

# Toronto Memorandum

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**Re:** The voters' list and related issues

**Date:** May 28, 2010

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## BACKGROUND

This memorandum addresses certain issues related to the compilation and composition of the voters' list used by the City Clerk in the administration of municipal elections. Part I of the memorandum includes specific responses to a number of City Council recommendations that were referred to the City Manager for consideration. Among the issues discussed is the shift in the use of voters' lists from *closed* lists to *open* lists. Part II describes the authority of the City Clerk as election administrator, as well as the role of City Council, the Municipal Property Assessment Corporation ("MPAC") and the City Manager in the municipal elections process and includes certain supporting materials as well as suggestions for legislative reform. Addressed briefly in Part II is the extent to which City staff may take part in election-related activities.<sup>1</sup> In that regard, the primary responsibility for preparing and conducting a municipal election is decidedly upon the City Clerk, but City staff may be permitted some scope to take part in election-related activities in a manner that promotes enfranchisement and is otherwise consistent with the terms and principles of the *Municipal Elections Act, 1996* ("MEA").

## DISCUSSION

### Part I – City Council Recommendations

At your request, we have reviewed City Council recommendations for consideration numbers five through ten from Executive Committee Decision EX40.3 (dated February 1, 2010) and respond to each recommendation as follows:

*Recommendation 5. That City Council adopt the principle that making a polling station accessible to the disabled shall be accomplished without seriously compromising the accessibility of the general electorate.*

Adopting such a principle would be outside City Council's jurisdiction. The City Clerk has the responsibility to prepare for and conduct the election. As part of that responsibility, the MEA specifically provides that "the clerk shall establish the number and location of voting places for an election as he or she considers most convenient for the electors" (s. 45(1)). The MEA was amended by Bill 212 to give the clerk the further responsibility to ensure that each voting place is accessible to electors with disabilities (s. 45(2)). The relevant subsections of the MEA are in the following terms:

TORONTO

MONTREAL

OTTAWA

CALGARY

VANCOUVER

NEW YORK

LONDON

SYDNEY

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<sup>1</sup> References to "City staff" in this memorandum shall be taken to mean employees of the City of Toronto who report, directly or indirectly, to the City Manager and carry out duties assigned by the City Manager and shall not include employees who report, directly or indirectly, to the City Clerk, or City employees to whom election-related tasks are delegated by the City Clerk.

**Number and location of voting places**

45. (1) The clerk shall establish the number and location of voting places for an election as he or she considers most convenient for the electors. 1996, c. 32, Sched., s. 45 (1).

**Accessibility**

(2) In establishing the locations of voting places, the clerk shall ensure that each voting place is accessible to electors with disabilities. 2009, c. 33, Sched. 21, s. 8 (23).

...

(5) The space [for use as a voting place] provided shall be acceptable to the clerk and shall not be a space that is being used as a dwelling.

[subsections (3), (4) and (6) to (10) omitted]

City Council has limited jurisdiction under the MEA in relation to voting places and may pass by-laws providing for reduced hours at mandatory voting places (s. 46(3)) and shall establish the dates and opening hours of advanced voting places (s. 43). There is nothing else in the scheme of the MEA to suggest that City Council has the authority to determine the location or nature or other characteristics of voting places.

*Recommendation 6. If necessary, transporting electors may be used by the City Clerk as a means of respecting this principle [i.e. not seriously compromising the accessibility of the general electorate].*

For the reasons expressed above, it is outside City Council's jurisdiction to require the City Clerk to make arrangements for the transportation of electors. The City Clerk has a responsibility to conduct the election in accordance with the principles of the MEA which have been held to include the principle that the election shall be accessible to the voters. Accordingly, the City Clerk already has the responsibility to ensure that voting places are accessible to all voters. There are, however, significant practical limitations on the City Clerk's ability to arrange for transport and, furthermore, if transport were provided for some, but not all, electors, or the transport were provided in a way that favoured some electors over others, such transport may not be in line with other principles of the MEA (including the principles that the election shall be fair and non-biased and that voters and candidates shall be treated fairly and consistently).

*Recommendation 7. The City Clerk, on the basis of the quantum of the deficiencies in the voters lists for the last municipal election, put in place a contingency capacity for direct enumeration of electors to correct obvious deficiencies in voters lists as they arise.*

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. There are furthermore significant practical and legal limitations on the City Clerk's authority and ability to conduct a direct enumeration and the manner in which the information, if gathered, may be used.

