

Motion File No. M49615
Court of Appeal 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 Party)

-and-

CITY OF TORONTO

Respondent
(Respondent in appeal – Responding Party)

(Title of Proceedings Continued on p.2)

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**

Intervenors
(Respondents in appeal – Responding Parties)

**FACTUM OF THE APPLICANT (RESPONDENT ON APPEAL)
ROCCO ACHAMPONG
(Motion for Stay Pending Appeal)**

17 SEPTEMBER 2018

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PART I – OVERVIEW

1. In 2014 the City of Toronto launched the Toronto Ward Boundary Review (TWBR), retaining independent consultants to present, through consultation and research, options and ultimately a recommendation for adjusting ward boundaries in response to changing population and demographics. The result was the 47-ward model adopted by Council in 2017 for the 2018 Municipal elections.
2. The Municipal campaign began on 1 May 2018. On 7 June 2018 the Provincial election was held, and on 29 June 2018 Doug Ford became the Premier of Ontario.
3. On 27 July 2018, the date on which nominations closed and 2/3 of the way into the 2018 Municipal campaign, Premier Ford announced his government's intention to amend the City of Toronto Act (COTA) to provide for a 25-ward model matching the Federal riding boundaries ("FEDs model"). Bill 5, the *Better Local Government Act 2018*, S.O. 2018, c. 11 (Bill 5), was introduced and adopted by the legislature over a period of two weeks ending 14 August 2018. The Applicant Mr. Rocco Achampong and others challenged this legislation on numerous grounds.
4. On September 10, 2018, Justice Edward Belobaba of the Superior Court of Justice, after hearing the parties and intervenors in this case, found that Bill 5 violated the section 2(b) *Charter* rights of both candidates and electors, and could not be saved under s.1. His Honour declined a finding on other grounds advanced by the parties, the most notable for this Applicant-Respondent being the operation of unwritten constitutional principles of democracy and the rule of law requiring reasonable notice to voters, electors, and all participants in the conduct of a democratic election.
5. The 10 September Decision held that the Province of Ontario clearly crossed the line of what is acceptable in our democratic society and that the impugned provisions of Bill 5 were

inoperable. The Crown appeals this decision and seeks a stay pending appeal, which would effectively restore Bill 5. In addition to appealing the decision, the Government of Ontario has announced its intention to pass new legislation with essentially the same content and purpose under the protection of the notwithstanding clause, and such legislation is now before the legislature.

6. Mr. Achampong agrees that Bill 5 is not only manifestly unfair but clearly crosses the line of what is acceptable in our democratic society. He agrees that Bill 5 is a clear violation of his s.2 rights as a candidate as well as the s.2 rights of 2 million electors in the City of Toronto. He asserts further that Bill 5 also breaches his fundamental rights to procedural fairness and basic constitutional principles of democracy and the rule of law. He asserts that no pressing objective has been identified and no evidence adduced by the Crown to rationally connect Bill 5 with any pressing objective, and therefore the Appellant has no reasonable prospect of success on appeal and their request for a stay should be denied.

7. By contrast the granting of a stay would return the election to chaos, perpetuate unjustified breaches of the fundamental constitutional and charter rights of 2 million electors in Toronto, potentially rendering the election unfree and unfair and undermining and invalidating its democratic process entirely. Any balance of convenience overwhelmingly favours the denial of the sought stay.

PART II – THE FACTS

8. The Applicant-Respondent Rocco Achampong, accepts and adopts the facts as set out by co-Applicants/Responding Parties on Appeal, The City of Toronto and Moise et al.

9. Rocco Achampong is registered as a candidate for City Councillor in Ward 13, Eglinton-Lawrence, in the 2018 City of Toronto municipal elections, having properly registered on 27 July 2018 under the 47-Ward system.

