

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 11, 2017

CASE NO.(S): MM170038

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

Appellant: Charles Scheffel
Subject: By-law No. BL 2017-053 (Ward Boundary) to revise the boundaries to eight wards and a mayor
Municipality: City of Kawartha Lakes
OMB Case No.: MM170038
OMB File No.: MM170038
OMB Case Name: Scheffel v. Kawartha Lakes (City)

Heard: August 24, 2017 in Lindsay, Ontario

APPEARANCES:

Parties

Counsel

Charles Scheffel (“Appellant”)

Self-Represented

City of Kawartha Lakes (“City”)

Stephen D’Agostino

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE BOARD

INTRODUCTION

[1] This appeal comes before the Board as a result of the enactment of By-law No. 2017-053 by Council for the City of Kawartha Lakes on March 21, 2017 (the “Ward Boundaries By-law”). The passage of the Ward Boundaries By-law followed an extended review and consultation process, and effected a reconfiguration of the wards and ward boundaries in the municipality, (“Wards” and “Ward Boundaries”) reducing the

number of Wards to 8, from 16. The Ward Boundaries By-law, in its preamble made reference to the fact that the Council had, under a different By-law “reduced the size of Council to a Mayor and Eight Councillors on December 13, 2016”.

[2] The Appellant appealed the Wards By-law on May 2, 2017 and accordingly the appeal comes before the Board pursuant to section 222(4) of the *Municipal Act, 2001*, (“Municipal Act”).

[3] The Affidavit of Service of the Notice of Appointment for Hearing was filed as Exhibit 1 to the hearing. At the hearing of this appeal, in addition to the Appellant, and the City, the Board recognized two Participants, Afe Helleman, and Kathy Morton (the “Participants”) who also voiced opposition to the Ward Boundaries By-law.

POSITION OF THE PARTIES

The Appellant’s Position—Grounds for Appeal

[4] It is the position of the Appellant that no change of ward boundaries is warranted and that the existing ward structure, and composition of council, should remain as is.

[5] There were multiple grounds set out in the Appellant’s appeal of the Ward Boundaries By-law but the Appellant’s primary objections on the appeal relate to the nature of the information relied on by the City to examine relative equality of representation. The primary objections, as stated by the Appellant are, two-fold.

[6] First, the Appellant asserts that the population figures use by the City were unreliable and inaccurate as a basis for the Ward Boundaries review. The Appellant submits that the City should not have used estimates of current and future population and non-resident electors in the City to assess options, or “guesses” as to the size and distribution of population.

[7] The second aspect of the Appellant’s grounds is his objection to the use of population numbers instead of voter numbers. The Appellant submits that the City

should have used the 2014 electoral/voter numbers (which was 65,278 persons) because the case law directs that the City should strive for a fair and equitable balance in electoral representation, as opposed to a fair and equitable balance in representation of the population/residents of the City. On that premise, the Appellant provides his allocation table of the electors in the 16 wards, as they were in the 2014 election, and asserts that if this data is used, the variances in population distribution among the 16 wards are well within the range of tolerance under the case law, with only one ward, Ward 8, exceeding a 25% deviation, at 27% higher than average. The existing Ward Boundaries (and the number of Councillors) should thus be retained without change.

[8] Upon inquiry by the Board, the Appellant confirms that the other reasons for the appeal are as set out in his Notice Letter of May 2, 2017: that the revised Ward Boundaries will isolate rural areas of the municipality; and will not represent the geographic regions of the wards.

[9] Finally, the Appellant contends that the Ward Boundaries By-law will “consolidate control and power in fewer hands” as a result of the reduction in the number of Councillors in each ward from two, to one. The Appellant’s position is that the number of Councillors also should not be altered and should remain as it is.

The City’s Position

[10] The City’s position is that it followed a rigorous and comprehensive path through its Ward Boundary review process (“WB Review”) guided by proper Terms of Reference reflecting the applicable principles determined by the Courts and the Board. Those processes were responsive to the circumstances of the City’s structure and characteristics, properly inclusive of all of its population and property-owners, with open and extensive public consultation processes. The City also enlisted the services of an expert in ward boundaries to review the WB Review and provide advice and guidance to Council. Option 3, the option eventually approved from the WB Review represents effective representation in accordance with the principles set out in the case law.

[11] In specific response to the Appellant's grounds for appeal, the City asserts that its data collection processes and methodology resulted in a reliable combined total of population numbers based on the most recent Federal Census Data and seasonal non-resident property owners. This information was then properly allocated and mapped for distribution in the possible options for revised Wards in the City. As such the City submits that the information and data was correct and well within an acceptable margin of error. The numbers were also eventually validated by the 2016 census information received after the Review was completed. The City submits that it quite properly sought the relative equality of representation in the Ward Boundaries of the City based upon the total estimated resident population and also considered other factors necessary to achieve the goal of effective representation, as required.

[12] The City maintains that the other grounds for appeal have no merit and that the Ward Boundaries By-law reducing the wards from 16 to 8 should be confirmed by the Board. Finally, the City submits that the Appellants challenge to the number of Councillors is not within the jurisdiction of the Board and should also be dismissed.

[13] As a minor matter, the Board is advised that in the course of subsequent review of the Ward Boundaries By-law, the City discovered that there was an inadvertent error in the descriptive reference to Ward 7 whereby the description should have referred to the lands "north of Lot 1 to 18 Concession 12 Manvers" and instead referred to the "north of Lot 1 to 25" in the description. The City requests that this minor amendment be addressed by the Board in its ruling on the appeal.

THE LAW

[14] Leaving aside those more narrow issues that may arise in this appeal or other Ward Boundary appeals, the legislative provisions and the body of law that has developed in relation to Ward Boundaries, are relatively settled and established in the Province of Ontario. It is helpful to first review this background.

[15] Section 222(1) of the *Municipal Act* grants jurisdiction to municipalities to enact a Ward Boundaries By-law to divide or subdivide the municipality into wards or to dissolve existing wards. Any person may appeal to the Board objecting to the Ward Boundaries By-law and provide reasons in support of such objectives.