The legislated responsibility for municipal enumeration is on MPAC under the *Assessment Act*. While the City Clerk has a general power under the MEA to provide for any matter or procedure she considers necessary or desirable, that power may only be exercised in relation to matters not otherwise provided for in an Act or regulation. Given that municipal enumeration is provided for in the *Assessment Act*, the City Clerk has no authority to conduct a broad enumeration.

It is furthermore not practical in terms of cost, available time or “return on investment” to undertake a door-to-door canvassing strategy or implement some other “contingency capacity for direct enumeration of electors”.

The costs of a door-to-door canvassing strategy would be high and the “return on investment” low. Moreover, its value as a tool to promote enfranchisement is questionable. An eligible elector may vote whether or not his or her name appears on the voters’ list. The available evidence does not suggest that the decision and/or motivation to vote is influenced in any significant way by whether an elector’s name is on the voters’ list.

Furthermore, response rates to direct enumeration campaigns by mail in Toronto and elsewhere have historically been very low (in the range of 10% to 15%). The cost of door-to-door enumerations has been prohibitively high and response rates in this regard have also been low, in part because of the reluctance of individuals to provide personal information. There are furthermore legal obstacles to a door-to-door enumeration in relation to gaining access to private premises and in relation to compliance with applicable privacy legislation.

The City Clerk has already taken measures to encourage eligible electors who are not on the voters’ list to have their names added. The City Clerk has initiated an outreach program, the Community Engagement Program, to increase public awareness of how to get on the voters’ list, with particular emphasis on tenants, persons with disabilities, shelter users, seniors, youth, new voters and new Canadian citizens. The City Clerk also communicates election information through notices in local newspapers, transit shelters, the “Our Toronto” publication, waste collection calendars, the Social Housing Exchange newsletter, the Parks, Forestry and Recreation Fun Guide and the election tabloid which is delivered to every household in the City, including apartments. MPAC, through its Tenant Information Program and other ongoing measures, also plays a role in encouraging tenants who are eligible electors to be added to the voters’ list.

The City Clerk’s authority to correct obvious errors arguably does not include the authority to add names to the voters’ list other than by way of applications brought by individual electors. The new amendments to the MEA do not significantly amplify the City Clerk’s authority in this regard. Furthermore, existing City databases do not include citizenship or school support information, do not apply consistent standards and their accuracy and currency remains, at this point, unknown.

Finally, there has been a shift in the use of voters' lists from *closed* lists to *open* lists. At one time, a voter's name had to appear on the voters' list prior to election day or the voter would not be permitted to vote (i.e. a *closed* list). Currently, an eligible elector is able to vote on voting day or at an advance poll even if his or her name is not on the list. Therefore, the inclusion of an elector's name on the list is arguably a less significant matter than it once was. The voters' list is still a key component of the electoral process and remains an important tool for informing the electorate, calculating campaign expense limits, to assist candidates when they are campaigning and for determining the staffing and administrative needs of election officials. In summary, a name on a voters' list is an authentication of an elector's right to vote in a particular voting subdivision, but not a pre-condition to it.

*Recommendation 8. MPAC be advised that the City of Toronto intends to hold them accountable for the accuracy of the voters list.*

The accuracy of the voters' list is the legislated responsibility of MPAC and the City Clerk and is not a matter within the jurisdiction of City Council. Compilation of the preliminary list of electors ("PLE") is MPAC's responsibility. MPAC has acknowledged its responsibility to deliver an accurate and current PLE to municipal clerks. (See copy of letter at Appendix A.) Correction, reproduction, revision and certification of the voters' list in accordance with the terms of the MEA is the City Clerk's responsibility, shared with individual electors who are entitled under the MEA to apply to have their names added to or removed from the voters' list during a specified period before the election (known as the "revision period") up to and including voting day. It is only by means of applications made by individual eligible electors that the City Clerk is able to add names to the voters' list. The voters' list is MPAC's and the City Clerk's responsibility and is a key component of the electoral process; City Council ought not to be seen dealing with it because it is outside the jurisdiction of City Council and because many councillors are also candidates.

*Recommendation 9. The Student Connect Program be expanded to include the hiring of students as election officials and as enumerators as required.*

The statutory scheme indicates that the appointment of election officials is a matter exclusively within the jurisdiction of the City Clerk. The MEA provides that the clerk may appoint election officials for the election "that the clerk considers are required" (s. 15(1)). It would therefore not be appropriate for City Council to recommend expansion of the Student Connect Program. Furthermore, any change to the Student Connect Program would require the approval of the Toronto District School Board. City Council has no authority to change the program independently. In addition, parental approval is required for student participation. In any event, we understand that the program has been growing in popularity and there is every possibility that more students will participate in the program for the 2010 election than in previous elections. To recommend the hiring of students as enumerators would also be outside City Council's authority

and would be subject to the legal and practical limitations described above under Recommendation 7.

