



Compliance Audit Committee Agenda
April 4, 2019 at 1:00 p.m.
Township of Puslinch, Council Chambers
7404 Wellington Road 34
Puslinch ON N0B 2J0

1. Call meeting to order
2. Introductions
3. Disclosure of Pecuniary Interest
4. Election of Chair and Vice Chair
5. Approval of Auditors
6. Compliance Audit Committee Training (Webinar)
7. Next Meeting: May 23, 2019, 1 p.m. Puslinch Council Chambers
8. Adjournment

The Compliance Audit Committee Process

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February 26, 2019

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This presentation may contain general comments on legal issues of concern to organizations and individuals. These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.

Outline

- *Municipal Elections Act, 1996* (MEA)
- Compliance Audit Committee (CAC)
- Candidates
- Registered Third Parties
- Clerks' Reports
- Compliance Audit Process
- Written Reasons



Municipal Elections Act, 1996

Municipal Elections Act, 1996 – Election Campaign Finances

- Sections 88.8-88.37 of the MEA govern election campaign finances
- Among other things, the subsections contain provisions regarding:
 - Contributions
 - Expenses
 - Election campaign period
 - Filing dates and reporting periods
 - Financial statement and auditor's report
 - Campaign account loans
 - Campaign period for registered third parties
 - Surplus and deficit
 - Compliance audit and CAC



Compliance Audit Committee

Compliance Audit Committee

- A CAC must be established
- Not fewer than three and not more than seven members
- CAC cannot include:
 - employees or officers of the municipality or local board
 - members of the council or local board
 - any persons who are candidates in the election for which the CAC is established
 - any persons who are registered third parties in the municipality in the election for which the CAC is established
- Municipal clerk establishes administrative practices and procedures, carries out duties under the MEA to implement CAC decisions
- Council pays **all** costs of CAC activities

Compliance Audit Committee

What is the CAC's role?

- Consider requests for compliance audit of candidates' and registered third parties' campaign finances
 - appoint an auditor (if request granted)
 - consider audit's report
 - if there is an apparent contravention, decide whether or not to commence legal proceedings against the candidate or the registered third party
- Review Clerk's report regarding apparent contravention by contributor
 - if there is an apparent contravention, decide whether or not to commence legal proceedings against the candidate or the registered third party

Compliance Audit Committee

***Ontario Ombudsman v. Hamilton (City)*, 2018 ONCA 502**

- The Ontario Court of Appeal considered whether the Ontario Ombudsman had jurisdiction to investigate an apparent contravention (holding closed door meetings) of the *Municipal Act, 2001* by Hamilton's Election Compliance Audit Committee (ECAC)
 - Hamilton's ECAC was held to not be a "local board" under the *Ombudsman Act* and, therefore, not subject to oversight by a closed meeting investigator

Ontario Information and Privacy Commissioner (2017), Order MO-3437

- CAC communications are subject to the *Municipal Freedom of Information and Protection of Privacy Act* with some exceptions, including records protected by solicitor-client privilege or containing personal information



Candidates

Duties of Candidates

- Campaign bank account – deposit all contributions of money
- Pay all expenses (except for nomination filing fee) from campaign account
- Value contributions of good and services (at fair market value)
- Issue receipts for contribution/obtain receipts for expenses
- Record every expense

Duties of Candidates

- Keep records:
 - receipts issued for contribution (except “pass the hat,” \$10 or less)
 - value of every contribution
 - note if in form of money, goods or services
 - name and address of contributor
- Return contributions made in contravention of the MEA (as soon as aware)

Contributions to Candidates

- Accept contributions only inside campaign period (restricted period)
- Accept only proper contributions
- Respect contribution limits
- Make only eligible expenses
- Pay attention to expense limits
- Prepare and file financial statements
- Pay surplus to the clerk

Filing Requirements

88.25 (1) On or before 2 p.m. on the filing date, a candidate shall file with the clerk with whom the nomination was filed a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances,

- (a) in the case of a regular election, as of December 31 in the year of the election; and
- (b) in the case of a by-election, as of the 45th day after voting day.

Filing Dates

88.30 (1) The filing date for documents that are to be filed under section 88.25 or 88.29 is the following:

1. In the case of a regular election, the last Friday in March following the election.
2. In the case of a by-election, 75 days after voting day.

(2) The supplementary filing date for documents that are to be filed under section 88.25 or 88.29 is the following:

1. In the case of a regular election, the last Friday in September in the year following the election.
2. In the case of a by-election, 30 days after the expiry of the six-month period described in paragraph 2 of subsection (3).

Reporting Periods

88.30 (3) The supplementary reporting period for documents that are to be filed under section 88.25 or 88.29 is the following:

1. In the case of a regular election, the six-month period following the year of the election.
2. In the case of a by-election, the six-month period following the 45th day after voting day.



