

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHRIS MOISE and ISH ADERONMU and PRABHA KHOSLA on her own behalf and on
behalf of all members of WOMEN WIN TORONTO**

Applicants

- and -

**ATTORNEY GENERAL OF ONTARIO and
THE CORPORATION OF THE CITY OF TORONTO**

Respondents

APPLICATION under Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194

REPLY FACTUM OF THE APPLICANTS

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A. The Charter Breaches are Not Justified

1. Relying solely on the legislative history of Bill 5, the government has identified two professed objectives they claim to be pressing and substantial: voter parity, and improved efficiency/effectiveness of Council decision making.

(a) Achieving Greater Voter Parity

2. In identifying voter parity as one of the objectives underlying Bill 5, the AGO relies on the responsible Minister's statement at Second Reading. However, achieving greater voter parity was scarcely adverted to by the responsible Minister, and not at all by the Premier, in the course of debate. The focus of the Minister's speech at Second Reading was squarely on saving taxpayers money – an objective on which the government does not rely for the purposes of s. 1 – and on “streamlining” Council to make it less “dysfunctional”.¹ These were also only objectives endorsed by the Premier,² and also the only objectives reflected in official communications, which said nothing about voter parity and spoke exclusively of the need to reduce the cost and size of government.³ Indeed, in the passage excerpted at paragraph 30 of the respondent's submissions, in which the responsible Minister is purported to “set out the rationale for Bill 5”, he is in fact simply recounting the views of those City Councillors who support the 25-ward model, and the benefits they believe will flow from the shift to that model.

3. In demonstrating that the legislation pursues a pressing and substantial objective, “it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place.”⁴ Certainly, to the extent that voter parity was addressed by the Minister, it was not the animating objective behind Bill 5. In the Applicants' submission, achieving greater voter

¹ *Ibid* at 1620, 1630.

² Ontario. Legislative Assembly. Official Report of Debates (Hansard), 1st Sess, 42nd Parl, August 2 2018 at 1040.

³ City of Toronto Application Record, Tab 3, Affidavit of Fiona Murray affirmed August 22, 2018, Exhibit “E”.

⁴ *Irwin Toy Ltd v Québec*, [1989] 1 SCR 927 at 984; *R v Zundel*, [1992] 2 SCR 731 at 761; *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 334.

parity was not the purpose of Bill 5 at the time it was enacted, but rather a *post hoc* rationalization.

4. However, even if voter parity is found to be an animating objective of Bill 5, it is not pressing and substantial. In order to be pressing and substantial, any objective must necessarily be one that promotes, or at the very least adheres to, the values and principles essential to a free and democratic society, which “are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown... to be reasonable and demonstrably justified”.⁵

5. In *Carter*, the Supreme Court held that the principles underlying a free and democratic society “are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity.” Our democratic system “is rooted in the tradition of effective representation and not in the tradition of absolute or near absolute voter parity”; “effective representation” is the “Canadian ideal”.⁶ Further, representation in our democratic system of government “comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative” – that is, elected officials serving both legislative and ombudsperson roles.⁷

6. Parity of voting power, although a first condition of effective representation, is “not the only factor to be taken into account in ensuring effective representation;”⁸ indeed, “it is a

⁵ *Oakes*, *supra* at 136.

⁶ *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 SCR 158 at 187 [*Carter*]. See also *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (ON LPAT) at para 40.

⁷ *Carter*, *supra* at 183.

⁸ The Court specifically adverts to factors such as geography, community history, community interests and minority representation, which must be accommodated to ensure that legislative bodies “effectively represent the diversity of our social mosaic” as well as “to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society.” *Carter*, *supra* at 184,188

practical fact that effective representation often cannot be achieved without taking into account countervailing factors.”⁹ To the extent that parity can be achieved, “it may prove undesirable because it has the effect of *detracting* from the primary goal of effective representation.”¹⁰ To insist on voter parity may “deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their ombudsman role.”

7. That is precisely the mischief worked by Bill 5. The 25 ward model both divides some communities of interest and amalgamates others to a far greater extent than the existing 47 ward model, thus impairing the ability of citizens with distinct interests to achieve an effective voice in the legislative process. At the same time, the 25 ward model vastly increases the population of each constituency, from an average of approximately 61,000¹¹ to an average of approximately 110,000.¹² Given the nature and structure of municipal government, Bill 5 thus deprives all Toronto electors of effective assistance from Councillors in their “ombudsperson” role. It also debases and dilutes the vote of a Toronto elector relative to the vote of an elector in any other city in the province, thus undermining “[r]espect for individual dignity and social equality”.¹³

8. By seeking to achieve voter parity to the exclusion of all other relevant considerations, Bill 5 significantly undermines the effective representation that lies at the core of our democratic system. An objective that is antithetical to the values of a free and democratic society cannot possibly be characterized as pressing and substantial, and thus cannot justify a *Charter* breach.

