

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 15, 2017

CASE NO(S): MM170033

PROCEEDING COMMENCED UNDER subsection 128(4) of the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A

Appellant: Justin Di Ciano
Appellant: Brian T. Graff
Appellant: Giorgio Mammoliti
Appellant: Mount Dennis Community Association; and others
Subject: By-law 267-2017 to re-divide the City of Toronto's
Ward Boundaries
Municipality: City of Toronto
OMB Case No.: MM170033
OMB File No.: MM170033
OMB Case Name: Di Ciano v. Toronto (City)

PROCEEDING COMMENCED UNDER subsection 222(4) of the *Municipal Act*, 2001, S.O. 2001, c. 25, as amended

Appellant: James Gordon Smith
Subject: By-law 267-2017 to re-divide the City of Toronto's
Ward Boundaries
Municipality: City of Toronto
OMB Case No.: MM170033
OMB File No.: MM170033

PROCEEDING COMMENCED UNDER subsection 128(4) of the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A

Appellant: Lakeshore Planning Council Corp.
Appellant: Anthony Natale
Subject: By-law 464-2017 to amend By-law 267-2017
Municipality: City of Toronto
OMB Case No.: MM170033
OMB File No.: MM170047

Heard: October 10, 11, 12, 13, 16, 17 and 19, 2017 in
Toronto, Ontario

APPEARANCES:

<u>Parties</u>	<u>Counsel*/Representative</u>
City of Toronto	Brendan O’Callaghan* and Matthew Schuman*
Justin Di Ciano and Anthony Natale	Bruce Engell* and Kyle Kidd (student-at-law)
Kevin Wiener	Self-represented
Brian Graff	Self-represented
Giorgio Mammoliti	Self-represented
James Gordon Smith	Self-represented
Lakeshore Planning Council Corporation	Peggy Moulder

**DECISION DELIVERED BY JAN de P. SEABORN AND HUGH S. WILKINS AND
ORDER OF THE BOARD**

INTRODUCTION

[1] The matter before the Ontario Municipal Board (“Board”) consists of several appeals in respect of By-law No. 247-2017 and By-law No. 464-2017 (“the By-laws”) enacted by Council for the City of Toronto (“City”) for the purpose of re-dividing the City into 47 Wards. Pursuant to the provisions of s. 128(1) of the *City of Toronto Act, 2006* (“Act”), the City has the authority to enact a by-law to divide or subdivide the municipality into wards or to dissolve the existing wards. Any person may appeal to the Board (s. 128(4) of the Act) objecting to a ward boundaries by-law. After hearing the appeal, the Board may make an order affirming, amending or repealing the by-law (s. 128(7) of the Act). Similar provisions are found in s. 222 of the *Municipal Act*.

[2] The City's By-laws have been appealed by Justin Di Ciano and Anthony Natale ("Di Ciano and Natale Appeals"), who were represented by Mr. Engell; Kevin Wiener ("Wiener Appeal"), who appeared as counsel on his own behalf; Brian Graff ("Graff Appeal"), Giorgio Mammoliti ("Mammoliti Appeal"), and James Gordon Smith ("Smith Appeal"), each of whom were self-represented; and the Lakeshore Planning Council Corporation ("LPCC Appeal"), represented by Ms. Moulder.

[3] The By-laws under appeal re-divide the City's existing 44 wards into 47 wards, effective for the 2018 municipal election (as long as the By-laws come into force by January 1, 2018). Collectively, the By-laws provide new boundaries for 40 wards and maintain existing boundaries for 7 wards. The bulk of the boundary changes are relatively minor, providing for minimal change, maintaining key historic boundaries and grouping communities of interest. The significant changes are that: 3 wards are added to the City's Downtown (as defined in the City's Official Plan); one ward is added in Willowdale; and existing Wards 14, 17 and 18 are combined into 2 wards (Exhibit 3, MAP 6: Recommended Wards with Refinements (47 Wards), p. 698).

[4] In support of the By-laws, the City called three witnesses: Beate Bowron and Gary Davidson (both qualified as land use planners, with expertise in ward boundaries); and Michael Wright (land use planning, with expertise in demographic analysis and population, household and employment projections). Andrew Sancton (municipal government, with expertise in ward boundaries) and Peter Norman (economist with expertise in demographics) testified in support of the Di Ciano and Natale Appeals. In addition, Mr. Natale testified on his own behalf. Mr. Wiener, Mr. Graff, Mr. Mammoliti and Mr. Smith did not call any evidence. However, they each cross-examined the various expert witnesses and made written and oral submissions at the conclusion of the evidence. Ms. Moulder represented the LPCC and its Chair, Timothy Dobson, filed a witness statement and testified. There was one Participant, the Bloor East

Neighbourhood Association, and its President, Linda Brett, filed a participant statement and provided testimony to the Board, largely in support of the City's position.

THE APPEALS

(a) Di Ciano and Natale Appeals

[5] Mr. Di Ciano and Mr. Natale seek an order from the Board dividing the City into 25 wards, with name and boundaries identical to the current Federal Electoral Districts ("FEDS"). It was their position that the new ward boundaries set out in the By-laws do not meet the principle of effective representation or achieve voter parity (the relationship between a ward's population and the average ward population of all municipal wards). The adoption of the latest FEDS is proposed because this system will: ensure a fair election in 2018; ensure that future elections are fair; result in boundaries which are produced regularly through an unassailable, arms' length open public process which can quickly, defensibly and inexpensively be adopted by the City on an ongoing basis (Engell, Argument, para. 2).

(b) Wiener Appeal

[6] Mr. Wiener's appeal seeks a decision from the Board that maintains a 44 ward boundary structure, albeit he proposes boundary shifts for several wards. He submits that voter parity is a prime condition for effective representation and submits that the operative question is whether at the time of the appeal the ward boundaries will provide effective representation. It was Mr. Wiener's position that the City's consultants fettered their analysis by relying on population projections for the 2026 election year and did not sufficiently analyse other options for the 2018 and 2022 elections. He submits that the ward boundaries set out in the By-laws may provide voter parity in the future, but not in 2018.

(c) Graff Appeal

[7] Mr. Graff's appeal seeks Board approval of the ward boundaries set out in the By-laws with two alterations for 2018 and 2022. First, he submits that only 43 wards should be used for the 2018 and 2022 elections in order to achieve better voter parity and reduce costs. Second, he submits that the boundaries of Recommended Ward ("RW") 36 and RW 37 along Queen Street East to the west of Coxwell Avenue should be shifted to keep both sides of Queen Street East within the same ward. He questions the value of the boundaries that permit significant variances in voter parity for the 2018 and 2022 elections to achieve parity in later elections based on possible future populations that are difficult to predict.

(d) Mammoliti Appeal

[8] Mr. Mammoliti's appeal was predicated on the basis that there has been inadequate public engagement and public consultation with respect to the By-laws. He submits that issues, including geography, community history, community interest and the representation of minority groups, have not been given adequate weight. Mr. Mammoliti requests that the Board send the matter back to Council for further consideration and no order be made that divides, re-divides or dissolves the existing 44 ward structure.