[16] No further guidance, tests, criteria, restrictions or obligations relating to Ward Boundary disputes is contained within the legislation or any regulation. The Board is instead guided by a body of law, and at the “apex” of the cases dealing with the determination of Ward Boundaries, is the decision of the Supreme Court of Canada, *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, (or the “*Carter Decision*” or “*Carter*” as it is often referred to, based on the name of one of the Respondents) which set out a number of principles to apply when determining whether the Ward Boundaries provide the “effective representation” required. Both the City and the Appellant have referred to this decision in support of their positions before the Board.

[17] In the *Carter Decision*, the Court expressed the often-repeated, and overriding principle that the purpose of the right to vote, as contained in the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), “is not equality of voting power *per se*, but the right to “effective representation””. As to exactly how a Ward Boundary system should achieve the goal of effective representation, was enunciated through the identified principles to be considered in appeals such as the one before the Board. They can be summarized as follows:

- (a) The process begins with the recognition that the first condition of effective representation is “relative parity of voting power”. The Court, in *Carter*, was being asked to consider the right to vote as contained in s. 3 of the Canadian Charter of Rights and Freedoms (the “*Charter*”) as it related to provincial electoral distribution and electoral boundaries. The Court’s conclusion, based on the *Charter*, was that “the right to vote should be defined as guaranteeing the right to effective representation” and not the expectation of absolute voter parity.

- (b) The Court stated that the first condition of effective representation is nevertheless the relative parity of voting power, acknowledging that if the fundamental equality of voting power is diluted, the representation will be uneven and unfair, and thus ineffective. Referring to “dilution”, this approach recognizes a quantitative or numerical aspect of equitable voting power. However, for the reasons discussed later in this Decision, relating to “population numbers vs. voter numbers” it is important to recognize that the relative parity of voting power is not the same as the phrase “voter parity” which is often used, and represents something different.
- (c) “Voter parity” might possibly suggest an equality of the number of voters in each ward and not the concept of an equality of voting power amongst wards referred to by Madam Justice McLachlin. Although the Court refers to the premise of “one person, one vote” and “voter parity” in the decision, the Court’s discussion of effective representation is based squarely upon the recognition of the parity of voting power and that there are factors that permit deviation from the “one person – one vote” rule. This gives rise to the issue relating to the difference between population numbers versus voter numbers.
- (d) The qualification of the Court as to the first condition of relative parity of voting power by the Court was that “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.”
- (e) There were two reasons that other factors and criteria impact upon effective representation. First, the Court noted that absolute parity of voting power cannot always be achieved because of constant changes that occur in any jurisdiction. The Court stated:

53. 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”

Accordingly, the Court warned that: “...deviations from absolute voter parity may sometimes be justified on the grounds of practical impossibility.

(f) The second reason that relative parity may be undesirable is because it may detract from the primary goal of effective representation. This is where the Court recognized that there may be other factors that are necessary to achieve what is required to ensure that the representation is effective. The Court emphasized:

54 ...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.

(g) As to when such factors of community interests, location, and local differences should be considered in determining effective representation, the Court again reiterated that “dilution of one citizen’s vote as compared with another’s should not be countenanced”, and there must be justifiable reasons to deviate from that principle:

55. ... 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.

(h) The practical implications of differences in geography and community interests is most easily seen in the differences between rural areas and urban areas where higher population densities in urban areas may numerically result in inequality of voting power over that of lower population densities in rural areas. The Court addressed this challenge where there are differences in density of population and said:

61. ... The problems of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter populations in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from the representatives in their "ombudsman" role. This is only one of a number of factors which may necessitate deviation from the "one person – one vote" rule in the interests of effective representation.

- (i) The Court stated: "In the end, it is the broader concept of effective representation which best serves the interests of a free and democratic society." The Board has fully adopted this principle in the adjudication of ward boundary appeals.

The *Carter* principles have subsequently been reviewed, analyzed, expanded upon, and applied in many Board decisions based upon the fact specific circumstances of each appeal based upon the clear direction of the court that the list of factors that may justify a departure from absolute voter parity is not a closed list.

[18] The City has drawn the Board's attention to decisions demonstrating the approach of the Board in reviewing the decisions of council in passing a Wards Boundary by-law, and the particular regard generally given to the decisions of municipal council, when there is no clear and compelling reason that would cause the Board to interfere in Council's decision. Although it is similarly provided for in a number of decisions before the Board, a review of the applicable principles by the Board in Niagara Falls (City) By-law No. 2002-097, *Savage v. Niagara Falls (City)*, 2002 CarswellOnt 5430 ("*Savage*") succinctly summarized the Board's approach to appeals such as this one. In considering the Ward Boundaries By-law passed by the City of Niagara Falls, the Board stated that the preference is always for a locally driven solution to the type of electoral representation that is imposed on a municipality, rather than a Board dictated one:

43 The matter before the Board does not involve dividing a local municipality into wards. The matter before the Board involves the duly elected members of Niagara Falls council reaching a decision to change, by by-law, its electoral system.

- 44 This Board should not lightly interfere with that decision unless there are very clear and compelling reasons to do so. The Board should be satisfied that city council acted fairly and reasonably. If the Board is so satisfied, deference should be accorded to Niagara Falls council, who are in a better position than the Board to determine what is the appropriate electoral system to provide fair and effective representation to its constituents.
- 45 The Minister has chosen not to prescribe regulations governing the criteria a municipal council must follow when deciding to divide, redivide or dissolve its ward boundaries. The applicable legislation has been in effect since 1996 and the Board can only assume an intention on the part of the province to confer broad discretion on municipal councils to decide the type of electoral systems it wishes, provided council acts fairly and responsibly.

[19] This approach has been similarly explained by the Board as being connected to the test of reasonableness. The City referred the Board to the decision in *Teno v. Lakeshore (Town)*, 2005 CarswellOnt 6386 where the Board endorsed the approach in *Savage* stating:

- 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.

ISSUES, EVIDENCE AND ANALYSIS

The Witnesses and The Evidence

[20] The Appellant's evidence was limited to his own testimony and the presentation of his Document Book (Exhibit 2). The testimony of the two Participants also appeared to challenge the City's decision in support of the Appellant.

