

Court of Appeal File No.: C65861
Superior Court File Nos. CV-18-00603797-0000
CV-18-00602494-0000
CV-18-00603633-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in appeal – Responding Party)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in appeal – Responding Party)

- and -

**ONTARIO (HON. DOUG FORD, PREMIER OF ONTARIO), ONTARIO
(ATTORNEY GENERAL)**

Respondents
(Appellants – Moving Parties)

- and -

CITY OF TORONTO

Respondent
(Respondent in appeal – Responding Party)

**FACTUM OF THE PROPOSED INTERVENER,
ULLI WATKISS, CITY CLERK, CITY OF TORONTO
(Motion for Leave to Intervene Returnable September 18, 2018)**

AND BETWEEN:

**CHRIS MOISE, ISH ADERONMU, and PRABHA KHOSLA, on her own
behalf and on behalf of all members of Women Win TO**

Applicants
(Respondents in appeal – Responding Parties)

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

- and -

**JENNIFER HOLLET, LILY CHENG, SUSAN DEXTER, GEOFFREY KETTEL AND
DYANOOSH YOUSSEFI**

Interveners
(Respondents in appeal – Responding Parties)

**FACTUM OF THE PROPOSED INTERVENER
(Motion Returnable September 18, 2018)**

PART I - ORIGIN OF THE MOTION

1. The Proposed Intervener, Ulli Watkiss, City Clerk of the City of Toronto (the “Clerk”), seeks leave to intervene in the Court of Appeal for the narrow purpose of filing evidence and making submissions on the Clerk’s ability to conduct an election in accordance with her statutory duties. The Clerk also seeks such further or other relief as the Clerk requests and this Honourable Court may grant.

PART II - OVERVIEW OF THE MOTION

2. The Clerk is asking for leave to intervene to address the issue of the Clerk's ability to conduct an election on October 22, 2018 in accordance with her duties under the *Municipal Elections Act, 1996* ("MEA").

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched. ["MEA"].

3. The Clerk's ability to conduct an election on October 22, 2018 is an issue in the motion to stay the Order of the Superior Court of Justice dated September 10, 2018 declaring provisions of the *Better Local Government Act, 2018* to be of no force and effect. Moreover, the Clerk has a substantial interest in the subject matter of the proceedings, as the outcome will impact the structure of the election she is responsible for administering.

4. The addition of the Clerk to this appeal does not cause significant prejudice to the other parties or to the administration of justice. This court would benefit from hearing the evidence of the Clerk independent from the evidence of the other parties regarding her current ability to administer an election. The Clerk will take no position on the appeal or the motion to stay.

PART III - THE FACTS

(A) THE ROLE OF THE CITY CLERK

5. The Clerk holds a statutory position defined by s. 137(1) of the *City of Toronto Act, 2006* (“COTA”). The Clerk is responsible for conducting elections pursuant to s. 11 of the MEA.

City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A., s. 137(1) [“COTA”].

MEA, supra, s. 11.

6. Section 11 of the MEA requires the Clerk to prepare for and conduct the elections for municipal City Council as well as four local school boards. The Clerk’s responsibility includes preparing for the election and maintaining peace and order in connection with the election. The MEA grants authority to the Clerk to (among other things) establish voting places, determine policies and procedures, hire staff and delegate responsibilities.

MEA, supra, s. 11.

(B) THE MEA’S GUIDING PRINCIPLES

7. When conducting an election, the Clerk and her staff are guided by the following principles, set out in case law:

- (a) the secrecy and confidentiality of the voting process is paramount;
- (b) the election shall be fair and non-biased;
- (c) the election shall be accessible to the voters;

- (d) the integrity of the voting process shall be maintained throughout the election;
- (e) there is to be certainty that the results of the election reflect the votes cast;
- (f) voters and candidates shall be treated fairly and consistently; and
- (g) the proper majority vote governs by ensuring that valid votes are counted and invalid votes are rejected so far as reasonably possible.

Cusimano v. Toronto (City) 2011 ONSC 7271, at paras 105-106, aff'd 2012 ONCA 907.

Di Biase v. Vaughan (City), [2007] O.J. No. 5490, at paras 15-16.

(C) THE CONDUCT OF MUNICIPAL ELECTIONS

8. The conduct of a municipal election in the City of Toronto is a significant and highly complex undertaking.

9. Toronto's municipal election is the fourth largest municipal election in North America and is larger than 9 of the 13 provinces and territories in Canada. The City has 2.7 million residents and approximately 2 million eligible electors. In the 2014 election, a total of 991,754 votes were cast in 1,679 voting locations. Over 15,000 short term election workers were hired and trained. The overall expenditure was approximately \$8,390,900.

10. The date of the 2018 municipal election is October 22, 2018. This date is fixed by section 5 of the MEA which specifies that the voting day in a regular election is the fourth Monday in October.