Registered Third Parties

Duties of Registered Third Parties

- Pursuant to section 88.26 of the MEA, registered third parties must ensure:
 - all contributions are deposited to a campaign bank account
 - all campaign expenses are paid for from the campaign account and properly accounted for
 - financial filings are made in accordance with sections 88.29 and 88.32 of the MEA
 - only contributions in accordance with the MEA are accepted
 - anonymous contributions must be paid to the municipality's clerk
 - contributions do not exceed: (i) a total of \$1,200 to any one registered third party in relation to third party advertisements, and (ii) a total of \$5,000 to two or more registered third parties registered in the same municipality in relation to third party advertisements

Contributions to Registered Third Parties

- Pursuant to section 88.12 of the MEA, a third party must register with the clerk in the municipality where they will advertise
 - Contributions cannot be made to a third party until they are registered
 - Contributions can only be made to registered third parties during the campaign period (same as candidates)
 - Pursuant to section 88.12(8) of the MEA, contributions in excess of \$25 cannot be made in cash

Contributions to Registered Third Parties

- Contributions can be made to registered third parties by:
 - an individual who is normally resident in Ontario
 - a corporation that carries on business in Ontario
 - a trade union that holds bargaining rights for employees in Ontario
 - the registered third party and, in the case of an individual, his or her spouse
- Contributions cannot be made to registered third parties by a federal political party, a provincial political party or the Crown

Contributions to Registered Third Parties

- Pursuant to subsection 88.13(3), contribution limits do not apply to contributions made by the registered third party to itself or if the registered third party is an individual, by his or her spouse
- Fundraising in support of a third party is prohibited until they are registered
- Fundraising may only occur during the campaign period

Campaign Period for Registered Third Parties

- Section 88.28 of the MEA – campaign period for registered third parties
- Generally, the campaign period for a registered third party begins on the day the party registers in relation to an election, and the campaign period ends on December 31 in the case of a regular election and 45 days after voting day in the case of a by-election
- Subsection 88.28(4) of the MEA provides for an extension of the campaign period for a registered third party in the event the registered third party incurs expenses relating to a compliance audit
 - the registered third party must notify the clerk in writing

Financial Statements of Registered Third Parties

- Pursuant to subsection 88.29(1) of the MEA, a registered third party must file a financial statement and an auditor's report with the clerk on or before 2 p.m. on the filing date
- The filings must reflect the registered third party's campaign finances in relation to third party advertisements
 - in the case of a regular election, as of December 31 in the year of the election; and
 - in the case of a by-election, as of the 45th day after voting day.

Financial Statements of Registered Third Parties

- Pursuant to subsection 88.29(6), an auditor's report is not required if
 - the total contributions received are equal to or less than \$10,000;
 - and
 - the total expenses incurred in relation to third party advertisements are equal to or less than \$10,000

Registered Third Parties' Expenses

- Pursuant to subsection 88.21(15) of the MEA, the clerk will provide the registered third party a certificate setting out the maximum amounts that may be spent by the third party in relation to third party advertising

Clerks' Reports

Review of Financial Statements

Review of contributions to candidates

- Under subsections 88.34(1) and 88.36(1) of the MEA, the clerk must review the contributions reported on the financial statements submitted by candidates and registered third parties to determine whether any contributor appears to have exceeded any of the contribution limits

Report Identifying Apparent Contraventions

Report contributions to candidates for council or local board

- 30 days after the filing date, or supplementary filing date, the clerk must prepare a report identifying each contributor to a candidate for office on a council or local board who appears to have contravened any of the contribution limits and,
 - (a) if the contributor's total contributions to a candidate for office on a council or local board appear to exceed the limit, the report will set out the contributions made by that contributor to the candidate; and
 - (b) if the contributor's total contributions to two or more candidates for office on the same council or local board appear to exceed the limit, the report will set out the contributions made by that contributor to all candidates for office on the same council or local board.

Report Identifying Apparent Contraventions

- The clerk must prepare a separate report in respect of each contributor who appears to have contravened any of the contribution limits
- In the case of a council, the clerk must forward each report prepared to CAC
- In the case of a local board, the clerk must forward each report to the secretary of the local board for which the candidate was nominated for office and, within 10 days after receiving the report, the secretary of the local board must forward it to the CAC
- The CAC considers the clerk's report and decides whether to commence legal proceedings against the contributor for the apparent contravention(s)

Report Identifying Apparent Contraventions

- Within 30 days of the filing date or supplementary filing date for registered third parties, the clerk must prepare a report identifying each contributor to the registered third party who appears to have contravened any of the contribution limits and forward the report to the CAC
- The CAC considers the clerk's report and decides whether to commence legal proceedings against the contributor for the apparent contravention(s)



Compliance Audit Process

Compliance Audit Process

There are two broad steps in the Compliance Audit Process:

1. Request for Compliance Audit (candidates, registered third parties)

- Application
- Appeal (if necessary)
- Appointment of Auditor
- Decision whether or not to commence legal proceedings
- Legal proceeding

2. Legal Proceeding

- Appointment of an independent prosecutor by the CAC

Application

- The test for applying for a compliance audit is set out in subsections 88.33(1) and 88.35(1) of the MEA:
 - an elector who is entitled to vote in an election
 - believes on reasonable grounds that a candidate or registered third party has contravened a provision of the MEA relating to election campaign finances
 - may apply for a compliance audit of the candidate's or the registered third party's election campaign finances
- An elector may apply for a compliance audit even if the candidate or registered third party has not filed a financial statement

Application

***Defrancesca v. Vaughan (City)*, 2008 ONCJ 762**

“It is important to remember that this stage of the proceedings is merely to determine if an investigation should be started. It is a pre-investigatory stage. It is not a determination that the candidate has in any way actually violated the statute. Rather, what council must decide is, and what this court must decide is, does the elector have reasonable grounds to believe that the candidate contravened the Act. It would then be a function of an auditor to investigate the matter.”

Application

***Jackson v. Vaughan (City)*, 2010 ONCA 118**

Five stages of the CAC process:

1. When an application for a compliance audit is made, the municipal council must consider the application within 30 days of its receipt and decide whether to grant or reject it. The requirement that the applicant have "reasonable grounds" prevents frivolous and vexatious applications. The council has little discretion in deciding whether to order a compliance audit once reasonable grounds have been found to exist. However, the applicant can be required to pay the auditor's costs if the compliance audit report indicates that there was "no apparent contravention" and the council "finds that there were no reasonable grounds for the application."
2. If the council refuses an application for a compliance audit, the applicant can appeal to the Ontario Court of Justice.