[21] The City responded to the proffered grounds for the Appeal, and provided a comprehensive overview of the processes that led to the decision of Council and the passage of the Ward Boundaries By-law, through the testimony of two witnesses, Ms.

Judy Currins, the Clerk of the City, and Dr. Robert Williams, a faculty member with the Department of Political Science at the University of Waterloo. The evidence included a series of documents, primarily those contained in the City's Document Book (Exhibit 3).

[22] Dr. Williams was qualified to provide expert opinion evidence in the area of ward boundary reviews based upon his extensive academic background and experience in municipal government and electoral systems and his work in assisting numerous Ontario municipalities with the review and development of electoral processes including ward boundary reviews. Dr. Williams has testified before the Board in Ward Boundary disputes on many occasions.

[23] Ms. Currins, the Clerk of the City, has been employed with the municipality since amalgamation, when the existing Wards system was enacted. Ms. Currins testified that she had been the primary City staff member responsible for overseeing the consultation and review processes leading up to the passage of the Ward Boundaries By-law. In fact, the passage and implementation of the new Ward Boundaries under the Ward Boundaries By-law is to be Ms. Currins' final "swan song" as it were, representing one of the last major projects undertaken by her before her retirement. Ms. Currins testified that as such, she personally, and quite rightly, accorded the Ward Boundaries By-law to be a significant accomplishment on her part, and one which she "would like to see through" as she departs.

[24] Ms. Currins' personal commitment to completing the Ward Boundaries review process is recounted because it is, in the Board's view, relevant to the matter of Ms. Currins' qualification as an expert witness before the Board in the area of municipal processes relating to municipal elections, upon which the City has sought to have her qualified in this hearing. Ms. Currins' preliminary evidence indicates that her experience in municipal elections is restricted to the City and she has had no prior experience with other municipalities or non-employment related expertise relating to the specific issues arising in ward boundary matters, save and except for some limited professional development courses. Dr. Williams, in his evidence, confirmed that Ms. Currins had

sought out his assistance on behalf of the City, because of his expertise and the absence of anyone at the City experienced in such tasks, including Ms. Currins.

[25] While Ms. Currins has no doubt accumulated significant experience in the area of municipal elections, given that such experience is limited to this municipality only, and that she has been forthright in expressing a strong interest in seeing the Ward Boundaries By-law enacted, as a final successful effort on her part, the Board also has some concern that Ms. Currins' does not possess sufficient disassociation and impartiality from the issues before the Board.

[26] It is noted that the City has produced Dr. Williams as an expert consultant on ward boundaries who has been qualified. On the evidence before me, the Board cannot qualify Ms. Currins as an expert as requested. The City was advised that certainly it would be appropriate, as Ms. Currins testified as to the background giving rise to the Ward Boundaries By-law, that she provide her relevant comments as to the sufficiency and appropriateness of the processes that had been followed by the City, to collect the data and information provided to Dr. Williams, and to enact the Ward Boundaries By-law.

Appellant's Objection to "Power in Fewer Hands"—The Number of Councillors

[27] The Board can summarily deal with this issue as raised in the Appellants Notice of Appeal before turning to the primary grounds for the appeal.

[28] As indicated, the Appellant's formal appeal, and submission to the Board, includes his opposition to "consolidating control and power in fewer hands" by reducing the number of councillors set for each of the Ward Boundaries. The City takes the position that the Board is unable to deal with the issue of the number of councillors as this is not appealable.

[29] The City is correct. The Board, and the Court, have fully addressed the ability of the Board, in adjudicating appeals of Ward Boundary dispute, to make orders relating to

the composition of the Council. In the decision of *Wagar v. London (City)*, [2006] O.J. No. 769, (“*Wagar*”) the Divisional Court affirmed that the Board has no power to directly change the composition of a council or determine the number of councilors in the wards because that power is exclusively granted to the local municipality under s. 217(1) of the *Municipal Act*. There is no right of appeal to the Board of any by-law of a council changing the composition of the council.

[30] The Divisional Court in *Wagar* did confirm that the Board’s exercise of its powers, pursuant to s. 223(5) of the *Municipal Act*, to divide, re-divide or dissolve existing ward boundaries might, in some cases, have the incidental effect of changing the composition of a Council. As an example given, if the order of the Board were to set the number of wards in a municipality to 20 wards, where there are 14 councillors, and the municipality’s by-laws provide for one councilor per ward, then the Board’s decision may incidentally result in a change in the composition of the council.

[31] In this case, there are no complex, or unusual, circumstances giving rise to an interplay between the determination of the Ward Boundaries by the Board in this Appeal and the determination of the number of councillors. Under By-law No. 2016-230, the City Council reduced the size of Council to a Mayor and eight Councillors on December 13, 2016. The Board has no ability to alter this By-law. Given the disposition of this appeal, the Board accordingly finds that it has no jurisdiction to consider that aspect of the Appeal that questions the decision of Council to reduce the number of councillors by half to eight. That ground of the Appeal is accordingly dismissed.

Accuracy of Data—“Estimates” and “Guesses”

[32] The first of the Appellant’s two primary grounds for the Appeal relate to the Appellants objection to the City’s unreliable “guess of current and future population” and the use of estimated population information in with WB Review.

[33] Ms. Currins explained that Council had determined that for the purpose of examining the population distribution in the WB Review, they would use the most

accurate population figures available as of January 2016. A review of the data collection options, by the City staff, and Dr. Williams, lead to the conclusion that the most reliable information on population distribution was the geographically tagged data obtained for population figures collected from the prior census, and as supplied by Statistics Canada. This is because the federally collected data is connected to “Census Dissemination Areas” which allows for the use of software to place, and then reallocate, population automatically as ward boundaries are set and the options considered. Dr. Williams testifies that the use of the census data allowed for a margin of error by not more than 5%, and in his opinion represented the most reliable data available.