(e) LPCC Appeal

[9] The LPCC's position is that the City's current system of municipal governance needs to be changed so that councillors are required to receive representations from residents through the creation of community boards consisting of community members who hold public meetings on matters relating to the welfare of the district and its residents. To facilitate this, LPCC submits that the number of wards and councillors should be reduced. On this basis, the LPCC generally supports a 25-ward structure.

(f) Smith Appeal

[10] Mr. Smith's appeal was based on one discrete issue. He submits that the boundary between RW 33 and RW 34 should be shifted to bring the area known as "Crothers Woods" back into RW 33 where it existed prior to 2000. Mr. Smith argues that his proposed change would have no impact on effective representation. Crothers Woods is a protected Environmentally Significant Area and no people live there and he submits that the changes should be made for historical reasons, with no impact on ward populations.

THE CITY'S WARD BOUNDARY REVIEW PROCESS

[11] The By-laws under appeal were developed following a process that began in June 2013 when Council authorized that a third-party consultant be retained to undertake a ward boundary review for the City. Known as the Toronto Ward Boundary Review ("TWBR") project, Dr. Davidson and Ms. Bowron were retained by the City as the consultants. They explained that they analyzed the status quo; developed and reviewed options; selected a preferred option; and refined their recommendations, culminating in City Council approving new wards for the City in November, 2016 and the adoption of the By-laws in March and April, 2017.

[12] The almost four-year TWBR project was described as a substantial undertaking requiring sizeable financial and human resources: "During this time, the project held over 100 face-to-face meetings with Members of Council, School Boards and other stakeholder groups and 24 public meetings and information sessions and produced 7 substantial reports" (Exhibit 4, Bowron Witness Statement, para. 9). The project team prepared a *Background Research Report ("Research Report")*, *Options Report* and a *Final Report* (a draft of each report was reviewed by a 5-person Advisory Panel). Following direction from the Executive Committee, an *Additional Information Report*

followed by a *Supplementary Report* was issued, with the final result being Council's decision to enact the By-laws under appeal.

[13] The *Research Report* examined other ward boundary reviews, the legislative framework, Board decisions, ward history in the City, development and electoral issues and incorporated comments from the Advisory Panel.

[14] The *Options Report* (August 2015, revised October 2015) analyzed eight options for drawing new ward boundaries. The purpose of the report was to commence a discussion about a new preferred ward system among the public, stakeholders and Council. The methodology used for the development of the options addressed the components of effective representation plus: Toronto's population growth; a ward structure that will last for multiple elections; options that are unique; balanced ward population size; and effective new boundaries (Exhibit 4, Davidson Witness Statement, para. 50). The conclusion reached at this stage of the review was that five of the eight options provided for effective representation and should be carried forward. These were termed: minimal change; 44 wards; population per ward at 50,000 (small wards); population per ward at 75,000 (large wards); and wards drawn on natural and physical boundaries.

[15] The prospect of using the FEDS to draw new ward boundaries was addressed in the *Options Report*. It commented that during Round One of the civic engagement and public consultation process the idea of using the boundaries of the 25 federal ridings covering the City was discussed in some detail. The TWBR stated that with 25 wards each would have a population of about 123,000, resulting in very large wards. It stated that while there was little public support for this outcome, there was considerable support for an option that would divide the population in each federal riding in half, resulting in 50 wards with an average population of about 62,000. The TWBR average population target per ward was determined to be 61,000. The FEDS (whether 25 or 50

wards) option was not pursued as the conclusion reached by the TWBR team was that it would not achieve effective representation:

This option does not resolve the issue of very large wards in the Downtown, Willowdale and southern Etobicoke and the city's numerous small wards. It merely continues most of the inequities of the current situation that led to the TWBR. An option based on using the federal riding boundaries and then dividing them into two will not achieve effective representation and has, therefore, not been pursued (*Options Report*, Exhibit 2, p. 414).

[16] The *Final Report* was reviewed by the City's Executive Committee on May 24, 2016. The recommendation from the TWBR was to increase the number of wards from 44 to 47. It recommended addressing existing voter parity issues with a minimum number of changes to the existing boundaries. It recommended minimally increasing the number of wards to accommodate projected population growth, retain an average ward size of 61,000 people to ensure a manageable capacity for councillors to represent their constituents, achieve effective representation in all wards by 2026, and be workable through to the 2030 election.

[17] Following receipt of the *Final Report*, the Executive Committee requested additional information on several matters, including a "ward option that is consistent with the boundaries of the 25 federal and provincial ridings" (Exhibit 4, Davidson Witness Statement, para. 90). An *Additional Information Report* (August, 2016) was prepared and it responded to several suggestions for ward specific refinements and re-examined whether the ward boundaries could be consistent with existing federal and provincial boundaries. Thereafter the TWBR submitted its *Supplementary Report* (October 2016) and confirmed its recommended 47 ward structure (with refinements) as the new ward boundaries, effective with the 2018 election. The refinements included changes to keep several communities of interest together, including the community on either side of Sentinel Road, Regent Park, and Church-Wellesley Village.

[18] The *Supplementary Report* also responded to (among other matters) the request for additional information in respect of the City adopting the FEDS. The TWBR team maintained its advice that the FEDS should not, in their analysis, be the preferred ward structure option given that there was little support for this option at public meetings or from councillors.

[19] In November, 2016 Council approved the new 47 ward structure, as recommended in the *Supplementary Report*. In March 2017, the implementing by-law (By-law 267-2017) was passed and in April 2017 Council adopted technical amendments through By-law 464-2017.

THE APPLICABLE LAW

[20] As part of their written and oral submissions, the parties provided the Board with a comprehensive overview of the body of case law that is regularly considered in municipal ward boundary reviews. The first area of law relates to what constitutes “effective representation”. In *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R 158 (referred to as “*Carter*”), the Supreme Court of Canada found that the purpose of the right to vote enshrined in s. 3 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) is the right to effective representation. The Court examined the conditions of effective representation, stating as follows:

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation. But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation (pp. 183-84).

[21] The Court went on to explain that “it is a practical fact that effective representation often cannot be achieved without taking into account countervailing

factors” (p. 184). Factors such as geography, community history, community interests and minority representation may need to be taken into account. “These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed” (p. 184). While the Court was dealing with proposed provincial riding boundaries for Saskatchewan, the elements of effective representation enunciated in *Carter* are routinely relied upon in evaluating ward boundary reviews.