11. Throughout 2017 and 2018 the Clerk's office had been preparing to conduct an election for mayor, 47 councillor positions and 39 school board trustees across four school boards.

12. For the 2018 municipal election, the Clerk is planning to print 2.6 million ballots, arrange for 1709 voting day places, and fill just under 18,000 positions. Some of the positions that need to be filled for the 2018 election include approximately 60 ward manager and assistant ward managers, 550 supervisors, 130 ward centre support staff, 500 receiving staff, 36 tabulator technicians and 90 results call centre agents. The remainder of the positions will be in the voting day places. The Clerk has planned to undertake over 1100 training sessions for voting place staff.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 13.

(D) THE BETTER LOCAL GOVERNMENT ACT, 2018

13. On July 30, 2018, the Minister of Municipal Affairs and Housing introduced Bill 5, the *Better Local Government Act, 2018*, into the Legislative Assembly. This legislation re-drew electoral boundaries. Among other things, the number of wards in the City of Toronto was reduced from 47 to 25. Bill 5 received Royal Assent on August 14, 2018.

Better Local Government Act, 2018, S.O. 2018, c. 11 ["Better Local Government Act, 2018"].

(E) THE DECISION OF JUSTICE BELOBABA

14. Three applications were brought on an urgent basis to challenge Bill 5. These applications were heard by Justice Belobaba of the Superior Court of Justice.

15. The Order of Justice Belobaba dated September 10, 2018 declared the relevant portions of the *Better Local Government Act, 2018* to be of no force or effect and ordered the election to proceed on the basis of a 47-ward structure (the "**Order**").

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 17.

16. On September 10, 2018 the Clerk sent a letter to Ms. Laurie LeBlanc, Deputy Minister at the Ministry of Municipal Affairs and Housing, that identified a list of items for the Minister's consideration to be included in a new regulation. These items must be addressed to meet the incredibly tight timelines and to ensure the integrity of the administration of the upcoming municipal election.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 30-32.

(F) THE INTRODUCTION OF BILL 31

17. On September 10, 2018 the Premier of Ontario announced that the Province would reintroduce the provisions of the *Better Local Government Act, 2018* and invoke the notwithstanding clause in section 33 the *Charter of Rights and Freedoms*. These provisions were contained in Bill 31, the *Efficient Local Government Act, 2018*, which

was introduced to the Legislative Assembly on September 12, 2018. It is not immediately clear when this legislation will come into force.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 18-19.

(G) THE CLERK'S CONTINGENCY PLANS

18. In response to the introduction of Bill 5, the Order of Justice Belobaba, and the introduction of Bill 31, the Clerk's office developed a number of contingency options to carry out the election on October 22, 2018 as required by the MEA using either a 25 or 47-ward structure.

19. However, without clarity on the structure of the election, the Clerk is rapidly reaching a point at which she will be unable to conduct an election on October 22, 2018 in accordance with the requirements of the MEA under either a 25 or 47-ward structure. It is simply not feasible for the Clerk's office to continue to effectively prepare for two elections at the same time given the October 22, 2018 election date.

20. If the current uncertainty is not resolved quickly, the Clerk will be required to implement measures that may undermine the integrity of the voting process in order to hold the election. Advance voting is currently scheduled to begin on October 10, 2018 and run until October 14, 2018. The measures in the contingency options developed by the Clerk's office include the cancellation of advance voting days and the reduction of logic and accuracy testing.

21. The Clerk is concerned that she will not be able to administer an election that complies with the principles of fairness, accessibility, and certainty that underpin the MEA.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 19-21.

PART IV - ISSUES AND THE LAW

(A) TEST FOR LEAVE TO INTERVENE

22. Leave to intervene may be sought by a non-party if that person claims:

- (a) To have an interest in the subject matter of the proceeding;
- (b) To be potentially adversely affected by a judgment in the proceeding; or
- (c) That there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

Rules of Civil Procedure, R.R.O. 1990, r. 194, r.13.01(1), r. 13.03(2)
[“*Rules of Civil Procedure*”].

23. Rule 13.01(2) provides that a court hearing a motion for leave to intervene “shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.”

Rules of Civil Procedure, *supra*, r.13.01(2).

(B) THE CLERK MEETS THE TEST FOR LEAVE TO INTERVENE

24. With respect to the Clerk's ability to bring a motion for leave to intervene, the Clerk's duties with respect to administering the municipal election - the structure of

which will be decided in these proceedings – demonstrate a clear interest in the subject matter of the proceedings.

25. The narrow basis upon which the Clerk seeks to intervene will not unduly delay or prejudice the rights of other parties. The Clerk will take no position on the appeal or the Motion to Stay. The Clerk is solely asking for leave to intervene to address the issue of the Clerk's ability to conduct an election on October 22, 2018

26. The structure of the election has shifted multiple times in recent weeks and contingency plans have had to be reconsidered at each turn.