[34] Dr. Williams and Ms. Currins further explained that the use of the population data from the Census provided only part of the needed information. Dr. Williams states that because the Federal Census Records do not show seasonal residents, it was then necessary to look to the municipal rolls to determine all non-resident owners in the municipality. The reason for this is that census data records, by their nature, count persons only once – in the jurisdiction where they permanently reside. For municipal purposes however, a seasonal resident owning property and paying taxes is regarded as a resident of the City’s population, is entitled to vote, and therefore must be added to the census population figures.

[35] The evidence indicates that concurrently with the assembly of the population data and the non-resident voter information, the City tendered services for a consultant to assist in mapping with allocation of population data to assist and frame the options for the Ward Boundaries and to ensure that accurate delineations of the optional boundaries, and the distribution of population figures as obtained, were correct. The specialized Geographic Information System software (“GIS”), and experienced manpower were not available internally, and the access to the data for the spatial distribution was crucial to fulfilling the primary objective in the Terms of Reference.

[36] Although the 2016 census data was not available during the WB Review, the data received after the WB Review eventually revealed a limited 3% increase in the permanent population of the City from the figures used, or 2,204 persons in the whole of

the City. Dr. Williams opines that, based on his experience, this limited increase in population revealed by the Census, however it may have been distributed through the municipality, was a low and acceptable margin of error and does not represent a significant enough change to invalidate the population patterns used by staff, and considered by Council, and which led to the passage of the Ward Boundaries By-law.

[37] Dr. Williams states that based on his experience in Ward Boundary reviews, other municipalities have encountered similar challenges in assembling the required population information and indicates that the methodology used by the City to collect the population data, inclusive of the seasonal resident component, was appropriate and justified in response to such challenges.

[38] The Appellant has provided no evidence to contradict or challenge the accuracy of this aspect of the WB Review.

[39] Based on the evidence, including the uncontradicted evidence of Dr. Williams, the Board finds that the manner in which the City determined the population numbers, by combining the most recent census data with collected data for non-residents from the tax rolls was appropriate. So too was the City's effective use of the GIS plotting software. This, in Dr. Williams' view, resulted in a reliable estimate of both the total population in the City as of January 2016 in accordance with the Terms of Reference, and an accurate mapping of the spatial patterns of the population. In turn, this was effectively used by the City to determine the impacts of various options for ward boundary placements proffered for the different variables which was eventually presented for review and consideration by the public, staff, and eventually, municipal Council. The Board finds that this entire process was a valid one and led to an estimate of population numbers that was as reliable, and as accurate, as possible.

[40] In summary, the Board accordingly accepts the City's evidence as to the reliability of the population data, and agrees with the City's submission that it is misguided for the Appellant to refer to the population information relied upon in the WB

Review as a “guess”. Upon all the evidence, the Board therefore finds that this facet of the Appellant’s grounds for the appeal fails.

Population Numbers v. Electoral Numbers

[41] The second aspect of the Appellant’s primary grounds for Appeal is that the City improperly used population figures instead of “proper electoral numbers” for the purposes of examining the distribution of numbers in the City’s wards, and determining how best to establish relative parity and provide effective representation. How then, should a municipality achieve the goal of relative parity of voting power such that there is effective representation in the Ward Boundary framework? Should the consideration of Ward Boundaries be based on population numbers (inclusive of seasonal recreational property owners) spatially distributed in the municipality or alternatively the number of electors that are spread throughout the City?

[42] The Appellant argues that the City should have used electoral numbers because that approach would be correctly based upon the Supreme Court’s ruling in the *Carter* Decision. The Appellant argues that electoral numbers must be used to assess and determine a fair and equitable balance in electoral representation and therefore the City should have used the electoral numbers from the 2014 election – i.e. 65,278 electors.

[43] The City fully acknowledges the principles set out in *Carter*, but interprets them differently. The City submits that the manner in which the “relative parity of voting power” is achieved in the City’s Wards is not by relying on the number of voters accounted for in the 2014 election but rather by determining, as accurately as possible, the total population of the City as of January 2016 based on the best data available, inclusive of seasonal “non-resident” property owners in the rural recreational areas within the City’s jurisdiction. That was the methodology used.

[44] While it may be understandable that the Appellant’s reliance upon the language used by the Supreme Court in the *Carter* Decision, which includes references to “voter

parity”, might lead to an assumption that voter parity requires parity of electors, this is nevertheless not the case.

[45] For the reasons that follow, the Board finds that the methodology and data utilized by the City, and identified in the City’s Terms of Reference for the purposes of the WB Review, and the Ward Boundaries By-law that ultimately resulted from that process, represents the correct approach and contributes to effective representation. Conversely the Board does not accept the Appellant’s argument that electoral numbers from the 2014 election would provide a more effective form of representation and the Board finds that the appeal fails on that ground.

[46] These findings of the Board are based upon the particular facts of this case as disclosed in the evidence, the expert opinion of Dr. Williams, the Board precedent for this approach and the analysis that follows.

[47] As Dr. Williams correctly points out, Madam Justice McLachlin’s statement that “...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” is an important statement. The court, here, clearly distinguishes between “voting power” and the goal of effective representation, which can, and should, be achieved in every ward boundary system. The Appellant, in this case, is incorrectly assuming that references to “voting power”, and “voter parity”, translate precisely into a parity of “electoral numbers”. That is not the case. Relative parity of voting power and effective representation are not necessarily achieved solely on the distribution of voter numbers but rather, and most effectively in these circumstances, based upon the distribution of population (inclusive of seasonal and non-resident voters that may not appear in the permanent population figures from the census), and also those other factors, like communities of interest, identified by the Court.

[48] The City relies, in part, upon Dr. Williams’ opinions on this issue, as an expert in ward boundaries. It is Dr. Williams’ view that the *Carter* decision confirms that the right to vote enshrined in s. 3 of the *Charter* is an equality, or parity, of voting power and not

an equality or parity of simple voter numbers in the manner interpreted by the Appellant. Dr. Williams is of the opinion that achieving relative parity of voting power, as that first condition of effective representation, is, in the City's circumstances, best served by examining population numbers, and seeking to achieve, to the extent possible, the relatively equal distribution of population within the Wards, inclusive of seasonal non-resident property owners.