[22] The second area of applicable law is the extent to which the Board should interfere with Council’s decision to divide, re-divide or dissolve its ward boundaries. The Board has consistently found that there must be clear and compelling reasons to interfere in a municipal council’s decision on ward boundaries (*Teno v. Lakeshore (Town)*, 2005 CarswellOnt 6386). In *Teno*, the Board adopted the approach taken in *Savage v. Niagara Falls (City)*, 2002 CarswellOnt 5430, stating that:

36 Thus, this Board accepts that there must be clear and compelling reasons for the Board to interfere in a municipal council’s decision on these matters, and it may have to be demonstrated that a municipal council has acted unfairly or unreasonably on these issues. However, if the evidence demonstrates that the decision of the municipality operates to diverge from the overriding principle of voter equity and effective representation, then the Board can only conclude that the Council has acted unreasonably. Where however the issues are not so clear cut, then it may be that the Board may accord deference to the decision of the municipal council.

[23] Regarding the relationship between the number of wards and the composition of Council, the Divisional Court has found that as a practical matter while the Board may consider the composition of council when deciding a ward boundary matter, it cannot determine that composition (*Wagar v. London (City)*, [2006] 210 O.A.C. 29). It is within the discretion of Council to address composition and to fix the number of councillors to be elected from each ward. The Board’s jurisdiction extends to the By-laws under appeal and to the matter of ward boundaries, it does not extend to address matters of governance, including how many councillors should comprise City Council.

EVIDENCE AND FINDINGS

Do the City's proposed Ward Boundaries achieve effective representation?

[24] There was general agreement amongst the parties that from a voter parity perspective, the City's existing 44 wards are out of balance. The 2014 municipal election was held just as the TWBR was starting and in that election the highest ward population was more than double the lowest ward population. The populations of the current wards range from 45,000 to 94,000 (Exhibit 2, p. 311). As Dr. Davidson said, to "achieve a balance in voter parity, not only do the large wards have to become smaller but the small wards need to get larger. This will require changes to the boundaries of many wards" (Exhibit 4, Davidson Witness Statement, para. 30). The evidence was clear that the existing ward boundaries do not achieve the voter parity component of effective representation and that the ward population imbalance is projected to increase in future elections unless there is change made to the status quo.

[25] The City's preferred approach, as expressed in the By-laws, is to increase the number of wards from 44 to 47 and in doing so, several adjustments are proposed to boundaries that have been in place since 2000. Reflecting the TWBR project team principle of "minimal change", the bulk of the existing wards will have minor boundary adjustments, with 1 ward added in Willowdale, 3 wards added to the City's downtown and 3 existing wards would be combined into 2. In arriving at the recommended 47 ward structure the TWBR considered: voter parity; natural and physical boundaries often used to separate wards; maintaining communities of interest such as geographic and historic neighbourhoods; ward history; capacity to represent (often equated with a Councillor's workload and the number of constituents that require representation); geographic size and shape of the ward; and population growth. The TWBR team's approach was based on the premise that any "ward boundary review has to balance the various components of *effective representation*. While voter parity (similar, but not identical numbers of people in each ward) is of prime importance to an individual's

'right-to-vote', not dividing neighbourhoods (if at all possible) and following clearly recognizable boundaries are also major factors" (Exhibit 3, *Additional Information Report*, p. 603).

[26] Dr. Davidson explained that the 47 ward structure is designed to be used in at least three and perhaps four, election cycles: 2018, 2022, 2026 and 2030. The TWBR established 2026 as the target or design year for the project. A target year or target election is required to draw ward boundaries. The assumption made was that given the City is growing at a rapid rate, the review had to consider future growth and where that growth is going to occur. Designing a system with a 2018 target year would have resulted, in Dr. Davison's view, in ward boundaries that would have to immediately be revisited following that election. Dr. Davidson explained that the TWBR looked to the future and considered the growth of the City in determining a new ward structure. He said that in a fast growing City, this is critical: "Determining new ward boundaries solely from the last census (2011) would yield a ward configuration out of balance at the outset (2018) that will become progressively more problematic in subsequent elections" (Exhibit 4, Davidson Witness Statement, para. 129). Consequently, what the TWBR did was use a projection scenario that reflects the *Growth Plan for the Greater Golden Horseshoe, 2006* (with a total projected population of 3.190 million for 2031). The City has detailed population projections by 599 small geographic areas called Traffic Zones ("TZs"). The City relies on these projections for use in the Official Plan and by other departments. They take into account proposed and potential development. The TWBR used the City TZ population projections, adjusted to election years, and calculated the voter parity based on population (also described as the population parity) component of effective representation for the various options under consideration.

[27] Dr. Davidson explained that the target year of 2026 to design ward boundaries remains appropriate for several reasons. He stated:

It provides stability for at least 3 elections and possibly 4. It is only 8 years in the future from the next election in 2018. It allows Toronto's

rapid growth to be accommodated, as it is more appropriate to allow wards to grow towards voter parity than away from voter parity. Selecting 2026 as the target year allows the TWBR to address the imbalance that arises from both wards with small populations that are stable and wards with large populations that are growing rapidly” (Exhibit 4, Davidson Witness Statement, para. 62).

[28] Dr. Davidson also explained that the City’s growing population will not be distributed evenly across the City. Taking into account the policies of the Official Plan, an accurate projection can be made of where the growth will occur over the next 15 years. He stated that the growing population will locate primarily in the waterfront, designated growth centres and on the avenues both in the central City and other specific locations throughout the entire City (Exhibit 2, p. 386). It was Dr. Davidson’s opinion (and Mr. O’Callaghan’s submission) that the City has good quality, provincially approved, population projections and it is entirely appropriate to rely upon these projections for ward boundary purposes (O’Callaghan Argument, paras. 45 to 49).

[29] Mr. Wright, responsible for the development of population and household projections for use throughout the City, concluded that the “population and housing projection methodology using the 2013 regional forecasts and potential housing supply as developed in 2015 are appropriate to projecting the future distribution of population for small areas in the City to 2041” (Exhibit 33, Wright Witness Statement, para. 11b)). Mr. Wright provided a thorough review of how the projections he developed were used by the TWBR project team and it was his opinion that they have been proven to be an accurate reflection of growth.

[30] In contrast, Dr. Sancton and Mr. Norman’s evidence (and the submission of Mr. Engell) was that the methodology relied upon by the TWBR was simply the wrong approach. Mr. Engell argued that projections are notoriously unreliable. The TWBR’s ambition to establish one ward structure for several election cycles was unreasonable and unrealistic. Drawing ward boundaries with a target year of 2026 suggests that fairness in a future election is more important than fairness in the current (2018) election. The philosophy of “looking forward” (adopted by the City through the use of

projections) versus “looking backward” (based on census data) was the crux of the difference of opinion between the City’s and the Appellants’ experts.

[31] The opposition argues that the City’s approach sacrifices voter parity in the next (2018) election and as a result, also sacrifices effective representation. The boundaries of federal electoral districts are reviewed after each 10-year census to reflect changes and movements in the population. Dr. Sancton’s opinion was that the target year of 2026 selected by the TWBR to achieve voter parity was “profoundly misguided”. Ward boundaries should be drawn so that voter parity is achieved as soon as possible. The TWBR approach is to move toward voter parity, rejected by Dr. Sancton and in his opinion an unreasonable approach that fails to achieve effective representation. Further, it was Dr. Sancton’s evidence that a +/- 15% variance for several wards is not acceptable. Beginning with the 2018 election, the FEDS results in better voter parity as compared to both the status quo and the TWBR options. On this basis alone, the submission made was that the FEDS should be adopted as the best means of achieving effective representation.