Application

3. The independent audit must be conducted by an independent auditor licensed under the *Public Accounting Act, 2004*. The auditor must promptly conduct an audit to determine whether the candidate has complied with the provisions of the MEA relating to election campaign finances and prepare a report outlining any apparent contraventions. The auditor's powers are set out in [subsection 88.33(15)].
4. The council must consider the compliance audit report within 30 days of receiving it and determine whether to commence legal proceedings against the candidate. The decision to commence legal proceedings for any apparent contravention must be made in accordance with the ordinary principles of administrative law and is amenable to judicial review.
5. The last stage is the legal proceeding itself, in which the candidate has full natural justice protection and *Charter* rights.

Application

Requirements

Under subsections 88.33(2) and 88.35(2):

- an application for a compliance audit will be made to the clerk of the municipality or the secretary of the local board for which the candidate or registered third party was nominated for office
- the application must be in writing and set out the reasons for the elector's belief

Deadline

Under subsections 88.33(3) and 88.35(3):

- the application must be made within 90 days of the candidate's or the registered third party's most recent filing date

Application

Application to be forwarded to Committee by clerk or secretary

Under subsections 88.33(4) and 88.35(4):

- within 10 days after receiving the application, the clerk of the municipality or the secretary of the local board must forward the application to the CAC

Application

Decision of Committee

Under subsections 88.33(7) and 88.33(8):

- within 30 days after the committee has received the application, the committee must consider the application and decide whether it should be granted or rejected and provide brief written reasons for the decision
- all meetings of the CAC must be public, but the members' deliberations may take place in private

Appeals

Under subsection 88.33(9) of the MEA:

- CAC decision may be appealed to the Superior Court of Justice
- It must be appealed within 15 days after the decision is made, and the court may make any decision the CAC could have made
- On appeal of a CAC decision to order or not order an audit, the test is low:
 - Courts have recently confirmed the test: Did the elector have reasonable grounds to believe that a contravention occurred?
 - CAC plays a “gatekeeper function” and is part of the enforcement process

Dickerson v. Compliance Audit Committee of the City of Pickering,
(December 21, 2011), Doc. 2811999 (Ont. C.J.)

Appeals

- If a candidate accepts an ineligible contribution and that contribution is returned to the contributor as soon as the candidate becomes aware and this is done before the CAC considers the audit request, then there are no reasonable grounds to believe a contravention occurred

Lancaster v. St. Catharines (City), 2012 ONCJ 70, aff'd 2012 ONSC 5629

- An appeal is based on the record – it is not a *de novo* hearing

Li Preti v. Toronto (City), 2012 ONSC 4149

- The applicant is entitled to a certain level of procedural fairness

Vezina v. Mississauga Election Campaign Finances Committee, 2013 ONSC 2368

Appeals

Shantz v. Woolwich (Township), 2015 ONSC 4848

- The applicant was elected Mayor of the Township of Woolwich on October 27, 2014
- Following the election, mayor failed to file a financial statement and auditor's report
- Under the MEA, the penalty for failure to file is:
 - (a) the candidate forfeits any office to which he or she was elected and the office is deemed to be vacant; and
 - (b) until the next regular election has taken place, the candidate is ineligible to be elected or appointed to any office to which this Act applies.

Appeals

- An elector filed an application with the Woolwich's CAC in regard to the applicant's contravention of the MEA
- The CAC dismissed the application and granted the applicant relief – the applicant acted in good faith and “there was nothing to gain by requiring a compliance audit when the applicant had already completed an audit herself”
- The Ontario Court of Justice upheld the CAC's decision – the breach was “trivial” and “technical”; and the forfeiture of office and the inability to participate in the next election “far outweighs [the applicant's] error in not filing an auditor's statement on time”

Appeals

Dickerson v. City of Pickering (Compliance Audit Committee)
(December 21, 2011), Doc. 2811999 (Ont. C.J.)

Standard of Review

- Qualifications of CAC members were not before the court and court could not therefore evaluate the expertise of the CAC
- Subsection 81(6) [now subsection 88.33(9)] of the MEA on review provides broad discretion to the appellate court and contains no privative clause

Appeals

Dickerson v. City of Pickering (Compliance Audit Committee)

Decisions

- Justice Bellefontaine found there were “credibly based reasonable grounds to support the request for an audit”
 - significant spending amount over the limit set by the municipal clerk was sufficient to provide reasonable grounds
 - significant expenditure beyond expenditures reported by other candidates

Appeals

***Lancaster v. St. Catharines (City)* (2012), 95 MPLR (4th) 113 (Ont. C.J.)**

- Application to CAC alleging four candidates received excess corporate contributions and did not complete financial statement in prescribed form
- Application rejected and Ontario Court dismissed appeal
- Standard of Review:
 - reasonableness (not correctness)
 - the CAC was “entitled to deference” as it “possesses the necessary expertise to decide the initial application and is free from political interference”
 - concluded the decision of the CAC passed the test of reasonableness and dismissed the appeal

Appeals

***Lancaster v. St. Catharines (City)*, 2012 ONSC 5629**

Appealed to the Superior Court of Justice

- Counsel agreed before the appeal was heard that the standard of review was reasonableness
- Reasonable for CAC to find candidates did not contravene the MEA
- Illegality arose if a candidate failed to return a contribution
- Duty to file includes an implied requirement to completely and correctly fill out required form
- CAC not bound to appoint an auditor in the face of a breach or contravention of the MEA
- No costs were awarded – matter was in the public interest