[49] Dr. Williams testifies that the concept of achieving relative parity of voting power, based upon population figures, requires recognition of the relationship that exists between the electors, and the people who the electors represent. The electors in a Ward vote and elect a Councillor (or Councillors) in that Ward on behalf of all the residents and property owners who live in that Ward – not just themselves.

[50] As Dr. Williams' stated, once voting is then completed, the representation by the Ward Councillor is, from that moment forward, the representation of all the residents in the Ward. Considering that the decisions made by councilors of a municipality affect everyone and not just the "voters", effective representation requires a determination of how the parity of voting power will best achieve effective representation of all persons in the Ward.

[51] In furtherance of this objective, Dr. Williams' opinion is that if the goal of our electoral system is to provide representation to the entirety of those in a community, and not just the voters, this must guide us in determining the measure of effective representation and by looking at all of the population in the City, both voting and non-voting. The Board agrees.

[52] The community for whom voters vote, and who councilors later represent, is not limited to the number of voters that exist; it is inclusive of others who may not vote, such as the elderly, youth and children, persons with disabilities, or social groups whose circumstances cause them to withdraw from the municipal voting process. Dr. Williams, as an example, points out that the 2016 census data eventually revealed that 40% of the City's population was comprised of children and youth. The Board finds this

inclusive approach to be correct and would agree that the relative parity of voting power” must be based upon the relative parity of the number of all residents, including those who may not vote but who are distributed throughout the wards of the City.

[53] The Board further accepts that the community may also be composed of other individuals whose circumstances of residency means they may not vote through choice or circumstance of location, such as students attending post-secondary education, short-term renters, or seasonal residents and cottage-owners who are absent from the municipal electoral processes where their cottage may be located, but who own property and are affected by decisions made by council. As such, they too must realistically be counted in the resident population distributed throughout the wards of the City whom the Councillors also represent.

[54] Dr. Williams’ opinion is that the City’s councillors who are voting on the business of the municipality are, for these reasons, representing not only those electors that permanently reside in their ward or who voted for them. They represent all the people who are resident in their ward who can’t vote or don’t vote. More to the point, a councillor in certain rural wards in municipalities such as the City, pointedly represents those seasonal property owners who very likely did not vote in the municipal election in which the councillor was elected. Achieving a relative parity of voting power thus requires inclusion of those property owners in the population numbers if those population numbers were based upon census data.

[55] As to the presence of recreational property owners there are many municipalities in Ontario “cottage country” with a sizeable component of their tax rolls listing persons whose permanent residence results in them being recorded in the census statistics as part of a segment of the population living elsewhere. Where a municipality such as the City is thus collecting data on population numbers from the Census it must, by necessity, supplement the process with additional information such as that gleaned from the tax rolls by the City in its WB Review. Only by adding the non-resident owners in each of the Wards to the working data will the “numbers” represented in each Ward be complete.

[56] The Board would note that the City's Terms of Reference, in this regard, stand up well to scrutiny in that they have been devised and approved to recognize the specific circumstances of its residents and property owners and the specific data collection methodology required for the WB Review.

[57] In his evidence, Dr. Williams testified that he was satisfied that the use of population data for the Wards, with the addition of the non-resident electors, to determine population distribution and patterns in the City, rather than just the number of electors, met the test of effective representation through "Option 3" as referred to herein. It is the Board's view that this evidence is uncontradicted and accords with the adopted approach of the Board.

[58] The Board has found, in other circumstances, that different Terms of Reference, or criteria and principles, may be required due to the nature of specific characteristics of the municipality. A municipality regarded as a "university town" or "college community", due the presence of a sizeable post-secondary student population, may, for example, be required to adjust its population summaries by drawing information from enrollment records of student numbers. Supplementing census population data, in order to count those student residents, and using such total population counts in apportioning numbers to set ward boundaries, achieves the goal of relative parity of voting power as a condition of effective representation.

[59] The Board has previously adopted this exact approach to effective representation and was referred by the City to the decision of *Wiener v. Kingston (City)*, [2013] O.M.B.D. No. 931 ("City of Kingston") which related to an appeal of a Ward Boundary by-law passed by the City of Kingston. In that decision the Board assessed the propriety of the City's adjustment of the ward boundaries in the central Sydenham ward in which Queen's University is situate, based on population counts that excluded the large body of post-secondary students that reside in the ward during the eight to nine months of the year that they attended school. The City took the position that since the University's students did not generally register to vote, although entitled to vote, they should be excluded from the counts used to set the Ward Boundaries.

[60] The Board determined that the exclusion of the students, who did not, in meaningful numbers, avail themselves of the right to participate in municipal elections, was unreasonable and did not provide effective representation. The Board considered the City's argument that relying on the statistics for the number of voting residents in the ward, as opposed to the population in the ward, was a fundamentally flawed approach:

- 21 But, is parity in voting power "the principle test" to determine a municipal electoral system? *Carter* puts considerable weight on "effective representation" which maintains that "each citizen is entitled to be represented in government."
- 22 The City argues that post-secondary students can still vote if they register to vote. The *[Municipal] Act* does give them this right. But, if they are not counted as residents of the City, does this send the message that their vote doesn't count? Or is somehow less important?
- 23 And what about other residents of Kingston who do not or cannot vote, including children who cannot, and the poor, who tend not to? Why are they counted when post-secondary students are not? This was a question raised by more than one witness and participant at the hearing.
- 24 Students are usually away from their post-secondary institutions when the census is taken. In fact, as was pointed out at the hearing, they are often the census takers. That does not mean that they do not live, study, work and contribute to the community for the nine months of the year that they are there. It does not mean that they do not use City services, have no issues to bring to their local government, and do not create issues for others to bring to their local government. The elected representative is not simply the representative of those who voted, or of those who voted for him or her, but of all the residents of his or her ward. All of this, too, the Board heard from witnesses and participants. It was, as well, implied in the evidence of the expert witnesses.