[32] Mr. Norman testified that population projections are often unreliable. He said census data is the most reliable population data, but that it too can be off due to undercounting and over-counting. He said that population projections for sub-city areas are built on a number of layers of information and assumptions and are particularly unreliable. He said the TWBR’s estimates are based on 2011 census data and that for 2018 they vary widely from data validated in the 2016 census. He stated that based on his calculations, the boundaries set in the By-laws will result in significantly greater variances than projected by the TWBR. It was Mr. Norman’s opinion that for population levels beyond 2018, the TWBR’s projections will likely have a very low degree of accuracy for evaluating voter parity. He said “the most accurate and reliable methodology for evaluating voter parity would be to do so with raw census population counts”.

[33] Relying in part on a previous decision of the Board which examined ward boundaries in Vaughan (*Milani v. Vaughan (City)* [2009] 63 O.M.B.R. 257), Mr. Engell submitted that the Board has rejected options where voter parity starts off poorly and improves over time. It was Mr. Engell's position that "there is no reason why starting closer to parity and growing farther away from it is inherently different from growing into parity. What must be kept in mind throughout is that an acceptable range of parity must be achieved for each election involved" (Engell, Argument, para. 70). Whether the range is acceptable on the facts of this ward boundary review is, ultimately, the major difference between the parties.

[34] A considerable amount of hearing time was dedicated to an examination of the variances involved for each election year for different ward structures. Dr. Davidson explained that voter parity is assessed in terms of "incremental percentage ranges around the average ward population. A range of plus or minus 10% is considered ideal. Population variances can be greater in order to satisfy the other criteria contained in the concept of effective representation. However, if the range gets too large without adequate reasons, effective representation is lost" (Exhibit 4, Davidson Witness Statement, para. 37a.). In assessing parity, Dr. Davidson's opinion was that +/- 15% variances result in acceptable voter parity (population) figures. The TWBR chose a target average ward size of 61,000 and a +/- 15% variance range in population (51,800 – 70,150). This choice was made to reflect minimal change, that is, keep the current average ward population at 61,000 (2011 census) and maintain as many of the current boundaries as possible.

[35] The argument against the 47 ward structure was simply that it does not provide voter parity within generally acceptable limits. The substance of the criticism was that several wards will fall outside the +/- 10% variance range for the 2018 election year (and beyond). Even if it is accepted that a variance of +/- 15% is appropriate, some wards will not achieve parity until 2026. In addition, even accepting 2026 as the

legitimate target year for parity, three wards will not fall within a +/- 15% variance (although each are close to this threshold, with the largest variance being 17.5%).

[36] The City's proposal, commencing with the 2018 election year, results in 17 wards with a variance of more than 10% and 7 wards outside a variance of 15% (Wiener Argument, para 29). On this basis, the argument made was that effective representation is not achieved in the short term. Mr. Engell argued that sacrificing voter parity in the short term (in particular the 2018 election) appears to be predicated on the assumption that fairness of a future election is more important than fairness of the current one. Leaving aside the fact that the City's experts did take issue with the methodology employed by the opposition in analyzing the variances, the City's view was that given their approach is to grow into voter parity through several election cycles, modest variances beyond +/- 15% can be tolerated. In essence, the City submitted that there is an "acceptable range of parity" for each election when comparing the 47-ward structure to the alternative proposals. "For the elections of 2018, 2022, 2026 and 2030, the vast majority (always above 87%) of the new wards fall within the +/- 15% voter parity factor" (Exhibit 4, Davidson Witness Statement, para. 285). In addition, the Board notes and relies upon the fact that communities of interest are best respected with a 47-ward structure, a factor that is a consideration in evaluating effective representation. In comparing his 44 ward structure proposal, Mr. Wiener acknowledged that the 47-ward option somewhat better respects communities of interest. Adoption of the FEDS would result in the Board imposing on the City a structure that could decrease the current 44-ward structure to 25 wards and increase individual ward population, resulting in a significant impact on the capacity to represent.

[37] The 47-ward structure does not achieve "perfect" voter parity for each election cycle. However, none of the alternative options achieve perfect voter parity either. Adoption of the FEDS (based on Mr. Norman's methodology) would result in a small improvement in voter parity (based on a +/- 15% variance) in 2018, for only a handful of wards. Mr. O'Callaghan stated in his closing submissions that one must take into

account the difference in population sizes in the City's proposed wards compared to those in the FEDS. He stated at paras. 66-70 of the City's submissions:

66. It is meaningless to compare the FED 15% voter parity variance from the average FED riding size to the 15% variance from the City's goal of 61,000 average ward population because the denominator in the case of the FED is almost twice the denominator of the TWBR.

67. A 15% variance to the FED with an average population of 111,000 is a range of 31,863 people.

68. A 15% variance to the City's preferred 61,000 people per ward is 18,300 people.

69. This demonstrates that the City's preferred goal of 15% variance from an average ward size of 61,000, achieves a much tighter band of acceptable parity than the FED.

70. In order to compare apples to apples, the variance from the average should be compared in numbers of people not in percentages.

[38] Mr. O'Callaghan goes on to submit that when the variances are compared in terms of numbers of people, the differences between them are not significant. Examining the population numbers of the areas with the largest variances in each proposal, he stated at paras. 71-72:

71. Comparing the worst case parity scenario in the TWBR to the worst case parity scenario in the FED involves the following arithmetic: If we accept Mr. Norman's numbers ... then the TWBR Revised Ward ("RW") 19 has a population variance of 37.33% which equals 45,542 people. [...]

72. From Exhibit 13, page 5, we know that FED riding Etobicoke-Lakeshore has a +21.07% variance from the average population of 111,127 which is 46,828 people.

73. The TWBR's biggest variance and the FED's biggest variance represent approximately the same number of people.

74. So if our +37% variance is a problem, which we do not accept, then it is not a problem that is solved by using the Federal Ridings because the FED's 21.07% variance results in a variance of at least as many people.

[39] Based on these submissions, and the evidence upon which they rely, the Board finds that the difference between the FEDS and the 47-ward structure is not significant and will not result in an unfair election in 2018. This is especially true taking into account all of the *Carter* criteria, including the protection of communities of interest. As indicated in the *Carter* decision, “absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible” (at p. 184). Mr. O’Callaghan submitted that factors other than equality of voter power must “figure in the analysis” (*Carter*, p. 194). The Board notes that another factor is growth projections. In *Carter*, in the context of the review of provincial ridings, the Court said given “that the boundaries will govern for a number of years - the boundaries set in 1989, for example, may be in place until 1996 - projected population changes within that period may justify a deviation from strict equality at the time the boundaries are drawn” (*Carter*, p. 195).