27. This Honourable Court would benefit from hearing the current perspective of the Clerk as to her ability to conduct the upcoming election in accordance with her statutory duties under the MEA.

(C) THE CLERK'S POSITION ON THE MOTION TO STAY

28. The Clerk takes no position on whether a stay should be granted.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 19-21.

29. In the event the stay motion is granted, the Clerk will revert to her contingency plan for holding an election using a 25-ward structure.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 19-21.

30. In this instance, the Clerk supports the three items of relief identified in the Attorney General's factum, namely:

- (a) An order extending the nomination day of September 14, 2018, in subsection 10.1 (3) of the Municipal Elections Act, 1996, to the date that is two calendar days following the date this Court grants a stay of the Order of Justice Belobaba, or if that date is a holiday (as defined in Rule 1.03(1) of the *Rules of Civil Procedure*), then the next date that is not a holiday;
- (b) An order extending the date by which the clerk shall have the voters' list reproduced to the date that is two calendar days following the date this Court grants a stay of the Order of Justice Belobaba, or if that day is a holiday, then the next date that is not a holiday (as defined in Rule 1.03 of the *Rules of Civil Procedure*) and substituting that date for the references to September 17, 2018 in subsections 4 (1), 11 (2), 13 (2) and 13 (3) of Ontario Regulation 407/18.
- (c) An order extending the date by which the clerk shall provide final spending limits to candidates under subsections 88.9.1 (4), 88.20 (13) and 88.21 (14) of the MEA to the date that is five business days following the date this Court grants a stay of the Order of Justice Belobaba.

31. The Clerk would also support the following relief in order to comply with her duty to administer an election in accordance with the principles underlying the MEA:

- (a) An order extending the timeline for closing voting proxy appointments outlined in s. 6(1) of *Ontario Regulation 407/18* by two calendar days after nominations close, or if that day is a holiday, then the next date that is not a holiday (as defined in Rule 1.03 of the *Rules of Civil Procedure*);
- (b) An order providing that the date the Clerk will certify candidates under s. 35(1) of the MEA will be one calendar day after nominations close, or if that day is a holiday, then the next date that is not a holiday (as defined in Rule 1.03 of the *Rules of Civil Procedure*);
- (c) An order providing that the Preliminary List of Electors prepared and delivered to the Clerk by the Municipal Property Assessment Corporation pursuant to s. 19(1) and (1.1) of the

MEA must be delivered to the Clerk two calendar days after nominations close, or if that day is a holiday, then the next date that is not a holiday (as defined in Rule 1.03 of the *Rules of Civil Procedure*); and

- (d) An order providing that, if the Clerk is required to acclaim any candidates under s. 37(1) of the MEA, that the date be one calendar day after nominations close, or if that day is a holiday, then the next date that is not a holiday (as defined in Rule 1.03 of the *Rules of Civil Procedure*).

MEA, supra, ss. 19(1), 19(1.1), 35(1), 37(1).

32. However, if the stay motion brought by the Attorney General is *not* granted, the Clerk will continue with her preparations to hold an election on October 22 utilizing a 47-ward structure while also planning for the contingency of reverting to a 25-ward structure in the event that Bill 31 is passed by the Legislative Assembly.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 20-21.

33. In that case, the Clerk will need to have the matters identified in the September 10 letter to Ms. LeBlanc addressed in order to comply with her statutory obligations under the MEA.

Affidavit of Fiona Murray, Intervener's Motion Record, Tab 2, pp. 30-32.

PART V - ORDER REQUESTED

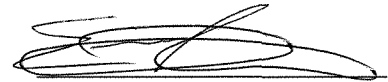
34. The following relief is respectfully requested:

- (a) An order that the Clerk be granted leave to intervene in the motion to stay the Order of the Superior Court of Justice dated September 10, 2018 declaring provisions of the *Better Local*

Government Act, 2018, SO 2018, c. 11 to be of no force and effect and have the right to file evidence and make submissions;

- (b) an order, if necessary, abridging the time for service of this notice of motion and the Clerk's motion record; and
- (c) such further or other relief as the Clerk requests and this Honourable Court may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2018



Emma Romano

September 17, 2018

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Lawyers for the Proposed Intervener
Ulli Watkiss, City Clerk, City of Toronto

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Cusimano v. Toronto (City)*, 2011 ONSC 7271
2. *Cusimano v. Toronto (City)*, 2012 ONCA 907
3. *Di Biase v. Vaughan (City)*, [2007] O.J. No. 5490
4. *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched.

TAB B

SCHEDULE "B"
RELEVANT STATUTES

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched.

