Court of Appeal File No: C65861
Motion File No: M49615
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)

Respondent

(Appellant – Moving Party)

and

CITY OF TORONTO

Respondent

(Respondent in Appeal – Responding Party)

(Title of Proceedings Continued on p. 2)

FACTUM OF THE INTERVENORS JENNIFER HOLLETT et al. (RESPONDENTS IN APPEAL) (STAY PENDING APPEAL)

AND BETWEEN:

CHRIS MOISE, ISH ADERONMU, and PRABJA KHOSLA, on her own behalf and on behalf of all members of WOMEN WIN TO

Applicants
(Respondent in Appeal – Responding Parties)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

and

JENNIFER HOLLETT, LILY CHENG, SUSAN DEXTER, GEOFFREY KETTEL, AND DYANOOSH YOUSSEFI

Intervenors

(Respondent in Appeal – Responding Parties)

FACTUM OF THE INTERVENORS JENNIFER HOLLETT et al. (RESPONDENTS IN APPEAL) (STAY PENDING APPEAL)

September 17, 2018

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PART I. OVERVIEW

1. The Province asks this Court to suspend the invalidity of an election statute that has already been found to be unconstitutional. Moreover, the Province asks this Court to do so on the eve of the Toronto City Council election, thereby radically altering the election ground rules less than five weeks from voting day.

2. The Province lost this case at first instance. The Superior Court held that the impugned provisions of the *Better Local Government Act, 2018* ("Bill 5"), which, mid-election, reduced the electoral wards in the City of Toronto from 47 to 25, violated the freedom of expression rights guaranteed under s. 2(b) of the *Canadian Charter of Rights and Freedoms* to both City Council candidates and voters in the City of Toronto. The Court further held that this violation was not justified under s. 1.

3. The present motion is simply an effort to secure the relief sought on appeal at this interlocutory stage. The Province is fully aware that a stay of the Superior Court's order at this time will amount to an award of final relief, given the short time left prior to the City's Election Day on October 22, 2018.

4. The 47-ward structure is the status quo in the City of Toronto, and has been the status quo for residents of Toronto since 2017, save for the four weeks during which Bill 5 was in force.

5. The Province cannot meet the high threshold for granting interlocutory relief in a constitutional case on the record before this Court.

6. Should this stay be granted, the opportunity for the people of Toronto to participate in a fair and democratic 2018 municipal election will be irretrievably lost and the expression rights of candidates and electors will continue to be infringed by the unconstitutional legislation.

7. The Province's motion should be dismissed.

PART II. FACTS

8. On July 30, 2018, the Ontario government (the "Province") introduced Bill 5. Bill 5 constitutes a wholesale re-drawing of the electoral map of the City of Toronto, reducing the City's 47 wards to 25, and doubling the ward populations from an average of 61,000 to 111,000.

> *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151 at para 4 ["*City of Toronto et al*"], Book of Authorities of the Intervenors Hollett et al ["Hollett BOA"], Tab 1.

9. The Province declared that these changes would be immediately implemented, impacting the City's 2018 municipal election scheduled for October 22, 2018 (the "Election"). The Bill received Royal Assent on August 14, 2018, less than 10 weeks before voting day, and more than three months into the election period.

10. The changes mandated by Bill 5 were contrary to the recommendations of the multi-year Toronto Ward Boundary Review, in which "the idea of having 25 very large wards gained virtually no support during the public process."

> Affidavit of Susan Dexter, affirmed August 21, 2018 ["Dexter Affidavit"], Record of the Responding Parties, Jennifer Hollett et al on Motion for Stay Pending Appeal ["Hollett Stay Record"], Tab C, Exhibit 4, page 384
>
> *City of Toronto et al*, *supra* para 8 at para 55.

A. The City Clerk's role in administering the Election

11. The Toronto City Clerk (the "City Clerk") is charged with administering the election for Toronto City Council as well as four local school boards. Since as early as December 2017, when the Clerk's office notified the Municipal Property Assessment Corporation ("MPAC") of boundaries for the 47-ward structure, the Clerk and her staff have been preparing to conduct an election for 47 City Council positions and 39 school board trustees, based on the 47-ward structure.

> Affidavit of Fiona Murray, affirmed August 22, 2018 ["First Murray Affidavit"], City Record, paras 5, 11.

12. Before Bill 5 came into effect on August 14, 2018, the City Clerk's preparations for a 47-ward election were "well underway." The 47-ward boundary lines had been set, all candidates had been certified, and candidates had begun campaigning. The City Clerk had remapped electoral geography for 47 wards, tested and placed into production ward boundary software, secured permits for 48 advance voting places and established 1,757 Election Day voting places, as well as a number of other steps tailored specifically to a 47-ward election.

> First Murray Affidavit, City Record, Tab 3, paras 8, 11-13.
>
> Affidavit of Fiona Murray ["Second Murray Affidavit"], affirmed September 14, 2018, Motion Record of Ulli Watkiss, City Clerk ["City Clerk Record"] at para 16.
>
> *City of Toronto et al, supra* para 8 at para 5.