⁹ *Carter, supra* at 184.

¹⁰ *Ibid.* [Emphasis added.] In some instances, therefore, effective representation and good government compel consideration of other factors: *Ibid.* at 188.

¹¹ Moise Application Record, Tab 6, Affidavit of Mayer Siemiatycki sworn August 21, 2018, Exhibit “B” at 27.

¹² Davidson Affidavit at para 40.

¹³ *Carter, supra* at 188. The average ward size for other municipalities in Ontario is 32,600, which means that the vote of a Toronto elector will be worth less than one-third of the vote of an elector in another municipality.

(b) Increasing Efficiency & Effectiveness is Not Pressing and Substantial

9. While some deference may be accorded to Parliament's regulation of the electoral process relating to the "nature and sufficiency of the evidence required" in the justification analysis,¹⁴ logic and common sense merely supplement, rather than substitute for, social science evidence.¹⁵ Moreover, the government still bears the burden of demonstrating – not simply asserting – the harm it purports to address.¹⁶

10. In this case, the government has not identified or adduced any social scientific or other cogent or substantive evidence of the alleged harm, namely the ineffectiveness and inefficiency of Toronto city council. By the government's own admission, its policy judgment with respect to that issue is supported solely by "common sense and experience."¹⁷ There is quite simply no evidentiary basis to establish the alleged harm.¹⁸ In the absence of demonstrable harm, the *Charter* breaches resulting from Bill 5 cannot be said to further a pressing and substantial objective.

(c) The Means Chosen are Grossly Disproportionate

11. Even if the professed government objectives were pressing and substantial, there is no rational connection between greater voter parity and the imposition of the FEDS. This is because, as the OMB found, the difference between the FEDS and the 47-ward model is insignificant when variances are considered in terms of number of people rather than percentages.¹⁹ Neither is the imposition of FEDS minimally impairing, given that government could have made more

¹⁴ *R v Bryan* at para 28, explaining *Harper v Canada*, 2004 SCC 33 at para 88 (*per* Bastarache J) and *Thomson Newspapers*, [1991] 2 SCR 158 (in which Bastarache J delivered the majority judgment).

¹⁵ *Bryan, supra* at paras 35, 41, 43, 47 (*per* Bastarache J); 69-78 (*per* Fish J); 101-103 (*per* Abella J, for McLachlin CJ and Binnie and LeBel JJ, dissenting but not on this point).

¹⁶ See *Bryan* at para 67 *per* Fish J.

¹⁷ Respondent's factum at para 93. None of the cases cited by the respondent stand for the proposition that the government can rely on mere "common sense and experience" to justifying a *Charter* breach.

¹⁸ This is in contrast to *Thomson Newspapers, supra*, *Libman v Québec (AG)*, [1997] 3 SCR 569, *Harper, supra* and *Bryan, supra*.

¹⁹ *Di Ciano, supra* at paras 38-39.

carefully tailored adjustments to ward boundaries in areas of concern while leaving the remainder of the electoral map intact.²⁰ Equally, there is no evidence of rational connection between increased effectiveness of Council functioning and a decreased number of Councillors, nor is there evidence that a *mid-election* reduction is the only reasonable way to achieve the objective of increased effectiveness, or that in the rush to legislate, the government averted to any other options.

12. The salutary effects of Bill 5 are minimal. At their highest, they consist of a marginal and temporary improvement²¹ in voter parity as between Toronto wards and whatever efficiency gains *might* be achieved through reducing the number of Councillors. The deleterious effects, in contrast, are both extensive and profound. As set out above, Bill 5 achieves voter parity at the expense of effective representation, one of the foundational principles underlying a free and democratic society. Its *Charter*-infringing effects similarly undermine democratic principles and process. Bill 5 trenches severely on expression and association that lies at the core of the constitutional guarantee of fundamental freedoms. This is not a case in which electoral expression is simply delayed, or subject to registration requirements or financial thresholds, but rather effectively and retrospectively nullified and eliminated. Further, the s 2 violations have a disproportionate and discriminatory s 15 impact on equity seeking groups that exacerbates their historical disadvantage in City politics. Finally, Bill 5 undermines expressive participation and trust in the electoral process.²²

²⁰ See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para 160.

²¹ Discrepancies between FEDS will only increase as the population of Toronto continues to change.

²² As the Organization for Security and Cooperation in Europe observes in its *Guidelines for Reviewing a Legal Framework for Elections*: “Electoral legislation should be enacted sufficiently in advance of elections to enable voters and all participants in the process – including election-administration bodies, candidates, parties and the media – to become informed of the rules. Electoral legislation enacted at the “last minute” has the potential to undermine trust in the process and diminish the opportunity for political participants and voters to become familiar with the rules of the electoral process in a timely manner.”

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2018

Howard Goldblatt Steven Barrett Christine Davies Heather Ann McConnell  Geetha Philipupillai

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Proceeding commenced at Toronto

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