[40] Effective representation is the primary goal and the Board finds that the 47 ward structure, reflected in the By-laws, does achieve that goal. The Board rejects that public consultation was inadequate. In this regard, the Board adopts and relies upon the evidence of Ms. Bowron who explained the various attempts to engage the public in the process, both via community meetings, surveys and on-line engagement. Where there was interest, the TWBR re-examined options (for example, the FEDS option was re-evaluated). Certain proposed boundaries were re-visited as a result of either input from local Councillors or suggestions from the public, whether local ratepayers groups or individuals. The evidence was clear that the 47 ward structure initially recommended was in fact adjusted to reflect input from stakeholders in respect of communities of interest. The Board also finds that ward history and physical and natural boundaries, as well as geographic size and the shape of the wards were carefully considered by the City’s consultants.

Should any alternative Ward Boundary scheme be implemented by the Board?

[41] The Board has the ability to amend the By-laws under appeal to reflect a different ward structure. However, the Board should exercise this power with caution and only in the clearest of cases. On the facts of this case, the Board finds that there are no clear and compelling reasons to interfere with the decision of Council. The City acknowledged in its submissions that there are other ward boundary structures that could have been recommended to form the basis for the By-laws under appeal. In this regard, the TWBR said at the outset of its work that several different approaches could be employed to address the present imbalance. In the final analysis, the Board is satisfied that it should accord deference to the decision of Council, especially in circumstances where the City undertook a thorough review of several options prior to enacting the By-laws.

[42] The alternative proposal provided by Mr. Graff recommended 46 wards, with certain boundary adjustments. Given Mr. Graff's position at the outset of his appeal was that he generally supported the 47-ward structure with refinement, the Board is not inclined to interfere with the work of the TWBR project team and implement a 46-ward structure. One important goal of the TWBR was to maintain communities of interest and the adjustments proposed by Mr. Graff with respect to the boundaries between RW 36 and RW 37 does not necessarily improve the alignment in this part of the City. It was Ms. Bowron's opinion that RW 36 includes important communities of interest, in particular the whole Leslieville neighbourhood north of Queen Street East. Both versions of Mr. Graff's proposal would split the eastern portion of Leslieville, dividing this community of interest (Exhibit 4, Bowron Witness Statement, para. 254). The proposed RW 37 is almost identical to the current Ward 32, subject to the boundary adjustment where a small area is moved into RW 36. As a result, the City's proposal for RW 37 meets the TWBR criterion of minimal change. On this basis, the modifications proposed by Mr. Graff as they affect the downtown wards are also problematic (regardless of election year). The downtown wards are designed to align with the City's Official Plan

designation and were designed to respect minimal change to existing boundaries and maintain the average ward population of 61,000 for each election cycle. The Board relies on the analyses provided by Dr. Davidson and Ms. Bowron in responding to Mr. Graff's proposals (Exhibit 4, Davidson/Bowron Witness Statement, Section 10).

[43] In addition, Mr. Graff's ward configuration would result in a move away from parity for the 2022 and 2026 elections. Mr. Graff suggests that the City should re-visit ward boundaries more often. Under Mr. Graff's approach, there would be fewer wards for the 2018 election and the number of wards would grow in subsequent elections. Given the resources and effort expended for the current ward boundary review process, the City's evidence was that three election cycles should be covered by the outcome, a choice that is within the purview of Council. Finally, phasing in a ward would also create a different standard for voter parity downtown than in the rest of the City (O'Callaghan Argument, para. 56).

[44] Council could have chosen to adopt the FEDS. It did not do so. As indicated previously, there are 25 federal and provincial riding boundaries within the City and the ward boundaries could coincide. However, the TWBR determined at the outset to use the year 2026

...to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required. This is different from how provincial and federal riding boundaries are determined. Federal and provincial riding boundaries are adjusted every 10 years based on the most recent Census. The current federal ridings are based on the 2011 Census and they will be adjusted again following the 2021 Census. In this respect the TWBR looks to the future, while the federal and provincial riding boundary commissions look to the past" (Exhibit 3, *Additional Information Report*, p. 611).

The difference in approach was clearly explained by the TWBR as part of its recommendations. The Executive Committee had asked the consultants for additional information on the ward option that is consistent with the boundaries of the 25 federal ridings. The evidence was that the TWBR team rejected the option during its initial

screening and again when it was asked by the Executive Committee to re-visit the option. As part of the process, the variance scenarios were analyzed and maps were produced depicting the boundary adjustments. Considerable information was provided.

[45] It is clear that prior to enacting the By-laws, the City Council carefully considered precisely the ward structure that Mr. Di Ciano and Mr. Natale urge the Board to adopt, effective with the 2018 municipal election. Council had considered and rejected a petition that was submitted in June 2013 asking the City to redraw its ward boundaries to mirror the federal riding boundaries. Even if one concludes that the FEDS is a legitimate alternative, the Board finds that it should not impose an option on the City that was available but clearly rejected by Council.

[46] Adopting the FEDS was also supported by the LPCC, albeit its main focus was to encourage the City to adopt an updated governance structure. It was Mr. Dobson's evidence and the submission of Ms. Moulder that implementing the FEDS would provide greater flexibility in designing a governance structure. For example, the 25 wards need not result in 25 councillors or 50 councillors. A different scheme could be implemented and implementing a FEDS would provide the greatest opportunity for change. Mr. Dobson testified that governance was a primary concern brought forward at near every public meeting held in connection with the ward boundary review. A community board structure is preferred by the LPCC and clearly the group has done considerable work and research on the issue. Nonetheless, on a ward boundary appeal the Board's jurisdiction does not extend to mandating a new structure of governance as proposed by LPCC. As indicated above, it is within the discretion of Council to address composition and fix the number of councillors. In this regard, it was Mr. Natale's evidence that there should be a reduction in the number of councillors, one of the reasons he urged the Board to adopt a 25-ward alternative. Yet as a practical matter, the Board was told that a 25-ward alternative could easily lead to 50 wards if the population for each ward were divided in half.

[47] Mr. Wiener's proposal was based on continuing with a 44-ward structure (with different boundaries than exist today). Mr. Wiener argued that his option provides significantly better voter parity in 2018 as compared to the City's approach. With respect to 2026 (City's target year), Mr. Wiener's position was that his option and the City's structure provide voter parity within generally acceptable limits. From the perspective of reflecting natural boundaries and incorporating public consultation, Mr. Wiener submitted that both options are equal. Finally, as indicated earlier Mr. Wiener agreed that the City's approach somewhat better respects communities of interest. Similar to the position taken by Mr. Engell, Mr. Wiener's primary objection to the 47-ward structure was that the variances for the 2018 election fail to maintain voter parity. He urged the Board to adopt his proposal at 44 wards, the 46-ward option proposed by Mr. Graff or the FEDS on the basis that "all three options will provide acceptable levels of voter parity for the 2018 election. Where there are deviations from voter parity, all three options justify those deviations by reference to the other *Carter* criteria of effective representation" (Wiener Argument, para. 49). For reasons explained earlier, the Board rejects the notion that the deviations in voter parity for the alternatives result in "significantly better" effective representation than those that arise in the 47-ward structure. Perfect parity is never achieved.