*Recommendation 10. Complaints be filed with the Ontario Human Rights Commission and the Ontario Ombudsman against MPAC, which despite repeated requests, has not adequately fulfilled its responsibility to enumerate tenants of multi-residential rental buildings for municipal elections, thereby denying them their right to full participation in the democratic process.*

The Ontario Ombudsman has responded (on March 16, 2010) to Council's complaint in relation to the accuracy of the voters' list and found that it has no authority to review the accuracy of municipal voters' lists. The Ontario Ombudsman further addressed Council's complaint in relation to MPAC's responsibility to enumerate tenants. The Ombudsman reviewed correspondence, documents and reports provided to it by the City Clerk's office as well as the relevant legislation. The Ombudsman took note of the significant challenges that MPAC faces in preparing accurate and up-to-date preliminary lists and MPAC's written commitment to improve the accuracy of the list and the specific efforts undertaken by MPAC in that regard. Accordingly, the Ontario Ombudsman has decided not to proceed further with a review of City Council's complaint at this time. (See copy of letter at Appendix B.)

A response (dated January 27, 2010) was also received from the Ontario Human Rights Commission (the "Commission") stating that it does not deal with individual complaints of discrimination and no longer has authority to receive complaints under the Human Rights Code and that the City Manager may wish to pursue the matter with the Human Rights Tribunal of Ontario. (See copy of letter at Appendix C.)

## **Part II – Municipal Elections and the Voters’ List**

### *(i) Authority of City Clerk as Election Administrator*

As an administrative actor, the City Clerk is a creature of statute. The power and authority of a City Clerk must be found in its enabling statute and regulations. The City Clerk also has many different reporting and accountability roles under other statutes.

The City Clerk’s election responsibility is a statutory obligation that is and should be independent from her functions as clerk. The paramount considerations in conducting an election are fairness and procedural integrity. The City Clerk’s role as election administrator is underpinned by the principle that public confidence in the electoral process is fundamental to a democratic society. The City Clerk, as election administrator, should be an independent neutral party, free from political or other external influence.

Under the MEA, the City Clerk is responsible for preparing for and conducting an election, preparing for and conducting a recount, maintaining peace and order in connection with an election and the preparation of a report about the identification, removal and prevention of barriers that effect electors and candidates with disabilities.

In discharging her responsibility to conduct an election, the City Clerk is given broad discretion. The MEA provides that the “clerk who is responsible for conducting an election may provide for any matter or procedure that, (a) is not otherwise provided for in an Act or regulation; and (b) in the clerk’s opinion, is necessary or desirable for conducting the election. [emphasis added]”

The MEA also gives the City Clerk broad powers of appointment and delegation, and assigns numerous specific responsibilities to the City Clerk, including, among others:

- a requirement to provide information to electors, candidates and persons who are eligible to be electors to enable them to exercise their rights under the MEA;
- authority and control over the costs incurred in discharging election-related responsibilities which costs are required to be paid by the municipality; and
- specific responsibilities in relation to the correction, reproduction, revision, and certification of the voters’ list.

The City Clerk has an obligation to prepare for and conduct the election in a manner consistent with the principles of the MEA. Those principles are not defined in the MEA, but have been held to be the following:

- The secrecy and confidentiality of the voting process is paramount;
- The election shall be fair and non-biased;
- The election shall be accessible to the voters;
- The integrity of the process shall be maintained throughout the election;

- There is to be certainty that the results of the election reflect the votes cast; and
- Voters and candidates shall be treated fairly and consistently.

Fairness and procedural integrity are key elements of the City Clerk's statutory elections mandate. Since the City Clerk is required to conduct the election in accordance with the principles of the MEA, the City Clerk may not act contrary to those principles. Any conflict between the City Clerk's statutory elections mandate and other responsibilities must be resolved so that the election is conducted in a manner consistent with the 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.

*(ii) Financial and Budgeting Independence*

The MEA stipulates that "the costs incurred by the clerk of a local municipality in conducting an election shall be paid by the local municipality". The local municipality is given no statutory right to pre-approve or contest the election-related costs incurred by the clerk. The MEA simply provides that "the local municipality shall pay the costs as soon as possible after its clerk has signed a certificate verifying the amount".

Discussions with clerks of other municipalities have revealed that election budgets are treated as substantially independent from the clerks' budgets for other purposes and many large jurisdictions maintain an election reserve to cover election costs.

