

Toronto Memorandum

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. It 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. Addressed briefly is the extent to which City staff may take part in election-related activities.¹ 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

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

¹ 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.

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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.²

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.

² 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.

(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).

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.

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