[61] In the course of his evidence Dr. Williams himself referred to a further example where the Board has embraced the use of population figures to determine relative parity rather than the number of electors. Referring to the decision relating to a Ward Review in the Township of Georgian Bay, Dr. Williams had similarly testified as an expert and had addressed essentially the same argument advanced by the Appellant in this case. The Board, in that case (*Hodson, Re 2013 CarswellOnt 17030*), acknowledged that parity in numbers was itself not absolutely determinative of fair representation, and

upheld the use of population figures rather than voters to examine parity of voting power, and found that this approach was the correct one, as supported by Dr. Williams.

[62] Finally, as Dr. Williams as noted in his evidence, and as submitted by the City, the Federal Parliament allocates its seats based upon population figures obtained through the Federal Census and not the number of electors. As the legislation indicates, representation of the provinces is adjusted at such time as the census population data warrants such change. No reliance is placed upon voter numbers. The Board does not consider it insignificant that its approach, and the analysis set out herein in response to the Appellant's grounds for appeal of the Wards Boundary By-law, accords with the same "numbers" format used for the Federal Parliament to determine an equity of representation.

[63] Accordingly, for these reasons, and having carefully considered upon all the evidence before it, the Board finds that the Appellants stated grounds in his appeal, that electoral numbers should have been used instead of population numbers, are not supportable and fail. For this reason, the Board finds that the City's data collection methods are not only accurate and reliable, as indicated earlier, but also are reasonable and proper in that they support the proper analysis required to ensure that the goal of effective representation is achieved when setting its Ward Boundaries based upon resident populations and not just electoral numbers.

[64] The Board has reviewed the Tables submitted by the Appellant as part of his evidence, demonstrating the manner in which the relative distribution of electoral numbers would appear, and showing only one ward exceeding the variance tolerance of 25% referred to by the Appellant. Given the findings made, that this approach is not the correct approach, the Board must instead consider the appropriateness of the relative distribution of population arising from the City's selected Ward Boundaries under Option 3 (and such other considerations as might be determined necessary).

Does The Ward Boundaries By-law Achieve Effective Representation?

[65] As to the balance of the Appellant's grounds for the Appeal, the Appellant submits that the change in the Ward Boundaries does not benefit the electors, isolates rural areas of the City, does not provide representation of the geographic regions of the City and that the status quo should remain. Save and except for the Appellant's numerical distribution calculations based on electoral numbers, he provides no specific reasons or evidence as to the manner in which the status quo achieves a more effective representation than what is proposed, or how the changes under the Ward Boundaries By-law fail to provide effective representation to any identified rural areas or other geographic regions of the City.

[66] It remains then for the Board to determine whether the City has, through its WB Review, fairly and reasonably enacted a By-law that provides fair and effective representation for its resident population and conversely whether the Council has acted unfairly or unreasonably in its decision to enact the Ward Boundaries By-law.

The Decision To Consider Restructuring of Ward Boundaries

[67] The process to revisit the issue of Ward Boundaries in the City began in November of 2013 when Council directed staff to begin preparation of a preliminary review and report to assist the next council by 2015 so that there would be ample time before the election in 2018. This was the first time that the issue of Ward Boundaries was examined since the Wards were established at the time of amalgamation in the City in 2001. The Ward Boundaries then had been based on a Restructuring Committee Report prepared in 2000. As Dr. Williams confirmed the sixteen wards that were created had been deliberately drawn so as not to align with the pre-amalgamation municipalities and instead was based on the goals of equalizing the number of electors in each ward and capturing a community of interest.

The Status Quo

[68] In his evidence, Dr. Williams provided his opinion as to the acceptability of the status quo, which is supported by the Appellant. Dr. Williams undertook his review after the WB Review was already underway but he indicates that ordinarily, when he is retained by a municipality to assist in a ward boundary review as a consultant to review, assist and advise Council, he will always begin with an analysis of the existing ward structure to determine whether or not the status quo is acceptable and whether change is even required. This review is also relevant where the preservation of the status quo remains one of the options for Council.

[69] Dr. Williams explained his analysis and took the Board through the methodology and evaluation criteria applied to assess the acceptability of the options and to balance the considerations and criteria. He then applied it to an assessment of the status quo. The first evaluation required a fair balancing of populations between wards based on a set of criteria which determines the variance from a determined optimal ward population. In this case it was Dr. Williams' opinion that the *de facto* ward composition with 16 wards had a distribution of population that was unacceptable because seven of the 16 wards were outside the acceptable range of variation. Only one ward was within the optimal ward population and the remaining eight were between 5% and 20% of optimal.

[70] Applying the other principles set out in the Terms of Reference to the status quo, Dr. Williams concluded that under the status quo there were a number of communities of interest and areas with established settlement patterns that were divided between different wards under the existing ward boundaries, which he found puzzling. This had resulted from the original analysis at the time of amalgamation, and it was Dr. William's view that applying the new Terms of Reference after the passage of approximately 16 years, the system warranted examination, and the recognition of those principles developed by the Board and the Courts as incorporated within the Terms of Reference. These principles included the objective of allowing for communities of interest, including active agricultural areas, seasonal recreational areas and long-established population

clusters around the former individual settlements to be properly considered in the WB Review. It was Dr. Williams' opinion that he could not recommend maintaining the status quo as a system when applying the Terms of Reference, and pursuing effective representation for the City's population. Dr. Williams expressed the opinion that the status quo in 2017 would not be defensible.

The Components and Steps in the WB Review

[71] The evidence introduced by the City confirms that the staff and Council, with the assistance of its retained consultant Dr. Williams, undertook a detailed, thorough, and, in the Board's view, comprehensive study that included: an extended data collection and information gathering process; multiple staff reports which continually assembled, updated, and revised information to narrow the focus of the review and the presented options; an extended multiple public consultation process with numerous, and staggered opportunities for residents of the municipality to provide input and receive information; and a final focused examination of the narrowed options to secure a Ward Boundary configuration that resulted in the selection of the option that the Council considered to be the best means of achieving effective representation for the municipality.

[72] As discussed, the WB Review also involved a very labour intensive exercise involving external specialists to determine population figures gleaned from Statistics Canada data collected by the City, and to map the distribution patterns for that population, which ultimately formed the basis for the various options and then assessed by Council.