13. The nomination period for the Election began on May 1, 2018, and ended on July 27, 2018. As of July 30, 2018, the Clerk had certified the nominations of all 509 candidates qualified to run in the Election.

> First Murray Affidavit, City Record, Tab 3, para 11.

B. The impact of Bill 5 and the 25-Ward model

14. Bill 5 has created "wide-spread confusion and uncertainty" for both candidates and electors. For candidates, the 47-ward structure informed their decision about where to run, what issues to run on, how to raise money, and how to publicize their campaign. Candidates believed the rules of the election were "set in stone" since a mid-stream change to election rules, such as those enacted by Bill 5, was entirely unprecedented.

> *City of Toronto et al, supra* para 8 *at* para 29, 30.
>
> Affidavit of Jennifer Hollett, affirmed August 21, 2018 ["Hollett Affidavit"], Hollett Stay Record, Tab A, para 22.

15. When Bill 5 took effect, candidates were in the midst of their campaigns. Most of the candidates had already produced campaign material such as websites and pamphlets that were expressly tied to the ward in which they were running. Consequently, some candidates had spent money on campaign materials for wards in which they were no longer running. Campaign services tailored to the 47-ward structure, such as website hosting and voter databases, were incapable of meeting the demands of the newer and substantially larger wards. A great deal of the candidates' time and money had been invested within the boundaries of their particular ward when the ward numbers and sizes suddenly changed.

> *City of Toronto et al, supra* para 8 at paras 5, 29.
>
> Hollett Affidavit, Hollett Stay Record, Tab A, para 39 – 43.

16. Further, and importantly, candidates' efforts to convey their political message about the issues in their particular ward "were severely frustrated and disrupted" by the passage of Bill 5.

> *City of Toronto et al, supra* para 8 at para 31.

17. Upon passage of Bill 5, candidates were notified that they were required to re-register in one of the 25 new wards, regardless of the prior certification of their candidacy under the 47-ward system. The 25-ward system resulted in dozens of candidates running in each ward, alongside multiple incumbents. In some cases, candidates found themselves suddenly running against candidates that they would otherwise support and who they did not intend to challenge.

Hollett Affidavit, Hollett Stay Record, Tab A, para 39.

18. Electors have also been impacted. Electors who donate to a candidate's campaign are subject to campaign financing limits. By virtue of the ward boundary changes set out in Bill 5, electors may not know which candidates are running in their wards or even which ward they are in. Donors who have already contributed the maximum amount may find the candidate (or candidates) to whom they donated are now running in a different ward, or may have dropped out of the 25-ward election altogether.

Affidavit of Lily Cheng ["Cheng Affidavit"], affirmed August 21, 2018, Hollett Stay Record, Tab B, para 26.

Affidavit of Geoffrey Kettel, affirmed August 21, 2018 ["Kettel Affidavit"], Hollett Stay Record, Tab D, para 28, 29.

19. Further, under the 25-ward system, electors would have been denied the right to cast a vote that can result in effective representation. The 25-ward system was considered and rejected by the Toronto Ward Boundary Review because at the current 61,000 average ward size, city councillors were already having difficulty providing effective representation. A 25-ward structure with an average ward population of 111,000 infringes on municipal voters' rights under 2(b) of the Charter. Electors rightly

fear that councillors under the new 25-ward system will not be able to attend to local issues.

City of Toronto et al, supra para 8 at para 55, 61.

Dexter Affidavit, Hollett Stay Record, Tab C, para 23 – 25.

Kettel Affidavit, Hollett Stay Record, Tab D, para 22, 25.

20. On August 17, 2018, the City Clerk reported to City Council that the cost of transitioning the administration of the 2018 Election from 47 wards to 25 wards was approximately $2.5 million over and above the initial election budget. Under s. 7 of the *Municipal Elections Act*, the City of Toronto is exclusively responsible for the costs of conducting municipal elections, not the Province. The Province has adduced no evidence of the costs savings it alleged will result from Bill 5, nor has the Province acknowledged the inevitable additional costs that will be incurred by the City of Toronto, and its taxpayers, should this stay be granted.

Municipal Elections Act, 1996, SO 1996, c 32, Sch, s. 7

Report from City Clerk to Toronto City Council, August 17, 2018, Exhibit A to the Second Murray Affidavit, City Clerk Record, Tab 2A, p 2.

C. The September 10, 2018 Decision and its aftermath

21. On September 10, 2018, the Superior Court held that the Province's enactment of Bill 5 violated s. 2(b) of the Charter, declared the impugned provisions of Bill 5 of no force and effect, setting them aside immediately, and ordered the election proceed on the basis of 47 wards. Consequently, the Clerk's office immediately returned to preparations for a 47-ward election.

City of Toronto et al, supra para 8 at paras 84-85.

Second Murray Affidavit, City Clerk Record, Tab 2, para 25.

