

Toronto Memorandum

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Client: City of Toronto
Re: Voters' List Issue
File No: 009324.1022
Date: June 30, 2010

You have requested our opinion on motion Item No. EX45.41 passed at Executive Committee on June 14, 2010, which is scheduled to be dealt with at Council on July 6, 2010.

If it passes, would City Council's authorization and direction to the City Clerk "to conduct a direct in-person effort to tenants to ensure that they are on the voter's list" be ultra vires City Council?

Yes. The statutory scheme indicates that City Council has no authority over the voters' list and therefore any direction in relation to the composition of the voters' list is outside City Council's jurisdiction and would be impermissible. It is similarly not within City Council's jurisdiction to purport to "authorize" the City Clerk to do something that is already within her independent discretion if she considered it necessary or desirable for conducting the election.

Under the Municipal Elections Act, 1996 ("MEA") council has been given certain limited election-related responsibilities (none of which relate to the voters' list) and courts have held (in other contexts) that municipal powers are to be interpreted broadly. Furthermore, there is Supreme Court jurisprudence holding that enfranchising statutes are to be interpreted in a way that favours enfranchisement. Therefore, some measure of involvement by council in election-related matters may be tolerated by the courts so long as the fairness and procedural integrity of the election are not adversely affected (and in that regard, the second recommendation in Item No. EX45.41 is not objectionable (viz. the request to support enfranchisement of tenants)).

However, it is critically important that the City Clerk in discharging her statutory mandate as election administrator should be impartial and independent from political or

other influences. Ontario and Federal elections legislation explicitly provides that no person shall interfere with election administrators in the exercise of their duties. The municipal and local elections legislation in other provinces similarly prohibits any interference or attempted interference with election officials. While the MEA does not have express provisions prohibiting interference with the clerk, the above-mentioned legislation strongly suggests that such a concept is inherent to the role and duties of election administrator. Accordingly, it is reasonable to conclude that the City Clerk, as election administrator, should be an independent neutral party, free from political or other external influence, including any obstruction, attempted obstruction or attempts to influence the City Clerk in carrying out her duties as election administrator.

The clearly defined statutory mandate and independence of the City Clerk to prepare for and conduct elections serve to insulate election-related activities undertaken by the City Clerk from any allegation of bias. Those same activities may appear in a different light if undertaken by the City Clerk at the direction of a City Council composed of candidates seeking re-election. It should be mentioned that in this election year, there may already be a gloss on any City staff election-related activities as a result of resolutions already adopted or discussed by City Council.

The risk of continuing with a motion that appears to interfere with the City Clerk's independent legal responsibility is that such a motion may support an allegation that the election has not been conducted in accordance with the terms and principles of the MEA. A failure to conduct an election in a manner consistent with the principles of the MEA may result in a declaration of invalidity, a recount or other consequences. Municipal clerks and their local municipalities have been held jointly liable for the costs (including legal costs) of contested elections. Furthermore, such a motion could form part of an evidentiary trail to support any criminal or civil lawsuits that may arise following an alleged improper election. In the 2004 municipal election in Calgary the improper and targeted use of special ballots was discovered by the municipal clerk which resulted in certain votes not being counted and the withdrawal of a candidate after the election. The incident gave rise to criminal and civil proceedings as well as the appointment of a public Inspector to inspect the election and produce a report. Obviously the costs and civic credibility that are at risk if the results of an election are challenged for perceived or real bias are enormous. The conduct of an election must be, and must be seen to be, beyond reproach.