfered in an unwarranted fashion with the freedom of expression of candidates in a municipal election. The minority justices emphasized that "the timing of the Act had a substantial impact on a municipal election that was well underway".

The minority justices agreed with the application judge that there was no pressing and substantial legislative objective to support the Act and therefore it could not be justified under s. 1 of the Charter.

The minority judgment concluded that:

"The 2018 Toronto municipal election concluded on October 22, 2018 with the election of a 25-member City Council. Yet the actions taken by Ontario to secure that result left a trail of devastation of basic democratic principles in its wake. By extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters. This infringement of s. 2(b) was extensive, profound, and seemingly without precedent in Canadian history."

Application for Leave to Supreme Court of Canada

Consistent with Council's instructions to the City Solicitor in January 2019, the City Solicitor will be submitting an application to the Supreme Court of Canada for leave to appeal the Court of Appeal decision. There are additional legal comments on this in the confidential attachment.

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SIGNATURE

Wendy Walberg
City Solicitor

ATTACHMENTS

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