Appeals

Vezina v. Mississauga Election Campaign Finances Committee, 2013 ONSC 2368

- Application for order compelling candidate to submit to compliance audit
- CAC declined to appoint compliance auditor
- Elector appealed – appeal judge held standard of review was reasonableness
- Appeals judge found arguable issues with respect to rental realty valuation
 - appeal was allowed – CAC was ordered to appoint auditor and candidate appealed

Appeals

Vezina v. Mississauga Election Campaign Finances Committee

- Appeal allowed and decision of CAC restored
- Appeals judge properly held that standard of review was reasonableness and that CAC acting within jurisdiction was owed significant appellate deference
- However, by effectively substituting appeals judge's view of record for that of CAC, appeal judge erred in law by in fact applying wrong standard of review, correctness
- Correct or not, the CAC's decision was within the reasonable range of possible outcomes and the appeal was accordingly properly allowed

Appeals

***Milani v. Iafrate* (2016), 50 MPLR (5th) 344 (Ont. C.J.)**

- Applicant appealed a decision by Vaughan's CAC dismissing a request to audit the council member's campaign expenses – no written reasons were provided
- Ontario Court of Justice dismissed the appeal:
 - "While written reasons would have been preferable, [the CAC] is an experienced body with a significant measure of independence from council. Its decisions are entitled to deference."
 - "The test for review is the reasonableness of [the CAC's] decision in all the circumstances."
 - "In all the material filed by the Applicant there is a complete absence of evidence supporting any reasonable inference that the Respondent Councillor misused public funds or incurred campaign expenses that were not reported that amount to anything key and nominal amounts."

Appeals

Gunn v. Halton District School Board, 2012 ONCJ 683

- Elector filed application for review of financial statement of candidate for Halton District School Board (HDSB)
- HDSB's CAC found no reasonable grounds to believe candidate had contravened the MEA
- Applicant was not notified of nor was present at audit
- Applicant appealed and filed additional affidavit material
- Court drew inference that the CAC did not have any established administrative practices and procedures clearly and transparently in place when considering the applicant's application, notwithstanding mandatory provisions of section 81.1(4) of the MEA [now section 88.33]

Appeals

- Absent such procedures, there was no clear notice to applicant regarding process that the CAC would follow, notwithstanding that she made every effort to find out in advance how process worked
- Existing record did not allow appeal court to make proper assessment
- Fair procedure requires fair notice of procedure to be followed, evidence to be considered, and transparent and complete record of what was before the CAC
- Only fair and transparent way of dealing with matter was to have *de novo* hearing on appeal

Appointment of an Auditor

Appointment of auditor

- Under subsections 88.33(10) and 88.35(4), if the CAC decides to grant the application, it must appoint an auditor to conduct a compliance audit of the candidate's or the registered third party's election campaign finances

Duty of auditor

- Under subsections 88.33(12) and 88.35(4), the auditor must promptly conduct an audit of the candidate's or registered third party's election campaign finances to determine whether he or she has complied with the provisions of the MEA relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate or registered third party

Appointment of an Auditor

Who receives report

- Under subsections 88.33(13) and 88.35(4), the auditor must submit the report to the candidate or the registered third party, the clerk with whom the candidate filed his or her nomination, the secretary of the local board, if applicable, and the applicant

Report to be forwarded to committee

- Under subsections 88.33(14) and 88.35(4), within 10 days after receiving the report, the clerk of the municipality or the secretary of the local board will forward the report to the CAC

Appointment of an Auditor

Powers of auditor

- Under subsections 88.33(15) and 88.35(4), for the purpose of the audit, the auditor,
 - (a) is entitled to have access, at all reasonable hours, to all relevant books, papers, documents or things of the candidate or the registered third party and of the municipality or local board; and
 - (b) has the powers set out in section 33 of the *Public Inquiries Act, 2009* and section 33 applies to the audit.

Costs

- Under subsections 88.33(16) and 88.35(4), the municipality or local board will pay the auditor's costs of performing the audit.

Decision to Commence Legal Proceeding

Power of Committee

- Under subsections 88.33(17) and 88.35(4), the CAC shall consider the report within 30 days after receiving it and if the report concludes that the candidate or the registered third party appears to have contravened a provision of the MEA relating to election campaign finances, the CAC shall decide whether to commence a legal proceeding against the candidate or the registered third party for the apparent contravention

Decision to Commence Legal Proceeding

Notice of decision

- Under subsections 88.33(18) and 88.35(4), the decision of the CAC and brief written reasons for the decision shall be given to the candidate or the registered third party, the clerk with whom the candidate filed his or her nomination, the secretary of the local board, if applicable, and the applicant

Saving provision

- Sections 88.33 and 88.35 do not prevent a person from laying a charge or taking any other legal action, at any time, with respect to an alleged contravention of a provision of the MEA relating to election campaign finances

Decision to Commence Legal Proceeding

What factors are to be weighed?