22. At first instance, the Province argued that Bill 5 had three objectives: efficiency, cost savings, and voter parity. The only evidence of those objectives the Province was able to adduce was *Hansard* transcripts that recounted what a small number of current City councillors thought were the government's objectives in introducing Bill 5. The Court found there was virtually no evidence that voter parity was ever an objective of Bill 5. The Province did not produce any evidence of the "dysfunction" the Bill was aimed at remedying, or any evidence that Bill 5 could achieve any of its alleged objectives.

City of Toronto et al, supra para 8 at paras 70 – 77.

23. Of the 509 candidates certified in the 47-ward election on July 30, 2018, 206 had not yet taken action to be certified under the 25-ward system by the date of the Superior Court's decision. Bill 5 was quashed four days before the candidate certification date of September 14, 2018, and therefore no candidates were ever certified for the 25-ward election. If the stay is granted, there will be no candidates to stand for election, and no process to certify any candidates before the Election Day.

Second Murray Affidavit, City Clerk Record, Tab 2, para 21.

24. On the same day as the Superior Court decision, the Clerk sent a letter to the Deputy Minister for the Ministry of Municipal Affairs and Housing. That letter identified a list of items the City Clerk felt needed to be addressed by a new regulation in order to effectively administer the 47-ward election. The Clerk advised the Deputy Minister that her ability to revert back to a 47-ward election would be compromised if a response was not received in a few days. The Deputy Minister did not respond.

Second Murray Affidavit, City Clerk Record, Tab 2, para 26.

25. Also on September 10, 2018, Premier Ford announced that the Province intended to reintroduce the provisions of Bill 5 and to invoke the notwithstanding clause found in s. 33 of the *Charter* for the first time in Ontario's history. On September 12, 2018, the Province did so, introducing Bill 31, the *Efficient Local Government Act, 2018* to the Legislative Assembly. Premier Ford stated that his government will not whip the vote on Bill 31, and will permit all MPPs to vote freely.

> Second Murray Affidavit, City Clerk Record, Tab 2, para 30-31.
>
> Affidavit of Joshua Mandryk ["Mandryk Affidavit"], Record of the Responding Parties, Chris Moise et al on Motion for Stay Pending Appeal ["Moise Stay Record"], Tab 1, para 5, and Exhibit B to the Mandryk Affidavit, Moise Stay Record, Tab 3.

26. As of the date of this motion, the Clerk is prepared to conduct a 47-ward election in accordance with the provisions of the *Municipal Elections Act*. Should the City be forced once again to return to a 25-ward system, the Clerk may be forced to cancel advanced voting days original scheduled to begin October 6, 2018 (already pushed back to October 10, 2018), and may be required to implement further measures that may undermine the integrity of the voting process in order to hold an election on October 22, 2018. The cancellation of advanced voting days will effectively disenfranchise those who cannot attend at a polling station on Election Day.

> Second Murray Affidavit, City Clerk Record, Tab 2, para 37.

PART III. ISSUES AND LAW

27. On this motion, the Province seeks an order staying the decision of the Superior Court pending appeal.

28. Rule 63.02(1)(b) provides that "an interlocutory or final order may be stayed on such terms as are just," by an order of a judge of the court to which an appeal has been taken.

Rules of Civil Procedure, RRO 1990, Reg 194, Rule 63.02(1)(b).

29. A stay is a discretionary remedy. It is well-established that the moving party on a motion to obtain a stay pending appeal must satisfy the familiar three-part test for an interlocutory injunction from *RJR-MacDonald*:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

RJR-MacDonald Inc. v Canada (AG), [1994] 1 SCR 311 at 334 (SCC) ["*RJR-MacDonald*"], Hollett BOA, Tab 2, citing *Metropolitan Stores (MTS) Ltd. v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110 at 127 ["*Metropolitan Stores*"], Hollett BOA, Tab 3.

30. However, in cases that raise *Charter* issues, the party seeking a stay pending appeal must satisfy a modified *RJR-MacDonald* test:

(a) a strong *prima facie* case on the merits of the appeal;

(b) that irreparable harm to the public interest will be suffered should the stay not be granted; and

(c) that the balance of convenience and public interest considerations favour a stay.

Frank v Canada (AG), 2014 ONCA 485 at para 12 ["*Frank*"], Hollett BOA, Tab 4.

RJR-MacDonald, supra para 29 at 338-339.

31. As explained by Robins J.A., in determining whether a stay should be granted:

> The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.
>
> *Ogden Entertainment Services v. Retail Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440* (1998), 38 OR (3d) 448 at para 5 (Ont CA), Hollett BOA, Tab 5.

32. The Province does not meet the test for a stay pending appeal. The Province's request for a stay should be refused.

A. The public interest in this case

33. This is a motion to stay an order finding election legislation to be unconstitutional. The case raises serious questions of public and constitutional law in the context of an ongoing election. A consideration of the public interest, and the potential harm caused by a stay, should form a central part of the court's analysis.