10. Also on 27 July 2018, the date on which nominations closed, the Premier's office announced that the Government of Ontario intended to act urgently and unilaterally to amend the *City of Toronto Act* (COTA) in order to, *inter alia*, reduce the number of wards from 47 to 25. On 30 July 2018 Bill 5, "*the Better Local Government Act*" (Bill 5) was introduced for first reading, and barely two weeks later, on 14 August 2018, it passed second reading and third reading and received royal assent.¹

11. While the 47-Ward model had been based on the results of the TWBR's nearly three years of research and consultations,² the government of Ontario did not engage in any consultations or provide any research supporting the change to the FEDs model under Bill 5 prior to its passage. While the TWBR considered the legal factors for determining effective representation, on Application before Justice Belobaba the Crown pointed exclusively to minor differences in relative voter parity between the two models, ignoring other factors including the protection of communities.³ While the 47-Ward model had been adopted in 2017 and the subject of ample notice by the Clerk's office,⁴ the new government of Ontario provided no notice whatsoever of its intent to overrule the TWBR – neither during the provincial election campaign nor in the month between the time the new government took power and the time Bill 5 was announced. Although Bill 5 was brought urgently, and the Crown now seeks a stay of the 10 September Decision urgently, no evidence has been presented in respect of any specific problem of governance at Toronto City Council, much less urgent governance problems; the evidence is to the contrary.⁵ Similarly, the Government has provided no evidence that Bill 5 and the 25-Ward FEDs would address any hypothetical governance problem; the government has not only failed to establish any mischief but has also failed to establish any rational connection between the impugned legislation and any such

¹ Achampong Affidavit at paras 6-8, 10; Zhang Affidavit at para 10.

² Davidson Affidavit at paras 9-61.

³ Davidson Affidavit at paras 31-40, 53-61.

⁴ Murray Affidavit sworn 22 August 2018 at paras 3-16.

⁵ Carbone Affidavit at paras 2-13.

possible mischief. Although the Government has justified Bill 5 on the basis that it will save money, City Council is not paid out of the Provincial budget and it is impossible that Bill 5 would save the people of Ontario anything; further, the costs of the continuing chaos in this election have already outstripped any likely savings to the City of Toronto.⁶

12. Mr. Achampong's response to Bill 5 was to bring an Application that sought an Order delaying the coming into force of the Bill 5 until after the 2018 municipal elections in order to protect the rights of candidates and electors to procedural fairness, to democratic participation, and to free and effective political speech, and to ensure the legislation complied with basic constitutional principles of democracy and the rule of law.⁷ Mr. Achampong's position remains, *inter alia*, that the introduction of Bill 5 during the 2018 election has deprived him (and all candidates) of the existing platform and of the procedural fairness implied therein with respect to the conduct of the election, breaching their reasonable expectations with respect to conduct of the election in accordance with the *City of Toronto Act* (COTA), the *Municipal Elections Act* (MEA), the City of Toronto By-Laws, and other rules that were in effect at the time they registered for the election.⁸

13. Mr. Achampong, like 206 other candidates for municipal office, did not re-file under the 25-Ward model, as required by Bill 5.⁹ Justice Belobaba's 10 September 2018 Decision restoring the 47-ward model that had been in place throughout the campaign up to 14 August ensured that Mr. Achampong continues to be a candidate. In seeking a stay, the Appellants seek to effectively frustrate, in a continuing sense, Mr. Achampong's candidacy and the candidacy of as many as 206

⁶ Carbone Affidavit at paras 10-19.

⁷ Notice of Application dated 31 July 2018; Re-Amended Notice of Application dated 22 August 2018; Achampong Affidavit at para 9; Zhang Affidavit at para 6.

⁸ Achampong Affidavit at paras 3-5, 11-17, Zhang Affidavit at 11.

⁹ Affidavit of Fiona Murray sworn 14 September 2018 at para 21.

other candidates for office who have not re-filed under the impugned and inoperable provisions of Bill 5, all of whose candidacies will be deemed withdrawn and void if a stay is granted.

