

ONTARIO PREMIER TO SET PRECEDENT INVOKING NOTWITHSTANDING CLAUSE

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For more information on the circumstances which led to the City's challenge of the Act, please see our earlier bulletins published on [July 27](#) and [August 1, 2018](#).

In an unprecedented decision^[1] released on September 10, 2018, Superior Court Justice Edward Belobaba made a finding of unconstitutionality and struck down the provisions of the provincial *Better Local Government Act, 2018* (the "**Act**"). The operative provisions of this Act put forward by Premier Doug Ford's government aimed to reduce the number of municipal wards and councillors in the City of Toronto from 47 to 25.

While acknowledging that the Province has authority under s.92(8) of the Constitution Act to pass laws relating to "Municipal Institutions in the Province," Justice Belobaba concluded that the Ontario government "clearly crossed the line" by violating candidates' and voters' freedom of expression, as guaranteed under s.2(b) of the *Canadian Charter of Rights and Freedoms* (the "**Charter**").^[2]

The Province has confirmed that it will be appealing the decision and, in an unprecedented move in Ontario, invoking s.33 of the *Charter*, known as the "notwithstanding clause."

(a) Candidates' Freedom Expression

According to Justice Belobaba, having been passed in the midst of an election campaign, the Act violated candidates' freedom of expression. He found that political expression is at the very heart of the values sought to be protected in s.2(b) of the Charter, noting that the "expressive activity of candidates competing in the City's ongoing election obviously falls within [this definition]."^[3]

Justice Belobaba found that the Act substantially interfered with candidates' free expression, explaining that by the time the Act was introduced, most candidates had invested considerable amounts of time and money campaigning in the original 47 wards. As a result of widespread confusion amongst both candidates and voters caused by the introduction of the Act, candidates' efforts to convey their political message were "severely frustrated and disrupted."^[4] The timing of the introduction of the Act rendered candidates unable to present

their positions, undermining the notion of a fair and equitable election: “where a democratic platform is provided . . . and the election has begun, expressive activity in connection with that platform is protected against legislative interference.”^[5]

(b) Voters' Freedom of Expression

Justice Belobaba's decision reinforces voting as one of the most important forms of expression protected by the Charter. He found that by nearly doubling the average size of the City's wards, the Act breached municipal voters' freedom of expression. According to Justice Belobaba, free expression protects voters' ability to cast votes that can result in meaningful and effective representation.^[6] Citing the findings of the Toronto Ward Boundary Review^[7], Justice Belobaba concluded that the size of the wards proposed by the Act would render effective representation impossible and, accordingly, he found that voters' rights were violated.^[8]

Justice Belobaba found that neither of these violations of free expression could be justified as reasonable limits under s.1 of the Charter, and stated that the City's election would proceed on October 22, 2018 on the basis of 47 wards.^[9]

The Ontario Provincial Government's Response

Shortly after Justice Belobaba released his decision, Premier Ford announced that his government would appeal the decision to the Ontario Court of Appeal (“**ONCA**”). In addition, he announced that he would immediately recall Ontario's Legislature and introduce legislation invoking s.33 of the Charter in order to revive the Act in time for the October 22 municipal election. Such a step would be unprecedented.

The invoking of s.33, known as the “notwithstanding clause,” functions to insulate legislation from the effect of certain provisions of the Charter. It has rarely been used by any provincial government since its enactment in 1981, and has never been used by the Ontario government. This section provides that, through a simple majority vote, the legislature may expressly declare that an act be exempt from the operation of certain enumerated provisions of the Charter, including the s.2 right to freedom of expression.

Uncertain Impacts

Despite the Ontario Superior Court of Justice's decision, there is still uncertainty as to how the upcoming election will unfold.

In the unlikely circumstance that the Ontario government simply chooses to appeal Justice Belobaba's decision, and not invoke s.33 in legislation anticipated to be introduced this week, the ONCA may stay the Superior Court decision pending the appeal decision (i.e., the election could proceed on October 22, 2018 with 25 wards). In this scenario, however, City Council would likely choose to seek postponement of the municipal

election (which is within its municipal powers) to await the appeal decision.

However, the potential delay associated with an appeal process may be irrelevant in light of the Ontario government's decision to invoke s.33, because any legislation passed that exempts the Act from Charter interference will override a decision of the ONCA based on Charter violations.

Whether or not the Ontario government successfully invokes s.33, municipal candidates will likely be materially impacted. For example, many candidates anticipated that the ward boundary changes would be upheld and ceased campaigning as a result. These candidates will have been left with less time to organize volunteers and advertise their candidacy. In light of such uncertainty, donations of money and resources to campaigns will likely have an even more significant effect on a candidate's success than in previous elections.

Further Information

If you have further questions relating to the above matters, please feel free to contact Melanie Paradis (Director) from McMillan Vantage, and from McMillan LLP: Mary Flynn-Guglietti (Partner & Co-Chair, Municipal Law), Kailey Sutton (Associate, Municipal Law), Nicole Rozario (Associate, Advocacy and Employment).

by Melanie Paradis, Kailey Sutton, Nicole Rozario and Christopher Tworzyanski, Articling Student

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

[2] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at para 9; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.2(b).

[3] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at para 27.

[4] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at para 31.

[5] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at para 37.

[6] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at para 47.

[7] Available online at [Draw the Lines](#).

[8] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at paras 52 and 60.

[9] *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151 at para 61.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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