34. The Province does not have a monopoly on the public interest.

35. Contrary to the repeated assertions of Premier Ford, the applicants in this proceeding are not a "small group of left-wing councillors looking to continue their free ride on the taxpayers' dollar", nor part of a "network of activist groups who have entrenched their power under the status quo." The applicants and intervenors in this proceeding are a diverse group of candidates and electors from across the political spectrum, many of whom have never before served in an elected capacity. They represent both the public and private interests of all candidates and electors in this election.

Exhibit B to the Mandryk Affidavit, Moise Stay Record, Tab 3.

36. In addition, the City of Toronto is acting in the public interest. Its involvement in this litigation is on behalf of the almost three million residents of the City who are directly impacted by Bill 5, and who have an interest in fair elections for their City Council.

37. Finally, the Province has statutorily delegated the determination of what is in the public interest for the City of Toronto:

> **2** The purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:
>
> 1. Determine what is in the public interest for the City.
>
> […]

City of Toronto Act, 2006, SO 2006, c 11, Sch A, s. 2.

38. What is the public interest? The Supreme Court of Canada has defined the public interest to include both "the concerns of society generally and the particular interests of identifiable groups."

RJR-MacDonald, supra para 29 at 344.

39. The public interest includes compliance with the *Charter* and its protection of democratic rights:

> […]the public interest must also include the protection of democratic rights enshrined in the *Charter*. What could be more fundamental than the right to vote in a free and democratic society? In defining public interest, therefore, consideration must be given not only to the pressing and substantial objectives noted above, but also to the protection of rights guaranteed under the *Charter*.

Sauvé v Canada (Chief Electoral Officer), [1997] 3 FC 628 at para 22, aff'd, 71 ACWS (3d) 1024 (Fed CA), leave to appeal to SCC ref'd ["*Sauvé*"], Hollett BOA, Tab 6.

40. Yet, democratic rights are not only protected under s. 3 of the *Charter*. Democracy is the bedrock of the *Constitution Act*, and is the baseline against which the

Constitution was framed. The democracy principle pre-dates the Charter and exists to protect democratic principles independent of section 3. As held by the Supreme Court in the *Secession Reference*:

> …the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers.
>
> *Reference Re Secession of Québec*, [1998] 2 SCR 217 at para 62 (SCC) ["*Secession Reference*"], Hollett BOA, Tab 7.

In the words of the Court, "the democratic nature of our political institutions was simply assumed."

> *Secession Reference, supra* para 40 at para 62.

41. The unwritten constitutional principles and rules, such as democracy, are not simply an interpretative guide; rather they are "the vital unstated assumptions" upon which the text of the Constitution is based. The principles are binding on courts and governments, and give rise to substantive legal obligations. They fill in gaps in the express written text, because, as the Court explains, "problems or situations may arise which are not expressly dealt with by the text."

> *Secession Reference, supra* para 40 at paras 49, 51, 53, 54.
>
> *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3d) 505, 2001 CarswellOnt 4275 at paras 116, 118 (Ont CA), Holett BOA, Tab 8.

42. In the context of this litigation, which challenges the constitutionality of election legislation, the public interest is certainly informed by the democracy principle. The residents of Toronto have in interest in participating in a fair election, one where the Legislature does not interfere by changing the rules midstream. Residents also have an

interest in ensuring that candidates have a level playing field in the election, absent the inequities and unfairness created by midstream changes to rules affecting the conduct of campaigns.

43. To conduct an election in a manner that has already been determined by a court of this province to be unconstitutional is inconsistent with the principle of democracy, and is not in the public interest.

B. The Province does not have a strong likelihood of success on the appeal

44. The Province argues that it must simply show that it is not acting in a "vexatious or frivolous manner" in order to satisfy the first branch of the *RJR-MacDonald* test. This is simply incorrect. While this lower threshold is the one normally encountered in *Charter* litigation, the Supreme Court of Canada and this Court have held that where a stay will "in effect amount to a final determination of the action" the moving party must demonstrate a "strong likelihood of success" on the merits of the appeal. This will be the case when the relief the appellant seeks can only be obtained immediately, or not at all.

> Factum of the Province at para 17.
>
> *RJR-MacDonald, supra* para 29 at 337-338.

45. Such is the case here. The Province has not requested an expedited hearing of the appeal. Therefore, there is little likelihood of a decision on the merits of the Province's appeal before the Election on October 22, 2018. The outcome of this motion will effectively determine whether that election is run on a 47 or 25-ward basis.

46. To meet this elevated standard of strong likelihood of success, the Province must demonstrate that each of the *Charter* violations found at first instance was "clearly

wrong". The Province must further demonstrate that it would also "very likely" succeed on appeal with respect to the claims that Bill 5 violates ss. 2(d) and 15 of the *Charter*, and is inconsistent with the unwritten constitutional principles of the rule of law and democracy. Further, the Province must demonstrate that it would very likely succeed on the s. 1 *Charter* analysis, even when it was incapable of producing evidence to justify Bill 5's enactment under s. 1 at first instance.

> *Fontaine v Canada (AG),* 2018 ONCA 749 at para 16, Hollett BOA, Tab 9.