14. Mr. Achampong has the very legitimate expectation, after complying with all *pro forma* requirements set forth by the city Clerk under the *Municipal Elections Act*, that he is a candidate in the 2018 Municipal election and is able to contest that election, and a stay if granted would negate that status, standing, and expectations. As a result of the chaos caused by the introduction of Bill 5 and the changing of the rules of the election 2/3 of the way into the campaign, Mr. Achampong has not been able to campaign effectively since registering his candidacy on 27 July 2018, a serious breach of his *Charter* and Constitutional rights and those of Toronto's 2 million electors and one that cannot be saved under s.1.

PART III – THE ISSUES AND LAW

15. The issues to be determined on a motion for a stay pending appeal are:¹⁰

- (1) Whether there is a serious issue to be adjudicated;
- (2) Whether there will be irreparable harm if the stay is refused; and
- (3) Whether the balance of convenience favours granting the stay.

The overarching principle is whether the granting of the stay is in the interest of justice.

- (1) There is no serious issue to be adjudicated**

¹⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at p. 334; *Tisi v St Amand*, 2017 ONCA 539 at para 4.

16. A stay is a discretionary remedy to be granted only as a last resort. Having resorted to invoking the notwithstanding clause through the legislative process and Bill 31, the government has chosen to pursue other measures. Therefore, a stay should not be granted.

17. In the history of elections in the United Kingdom and Canada, in form, style, and substance, no government has ever interfered in an election in the way the present Ontario government is interfering with Toronto's local democracy and elections. While municipal voting rights are not enumerated in the *Charter* or Constitution, the flagrant breach of fundamental principles of democracy and the rule of law constitute justiciable issues and entitle the Applicant to a constitutional remedy.

18. While there are serious issues that remain untried in respect of the Applicant's rights – and the rights of all candidates and electors – to reasonable notice and procedural fairness, as well as the applicability of constitutional principles of democracy and the rule of law, there is no serious issue to be tried in terms of the Appellant's claim that the decision of the honourable Court below was in error. In restricting his decision to s.2 *Charter* rights, Justice Belobaba provided a clear and concise reasoning showing breaches of the s.2 rights of candidates and electors, and without evidence of any pressing and substantial objective *or* any evidence connecting the legislative response to such an objective, there is no reasonable prospect this violation can be justified.

19. Because the granting of the sought stay would effectively grant the order sought on appeal and terminate the rights of the respondents who were successful on application, the Crown requires not only an arguable case or one that is not frivolous, but a strong *prima facie* case.¹¹ The Crown has not met this onus and the sought stay must be denied.

¹¹ *Enbridge Pipelines Inc. v Williams*, 2017ONSC 1642 (canlii) at 38-40.

(2) No harm will flow if the stay is refused

20. The Respondents/Appellants on Appeal move for a stay, claiming that "Allowing the 25-ward election to proceed would avoid cost, disruption and inconvenience, rather than cause it..."¹² This claim is contradicted by uncontested evidence that the ongoing disruptions caused by Bill 5 have cost the City over \$2 million dollars and risk undermining the legitimacy of the election entirely.¹³

21. While the Crown correctly notes that a public authority "can almost always show irreparable harm... by demonstrating its actions have been taken to promote the public interest," the Crown has not adduced any evidence to establish the pressing public interest in this legislation, nor any rational connection between the legislation and the purported public interest. The TWBR established uncontradicted evidence that the 47-Ward model is in the public interest, while the proposition that the 25-Ward model is in the public interest is unevidenced, contradicted by the extensive evidence in the TWBR, and rejected by the overwhelming majority of Toronto City Council. The respondent does not doubt that most public authorities can demonstrate their actions are in the public interest; the fact that the government of Ontario cannot establish this in the present case shows that Bill 5 was introduced and adopted without even a fig leaf of supporting evidence.