[48] Mr. Smith urged the Board to amend the By-laws for the purpose of adopting one discrete boundary change between RW 33 and RW 34. Mr. Smith argued that the area known as Crothers Woods should be brought back into RW 33, where it had existed for decades. Based on the preference of the TWBR for minimal change, the City's preference is that the boundary should not be adjusted. However, Dr. Davidson did acknowledge that Mr. Smith's proposed changes will not alter the current and projected populations in either RW 33 or RW 34, given there are no residents in the area in question (Exhibit 4, Davidson Witness Statement, para 226). Two options were proposed and while opposed to any change, the City indicated that if a boundary adjustment were made, its preference is "version 2": where the boundary would continue along the Don Valley Parkway westward to Pottery Road. This adjustment

would not affect the voter parity component of effective representation and provide a more coherent physical boundary for RW 33.

[49] Unlike other Appellants' proposals, Mr. Smith's proposed change does not alter the degree of effective representation provided by the boundaries in the By-laws. The Board finds that based on the historical reasons advocated by Mr. Smith, and taking into account the City's decision to not produce compelling evidence opposing Mr. Smith's proposals, the Board grants Mr. Smith's Appeal and amends the By-laws in accordance with "version 2" of his proposal with the RW 33 boundary continuing along the Don Valley Parkway westward to Pottery Road.

[50] Finally, the Board rejects the relief sought by Mr. Mammoliti which is, in essence, "do nothing". As indicated at the outset, maintaining the status quo would fail to achieve effective representation and would not account for the significant growth that has occurred since 2000 (and is projected to occur going forward) in certain areas of the City, particularly the Downtown. All of the experts who testified agreed that from a parity perspective, the status quo is not an option. Ultimately, the decision to re-examine the City's ward boundaries is one that lies with Council. It has the ability to review its ward structure as often (or as little) as it chooses. The City undertook a lengthy, detailed process, incorporating public comment and considered (and reconsidered) various options. Public and stakeholder inputs were incorporated throughout the process. For the Board to simply send the matter back to Council would be an untenable outcome.

[51] The Board finds that the work undertaken by the TWBR culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a

47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council.

DECISION AND ORDER

[52] For all of the reasons given, the decision and order of the Board is to:

- (a) dismiss the Di Ciano, Natale, Wiener, Graff, Mammoliti and LPCC appeals;
- (b) allow the Smith appeal, in part; and
- (c) approve By-law No. 247-2017 and By-law No. 464-2017 re-dividing the City's Ward Boundaries into 47 Wards, subject to moving the RW 33 boundary so that it continues along the Don Valley Parkway westward to Pottery Road, as set out in "Version 2" of Mr. Smith's proposal.

"Jan de P. Seaborn"

JAN de P. SEABORN
VICE-CHAIR

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

DISSENTING DECISION DELIVERED BY BLAIR S. TAYLOR

[1] I have had the opportunity to review the decision of my colleagues.

[2] With great respect, I disagree.

[3] I would have allowed the appeals by Justin Di Ciano and Anthony Natale.

[4] I would have made an Order dividing the City into 25 wards with names and boundaries identical to the current FEDS in the City, all for the reasons set out below.

SUBJECT MATTER

[5] While this appeal ostensibly concerns the review of ward boundaries in the City, at its core this appeal is about one of the most fundamental rights granted to citizens of Canada in the *Charter of Rights*: the right to vote.

[6] In that light, it is an appeal with regard to the restructuring of the City's wards to ensure that each citizen's vote is (relatively) equal to another citizen's vote, not just for the 2018 election, but for every decision that City Council will make during that four year term.

CENTRAL ISSUE

[7] The central issue in this appeal is when voter/population parity must be achieved.

[8] The City's By-laws are based on achieving voter/population parity in 2026.

[9] Other Appellants including Mr. Di Ciano and Mr. Natale submit that voter/population parity should be achieved for the 2018 election.

BACKGROUND

[10] In 1997, the (newly) amalgamated City had 28 wards that were used to elect 56 representatives (two per ward).

[11] For the 2000 election, the City had 44 wards based on the 22 FEDS in place at that time. Those 44 wards continue to this date.

[12] In June of 2013, the City Council authorized the City Manager to start a process which led to the TWBR.

[13] The TWBR July 2015 Report (“Why Is Toronto Drawing New Ward Boundaries?”) stated that the status quo is not an option and that in terms of voter/population parity, the City is becoming less equitable.

[14] The TWBR in its “Civic Engagement Plus Public Consultation” report stated:

Based on the distribution of ward populations at present, Toronto’s ward structure does not meet the requirements of effective representation. The population of the current wards range from 45,000 to 94,000.

Effective representation is a combination of a number of elements – voter parity, protection of communities of interest and neighbourhoods, physical and natural boundaries, ward history and capacity to represent. While some of the elements may alter strict voter parity, sometimes referred to as rep by pop, voter parity is a major criterion. It forms the basis for representative democracy. There needs to be some assurance that one elector’s vote is similar in weight to another person’s vote.

[15] In the Civic Engagement Plus Public Consultation Report of February of 2016, the Executive Summary noted that five options were pursued and one option was not pursued, the latter being the option of using the 25 FEDS. It was not pursued because:

...It would not achieve voter parity, an essential component of effective representation, nor would it address current discrepancies in ward population sizes.

[16] Thus the FEDS did not make it to the final options considered by the consultants.

[17] The “*Final*” Report by the TWBR is dated as of May 2016 and it recommended a ward structure of 47 wards, with a target population of 61,000 and a target to achieve voter/population parity in the 2026 election. The Executive Committee of the City of Toronto, in receiving the Final Report, referred the matter back to the City Manager with the request to:

- (a) review option 1 (47 wards) with a focus on amendments to address wards with the highest population discrepancies i.e. Wards 20, 22, 23, 27 and 28;
- (b) prepare refinements for option 2 (44 wards);
- (c) further consider Toronto’s ward boundaries for increased consistency with the 25 FEDS; and
- (d) undertake any required additional public consultation.

[18] That work was completed and the TWBR recommended to City Council in its *Supplementary Report* of October 2016, refinements to its 47-ward approach, which the TWBR stated were an improvement to the original 47-ward recommendation. City Council ultimately adopted this revised 47-ward recommendation.

VOTER/POPULATION VARIANCE RANGES

[19] The TWBR *Options Report* (Exhibit 2 page 400) provided this narrative with regard to the ranges used in ward boundary reviews.