*(iii) Compliance with City Policies*

Since the City Clerk's election responsibilities are substantially independent from her other functions as City Clerk, the City Clerk should not be bound by City administration policies where those policies would have an adverse impact on the integrity of the election. Accordingly, the City Clerk could not be compelled to comply with City policies so long as her actions in refusing to comply are reasonable and related to her election mandate. The City Clerk should be accorded a measure of independence in relation to the use of City resources (including HR, purchasing, IT and communications resources) that are necessary or desirable to conduct the election.

*(iv) Role of MPAC in Municipal Elections*

In each election year, pursuant to the *Assessment Act* and the direction of the Minister of Finance, MPAC shall conduct a municipal enumeration by confirming the information in its database with the National Register of Electors and thereafter conducting a municipal enumeration by mail for unconfirmed inhabitants. MPAC uses that



information, and information gathered from other sources, to compile the PLE. As mentioned above, MPAC has acknowledged its responsibility to deliver an accurate and current PLE to municipal clerks.

Once the PLE has been delivered, the City Clerk may correct obvious errors and shall notify MPAC of the corrections. The corrected PLE becomes the voters' list.

Accordingly, responsibility for the accuracy of the voters' list is split between MPAC, municipal clerks and individual electors. Eligible electors are entitled under the MEA to apply to have their names added to or removed from the voters' list during a specified period before the election (known as the "revision period") up to and including voting day. It is only by means of applications made by individual eligible electors that the City Clerk is able to add names to the voters' list.<sup>2</sup>

Within 31 days after voting day, the City Clerk shall prepare and provide a certified copy of the final list of changes to the voters' list together with a copy of the approved MEA applications to MPAC. This final list then becomes the starting point for the list that will become the PLE for the next election.

*(v) The Correction of Obvious Errors*

The correction of obvious errors by municipal clerks does not result in adding names to the voters' list. By contrast, it generally involves removing names and correcting addresses. Discussions with municipal clerks have revealed that obvious errors in past elections have included duplicate names, names of deceased electors, apartment buildings in the wrong voting subdivision, individuals in the wrong voting subdivision, municipal property that should not be on the list, unassigned municipal property that should be on the list, incorrect spelling of elector names, incorrect or inconsistent spelling of street names, incomplete elector information and errors caused by new developments, condominium conversions and/or fluid municipal population changes.

Municipal clerks rely upon a variety of resources in seeking to correct obvious errors including candidates, mail-out campaigns, subdivision and building approvals, and anecdotal knowledge. The new amendments put into effect by Bill 212 (which permit municipal clerks to "use any information that is in the local municipality's custody or control" for the purposes of correcting obvious errors in the voters' list) do not appear to enhance the City Clerk's ability to correct obvious errors in any significant way primarily because existing City databases do not contain the information most relevant to a municipal election (particularly citizenship and school support information).

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<sup>2</sup> It should be mentioned that there are two potential ways that eligible electors can have their names added to the voters' list: (1) at any time, an eligible elector may complete an Occupant Information Form and send it to MPAC (this is also the form that MPAC mails out to unconfirmed electors as part of its enumeration responsibility); and (2) during the revision period (from just after Labour Day until close of voting on voting day) an eligible elector may apply to the City Clerk pursuant to s. 24 of the MEA to have his or her name added to (or removed from) the voters' list.

The City Clerk has in past elections made use of the information in three City databases which contain geographic data in order to correct obvious errors in the PLE and plans to do likewise in this election year. However, with respect to other databases, we understand that there are no consistent standards applied and that the accuracy and currency of the information in them remains unknown. Accordingly, it is not practical at this time to make use of the information they may contain. Given the new amendments to the MEA, which give municipal clerks the express authority to use any information in the local municipality's custody or control for the purposes of correcting obvious errors in the PLE, the extent to which existing City databases may be used is an issue that deserves further study.

Municipal clerks have a short period in which to correct obvious errors (essentially, the month of August) and therefore time limitations may also render impractical the use of previously unused City databases for the correction of obvious errors in the PLE in this election year.

*(vi) Role of City Council in Municipal Elections*

Under the MEA and the *City of Toronto Act, 2006* ("COTA"), City Council has been given very limited election-related responsibilities. City Council may:

- submit proposed by-laws and questions to electors;
- pass by-laws allowing (but not mandating) the use of languages other than English in notices, forms and other information provided under the MEA;
- pass by-laws authorizing the use of vote-counting equipment or authorizing electors to use an alternative voting method (but it is the clerk's responsibility to establish procedures and forms for the use of such equipment or alternative voting methods);
- pass by-laws providing that specified voting places shall be open before 10 am;
- pass by-laws providing for reduced opening hours at mandatory polls (i.e. nursing homes, retirement homes, certain Canadian forces institutions);
- pass a resolution requiring a recount (which recount is administered by the clerk);
- fix a day for by-election vote on questions related to the *Liquor Licence Act* (with the approval of Liquor Licence Board of Ontario);
- by by-law prohibit corporations that carry on business in Ontario or trade unions that hold bargaining rights for employees in Ontario from making campaign contributions;

- pass by-laws authorizing electronic filing of candidates' financial statements and auditors' reports; and may
- provide for the payment of rebates for campaign contributions.