(3) The balance of convenience overwhelmingly favours denying the stay

22. Voting in municipal elections has become as important a right as voting provincially or federally, if not more so given what areas municipal governments are responsible for, the taxes they collect, the services they provide (many of them downloaded on them by the provincial government in Ontario).¹⁴ Municipal governments, like the judiciary, are now an important check

¹² Crown Notice of Motion at 6.

¹³ Carbone Affidavit at para 19; Murray Affidavit dated 14 September at paras 25-29, 35-37.

¹⁴ Davidson Affidavit at paras 48-49; Carbone Affidavit at paras 2-13.

and balance on provincial government, and the Crown cannot be allowed to be undermine and circumvent local democracy as Bill 5 clearly does, based on the mere declarations of the Premier that there is a problem that is urgent that Bill 5 addresses. The City, its Council, and its local democracy are all under risk through Bill 5 and would be irreparably damaged if a stay is granted.

23. While the Crown has not demonstrated a pressing public purpose or any harm that would flow from the refusal of the stay, the sudden and dramatic changes to the City of Toronto's 2018 electoral process arising from Bill 5's sudden adoption have had material affects on the Applicant and on all candidates and electors that cannot be easily remedied or ameliorated. Prior to formal registration, the Responding Party Mr. Achampong was required to make determinations about his electability as a candidate in Ward 13. This required him to consult with professionals and expend time and resources pertaining to an election strategy, fundraising plan, voter outreach, advertising, budgeting, data management, office location and political calculation to name a few. On deciding to contest the election, he was required to make direct sacrifices in his personal and professional life and restructure his law practice, which losses cannot be adequately compensated.

24. Ward 13 as currently constituted is the same neighborhood in which Mr. Achampong grew up and where he has many meaningful contacts, historical and community connections, and support systems. With this dramatic change to the constitution of the Ward, its dramatic increase in size, and the dramatically curtailed time in which any campaigning may be accomplished, Mr. Achampong states and the fact is that he and all candidates have had their ability to communicate about and contest this election irreparably damaged. As many as 209 candidates will have their candidacies retroactively voided if the sought stay is granted.

25. The opportunity to contest for Municipal office occurs only once every 4 years. The Respondent submits that it is no harm to the Crown for it to take the time to evidence a problem, address that problem, consult on the solution, and pass appropriate legislation well in advance of

the 2022 Municipal Elections, but it is a significant harm and deprivation for the Applicant, every candidate, and every elector in the City of Toronto to have their 2018-2022 local government compromised, undermined, and delegitimized by the Crown's actions.

26. While the government has treated this legislation as an urgent priority, there is no evidence of urgency or in fact of mischief at all. A matter cannot become of urgent public importance simply by the declaration of the Premier that it is so. Further, it is *exclusively* the introduction of Bill 5 without notice or consultation that has plunged the 2018 election into chaos, and arguments by the Crown in respect of restraint or deference in the face of this mischief of their own creation cannot have any merit and must be rejected by this honourable Court.

27. The election is set to conclude with a vote by the electors of Toronto on October 22nd, 2018, and if the sought stay is granted the entire 2018 Toronto Municipal election will be delegitimized.

PART IV – ORDER REQUESTED

28. The Responding Party Rocco Achampong requests that the motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DONE AT THE City of Toronto, in the Province of Ontario, this 17th Day of September 2018

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Applicant (Respondent in appeal) Respondent (Appellant)

ROCCO ACHAMPONG and ONTARIO and CITY OF TORONTO Superior Court File No.: CV-18-00602494-0000
Applicant (Respondent in appeal) Respondents (Appellants) Respondent
(Respondent in appeal)

CHRIS MOISE et al. and ATTORNEY GENERAL OF ONTARIO and CITY OF TORONTO Superior Court File No.: CV-18-00603633-0000
Applicants (Respondents in appeal) Respondents (Appellants) Respondent
(Respondent in appeal)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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