Calculating voter parity does not use absolute figures, but proceeds by determining population ranges to achieve wards with ‘similar’ populations. Generally, ward boundary reviews analyze the following ranges:

- Range 1 plus or minus 10% of the ward average;
- Range 2 10% to 15% above the ward average;

- Range 3 10% to 15% below the ward average;
- Range 4 15% to 20% above the ward average;
- Range 5 15% to 20% below the ward average;
- Range 6 20% to 25% above the ward average;
- Range 7 20% to 25% below the ward average;
- Range 8 25% or more above the ward average; and,
- Range 9 25% or more below the ward average.

Achieving a population balance of plus or minus 10% of the ward average (Range 1) is the gold standard of ward boundary reviews. Ranges 2 and 3 (10% - 15% above or below average) can result in acceptable voter parity figures. Ranges 4 and 5 (15% to 20%) can only be used under special circumstances, for example a ward may be below 15% to 20% because it is expected to grow or it may be above this percentage because it is stable and will get closer to the city-wide average in time.

Wards with populations of 20% to 25% above or below average (Ranges 6 and 7) do not satisfy the voter parity criterion. Ranges 6 to 9 (20% to 25% and 25% or more above or below average have been applied, on rare occasions, by municipalities that have to ensure the representation of rural areas within their boundaries.

CONTEXT

[20] Exhibit 1, Tab 17, page 257 is an excerpt from the Ward Population Background Brief and it shows that in 2014: the populations of wards ranged from 44,404 to 93,687, that one ward had a 56.07% variance, a second ward had 54.57% variance, a third ward had 40.72%, and about seven other wards had population variances over 20%.

[21] The TWBR Recommended (47) Wards With Refinements plan is based on a “target” population of 61,000 per ward, and to achieve voter/population parity in 2026.

[22] For 2018, (being the first municipal election for the new ward boundaries using the target population of 61,000 per ward), the TWBR projected for its proposed 47 wards that:

8 wards would have variances of +/- 10%,
 1 ward with +/- 15%,
 2 wards with +/- 20%, and
 2 wards with +/- 30% (37.45% and 34.67%).
 (Exhibit 3, Tab 24, page 699)

[23] Contrasted to the average population per ward of 58,892 (not the “target” population of 61,000), the TWBR Recommended (47) Wards With Refinements would result in:

10 wards would have variances of +/- 10%
4 wards with +/- 15%
1 ward with +/- 20%, and
2 wards with +/- 30% (35.21% and 31.91%).
(Exhibit 13, page 2)

[24] The evidence of on behalf of Messrs. Di Ciano and Natale is that for 2018 using the FEDS, there would be only 2 instances where variances were outside 10% and 1 of over 20% (Exhibit 13, Tab 1).

[25] The use of the FEDS was supported by the LPCC as a means of addressing governance issues, which are beyond the jurisdiction of this Board.

[26] Messrs. Wiener, Graff and Mammoliti called no evidence in chief: neither expert nor lay. This Member assigns little weight to their positions.

LUMPINESS/SPIKEYNESS

[27] The City consultants testified that it is appropriate to use a population projection target of 61,000 per ward and a target date of 2026 to implement the new ward boundary system.

[28] They assert this based on the fact that the growth that has occurred in the City has been uneven in nature (“lumpy/spikey”), that the target population of 61,000 per ward is appropriate, and that the goal of voter/population parity by 2026 enables the revised ward system to grow into parity based on the anticipated further development in specific areas in the City.

[29] In contrast, Messrs. Di Ciano and Natale submit that the census work of Statistics Canada ought to be used as it is used in the FEDS, as those numbers are actual numbers and not projections, that one should use the actual average population for a ward not a target, and also that it is not appropriate to be looking at a time frame to 2026 to implement voter/population parity.

THE LAW

[30] Much of the case law has been reviewed in the majority decision.

[31] I set out below certain portions of the Justice McLachlin (as she then was) decision in *Carter, supra*, that are central to my decision with my emphasis.

C. The Meaning of the Right to Vote

It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to “effective representation”. Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation 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; as noted in *Dixon v. B.C. (A.G.)*, [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles – legislative and what has been termed the “ombudsman role”.

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen’s vote unduly as compared with another citizen’s vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

But parity of voting power, though of prime importance is not the only factor to be taken into account in ensuring effective representation...

Notwithstanding the fact that the value of a citizen’s vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district.

Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon, supra*, at p. 414, that "only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed."
(Emphasis added)

[32] Further, at page 195 of the decision, Justice McLachlin provides this comment with regard to timing.

... Yet another factor is growth projections. Given that the boundaries will govern for a number of years – the boundaries set in 1989, for example, may be in place until 1996 – projected population changes within that period **may justify a deviation from strict equality at the time the boundaries are drawn. (Emphasis added)**

[33] In terms of the approach to ward boundary appeals such as this, the Board has taken the position that it should not lightly interfere with municipal decisions unless there are clear and compelling reasons to do so (*Savage v. Niagara Falls (City)*, 45 O.M.B.R. 56).

[34] Similarly, the Board in *Teno v. Lakeshore (Town)*, 51 O.M.B.R. 473 made these findings:

29 The Board finds that in assessing whether ward boundaries should be redivided, **the over-riding principle is voter parity** as cited by the Supreme Court of Canada. Any deviations from voter parity must

be justified based on the other factors referred to by the Supreme Court and by this Board, in a manner which supports the notion that in the absence of this deviation, there would be a loss of effective representation. Thus any deviation factor whether it be 1% or 33% must be supportive of a more effective representation of the electors and their interests...**(Emphasis added)**

36. Thus, this Board accepts that there must be clear and compelling reasons for the Board to interfere in a municipal council's decision on these matters, and that it may have to be demonstrated that a municipal council has acted unfairly or unreasonably in making a decision on these issues. However, if the evidence demonstrates that the decision of the municipality operates to diverge from the overriding principle of voter equity and effective representation, then the Board can only conclude that the Council has acted unreasonably. Where however, the issues are not so clear cut, then it may be that the Board may accord deference to the decision of the municipal council.

[35] The Board in *Teno, supra*, found based on the evidence before it, that the disparities in voter representation that then existed would continue to worsen, and the Board found it was untenable and contrary to the principles set out in the Supreme Court of Canada to allow the current system to continue. The Board said this:

46 Thus the Board finds that there is clear and compelling evidence to support a redivision of the ward boundaries, and that the municipality, while always acting fairly and in a way which they viewed as representing the public interest, acted unreasonably in deciding to maintain the current electoral boundary system, in the face of the information and recommendations made to them by their staff.

PRINCIPLES

[36] From this case law, four principles ensue.

[37] First, the overriding principle in assessing ward boundaries is to achieve voter/population parity at the time the boundary lines are drawn.

[38] Second, any deviation from such voter/population parity must be justified by other *Carter* criteria in a manner that is more supportive of effective representation. Absent this, the dilution of one citizen's vote as compared to another should not be countenanced.

[39] Third, there must be clear and compelling reasons for the Board to interfere with a municipal council's decision.