[73] An examination of the chronological steps of the City's WB Review demonstrates that the City staff, and Council, exercised caution and patience in arriving at conclusions only once adequate information and data had been gathered, and only when carefully considered options had been assembled, and presented. The options, at the outset, included the option of retaining the existing 16 ward structure and boundaries.

Terms of Reference

[74] The staff created Terms of Reference for the WB Review which were relied upon by Dr. Williams. The Board would note that the Terms of Reference (Exhibit 3, Tab 5) adopted by Council (Exhibit 3, Tab 7) accurately reflected the *Carter* principles and adopted the primary principle that, to the extent possible, any new ward boundaries should achieve a general balancing of populations between wards with variances not to exceed 25% based on population projections that will include growth projections, and with consideration for the non-resident population (relating to seasonal “cottage country” dynamics) and variations in population densities.

[75] Council then went so far as to consider the reports of staff and the consultant, and decided to reduce the acceptable range for numerical representation variances in the wards to be limited to 20%. The Board has noted that the Appellant has critically questioned Council’s decision to reduce the tolerable variance ceiling down to 20% and suggests that Council reduced the variance to 20% with the ulterior motive of justifying the ward reduction. There is absolutely no evidence to support such an assertion. It is the Board’s view that Council’s actions in minimizing and reducing the tolerance level in variances of population representation is more accurately a further credit to the efforts of Ms. Currins, Council and the City to make every effort to achieve an equality of effective representation.

Public Consultation

[76] The evidence reveals that the public consultation was more than adequate as there were multiple opportunities extended, through public meetings, including 10 Open Houses with the Mayor, web information, newsletters to reach seasonal residents, a dedicated email link and multiple press releases. The public consultation process also included access to Dr. William’s reports.

[77] Surveys were conducted to determine public opinion, and as steps progressed, public meetings were held and input was obtained and analyzed by staff.

Consideration of Other Factors under the Terms of Reference

[78] Ms. Currins explained the interplay of the various factors considered by the City and Council in reviewing the various options during the WB Review, always considering the Terms of Reference determined at the outset of the Process.

[79] In accordance with the principles and factors outlined by the Court in *Carter*, the City correctly went beyond the primary goal of balancing populations and gave pointed consideration to established settlement patterns and existing communities of interest as well as natural or man-made boundaries.

[80] Without reviewing all of the evidence in this regard, the Board is of the view that Staff and Council went to great lengths to consider such different factors, and certainly considered the concerns and comments provided through the public consultation process. As indicated, when considering the status quo, Dr. Williams considered the fact that the existing Ward Boundaries were deficient in this regard in dissecting some settlement areas and failing to consider the rural/regional geographic areas. The reports, minutes and documentary evidence have been carefully reviewed by the Board and it is readily apparent that in examining the options that led to the selection of Option 3, Council examined the relative distribution of the population but also carefully assessed options against the other criteria such as geographic and road boundaries, the limits of settlement areas as they had altered over the years, the character of the central urban area in Lindsay relative to its immediate surrounding area, and most importantly, the various communities of Interest.

[81] The evidence demonstrates to the Board that as the analysis of the options continued in the WB Review, Staff and Council, with Dr. Williams, pointedly considered the various characteristics specific to the City of Kawartha Lakes. Consideration was given to the outlying and smaller urban areas such as Omemee and Little Britain in the eastern area of the City, Bobcaygeon, Woodville, and the communities in the north area such as Fenelon Falls, Kinmount, Sturgeon Point and other smaller centres.

Examination was directed to the community of interests and areas that share tourism or seasonal recreational areas, and importantly, agricultural areas.

[82] Ms. Currins responded directly to some of the comments raised by the Participants regarding the “jog” in the north boundary of Ward 8 for the option ultimately selected and the reasons for the boundary determination in the area around Bobcaygeon the eastern perimeter. Ms. Currins’ evidence confirms that the City was squarely addressing various issues relating to these areas. In the south, the City plainly recognized what was referred to as the “awkward geography” of what was proposed for Ward 8, and the narrow connection point between the west and east sections of that Ward, but attempts were made to allow the residents in Ward 8, and their elected councillor, to deal with shared issues in this southern-most ward with the adjacent municipality to the southeast (County of Peterborough).

[83] Ms. Currins explained that the proposed configuration brought Omemee’s urban area in the ward to the north, (Ward 6) together, instead of being divided as it was under the de facto Wards. Similarly, in Bobcaygeon the City attempted to include the entire Bobcaygeon area (again, previously divided) and Kinmount, into one Ward taking into account road linkages. Attempts were made to retain as much of the existing boundaries and follow natural boundaries. The City also wrestled with the way in which Lindsay was to be divided acknowledging that a significant number of rural residents to the south of Lindsay would be included in a ward that would be combined with the southern part of the urban component of Lindsay, but balancing this with the attempt to balance the overall population numbers.

[84] It is the Board’s view that the City adhered to the Terms of Reference and considered all of the specific and important factors relating to matters other than the relative parity of numbers thoughtfully, pragmatically, with a view to ensuring that other communities of interest and geographic factors were considered in setting the ward boundaries in a manner that would provide effective representation.

Final Processes and Narrowing of Options

[85] Ms. Currins and Dr. Williams recounted the manner in which the options were eventually narrowed to four options for Council. Notably, Dr. Williams explained that it has always been his approach, in providing consultation services to a municipality in Ward Boundary reviews, not to provide directives or recommendations for any one or more options, as the process nears the end of the “weaning” of the options. Instead, Council is provided with lists of the relative strengths and weakness for each of the option and no directive as to a single right answer is provided.

[86] By March of 2017, Council wished to move forward to meet the established timelines. Despite the public consultation that had already occurred, the evidence indicates that Council nevertheless entertained one further and final public consultation session on March 6, 2017 and received additional written comments on the narrowed four options. After considering these additional comments, and deliberating with the assistance of reports from staff and Dr. Williams, Council passed its resolutions and enacted the Ward Boundaries By-law now appealed on March 21, 2017.