There are two primary factors to consider:

1. Is evidence available or likely available to support a legal proceeding?
2. If so, is the legal proceeding in the interest of justice?
 - whether or not the infraction was *de minimis*
 - whether the violation was deliberate
 - whether the violation was committed to realize a personal benefit
 - whether the violation was committed at the direction of a professional

Decision to Commence Legal Proceeding

Township of Springwater Compliance Audit Committee

- During a meeting on May 25, 2018, the Township of Springwater CAC decided to commence legal proceedings against the Mayor, Bill French
- The Committee provided the following reasons for its decision:
 - “The Committee has carefully considered the MEA, the auditor’s report, and the submissions from the various parties in response to the auditor’s report.”
 - “The Committee finds that part of its role is a consideration of the values of public accountability and transparency in our system of elections. A candidate for public office must be aware of these duties.”
 - “The Committee finds that the apparent contraventions in failing to pay campaign expenses, issue proper contribution receipts, acceptance of contributions in apparent contravention of the MEA, and filing of inaccurate financial statements, along with other apparent contraventions detailed in the auditor’s report as required by the MEA, are serious in nature and essential to protect the integrity and public confidence in the democratic process.”

Decision to Commence Legal Proceeding

French v. Township of Springwater, 2018 ONSC 94

“It must also be noted that the Committee performs no adjudicative role. Rather, it is a gatekeeper. It may, for example decide not to commence legal proceedings for minor or trivial noncompliance rules. However, it makes no determination as to right or wrong.”

Decision to Commence Legal Proceeding

***Ford v. Toronto (City)*, 2012 ONCJ 92**

- Audit concluded that former Toronto Mayor Rob Ford had committed various apparent contraventions in his 2010 campaign and exceeded his \$1.3 million spending limit by \$40,168
- In February 2013, Toronto's CAC voted 2-1 against hiring a special prosecutor to pursue charges against Mayor Ford for his alleged election finance violations
- Under an earlier version of the MEA, the CAC was not required to provide reasons for its determination

Decision to Commence Legal Proceeding

***Ford v. Toronto (City)*, 2012 ONCJ 92**

“... I am of the view that the role of the court at this juncture is akin to the role of the court in assessing the reasonableness of an authorization of a search warrant issued by a justice of the peace in a criminal context. In performing that function the court engages in a review of the record that was before the justice of the peace at the time of the authorization. The court determines whether the record provided an adequate basis for the authorization. The court is not to substitute its reasoning for that of the justice of the peace but is to find whether such an authorization could be supported by the record. A justice of the peace is not required to provide reasons for his or her decision. Nor, are reasons typically provided by the authorizing justice of the peace. The reviewing court is free to determine whether reasons could be found. With respect to decisions of the CAC, the MEA does not provide for appeals of their decisions to be conducted as de novo hearings.”

Decision to Commence Legal Proceeding

- In deciding to prosecute the candidate or the registered third party, the CAC appoints an *independent* prosecutor
- Prosecutor's role consists of five main parts:
 - determination of whether reasonable and probable grounds exist to believe that the candidate or the registered third party committed offences under the MEA
 - determination of whether there is a reasonable prospect of conviction on those charges
 - the laying of charges
 - crown and judicial pre-trials
 - trial itself

Decision to Commence Legal Proceeding

***Jackson v. Vaughan (City)*, 2010 ONCA 118**

- Two residents sought compliance audit of candidate's campaign finances
- City declined, complainants appealed and court directed City to appoint auditor to conduct compliance audit
- Audit identified numerous apparent contraventions and City approved laying of charges against candidate
- Applicant sought order quashing by-laws that authorized and confirmed decision to prosecute, arguing they were an unlawful delegation of authority
- Trial judge found nothing vague, ambiguous or mysterious in term "compliance audit" and it was not auditor's function to determine whether apparent contravention of MEA is real contravention, this is for judge
- Court of Appeal upheld lower court decision

Decision to Commence Legal Proceeding

***Jackson v. Vaughan (City)*, 2010 ONCA 118**

“The Act does not require council to decide what charges to lay and how to handle them. Section 81(10) [now subsection 88.33(17)] of the Act gives council the power to commence a legal proceeding against a candidate for any apparent contravention of the Act relating to election campaign finances.”

“In the circumstances, not only was it reasonable to delegate the prosecution to a person with the appropriate expertise and qualifications, it was necessary as it would have been difficult, if not inappropriate, for any City employee to act as the prosecutor in the proceedings.”

“[A prosecutor] is an agent of the municipal corporation and the powers he has been given are properly characterized as administrative, in the sense that they are required to implement council's decision to commence legal proceedings.”

Written Reasons

- The most recent changes to the MEA require the provision of **brief written reasons** from the CAC
- Under subsections 88.33(8) and 88.33(18), a CAC must provide written reasons when:
 - it grants or rejects the application
 - it chooses whether to commence legal proceeding against the candidate for an apparent contravention of the MEA
- Pursuant to subsections 88.34(11) and 88.36(7), written reasons are also required for reviews of contributions to candidates and registered third parties

Written Reasons

Dome Petroleum Ltd. v. Alberta (Public Utilities Board), 2 AR 453

"[Written reasons are] intended to enable persons whose rights are adversely affected by an administrative decision to know what the reasons for that decision were. **The reasons must be proper, adequate and intelligible.** They must also enable the person concerned to assess whether he has grounds of appeal."

Baker v. Canada, [1999] 2 SCR 817

"The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has **important significance for the individual, when there is a statutory right of appeal,** or in other circumstances, some form of reasons should be required."