47. The Province has not met this high threshold.

C. The Province has not demonstrated that it will suffer irreparable harm

48. At the second stage of the analysis, the Province must demonstrate that it will suffer irreparable harm if the stay is not granted. As explained by the Supreme Court of Canada in *RJR MacDonald*:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> *RJR MacDonald*, *supra* para 29 at 341.
>
> *Noble v Noble* (2001), 119 ACWS (3d) 183 at para 16 (Ont Sup Ct [Comm List]), Hollett BOA, Tab 10.

49. That a party is *likely* to suffer irreparable harm is not sufficient; evidence of irreparable harm must be "clear and not speculative". This stage of the test is not a balancing exercise. If the Province cannot demonstrate that it *will* suffer irreparable harm, their request for a stay should be denied.

> *Kanda Tsushin Kogyo Co. v. Coveley* (1997), 96 OAC 324, 1997 CarswellOnt 80 at para 14 (Ont Div Ct), Hollett BOA, Tab 11.
>
> *Centre Ice Ltd. v National Hockey League* (1994), 166 NR 44, 1994 CarswellNat 1332 at para 7 (Fed CA), Hollett BOA, Tab 12.

> *F(S) v Ontario (Director of Income Maintenance, Ministry of Community & Social Services),* 49 OR (3d) 564 at paras 4-6 (Ont CA), Hollett BOA, Tab 13.

50. The Province submits that the onus on the government to demonstrate irreparable harm to the public interest at this stage is so low as to be a near certainty because the government is presumed to be acting in the public interest in enacting Bill 5.

51. The Province does not enjoy such a legal presumption.

52. The Supreme Court of Canada has held that the onus of demonstrating harm to the public interest is a relatively low one for government authorities when *opposing* interlocutory relief and not necessarily when seeking it themselves.

> *Tabah c Quebec (Procureur general,)* [1994] 2 SCR 339 at 385 (SCC), Hollett BOA, Tab 14.
>
> *Sauvé*, *supra* para 39 at para 12.

53. In *Frank*, this Court held that the Province has no presumption "approaching an automatic right to a stay in every case where a court of first instance has ruled legislation to be unconstitutional." In each case the Court must examine the particular facts and circumstances to decide whether a stay is warranted:

> [I]t is apparent that a court will only grant a stay at the suit of the Attorney General where it is satisfied, after careful review of the facts and circumstances of the case, that the public interest and the interests of justice warrant a stay. In [*Bedford*], the government filed a substantial volume of evidence to demonstrate the very real and tangible harm that would result if the matter of prostitution were left completely unregulated. It is clear from reading the reasons as a whole that Rosenberg J.A. only granted a stay in [*sic*] because, after reviewing and weighing that body of evidence, he was (at para 72) "satisfied that the moving party ha[d] satisfied irreparable harm test."
>
> *Frank*, *supra* para 30 at paras 16-19.
>
> *See also Sauvé, supra* para 39 at para 11.

54. In any event, this Court cannot assume that the Province passed Bill 5 in the public interest.

55. Bill 5 has no stated public interest objective. In Superior Court, the Province was not able to produce any evidence whatsoever of the alleged dysfunction and inefficiencies that the Bill was designed to remedy. Rather, the Province relied on some commentary made by a small group of City Councillors in an effort to establish a section 1 justification for the legislation. These arguments led the Court to note that the Bill appeared to be enacted "more out of pique than principle."

City of Toronto et al, supra para 8 at para 70.

56. In addition to having no public interest objective, the Superior Court found that the timing of Bill 5 was part of what made it unconstitutional. In these circumstances, there is no reason for the Court to assume that the Province enacted the legislation in the public interest.

City of Toronto et al, supra para 8 at para 34.

57. The Province has adduced absolutely no evidence that its interests will suffer should the Election continue, as planned, with the existing 47-ward structure. In our submission, no such evidence exists.

58. Moreover, the Province has not demonstrated that any alleged harm to the public interest that will result from a dismissal of this motion is *irreparable* harm, sufficient to satisfy the test at stage two.

59. The Province alleges that without a stay, residents of Toronto will "lose the benefit" of the supposed objectives of Bill 5. Yet, the Province has adduced no

evidence that those objectives can or will be achieved by the legislation. There are also real questions as to whether those objectives are in the public interest at all. In any event, the Province has adduced no evidence that delayed achievement of these objectives would in any way constitute irreparable harm.

Factum of the Province at para 20.

60. In contrast, the City of Toronto opposes the stay. Several electors and candidates have brought applications, or intervened, in opposition of Bill 5. The electors and candidates share, with the almost three million residents of the City, and the City of Toronto itself, a public interest in a fair municipal election.

61. Elections are snapshots in time. If the fairness of the 2018 Election, for both candidates and electors, is impaired by the Province's legislative meddling with Bill 5, that harm is irreparable.

D. The balance of convenience favours the respondents

62. The balance of convenience is a "determination of which of the two parties will suffer the greater harm from the granting or refusal of [a stay] pending a decision on the merits."