Duties of clerk

11 (1) The clerk of a local municipality is responsible for conducting elections within that municipality, subject to the following exceptions:

1. The clerks specified in the regulations made under the *Education Act* are responsible for certain aspects of the elections of members of school boards, as set out in those regulations.
2. The clerks specified in section 11.1 are responsible for certain aspects of the election of members of the council of an upper-tier municipality, as provided for in that section.
3. Repealed: 2002, c. 17, Sched. F, Table.
4. The clerks specified in subsection (5) are responsible for certain aspects of the election with respect to a question an upper-tier municipality submits to its electors under clause 8 (1) (b) or (c). 1996, c. 32, Sched., s. 11 (1); 1999, c. 14, Sched. F, s. 6 (4); 2000, c. 5, s. 29 (1); 2002, c. 17, Sched. F, Table.

Same

(2) Responsibility for conducting an election includes responsibility for,

- (a) preparing for the election;
- (b) preparing for and conducting a recount in the election;
- (c) maintaining peace and order in connection with the election; and
- (d) in a regular election, preparing and submitting the report described in subsection 12.1 (2).

...

Preliminary list

19 (1) In the year of a regular election, the Municipal Property Assessment Corporation shall prepare a preliminary list for each local municipality and deliver it to the clerk.

Deadline

(1.1) The preliminary list must be delivered to the clerk no later than the following date:

1. The date agreed upon by the clerk and the Municipal Property Assessment Corporation, which must be a date earlier than September 1.
2. If no date is agreed upon, the date prescribed by the Minister.
3. If no date is agreed upon or prescribed, July 31.

...

Examination of nominations

35 (1) The clerk shall examine each nomination that has been filed, in accordance with the following timetable:

1. All nominations filed on or before nomination day shall be examined before 4 p.m. on the Monday following nomination day.
2. Any additional nominations filed under subsection 33 (5) shall be examined before 4 p.m. on the Thursday following nomination day.

Acclamations

37 (1) If, at 4 p.m. on the Monday following nomination day, the number of certified candidates for an office is the same as or less than the number to be elected, the clerk shall immediately declare the candidate or candidates elected by acclamation.

...

O Reg 407/18, made under the Municipal Elections Act, 1996

Voting proxy appointments

6 (1) Despite subsection 44 (4) of the Act, a person may appoint a voting proxy for the election beginning on September 17, 2018. ...

City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A.

City clerk

137 (1) The City shall appoint a clerk whose duty it is,

(a) to record, without note or comment, all resolutions, decisions and other proceedings of city council;

(b) if required by any member present at a vote, to record the name and vote of every member voting on any matter or question;

(c) to keep the originals or copies of all by-laws and of all minutes of the proceedings of city council;

(d) to perform the other duties required under this Act or under any other Act; and

(e) to perform such other duties as are assigned by the City.

Deputy clerks

(2) The City may appoint deputy clerks who have all the powers and duties of the clerk under this and any other Act.

Status

(3) A clerk or deputy clerk is not required to be a city employee.

Delegation

(4) The clerk may delegate in writing to any person, other than a member of council, any of the clerk's powers and duties under this and any other Act.

Same

(5) The clerk may continue to exercise the delegated powers and duties, despite the delegation.

Rules of Civil Procedure, R.R.O. 1990, r.194

1.03 (1) In these rules, unless the context requires otherwise,

...

"holiday" means,

(a) any Saturday or Sunday,

(b) New Year's Day,

(b.1) Family Day,

- (c) Good Friday,
- (d) Easter Monday,
- (e) Victoria Day,
- (f) Canada Day,
- (g) Civic Holiday,
- (h) Labour Day,
- (i) Thanksgiving Day,
- (j) Remembrance Day,
- (k) Christmas Day,
- (l) Boxing Day, and
- (m) any special holiday proclaimed by the Governor General or the Lieutenant Governor,

and where New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and where Christmas Day falls on a Friday, the following Monday is a holiday;

...

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the

proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

...

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

...

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

ROCCO ACHAMPONG
Applicant (Respondent in appeal)

and

ONTARIO
Respondent (Appellants)

and

CITY OF TORONTO
Respondent (Respondent on Appeal)

Court of Appeal. File No. C65861_____
Superior Court File No: CV-18-
00602497-0000

THE CITY OF TORONTO
Applicant (Respondent in appeal)

ATTORNEY GENERAL OF ONTARIO
Respondent (Appellant)

Superior Court File No: CV-18-
006003797-0000

CHRIS MOISE *et al.*
Applicants (Respondent in appeal)

ATTORNEY GENERAL OF ONTARIO
Respondent (Appellants)

and

CITY OF TORONTO
Respondent (Respondent on Appeal)

Superior Court File No: CV-18-
00603633-0000

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**FACTUM OF THE PROPOSED INTERVENER,
ULLI WATKISS, CITY CLERK, CITY OF
TORONTO**

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