Written Reasons

De Villars and Jones, *Principles of Administrative Law* (2014)

- When required by statute to provide reasons, failure to do so will violate the duty to be fair and will amount to a jurisdictional error

***Morin v. Alberta (Provincial Planning Board)*, [1974] AJ No 199**

- Section 8 of the *Alberta Administrative Procedures Act* was at issue requiring an authority who exercises a statutory power that adversely affects the rights of the party to provide written reasons
- The judge emphasized the significance of the procedural or statutory rule requiring reasons to be given
- It was ruled that the written reasons given would have been adequate, but the order given was a nullity for non-compliance with the Act in other respects

Written Reasons

- When decisions require written reasons, they must be adequate
- In *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, the Supreme Court of Canada wrote:
 - “This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and “look to see” whether any of those reasons adequately support the decision.”
 - For reasons to be adequate, they must be “tenable, grounded in the evidence, and supporting of disbarment as the choice of sanction.”
 - In general, it is a question of whether the “reasons, taken as a whole, are tenable as support for the decision.”

Written Reasons

- Examples of errors leading to inadequacy:
 - only repeating the matters that were under consideration

Shooters Sports Bar Inc. v. Ontario, 2008 CanLII 25052 (Ont Div Ct)

“It is not sufficient for the Board to summarize the evidence and then baldly state its conclusions. The parties are entitled to know the process by which the Board came to those conclusions . . . The reasons of the Board are inadequate and do not meet the standards of procedural fairness and natural justice.”

Written Reasons

- Examples of errors leading to inadequacy:
 - only reiterating the parties' submissions (can be adequate)

Cojocaru v. B.C. Women's Hospital & Health Center, 2013 SCC 30

"Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside."

Written Reasons

- Examples of errors leading to inadequacy:
 - unintelligible reasons (incapable of proper judicial scrutiny)

R v. Sheppard, 2002 SCC 26

The judge stated a conclusion, provided “boilerplate” reasons and missed addressing central pieces of evidence blaming a busy courtroom. In addition, it was deemed that “the trial judge's reasons were so “generic” as to be no reasons at all.”

Written Reasons

- According to the *Canadian Encyclopedic Digest* (III.4.(d).(ii).B.4), other adequacy considerations include:
 - obscure reasons can be acceptable if inferences can still be drawn
 - deficiency of reasons does not immediately make a decision invalid
 - delay in issuing reasons can violate the duty of fairness

Written Reasons

- It is important to note that the court understands legal perfection will not be met

Clifford v. OMERS, 2009 ONCA 670

- “[R]ecognition of the day-to-day realities of administrative agencies is important in the task of assessing sufficiency of reasons in the administrative law context. One of those realities is that many decisions by such agencies are made by nonlawyers. That includes this one. **If the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, this will not render the reasons insufficient provided there is still an intelligible basis for the decision.**”
- In this case, the court upheld the reasons since they sufficiently grappled with the two live issues and provided explanations leading to the answer

Written Reasons

- The court also does not require written reasons to set out every finding

***R v. R.E.M.*, 2008 SCC 51**

- “Explaining the “why” and its logical link to the “what” does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict.”
- In this case, the court upheld the reasons on the basis that although the trial judge could have explained matters more fully, he properly articulated his conclusions based on the context of the issues that arose during trial

Written Reasons

- At the 2015 Society of Ontario Adjudicators and Regulators Conference, Justice Laskin summarized common errors:
 - Failing to explain why a person was credible or not
 - Failing to explain why a statutory provision was cited
 - Saying you have considered the relevant criteria without actually doing so
 - Failing to analyze the evidence or explain findings
 - Disregarding material evidence or failing to deal with important inconsistencies

Written Reasons

- At the 2015 Society of Ontario Adjudicators and Regulators Conference, Justice Laskin mentions that “one size does not fit all” when structuring reasons. Each case is different.
- Justice Laskin also states that when providing written reasons, consider:
 - Who are you writing for?
 - Set out the relevant evidence
 - Conciseness is key
 - Use the introduction as an organizing device
 - Consider using headings and sub-headings

Written Reasons

- At the 2015 Society of Ontario Adjudicators and Regulators Conference, Justice Laskin states that reasons are typically written in the following format:
 - Introduction
 - Evidence/Facts
 - Analysis (Issues)
 - Conclusion

Note:

As long as the principles discussed earlier on the importance of written reasons are kept in mind, the structure is flexible as demonstrated in the next examples

Written Reasons



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Decision of the Compliance Audit Committee

established under Section 81.1(1) of the Municipal Elections Act, 1996

A Compliance Audit Application Respecting the Election Finances of Bill French,
Candidate for Mayor in the 2014 Municipal Election

With respect to the meeting held on May 25, 2018 to deal with the application submitted by Mr. Dan McLean concerning the election finances of Mr. Bill French, candidate for Mayor in the 2014 Municipal Election, the Compliance Audit Committee (the "Committee") provides the following:

This decision of the Committee relative to the application by Mr. McLean for a Compliance Audit under Section 81(1) of the Municipal Elections Act, 1996 as it was at the time¹ (the "MEA") of Mr. French in his election for Mayor of the Township of Springwater on October 27, 2014 and his financial statement, attested to on March 18, 2015 follows:

A short summary of the history of this application in view of its complexity and length is set forth:

1. Mr. French was elected Mayor of the Township of Springwater on October 27, 2014.
2. On June 24, 2015 Mr. McLean submitted an application for a compliance audit pursuant to the MEA, of Mr. French's campaign finances.
3. On July 21, 2015 the Committee ordered a compliance audit pursuant to subsection 81(7) of the MEA and appointed Grant Thornton LLP to conduct the audit.
4. On October 23, 2015 the Committee determined that the Grant Thornton report was inadequate in view of its irregularities and public perception of fairness, and ordered a second compliance audit.
5. A tender process occurred and the Committee selected Froese Forensic Partners Inc. on November 11, 2015 to conduct the second compliance audit in accordance with the MEA.