RJR-MacDonald, *supra* para 29 at 342.

63. On a motion to impose a stay pending appeal, the court must give weight to the fact that the adjudication has already taken place and the trial judgement is regarded as *prima facie* correct. The burden of the loss at first instance must be borne by the unsuccessful litigant – in this case, the Province.

82009 Ontario Inc. v Harold E Ballard Ltd. (1991), 26 ACWS (3d) 627, 1991 CarswellOnt 427 at para 14 (Ont Div Ct), Hollett BOA, Tab 15.

1. There is no presumption of harm to the public interest

64. The public interest is a "special factor" that must be considered in assessing where the balance of convenience lies. As outlined above, the Province does not have a monopoly on the public interest.

65. The Province claims that courts must presume that the public interest and the balance of convenience favours the continued operation of legislation, even when it has already been found to be unconstitutional. This is not the law.

> Factum of the Province at para 23.

66. Rather, both *Harper* and *RJR* require that the Province first be able to demonstrate that the legislation was undertaken pursuant to the public interest. The Province has simply failed to do so, both before the Superior Court and on this motion.

> *Canada v Canadian Council for Refugees,* 2008 FCA 40 at para 32 ["*Canadian Council for Refugees*"], Hollett BOA, Tab 16.

67. Even if the Province could establish Bill 5 was enacted in the public interest, the case law of this Court is clear that there is no automatic presumption that a stay is in the public interest.

> *Frank, supra* para 30 at paras 16-19.

68. A stay is a discretionary remedy. The Province does not enjoy any entitlement to a stay when a court has found it enacted legislation that was unconstitutional. The balance of convenience in this case does not justify the granting of a stay.

2. The Province has not demonstrated that any harm would arise from refusing to grant a stay

69. The Province submits that the "cost, confusion and inconvenience" that would result from the dismissal of this motion should tip the balance of convenience in its favour.

70. This submission is misleading. The Province is statutorily precluded from bearing any of the cost of this election by the *Municipal Elections Act*. Regardless of the outcome of this motion or the appeal, the costs of this election will be borne exclusively by the City of Toronto, and its residents. Introducing Bill 5 in the middle of the election has already increased the City's cost of this election by at least $2.5 million, and changing the structure of the election for a third time at this late date by ordering a stay would inevitably increase costs further.

> Report from City Clerk to Toronto City Council, August 17, 2018, Exhibit A to the Second Murray Affidavit, City Clerk Record, Tab 2A, p 2.

71. The Province also argues that the balance of convenience favours a stay because "there is a concern that a rushed 47-ward election may not be able to be conducted with integrity and the results may be controverted." This is patently untrue. The evidence of the Clerk is that she is prepared to run a 47-ward election at this time in accordance with the *Municipal Elections Act*.

> Factum of the Province at para 31.
>
> Second Murray Affidavit, City Clerk Record, Tab 2, para 35.

72. The Province also cannot seriously claim that the balance of convenience favours granting a stay because of the confusion and inconvenience that will allegedly result if the Superior Court's decision is upheld. It does not lie in the mouth of the

Province to say that confusion and inconvenience have resulted from these proceedings, when, as the Superior Court held, Bill 5 was the cause of "wide-spread confusion and uncertainty" that has been exclusively borne by the City of Toronto and the candidates and electors – not the Province. Moreover, the Province has done nothing to mitigate that confusion and inconvenience, instead choosing to ignore pointed requests for assistance from the City Clerk on the 47-ward election.

Second Murray Affidavit, City Clerk Record, Tab 2, para 26.

City of Toronto et al, supra para 8 at paras 29, 30.

73. Finally, the Province inexplicably submits that to revert back to the 25-ward system would somehow avoid cost, confusion and inconvenience. In fact, contrary to the assertions of the Province, returning to a 25-ward election model now would incur additional cost, disrupt the ongoing preparations of the City Clerk, and inconvenience both voters and candidates.

74. The 47-ward system is the current status quo in the City of Toronto. The balance of convenience favours maintaining this status quo, rather than upending the process a third time at the eleventh hour.

3. Granting a stay would harm the public interest

75. The harm done to the public interest by Bill 5 favours refusing the Province's request for a stay.

76. First, the courts agree that it is contrary to the public interest to grant final relief in interlocutory proceedings involving constitutional challenges in the context of a pending election. In this case, allowing the stay would make it virtually impossible for the election

to be run on the basis of 47-wards on October 22, 2018 – granting the Province the ultimate relief it seeks on the appeal.

> *Council of Canadians v Canada (Attorney General)*, 2015 ONSC 4601 at para 84-86 ["*Council of Canadians*"], Hollett BOA, Tab 17.
>
> *Gould v Attorney General of Canada,* [1984] 1 FC 1133, 1984 CanLII 3011 at paras 17-18 (Fed CA) ["*Gould*"], affirmed [1984] 2 SCR 124 (SCC), Hollett BOA, Tab 18.
>
> *Metropolitan Stores, supra* para 29 at 144.