Some City Council election responsibilities are mandatory. City Council shall:

- pass a by-law establishing one or more dates for an advance vote and the opening hours of the voting places;
- establish a compliance audit committee;
- pay all costs in relation to the compliance audit committee's operation and activities;
- pass a by-law requiring a by-election if a vacancy occurs; and shall,
- on behalf of the local municipality and as soon as possible after certification, pay the costs incurred by the clerk in conducting the election.

The statutory scheme indicates that, other than the above-mentioned specific areas of competence, City Council has no further authority in relation to a municipal election. The scheme of the MEA is clear in that it assigns the conduct of an election to the City Clerk.

*(vii) Role of City Manager in Municipal Elections*

The City Manager is responsible for exercising general control and management of the affairs of the City for the purpose of ensuring the efficient and effective operation of the City; and performing such other duties as are assigned by Council. The City Manager has no express statutory authority over election-related matters and therefore could only perform election-related duties that are within the competence of City Council and that are capable of delegation.

For the most part, the election-related matters assigned to City Council under the MEA are not delegable as they involve council's legislative function. However, the City Manager could perform administrative tasks associated with those matters. For example, the administration of the payment of campaign contribution rebates could be delegated to the City Manager by City Council (though we understand this function is currently delegated by by-law to the City Clerk).

It is difficult to articulate the precise boundaries of City staff authority in relation to municipal elections in part because courts have been reluctant to interfere with the exercise of municipal powers and will interpret election-related legislation in a way that favours enfranchisement of the electorate.

While the primary responsibility for preparing and conducting a municipal election is decidedly upon the City Clerk, City staff may be permitted some scope to take part in election-related activities in a manner that promotes enfranchisement and is otherwise consistent with the terms and principles of the MEA.

For example, if City staff were to go out and distribute election information (MPAC Occupant Information Forms (at any time) or MEA s. 24 applications (during the revision period in September and October)) and post notices to encourage eligible electors to get on the list, subject to the caveats expressed below, they can at least argue that their purpose in doing so is to promote enfranchisement.

An appropriate message would be to inform eligible electors that it will be easier for them to vote on voting day if they get on the voters' list ahead of time, but they can still vote even if they are not on the list so long as they attend the appropriate voting location and bring proper identification.

The MEA clearly stipulates that the City Clerk is responsible for the preparation and conduct of an election. City Council is assigned certain specific capabilities and responsibilities. There remains very little, if any, independent authority for City staff to engage in election-related activities.

The SCC has held that enfranchising statutes (such as the MEA) should be interpreted in a way that favours enfranchisement. The limited authority granted to Council in the MEA should therefore be interpreted not in a restrictive way but in a way that promotes enfranchisement and therefore, reliance on those limited heads of authority in the MEA as the "legal pedigree" of City staff actions would be acceptable so long as the purpose is the promotion of enfranchisement and so long as the result does not offend the principles of the MEA.

As an example, under the authority to pass by-laws allowing the use of languages other than English in notices, forms and other information provided under the MEA, City staff could distribute forms in foreign languages in areas where there was evidence of need. However, if City staff undertook these actions in a way that has an appearance of bias, there is a risk that such actions could be characterized as biased enfranchisement which would be inconsistent with the principles that the election shall be fair and non-biased and that voters and candidates shall be treated fairly and consistently.

There may also be operational and appearance of propriety concerns if City staff undertake election-related activities that are more properly within the jurisdiction of the City Clerk. The clearly defined statutory mandate and independence of the City Clerk to prepare for and conduct elections may 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 City staff and particularly if undertaken 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.

Furthermore, operational concerns may arise if City staff take on responsibilities that were formerly or should be performed by the City Clerk. There may be an absence of continuity from election to election and the City Clerk's office may not build expertise in areas where it should.

The best approach would be for the City Clerk to be advised of the particular election-related issue and then the City Clerk may determine the appropriate action in the exercise of her independent discretion.<sup>3</sup> Subsequently, City staff should only undertake election-related activities that could be characterized as activities over and above those already done by the City Clerk.

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<sup>3</sup> The Community Engagement Program would be a good example of this process at work.