By-Law No. 2017-053 - The Final Ward Boundary Structure

[87] Based upon the options that had been presented, the Council adopted Option 3. Both Ms. Currins and Dr. Williams reviewed the details of Option 3 and the general considerations and rationale that resulted in the selection of the eight Ward boundary plan provided for in Option 3. In the course of Ms. Currins’ and Dr. Williams’ testimony the Board was referred to the final reports prepared by staff, and the External Review report which provided the comparative analysis of the final four options.

[88] As Dr. Williams noted, at this final stage there was no one final answer since no one option was perfect in regards to population distribution and there were pros and cons to consider for each of the last four options. Ultimately, he said, it was a political decision to be made by Council as to which of the four options represented the most effect means of achieving a relative parity of population, inclusive of all property owners,

and ensuring that each Ward, and the community as a whole, had the benefit of effective representation.

[89] Dr. Williams testified that the final analysis of the population balance for Option 3, followed the same methodology that had been consistently applied throughout the WB Review. Based upon the total estimated population of 80,069 (which thus meant that the City was considering, by numbers alone, the representation of a population significantly larger than the 65,278 electors considered by the Appellant in his calculations) Dr. Williams confirmed that Option 3 adhered to Council's adopted Terms of Reference variance set at 20%. Although the population number for Ward 1 was low, when considering all figures, and all of the criteria and principles guiding the City, Dr. Williams was of the view that the lower population in Ward 1 did not represent a deficiency that impacted the overall effectiveness in representation.

[90] At its meeting of regular Council on March 21, 2017, Council accordingly voted to approve Option 3 and the Ward Boundaries By-law was prepared and passed to reflect that final decision.

[91] Dr. Williams's professional opinion, with his background in political science, and as an expert in Ward Boundary reviews, was that the configuration of ward boundaries reflected in the City's Ward Boundaries By-law was based upon reliable estimates of population from census data and which properly added seasonal non-resident electors. Dr. Williams was of the opinion that Option 3 provided for an appropriate distribution of that population within the Ward structure. Dr. Williams opined that the WB Process, and Council's final decision was also based upon a thorough consideration of settlement patterns and communities of interest in the City in a manner consistent with other municipalities, the *Carter* Case, and other decisions of the Board. Dr. Williams accordingly concluded that the Ward Boundaries By-law thus met all of the guiding principles and provided effective representation. For these reasons, it was Dr. Williams considered opinion that the appeal should be dismissed.

THE PARTICIPANTS TESTIMONY

[92] The Participants provided their comments to the Board. Ms. Kathy Morton supported the Appellant's submission that no change was warranted, stating "Why fix what is not broken?" In support of this Ms. Morton questioned the accuracy of the population numbers, and thought that non-resident electors should not be included in voter numbers. The Board has considered and rejected both these arguments.

[93] Ms. Morton also referred to some matters not before the Board or relevant to the issues to be considered, referring to things such as preferred areas for growth in the City, the cost of the ward boundaries review, and criticisms as to the effective provision of community services, responses to 911 emergency calls, and civic building closings. Ms. Morton did testify as to the awkward and narrow "jog" in Ward 8 and the confusion that would occur in dissecting lots and confusing by-law officers.

[94] Mr. Helleman recounted frustrations stemming back to the original amalgamation, the erosion of trust with the political processes, the general lack of accountability of City politicians, and the cost of the ward boundaries change, again matters that might be well-founded, but which are irrelevant to the issues before the Board. Mr. Helleman generally believed that there were issues as to the communication of information to residents and the consultation process during the WB Review. He also provided general comments regarding the mix of urban and rural areas in wards in the city but provided no specifics as to alternatives to the proposed ward boundaries.

SUMMARY OF FINDINGS

[95] The Board has carefully considered all of the evidence presented by the parties, including the comments provided by the Participants, and the uncontradicted expert evidence provided by Dr. Williams. The Board has also thoroughly reviewed the chronology of the WB Review and the various reports and reviewed occurring throughout the process and supporting the various options. Specifically the Board has

considered the analysis of both the status quo which the Appellant submits should remain and Option 3, as adopted through the City's WB Review.

[96] Although the Appellant has been forthright in his belief that the analysis of representation based upon parity of voter numbers is the preferred approach and adheres to the principles set out in the *Carter* Decision, the Board cannot accept this position based on the stated findings regarding the methodology and population data analysis, and the recognition that population numbers are the fundamental consideration when examining equality of representation and relative parity of voting power. Voter numbers are not of assistance in considering equality of representation. The Appellant has also provided no supporting evidence or persuasive reasons to suggest that there are factors relating to communities of interest, geography, or other concerns that would persuasively challenge the analysis and determinations made by Council under the WB Review.

[97] In the Board's view the entirety of the WB Review undertaken by the City, under the direction of Ms. Currins, aided by the external consultants, including Dr. Williams was thorough, methodical, complete, transparent and consistent in adhering to the Terms of Reference and the established methodology. As such, the Board concludes that from the point of commencement of the WB Review through to the final decision of Council adopting Option 3 and implementing it through the Ward Boundaries By-law, the City properly adhered to the guiding principles and arrived at a conclusion that was fair and reasonable.

[98] For these reasons, the Appellant has not established that Council acted unfairly or unreasonably in coming to its conclusion and the Board can find no clear and compelling reason that would cause the Board to interfere in Council's decision as expressed through the Ward Boundaries By-law on these matters. In the absence of any concern, City Council determined the ward boundary structure that was appropriate and the Board must defer to Council's decision.

[99] The Board accordingly finds that the appeal should be dismissed, and the Ward Boundaries By-law affirmed subject to the amendment requested by the City.

[100] The Board additionally finds that the amendment necessary to correct the inadvertent error in the description of Ward 7 in Schedule B to the Ward Boundaries By-law is a minor one and should be made to reflect the corresponding Map in Schedule A, and to reflect the decision of Council.

ORDER

[101] The Board orders that the Appeal is dismissed.

[102] The Corporation of the City of Kawartha Lakes Zoning By-law No. 2017-053, is accordingly affirmed in the form presented to the Board as Exhibit 8(b) inclusive of the minor amendment to the description of Ward 7 as contained in Schedule B to the said By-law.

“David L. Lanthier”

DAVID L. LANTHIER
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