77. Second, the courts are unanimous that the question of constitutional validity should not be determined at the interlocutory stage and should be left to a trial of the merits. In *Metropolitan Stores*, the Supreme Court applied this principle and added that:

> Such cautious restraint respects the rights of both parties to a full trial... to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise… at this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.
>
> *Metropolitan Stores, supra* para 29 at 132.

78. Such cautious restraint is even more important when, as here, the merits of the case have already been considered and decided in favour of the respondents. As held by the Divisional Court in *Figueroa v Canada (AG)*, "the public interest in the uniform, fair and orderly conduct of election procedures" requires that cases like this be decided on the merits and not before. Courts have held that it is inappropriate to "decide questions like this without a proper trial on the eve of an election." Similarly, it is inappropriate to grant the interlocutory relief sought by the Province, before the appeal can be heard on its merits, with the election just weeks away.

> *Gould, supra* para 76 at paras 17-18.

> *Figueroa v Canada (Attorney General)* (1997), 34 OR (3d) 59, 1997 CarswellOnt 1782 at para 2 (Ont Div Ct), Hollett BOA, Tab 19.

79. A stay would undermine the public interest. The enactment of Bill 5 was held to be unconstitutional because it was enacted in the midst of an election. Granting a stay exacerbates and continues the *Charter* violations in that it would, again, upend the status quo at the last minute. As found in *Council of Canadians*:

> [I]t is problematic to change the rules for elections at the last minute through the blunt instrument of judicial intervention. Such action might harm public confidence and could lead to further errors in the election process. There are many actors in an election: parties, candidates, campaign workers, volunteers, election officials and staff, and electors themselves. Parties' and candidates' election strategies and election day plans are formulated having regard to the known and established rules of engagement. In order to be fair to all, any changes must be fully known and fairly implemented. Late changes in election rules run the risk of unfairness or, at the very least, the perception of unfairness.

> *Council of Canadians, supra* para 76 at para 95.

> *City of Toronto et al*, *supra* para 8 at para 34.

80. Third, granting the stay sought by the Province would result in a legislative void. Reverting to the provisions of Bill 5 would return to a hastily conceived-of and drafted regime for which there are no confirmed candidates. In *Bedford*, the court granted a stay of the trial decision because to do otherwise would have resulted in a legislative void. The reverse is true here. The nomination date established by Bill 5 for the 25-ward system has passed. No candidates have been certified or can be certified under Bill 5. If this stay is granted, further legislative amendment will be required in order for the election to proceed on October 22, 2018.

81. The Province argues that the balance of convenience favours a stay because a 25-ward election is, in essence, inevitable because of the introduction of Bill 31 and because the Province will seek to suspend any declaration of invalidity should it be unsuccessful on appeal.

82. A 25-ward election is far from inevitable. The Province cannot guarantee Bill 31 will pass on a free vote, nor that it will receive Royal Assent given its unprecedented use of the notwithstanding clause. Moreover, the Province has not asked for an expedited hearing of their appeal.

83. Finally, granting the stay is inconsistent with the democracy principle. The electoral process mandated by Bill 5 is both unfair and unconstitutional. Justice Belobaba's ruling found that the electoral process prescribed by Bill 5 breached the s. 2(b) rights of both electors and candidates, and could not be saved under s. 1.

City of Toronto et al, supra para 8 at paras 59 – 61.

84. Electoral fairness is a fundamental value of democracy. Bill 5 undermines the fairness of the municipal election for both candidates and electors. If a stay is granted on the present appeal, it will further exacerbate this unfairness:

> The Supreme Court has stated time and again that "preserving the integrity of the election process is a pressing and substantial concern in a free and democratic society." Passing a law that changes the City's electoral districts in the middle of its election and undermines the overall fairness of the election is antithetical to the core principles of our democracy.

City of Toronto et al, supra para 8 at para 73

Figueroa v Canada (Attorney General), 2003 SCC 37 at paras 37, 50, 51, 72.

85. To grant this stay would permit the upcoming election to be run in a manner that violates the constitutional rights of candidates and electors. Candidates would be plunged back into the confusion of an unfinished 25-ward nomination process, less than 40 days before the Election. Electors would not be able to cast a vote that would result in effective representation. It is not difficult to see how this offends the democracy principle. It is contrary to the norms of democracy and the democracy principle to strip candidates and electors of the ability to participate in a fair 2018 municipal election.

Perpetuating a violation of the constitutional principle of democracy cannot be in the public interest.

E. The order requested by the province requires this court to step into the shoes of the legislature

86. The province requests "consequential relief" on this motion that asks this Court not only to stay the order of the court below, but also to amend legislation and regulations to address gaps and shortfalls created by the hasty passage of Bill 5.

Factum of the Province at paras 32-33.