6. Mr. French brought an application for judicial review of the Committee's decision on November 30, 2015.
7. On July 18, 2016 Mr. McLean brought an application for judicial review relative to Grant Thornton's position. However, the Court on a motion, dismissed a portion of this application on January 5, 2017.
8. On January 16, 2018 both judicial review applications were heard by the Divisional Court in Toronto. Justice Malloy dismissed Mr. French's application and found, "the process before the Committee should be permitted to run its course".
9. On February 27, 2018 the Committee appointed Glen R. Davidson of Froese Forensic Partners Inc., Auditor, to conduct the second compliance audit in accordance with the MEA.
10. The report of Glen R. Davidson, Auditor dated May 7, 2018 has been received by the Committee.

The Compliance Audit Committee is a statutory body, governed by the MEA. The Act dictates the Committee's decision and subsection 88.33(17) states:

"The committee shall consider the report within 30 days after receiving it and, if the report concludes that the candidate appears to have contravened a provision of the Act relating to election campaign finances, the committee shall decide whether to commence a legal proceeding against the candidate for the apparent contravention."

The Committee has carefully considered the MEA, the auditor's report, and the submissions from the various parties in response to the auditor's report.

The Committee finds that part of its role is a consideration of the values of public accountability and transparency in our system of elections. A candidate for public office must be aware of these duties.

The auditor's report confirms initial apparent contraventions of the MEA by the candidate and in addition, the auditor's report has disclosed several additional apparent contraventions, not initially disclosed.

The Committee finds that the apparent contraventions in failing to pay campaign expenses, issue proper contribution receipts, acceptance of contributions in apparent contravention of the MEA, and filing of inaccurate financial statements, along with other apparent contraventions detailed in the auditor's report as required by the MEA, are serious in nature and essential to protect the integrity and public confidence in the democratic process.

In view of the above reasons, the Committee has determined that legal proceedings shall be commenced against the candidate for the apparent contraventions of the MEA.

Written Reasons

- Sample Analysis
 - ✓ Introduction summarized issue at hand
 - ✓ Material facts were listed
 - ✓ Stated relevant MEA provisions
 - ✓ Evidence cited from auditor's report
 - ✓ CAC clearly explained how and why they reached their decision

Written Reasons



CITY OF HAMILTON

**DECISION of the
ELECTION COMPLIANCE AUDIT COMMITTEE**
*established under Section 81.1(1) of the *Municipal Elections Act, 1996**

**A COMPLIANCE AUDIT APPLICATION RESPECTING THE
SUPPLEMENTARY REPORTING PERIOD (January 1, 2015 to June 30, 2015)
OF THE EXTENDED CAMPAIGN PERIOD OF JASON FARR, CANDIDATE,
WARD 2**

With respect to the meeting held on January 15, 2016 to deal with the application submitted by Ms. Vivian Saunders concerning the Supplementary Reporting Period (January 1, 2015 to June 30, 2015) of the Extended Campaign Period of Jason Farr the Committee considered only items: 7, 8, 9, 10 and 12. Items 1, 2, 3, 4, 5, 6, 11, 13, 14, 15, 16, 17 and 18 were not considered as they concerned the original reporting period from nomination day to December 31, 2014.

With respect to the item regarding the auditor's expense, it is the view of the Committee that the Candidate's reporting of expenses in the same amount as shown on his original filing is appropriate given that there were no additional fees.

With respect to the expenses related to the Candidate's campaign website, it is the view of the Committee that the Candidate's reporting of expenses in the same amount as shown on his original filing is appropriate given that there were no additional fees.

With respect to the Candidate's proper filing of the supplementary financial statement, the Committee reviewed the original document and confirm that the supplemental financial statement was filed on time as attested to by the Declaration (Form 4) dated September 24, 2015.

The Applicant's statement that the Candidate has abused the purpose of the supplementary campaign period is speculative, not supported by any evidence and there is no requirement under the MEA that a campaign deficit must be eradicated.

With respect to the Candidate campaigning outside of the campaign period, there is no indication that expenses were incurred for the website, or contributions received through the website, during the Supplementary Reporting Period (January 1, 2015 to June 30, 2015).

The Committee is in agreement that there has not been a contravention of the MEA. In the Superior Court rulings of *Lancaster v. Compliance Audit Committee et al.*, 2013 ONSC 7631 and *Vezina v. Parrish*, 2013 ONSC 2368, it was held that the Committee, not the Applicant, must believe on a reasonable grounds that the Candidate has contravened the MEA before an audit is ordered.

The Committee does not order a compliance audit.

Dated at the City of Hamilton January 15, 2016

Written and approved by the following Committee Members:

Ross Anderson, Chair

Barry Gilbert, Vice Chair

John Klein

Linda Lister

Written Reasons

- Sample Analysis
 - ✓ Each material issue is addressed
 - ✓ CAC clearly explained how and why they reached their decision (for each issue and the overall case)
- Reminder from *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20:

“The question is rather whether the reasons, taken as a whole, are tenable as support for the decision.”

Election Campaign Finance Offences

Offences by candidate

92 (1) A candidate is guilty of an offence and, on conviction, in addition to any other penalty that may be imposed under this Act, is subject to the penalties described in subsection 88.23(2),

- (a) if the candidate incurs expenses that exceed the amount determined for the office under section 88.20 [candidate's expenses]; or
- (b) if the candidate files a document under section 88.25 [financial statement and auditor's report] or 88.32 [surplus] that is incorrect or otherwise does not comply with that section.