[40] And finally, if the evidence demonstrates that the municipal council's decision diverges from the overriding principle of voter/population parity and effective representation, the Board can only conclude that council acted unreasonably.

2018 VOTER/POPULATION PARITY

[41] Using the TWBR's variance ranges, the use of the revised 47-ward boundaries for 2018 would not result in voter/population parity for the 2018 municipal election. Of the 47 proposed wards, using the average ward population (and not the "target"), 10 wards would have a +/- variance over 10%, 4 wards would have +/- 15% variance (which can only be justified under special circumstances), 1 ward at +/- 20%, and 2 wards over +/- 30%, which do not satisfy the TWBR's voter/population criterion (and there are no "rural" areas in the City).

GROWING INTO PARITY

[42] The City submits that it is preferable to grow into parity with the aim of reaching that parity based on the population projections by 2026. Why? Because, say the City consultants, ward boundary reviews are expensive and time consuming, and the City is experiencing uneven growth in areas that have been designated for such growth in the City's Official Plan.

[43] Messrs. Di Ciano, Natale and Wiener challenge that provision. Counsel for Messrs. Di Ciano and Natale submits:

The TWBR's insistence that it is better to grow into parity than grow out of it must have implicitly been predicated on the idea that fairness of a future election is more important than the fairness of the current one. There is no reason why starting closer to parity and growing farther away from it is inherently different from growing into parity. What must be kept in mind throughout is that an acceptable range of parity must be achieved for each election involved.

[44] Mr. Wiener aptly notes:

While there has been significant jurisprudence on what effective representation is, there has been little jurisprudence on when effective representation should be determined.

[45] In Reply, counsel for the City submitted that: "...there is no jurisdiction or statutory authority that the City must achieve parity [of voter/population] in any particular time frame."

PARITY WHEN?

[46] Counsel for Messrs. Di Ciano and Natale submits that the position of the City on achieving voter/population parity is like "Waiting for Godot": voter/population parity is hoped for by the City, but under its proposed ward boundary system, like Mr. Godot, it may never show up.

FINDINGS

[47] This Member of the panel finds that the appropriate approach for a ward boundary review would be to first consider the issue of voter/population parity at the time the boundaries are drawn. A review of the voter/population parity for 2018 for the revised 47 wards as proposed by the City reveals that voter/population parity would not be achieved for 2018. Using the average (and not the target) population per ward, 17 wards would have variances of greater than +/- 10%, of which 4 wards would be in the +/- 15% range, 1 ward in the +/- 20% range, and 2 wards in the +/- 30% range. Such variances well exceed the standards recommended by the City consultants. Such

variances do not meet the conditions of effective representation that are set out in *Carter* inasmuch as the first criteria is relative parity of voting power and this Member finds that relative parity is lacking in the revised 47 ward option, affecting the fundamental *Charter* given right to vote for thousands of citizens of the City.

[48] Second, this Member finds that the imbalance of voter/population parity will permeate every decision that City Council will make during its four year term of office. As the TWBR Supplementary Report notes: “Toronto’s current ward structure, implemented approximately 15 years ago, has become unbalanced. This is problematic, not just at election time, but every time City Council votes.”

[49] Third, in contrast to the recommended 47 wards, this Member finds that the voter/population variances in the FEDS wards with the names and boundaries identical to the current federal electoral districts (and provincial districts) achieve much better voter parity in 2018 with only 2 wards outside 10% and 1 outside 20%. Even this is not perfect parity, but it is far superior to that recommended by the City’s consultants.

[50] Fourth, with regard to the other *Carter* criteria, this Member finds that there is no overriding and countervailing case to be made on communities of interest, physical and natural boundaries, and ward history. All those criteria are duly considered in the FEDS for both the federal elections and the provincial elections (the latter of which occurs in 2018 before the City’s election).

[51] Fifth, as voter/population parity is of “prime” importance, are there some other clear or compelling reasons to allow such deviation? I do not find the City’s submissions (that ward boundary reviews are expensive and time consuming) to be persuasive as the City’s ward boundaries have not been reviewed since 2000, and the FEDS are regularly reviewed and accordingly adjusted, and this process is readily available to the City.

[52] Sixth, I find that the use of the FEDS would result in a fair election in 2018, that the continued use of the FEDS would provide the basis for future elections that are fair, that they will result in boundaries that are derived from regular, thorough, arms-length, open public processes and which can be quickly, reliably, and relatively inexpensively adjusted and adopted by the City on an ongoing basis.

[53] Finally, I strongly disagree with the submission of City's counsel that: "...there is no jurisdiction or statutory authority that the City must achieve parity [of voter/population] in any particular time frame".

[54] I find that the City is dealing with a fundamental right provided under the *Charter* such that when the City is proposing a ward boundary review, the cornerstone of such a review must seek to achieve acceptable voter/population parity for the forthcoming election and not be aimed at an election event in 2026, (eight years hence following innumerable City Council votes, resolutions and By-laws), the result of which would be to unduly dilute the fundamental, *Charter* given, right to vote for thousands of citizens during that entire intervening period. In short, I find that the *Charter* provides the jurisdiction and the authority that requires the City to achieve parity [of voter/population] in 2018.

NUMBER OF COUNCILLORS

[55] There will be those who will say that the FEDS with 25 wards will result in 50 councillors. That might be, but that is an issue that the Board has no jurisdiction over. That decision rests solely with City Council.

[56] However, it appears to this Member that there are a host of options open to the City, including but not limited to these four as set out by Dr. Sancton:

1. 25 councillors (1 councillor per ward);
2. 30 councillors with 25 councillors (1 per ward) plus 1 area councillor for each five groupings of five wards;
3. 35 councillors with 25 councillors (1 per ward) plus 10 councillors elected at large; or
4. 50 councillors with 2 councillors elected per ward.

[57] City Council has the jurisdiction to make decisions on the number of councillors, and I would have left that to City Council.

CONCLUSION

[58] I would have allowed the appeal by Justin Di Ciano and Anthony Natale.

[59] I would have made an Order to divide the City into 25 wards with names and boundaries identical to the current FEDS in the City which also happen to be identical to the current provincial electoral districts.

[60] The basis for my decision is that, as in *Teno, supra*, while City Council has, I believe, acted fairly and in a way they viewed as being in the public interest, nevertheless the recommended results from the consultants to the City and adopted by the City Council do not meet the criteria established by the Supreme Court of Canada in *Carter*. In my opinion, the proposed 47 wards do not provide voter/population parity in 2018. The result of this will affect the *Charter* given fundamental right to vote (and effective representation), and unduly dilute that right to thousands of voters, not just in the 2018 election but for all the decisions of City Council in the four year term of office.

[61] The case law is clear that where the evidence demonstrates that the decision of the municipality operates to divert from the overriding principle of voter/population parity

and effective representation, then the Board can only conclude that the Council has acted unreasonably.

“Blair S. Taylor”

BLAIR S. TAYLOR
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248