87. It is the role of the courts to interpret and apply the law, not to make it.

88. This Court should not "over step its bounds" and enter into the "legitimate sphere of activity" of the legislature in order to remedy a problem that the legislature itself created by passing an unconstitutional law more than halfway through the City of Toronto's municipal election. The Province argues on this motion that the court below erred by intruding upon the legislative sphere. The irony is not lost on the parties that it now asks this Court to do the same. No assistance from this Court is necessary, nor should it be given.

Factum of the Province at para 17 (e).

PART IV. ORDER REQUESTED

89. The Intervenors request that the Appellant's motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 17, 2018

Per:_____
Donald Eady / Caroline V. (Nini) Jones / Jodi Martin
Paliare Roland Rosenberg Rothstein LLP
Lawyers for the Intervenors

SCHEDULE "A" – AUTHORITIES

1. *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151.

2. *RJR-MacDonald Inc. v Canada (AG),* [1994] 1 SCR 311 (SCC).

3. *Metropolitan Stores (MTS) Ltd. v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110 (SCC).

4. *Frank v Canada (Attorney General)*, 2014 ONCA 485.

5. *Ogden Entertainment Services v. Retail Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440* (1998), 38 OR (3d) 448 (Ont CA).

6. *Sauvé v Canada (Chief Electoral Officer)*, [1997] 3 FC 628 (Fed Ct), aff'd, 71 ACWS (3d) 1024 (Fed CA), leave to appeal to SCC ref'd.

7. *Reference Re Secession of Québec*, [1998] 2 SCR 217 (SCC).

8. *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3d) 505, 2001 CarswellOnt 4275 (Ont CA).

9. *Fontaine v Canada (Attorney General),* 2018 ONCA 749.

10. *Noble v Noble* (2001), 119 ACWS (3d) 183 at para 16 (Ont Sup Ct [Comm List]).

11. *Kanda Tsushin Kogyo Co. v. Coveley* (1997), 96 OAC 324, 1997 CarswellOnt 80 at para 14 (Ont Div Ct).

12. *Centre Ice Ltd. v National Hockey League* (1994), 166 NR 44, 1994 CarswellNat 1332 at para 7 (Fed CA).

13. *F(S) v Ontario (Director of Income Maintenance, Ministry of Community & Social Services),* 49 OR (3d) 564 at paras 4-6 (Ont CA).

14. *Tabah c Quebec (Procureur general,)* [1994] 2 SCR 339 (SCC).

15. *82009 Ontario Inc. v Harold E Ballard Ltd*. (1991), 26 ACWS (3d) 627, 1991 CarswellOnt 427 (Ont Div Ct).

16. *Canada v Canadian Council for Refugees,* 2008 FCA 40.

17. *Council of Canadians v Canada (Attorney General),* 2015 ONSC 4601.

18. *Gould v Attorney General of Canada,* [1984] 1 FC 1133 (Fed CA), aff'd [1984] 2 SCR 124 (SCC).

19. *Figueroa v Canada (Attorney General)* (1997), 34 OR (3d) 59, 1997 CarswellOnt 1782 (Ont Div Ct).

20. *Figueroa v Canada (Attorney General),* 2003 SCC 37.

SCHEDULE "B" – STATUTES AND REGULATIONS

City of Toronto Act, 2006, SO 2006, c 11, Sch A

Purposes of this Act

2 The purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:

1. Determine what is in the public interest for the City.

2. Respond to the needs of the City.

3. Determine the appropriate structure for governing the City other than with respect to the composition of city council and the division of the City into wards.

4. Ensure that the City is accountable to the public and that the process for making decisions is transparent.

5. Determine the appropriate mechanisms for delivering municipal services in the City.

6. Determine the appropriate levels of municipal spending and municipal taxation for the City.

7. Use fiscal tools to support the activities of the City.

Municipal Elections Act, 1996, SO 1996, c 32, Sch

Cost of election payable by local municipality

7 **(1)** Unless an Act specifically provides otherwise, the costs incurred by the clerk of a local municipality in conducting an election shall be paid by the local municipality.

Payment on certification

(2) The local municipality shall pay the costs as soon as possible after its clerk has signed a certificate verifying the amount.

…

Rules of Civil Procedure, RRO 1990, Reg 194

Stay by Order - By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

…

Court of Appeal File No: C65861 (M49615)
Court File No. CV-18-00602494-0000
Court File No. CV-18-00603633-0000
Court File No. CV-18-00603633-0000

ROCCO ACHAMPONG Applicant (Respondent in appeal)	-and-	**ONTARIO** Respondent (Appellant)	-and-	**CITY OF TORONTO** Respondent (Respondent in Appeal)
CITY OF TORONTO Applicant (Respondent in appeal)	-and-	**ATTORNEY GENERAL** Respondent (Appellant)		
CHRIS MOISE *et al* Applicant (Respondent in appeal)	-and-	**ATTORNEY GENERAL** Respondent (Appellant)	-and-	**CITY OF TORONTO** Respondent (Respondent in Appeal)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE INTERVENORS JENNIFER HOLLETT et al. (RESPONDENTS IN APPEAL) (STAY PENDING APPEAL)

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