Election Campaign Finance Offences

Exception, action in good faith

92 (2) However, if the presiding judge finds that the candidate, acting in good faith, committed the offence inadvertently or because of an error in judgment, the penalties described in subsection 88.23(2) do not apply.

General offence

94 A person who contravenes any provision of this Act or a regulation under this Act or a by-law passed by a municipality under this Act is guilty of an offence.

Election Campaign Finance Offences

Offences by registered third party

92 (4) A registered third party is guilty of an offence and, on conviction, in addition to any other penalty that may be imposed under this Act, is subject to the penalty described in subsection 88.27(1),

- (a) if the registered third party incurs expenses that exceed the amount determined under section 88.21; or
- (b) if the registered third party files a document under section 88.29 or 88.32 that is incorrect or otherwise does not comply with that section.

Election Campaign Finance Offences

Exception, action in good faith

92 (5) However, if the presiding judge finds that the registered third party, acting in good faith, committed the offence inadvertently or because of an error in judgment, the penalty described in subsection 88.27(1) does not apply.

Additional penalty, registered third parties

92 (6) If the expenses incurred by or under the direction of a registered third party exceed the amount determined under section 88.21, the registered third party is liable to a fine equal to the excess, in addition to any other penalty provided for in the Act.

Pleas

Dickerson v. Compliance Audit Committee of the City of Pickering

(December 21, 2011), Doc. 2811999 (Ont. C.J.)

- former Pickering Councillor Doug Dickerson plead guilty to two counts under the MEA

Count #1: Filed an inaccurate financial statement

- Classified an \$11,550 gift to common law spouse as an election campaign salary/ honoraria/professional fee
 - payment not technically unlawful, but should have been classified as a gift
 - not related to any actual work

Pleas

Dickerson v. Compliance Audit Committee of the City of Pickering

- Classified a \$14,594 purchase of alcohol as an expense for voting day party
 - purchased 288 bottles of alcohol – when scrutinized, explained these were for post-election party planned for spring/summer 2011
 - however, when statement was filed in March 2011, it was no longer possible to legally incur any further expenses related to the party
- Failed to reflect a \$750 campaign contribution received from and later returned to a business owned by Mr. Dickerson's former wife
 - contribution and its return were not included in financial statement

Count #2: Expenses exceeding the spending limit

- Exceeded allowable campaign expense spending limit by \$2,909.65

Pleas

Toronto Councillor Giorgio Mammoliti

- In December 2014, plead guilty (joint submission) to overspending (by at least \$10,000), filing false financial records and failing to keep records of campaign expenses
- Will pay back \$17,500
- Agreed statement of facts included:
 - campaign lacked in-house accounting expertise – volunteers filled out paperwork provided by an outside accountant
 - candidate continued to fundraise during the campaign
 - some expenses were not recorded at all (e.g., \$3,390 order of “Team Mammoliti” jackets)

Pleas

Toronto Councillor Giorgio Mammoliti

- Justice of the Peace accepted position that while Councillor Mammoliti did not prepare the financial statements, he was ultimately responsible for them
- Justice of the Peace determined that Councillor Mammoliti acted in good faith at all times although there may have been an error in judgment in appointing his financial assistant

Judicial Review in Compliance Audit Committee Context

French v. Township of Springwater, 2018 ONSC 94

- The applicant sought judicial review of a CAC decision regarding his election spending
- Two audits were conducted – the CAC did not consider the first audit, and ordered a second, “forensic audit”
- The applicant asserted that the CAC did not have the authority to not consider the first audit and to order a second audit. In the alternative, if the CAC did have the authority, the applicant asserted that it should be quashed because it is unreasonable. Finally, the applicant alleged that the CAC’s term expired and it did not have the authority to consider the matter further.

Judicial Review in Compliance Audit Committee Context

French v. Township of Springwater, 2018 ONSC 94

- The court dismissed the application for prematurity. However, confirmed that a CAC has jurisdiction to order a new audit if it determines that a new audit is necessary.
- The CAC ordered a forensic audit following a standard audit

Costs

Public Interest Litigation

Incredible Electronics Inc. et al v. Attorney General of Canada (2006), 80 OR (3d) 723, [2006] OJ No 2155

- "Litigation that involves the resolution of a legal question of importance to the public as opposed to private-interest litigation which . . . involves the resolution of a legal question of importance mainly only to the parties."
- Costs in public interest litigation require special treatment and are to be awarded on a principled basis

Costs

Factors considered

- Litigation must be of public importance
- Litigant should have little to gain financially
- Public-interest litigant should have unselfish motives

Other factors to consider

(from *St. James Preservation Society v. Toronto*, 2007 ONCA 601)

- Nature of the unsuccessful litigant
- Nature of the successful litigant
- Nature of the dispute – was it in public interest?
- Has litigation had adverse impact on public interest?
- Financial consequences to the parties

Costs

Lancaster v. St. Catharines (City)

- There was a clear public importance and benefit of the applications and appeals – to improve financial accountability in public election campaigns
- There was no adverse impact on the public interest – without the applicant's vigilance, the candidates would have kept the over-contributions
- No evidence that the candidates were "targeted" by the applicant

Costs

Dickerson v. Compliance Audit Committee of the City of Pickering

- Appeal from decision of the CAC to grant applications
- Court awarded costs to the CAC on a partial indemnity basis

“Given the significant role that costs play in the *Municipal Elections Act* finances regime to discourage frivolous or unnecessary requests for an audit, I view costs to be a proper mechanism to discourage one side or the other from appealing decisions of the Compliance Audit Committee.”

Presented by:



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